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Joe Camel Versus Uncle Sam: The Constitutionality of Graphic Cigarette Warning Labels

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JOE CAMEL VERSUS UNCLE SAM: THE CONSTITUTIONALITY OF GRAPHIC CIGARETTE WARNING LABELS

*B. Ashby Hardesty, Jr.**

According to the Surgeon General, tobacco use is the leading preventable cause of death in the United States. Smoking-related diseases kill 443,000 Americans each year, more than are killed by HIV, illegal drug use, alcohol use, motor vehicle injuries, suicides, and murders combined. To address this public health threat, Congress enacted the Family Smoking Prevention and Tobacco Control Act (TCA) in 2009, which gave the federal government unprecedented power to regulate the tobacco industry. Among its provisions, the TCA requires the U.S. Food and Drug Administration to select images that depict smoking's deleterious effects and compels tobacco companies to display the images, accompanied by a textual warning, on half of the front and rear panels of every cigarette package. This new graphic format—the first alteration of cigarette package warnings in over twenty-five years—represents a significant and aggressive change in the way that the government communicates the dangers of smoking to the public.

To prevent the introduction of these new labels into the marketplace, the tobacco industry has filed suit alleging that the graphic warnings infringe on its First Amendment right to refrain from speaking. The two circuit courts that have considered this issue are divided sharply over the labels' constitutionality and the appropriate framework for assessing them. This Note examines this legal fissure and argues that the warnings should be examined under the strict scrutiny standard of judicial review. Ultimately, this Note contends that the labels do not pass muster under this intense level of scrutiny and are thus unconstitutional compulsions of speech.

* J.D. Candidate, 2014, Fordham University School of Law; B.A., 2008, Columbia University. I am deeply grateful to my advisor, Professor Elizabeth Cooper, for her incisive feedback and unwavering enthusiasm throughout this process. Thank you, too, to Professors Abner Greene, Robin Lenhardt, and Olivier Sylvain for discussing various aspects of this topic with me, and to my wonderful friends. Finally, this Note would not exist without the love and encouragement of my parents, Ben and Jean Hardesty. For Rodrigo Zamora.

TABLE OF CONTENTS

INTRODUCTION.....	2813
I. CIGARETTE WARNING LABELS AND THE RIGHT (NOT) TO SPEAK.....	2815
A. <i>Cigarette Warning Labels: The Government Attempts To Inform the Public About the Dangers of Smoking</i>	2816
1. Like “Bringing a Butter Knife to a Gun Fight”: Cigarette Warning Labels Before the Family Smoking Prevention and Tobacco Control Act.....	2817
2. The Family Smoking Prevention and Tobacco Control Act.....	2819
3. The FDA Selects the Nine Images.....	2823
B. <i>The First Amendment: The Freedom To Speak and Not To Speak</i>	2824
1. An Introduction to the First Amendment.....	2825
2. Compelled Speech	2827
3. Commercial Speech: “The Stepchild of the First Amendment”	2828
a. <i>From “No Protection” to “Limited Protection”: The Beginning of the Court’s Commercial Speech Doctrine</i>	2829
b. <i>The Court Establishes a Standard with Central Hudson</i>	2830
4. Factual Disclosures that Prevent Consumer Deception ...	2832
a. <i>The Supreme Court Creates the Zauderer Exception to Strict Scrutiny for the Correction of Potentially Misleading Speech</i>	2832
b. <i>Zauderer Applied: Three Instructive Cases</i>	2834
II. CONFUSION IN THE COURTS: THE GRAPHIC WARNING LABELS’ CONSTITUTIONALITY AND THE APPROPRIATE ANALYTICAL FRAMEWORK FOR ASSESSING IT	2836
A. <i>The Sixth Circuit: Discount Tobacco City & Lottery, Inc. v. United States</i>	2837
1. The District Court: The Graphic Warning Label Requirement Is Constitutional Using <i>Central Hudson</i> Intermediate Scrutiny	2837
2. The Sixth Circuit Affirms, but Does So Using Rational Basis Review Under <i>Zauderer</i>	2839
3. The Dissent: The Requirement Fails Rational Basis Review Under <i>Zauderer</i>	2840
B. <i>The D.C. Circuit: R.J. Reynolds Tobacco Co. v. FDA</i>	2841
1. The District Court Holds That the Images Do Not Survive Strict Scrutiny and Are Unconstitutional.....	2841
2. The D.C. Circuit Affirms but Uses Intermediate Scrutiny Under <i>Central Hudson</i>	2842

3. The Dissent: The Images Fall Within <i>Zauderer's</i> Ambit, Survive Both Rational Basis and <i>Central Hudson</i> Review, and Are Constitutional.....	2845
III. THE TCA'S GRAPHIC WARNING LABELS	
SHOULD BE FOUND UNCONSTITUTIONAL	2846
A. <i>A Framework for Analysis: The Labels Should Be Subjected to Strict Scrutiny Unless the Zauderer Exception Applies</i>	2846
1. <i>Zauderer Applies If the Warnings Are Corrective</i>	2847
2. If <i>Zauderer</i> Does Not Apply, the Warning Labels Should Be Subjected to Strict Scrutiny, Not Intermediate Scrutiny Under <i>Central Hudson</i>	2847
B. <i>Applying the Framework: The Labels Do Not Fall Within Zauderer's Ambit, Strict Scrutiny Applies, and the Labels Fail Under It</i>	2849
1. <i>Zauderer Does Not Apply</i>	2849
2. The Labels Do Not Survive Strict Scrutiny and Are Thus Unconstitutional	2851
CONCLUSION.....	2852

"To cease smoking is the easiest thing I ever did. I ought to know because I've done it a thousand times."¹

INTRODUCTION

In the convenience store, the cigarette packages are in their usual location behind the counter. A smoker, you approach the cashier and ask for your brand of choice. She passes you a pack, which you take without much thought. In your hands it feels like it always has, the same familiar size and weight. But as you fetch your wallet to pay for it, something about its label catches your eye: it is significantly different than what you have grown accustomed to. The name and logo of the brand are still there, but covering half of the package is a color photo of a man smoking a cigarette through a hole in his throat. Accompanying this disturbing image are the words "WARNING: Cigarettes are addictive." Surprised, you strain to see the other packages behind the counter; they too, you notice, follow this new labeling scheme. You look back down at the package and for a few beats consider the gruesome image and its textual admonition. You are now faced with a choice: do you buy the cigarettes and eventually smoke them, or do you leave the package at the counter and exit the store?

Consumers of cigarettes in the United States may soon be asking themselves this and similar questions as a result of the Family Smoking Prevention and Tobacco Control Act² (TCA). Among its provisions, the

1. See READER'S DIG., Dec. 1945, at 26 (attributing the quotation to Mark Twain); see also Bayard T. Horton, *The Outlook in Thrombo-Angiitis Obliterans*, 111 J. AM. MED. ASS'N 2184, 2188 (1938) (same). The origin of this quotation is disputed.

2. Pub. L. No. 111-31, 123 Stat. 1776 (2009) (codified in scattered sections of 5, 15, and 21 U.S.C.).

TCA requires the U.S. Food and Drug Administration (FDA) to select images that depict smoking's deleterious effects and compels tobacco companies to display the images, accompanied by a textual warning, on half of the front and rear panels of every cigarette package.³ This new graphic format, the first alteration of cigarette package warnings in over twenty-five years,⁴ represents a significant and aggressive change in the way that the government communicates the dangers of smoking to the public.

To prevent the introduction of these new labels into the marketplace, the tobacco industry has filed suit in two federal courts, alleging that the graphic warnings infringe on its First Amendment right to refrain from speaking. Consequently, the rollout of the new labels, originally slated for September 2012,⁵ is now uncertain. In limbo, too, is the appropriate framework for assessing the constitutionality of this regulation and the extent to which the government can warn the public about the dangers of smoking and other activities deemed harmful or unhealthy.

In 2012, two circuits considered this issue and divided sharply over the labels' constitutionality and the appropriate framework for assessing them. The Sixth Circuit determined that the labels were subject to strict scrutiny unless an exemption—namely, the U.S. Supreme Court's decision in *Zauderer v. Office of Disciplinary Counsel*, providing for rational basis review of disclosures meant to correct potentially misleading commercial speech⁶—applied.⁷ The court found that, because the labels disclose factual information, such an exemption did apply.⁸ The court then reviewed the labeling requirement using the *Zauderer* rational basis standard and found that the provision satisfied this test.⁹ For this reason, the Sixth Circuit held that the labeling requirement did not violate the First Amendment.¹⁰

In contrast, the D.C. Circuit determined that the labels were subject to intermediate scrutiny under *Central Hudson Gas & Electric Co. v. Public Service Commission*¹¹ unless the *Zauderer* exception applied.¹² The court found that the labels did not correct potentially misleading speech and thus found *Zauderer* inapplicable.¹³ After examining the images using intermediate scrutiny, the court found that the labels did not satisfy this

3. See *id.* § 201 (amending 15 U.S.C. § 1333); see also *infra* Part I.A.2–3.

4. See *infra* notes 45–47 and accompanying text (noting that Congress last altered cigarette warning labels in 1984).

5. See Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628, 36,628 (June 22, 2011) [hereinafter Final Rule] (to be codified at 21 C.F.R. pt. 1141) (“This rule is effective September 22, 2012.”).

6. 471 U.S. 626 (1985); see also *infra* Part I.B.4 (discussing the *Zauderer* standard).

7. *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509 (6th Cir. 2012).

8. See *id.* at 558.

9. See *id.* at 561–69.

10. See *id.* at 569.

11. 447 U.S. 557 (1980); see also *infra* Part I.B.3 (detailing the *Central Hudson* standard).

12. *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1213–17 (D.C. Cir. 2012).

13. See *id.* at 1215–17.

standard.¹⁴ Consequently, the D.C. Circuit held that the labels violated the First Amendment.¹⁵

Adding to the confusion, although each circuit court upheld the judgment of its respective trial court,¹⁶ each employed a different level of scrutiny than its district court.¹⁷ Further, neither circuit court decision was unanimous.¹⁸

This Note analyzes this legal fissure. It focuses on identifying and applying the appropriate framework for assessing the graphic warning labels' constitutional fitness. It concludes that the warnings should be examined under strict scrutiny unless the *Zauderer* exception applies. Moreover, it argues that the graphic warning labels do not correct potentially misleading speech as defined by *Zauderer* and its progeny, that *Zauderer* does not apply, and that strict scrutiny does. This Note concludes that, under this intense level of scrutiny, the cigarette labels proposed by the FDA do not pass muster and are therefore unconstitutional compulsions of speech.

Part I of this Note first examines the federal government's attempts to educate the public about smoking through package warning labels and then reviews the applicable First Amendment jurisprudence. Part II describes the different frameworks that the Sixth and D.C. Circuits and the district courts used to determine the appropriate level of scrutiny and the application of their chosen scrutiny. Part III contends that strict scrutiny should apply unless *Zauderer* does, that *Zauderer* does not apply and thus strict scrutiny does, and that the regulation is unconstitutional when subjected to this review.

I. CIGARETTE WARNING LABELS AND THE RIGHT (NOT) TO SPEAK

The litigation over the TCA's labeling requirement sits at the intersection of public health policy and freedom of expression. In order to fully appreciate the split in the circuit courts, it is necessary to understand the government's history of requiring warning labels on cigarette packages, the new format mandated by the TCA, and the Supreme Court's First Amendment jurisprudence. Accordingly, this part sets forth this context, with Part I.A tracing the government's attempts to educate consumers about

14. *See id.* at 1217–22.

15. *See id.* at 1221–22.

16. *See infra* Part II.A.1 (discussing the Western District of Kentucky's opinion in *Commonwealth Brands, Inc. v. United States*, 678 F. Supp. 2d 512 (W.D. Ky. 2010)); *infra* Part II.B.1 (examining the District Court for the District of Columbia's judgment in *R.J. Reynolds Tobacco Co. v. FDA.*, 845 F. Supp. 2d 266 (D.D.C. 2012)).

17. The court in *Commonwealth Brands* used the *Central Hudson* intermediate scrutiny standard to analyze the provision's First Amendment constitutionality. *See infra* notes 248–50 and accompanying text. The district court in *R.J. Reynolds Tobacco* examined the provision under strict scrutiny. *See infra* note 282 and accompanying text.

18. *See infra* Part II.A.2–3 (detailing the majority and dissenting opinions in the Sixth Circuit decision); *infra* Part II.B.2–3 (exploring the majority and dissenting opinions in the D.C. Circuit judgment).

the health consequences of smoking through warning labels on cigarette packages, the TCA's graphic warning labeling requirement, and the FDA's implementation of that provision. Part I.B surveys the speech—and silence—that the First Amendment protects, focusing in particular on the Supreme Court's compelled and commercial speech doctrines and its treatment of factual disclosures.

A. *Cigarette Warning Labels: The Government Attempts To Inform the Public About the Dangers of Smoking*

The adverse effects of cigarette smoking are considerable.¹⁹ According to the Surgeon General, tobacco use is the leading preventable cause of death in the United States.²⁰ Smoking-related diseases²¹ kill 443,000 Americans each year,²² more than are killed by HIV, illegal drug use, alcohol use, motor vehicle injuries, suicides, and murders combined.²³ The economic losses stemming from tobacco use are also staggering: in the United States alone, smoking accounts annually for over \$193 billion in lost productivity and health care expenditures.²⁴ These considerable health and financial costs contrast with the billions of dollars in profits made each year

19. The Surgeon General has concluded that “[s]moking harms nearly every organ of the body, causing many diseases and reducing the health of smokers in general.” See U.S. DEP’T OF HEALTH & HUMAN SERVS., THE HEALTH CONSEQUENCES OF SMOKING: A REPORT OF THE SURGEON GENERAL 25 (2004) [hereinafter 2004 SURGEON GENERAL REPORT], available at http://www.cdc.gov/tobacco/data_statistics/sgr/2004/complete_report/index.htm (click on “Chapter 1”); see also *Smoking & Tobacco Use: Health Effects of Cigarette Smoking*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/effects_cig_smoking/index.htm (last updated Jan. 10, 2012).

20. See 2004 SURGEON GENERAL REPORT, *supra* note 19, at 30.

21. Cigarette smoking is causally linked with twenty-nine medical conditions, such as coronary heart disease and at least ten types of cancers. See, e.g., *id.* at 4–8 tbl.1.1; *Smoking & Tobacco Use*, *supra* note 19.

22. Smoking-related diseases cause nearly one of every five deaths in the United States. See *Smoking & Tobacco Use*, *supra* note 19; see also *Smoking-Attributable Mortality, Years of Potential Life Lost, and Productivity Losses—United States, 2000–2004*, 57 MORBIDITY & MORTALITY WKLY. REP. 1226, 1226–28 (2008) (categorizing the 443,000 annual smoking-related deaths by cause). This figure includes those affected indirectly by smoking, such as victims of secondhand exposure to tobacco smoke. See *id.*

23. See *Smoking & Tobacco Use*, *supra* note 19.

24. During 2000–2004, cigarette smoking was estimated to be responsible for nearly \$96 billion in direct medical costs and an additional \$97 billion in lost productivity, a total of \$193 billion. See *Smoking & Tobacco Use: Economic Facts About U.S. Tobacco Production and Use*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/tobacco/data_statistics/fact_sheets/economics/econ_facts/index.htm (last updated Nov. 15, 2012).

by the tobacco industry²⁵ and the billions of dollars spent by that industry annually on advertising and other promotions.²⁶

To address this public health threat and to counteract the tobacco industry's financial and advertising strength, the federal government has implemented a number of regulatory and legislative initiatives, including mandating the placement of warning labels on every pack of cigarettes. This section outlines the history of the government's response, the TCA's graphic labeling scheme, and the images chosen by the FDA to appear on future cigarette labels.

1. Like "Bringing a Butter Knife to a Gun Fight"²⁷: Cigarette Warning Labels Before the Family Smoking Prevention and Tobacco Control Act

Although physicians had suspected a connection between smoking and disease for centuries,²⁸ the first medical studies confirming that link did not appear until the 1920s.²⁹ In the years following these initial studies, thousands of laboratory, autopsy, and epidemiologic studies examined the relationship between tobacco use and disease.³⁰ With the evidence mounting, the Surgeon General convened an advisory committee to examine the issue in 1962.³¹ The committee's report, issued in 1964, concluded that cigarette smoking caused disease³² and death.³³ In response,

25. Altria Group, the parent company of Philip Morris USA, the United States' largest tobacco company, reported earnings of almost \$3.6 billion in 2011. *See* ALTRIA 2011 ANNUAL REPORT 92 (2011), available at https://materials.proxyvote.com/Approved/02209S/20120323/AR_120342/. The top six global tobacco companies made an estimated \$500 billion in revenues and \$35.1 billion in profits in 2011. *See* Simon Bowers, *Global Profits for Tobacco Trade Total \$35bn As Smoking Deaths Top 6 Million*, GUARDIAN (March 21, 2012), <http://www.guardian.co.uk/business/2012/mar/22/tobacco-profits-deaths-6-million>.

26. In 2006, cigarette companies spent \$12.4 billion on advertising and promotional expenses in the United States alone. *See Smoking & Tobacco Use: Tobacco Industry Marketing*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/tobacco/data_statistics/fact_sheets/tobacco_industry/marketing/index.htm (last updated Mar. 21, 2011).

27. *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1221 (D.C. Cir. 2012) ("[The] FDA lament[s] that their previous efforts to combat the tobacco companies' advertising campaigns have been like bringing a butter knife to a gun fight.").

28. *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., REDUCING THE HEALTH CONSEQUENCES OF SMOKING: 25 YEARS OF PROGRESS—A REPORT OF THE SURGEON GENERAL 5 (1989) [hereinafter 1989 SURGEON GENERAL REPORT], available at <http://profiles.nlm.nih.gov/ps/access/NNBBXS.pdf>; *see also* *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 513–15 (1992) (summarizing the early scientific research on tobacco and the government's initial responses to educating the public of the ill-effects of its use).

29. *See, e.g.*, A.C. Broders, *Squamous-Cell Epithelioma of the Lip: A Study of Five Hundred and Thirty-Seven Cases*, 74 J. AM. MED. ASS'N 656 (1920) (linking tobacco use to lip cancer); Herbert Lombard & Carl Doering, *Cancer Studies in Massachusetts: Habits, Characteristics and Environment of Individuals with and Without Cancer*, 198 NEW ENG. J. MED. 481, 485–87 (1928) (noting that heavy smoking was more common among cancer patients than among control groups).

30. *See generally* 1989 SURGEON GENERAL REPORT, *supra* note 28.

31. *See id.* at 6.

32. *See id.* at 7.

33. *See* PUB. HEALTH SERV., U.S. DEP'T OF HEALTH, EDUC., & WELFARE, SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC

the Surgeon General declared cigarette smoking to be a significant health hazard in need of immediate attention.³⁴

Reacting to the Surgeon General's findings, Congress enacted the Federal Cigarette Labeling and Advertising Act³⁵ (FCLAA) in 1965.³⁶ The FCLAA gave the Federal Trade Commission the authority to regulate cigarette labels³⁷ and the Federal Communications Commission (FCC) the authority to regulate tobacco advertising on radio and television.³⁸ The new law also delegated authority to the Internal Revenue Service (IRS), the Department of Agriculture (USDA), and the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) to regulate other aspect of the tobacco industry.³⁹ Finally, the FCLAA required tobacco companies to display a textual warning in "a conspicuous place" on all cigarette packages starting in 1966.⁴⁰ This warning read: "Caution: Cigarette Smoking May Be Hazardous to Your Health."⁴¹ With the introduction of this warning, the United States became the first country to mandate a warning label on cigarette packages.⁴²

Since the appearance of this initial warning in 1966, Congress has twice modified the wording of the required warning. In 1970, the Public Health

HEALTH SERVICE 31 (1964), available at <http://profiles.nlm.nih.gov/ps/access/NNBBMQ.pdf> ("In view of the continuing and mounting evidence from many sources, it is the judgment of the Committee that cigarette smoking contributes substantially to mortality from certain specific diseases and to the overall death rate.")

34. See *id.* at 33 ("Cigarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action." (emphasis omitted)).

35. Pub. L. No. 89-92, 79 Stat. 282 (1965) (codified as amended at 15 U.S.C. §§ 1331–1341 (2006)); see also *President Signs Cigarettes Bill*, N.Y. TIMES, July 28, 1965, at 17 (reporting on President Lyndon Johnson's signing of the FCLAA).

36. Congress enacted the Federal Food, Drug, and Cosmetic Act (FDCA) in 1938. See Pub. L. No. 75-717, 52 Stat. 1040 (1938) (codified as amended at 21 U.S.C. §§ 301–399 (2006)). The FDCA authorized the FDA to regulate food, drugs, cosmetics, and devices. See 21 U.S.C. § 321 (2006) (establishing the contours of the FDA's authority by clearly identifying food, drugs, cosmetics, and devices as subject to FDA regulation). Tobacco products were not included in this original grant of authority. See *id.* In 1965, the House passed, and later withdrew, a bill that would have placed tobacco within the FDA's regulatory jurisdiction by expanding the FDCA. See Richard A. Merrill, *The FDA May Not Regulate Tobacco Products As "Drugs" or As "Medical Devices,"* 47 DUKE L.J. 1071, 1079 (1998). Professor Richard A. Merrill characterizes this withdrawal and the subsequent passage of the FCLAA as a congressional "compromise," a "'deal' struck in Congress" that excluded the FDA "from any role in federal [decision making] about the health effects of tobacco use." *Id.* at 1079–80.

37. See FCLAA § 5.

38. See Jennifer Costello, Comment, *The FDA's Struggle To Regulate Tobacco*, 49 ADMIN. L. REV. 671, 677 n.32 (1997) (explaining the FCC's initial regulatory role).

39. See *id.* at 678 n.42 (describing the IRS's role in taxing tobacco sales, the USDA's regulation of tobacco farming, and the ATF's task of fighting illegal tobacco sales and distribution).

40. See FCLAA § 4. The FCLAA did not specify the size, color, or position of the warning on package, leaving these details to the discretion of the cigarette industry. See *President Signs Cigarettes Bill*, *supra* note 35.

41. See FCLAA § 4.

42. See Duff Wilson, *U.S. Selects Cigarette Warning Images*, N.Y. TIMES, June 22, 2011, at B1 (noting this milestone).

Cigarette Smoking Act⁴³ (PHCSA) amended the warning to include an admonition from the Surgeon General and stronger language: “Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health.”⁴⁴ In 1984, the Comprehensive Smoking Education Act⁴⁵ (CSEA) introduced four new warnings to be placed on all tobacco products and to be rotated on a quarterly basis for each brand.⁴⁶ These warnings are:

“SURGEON GENERAL’S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy”

“SURGEON GENERAL’S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks to Your Health”

“SURGEON GENERAL’S WARNING: Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, And Low Birth Weight”

“SURGEON GENERAL’S WARNING: Cigarette Smoke Contains Carbon Monoxide.”⁴⁷

These 1984 warnings remain emblazoned on cigarette packages and were to be modified by the TCA’s graphic labels.⁴⁸

2. The Family Smoking Prevention and Tobacco Control Act

Since the introduction of warnings labels on cigarette packages in 1965, the rate of smoking among adults in America has decreased from approximately 42 percent⁴⁹ to approximately 19 percent in 2011,⁵⁰ due in large part to the increasing awareness that cigarette smoking is harmful.⁵¹

43. Pub. L. No. 91-222, 84 Stat. 87 (1970) (codified as amended at 15 U.S.C. §§ 1331–1340 (2006)).

44. *See id.* § 4. The PHCSA also banned television and radio advertisements for tobacco products. *See id.* § 6.

45. Pub. L. No. 98-474, 98 Stat. 2200 (1984) (codified as amended at 15 U.S.C. §§ 1331–1340 (2006)).

46. *Id.* § 4(c). *See generally* Ronald M. Davis et al., *The Rotation of Health Warnings in Cigarette Advertisements: Compliance with the Comprehensive Smoking Education Act of 1984*, 9 J. PUB. HEALTH POL’Y 403 (1988) (describing the warning label rotation system introduced by the CSEA and its increased efficacy).

47. CSEA § 4.

48. Kristin M. Sempeles, Note, *The FDA’s Attempt To Scare the Smoke Out of You: Has the FDA Gone Too Far with the Nine New Cigarette Warning Labels?*, 117 PENN ST. L. REV. 223, 223 n.3 (2012); *see also* Gary Strauss, *Graphic Cigarette Labels, Will They Work?*, USA TODAY (June 22, 2011, 12:58 PM), <http://usatoday30.usatoday.com/news/health/story/health/story/2011/06/FDA-issues-graphic-cigarette-labels/48676990/1> (noting that “[t]he images are the biggest change to cigarette warning labels since 1984”).

49. *See Cigarette Smoking Among Adults—United States, 2006*, 56 MORBIDITY & MORTALITY WKLY. REP. 1157, 1161 fig.1 (2007) (illustrating the smoking prevalence rate among adults in the United States between 1965 and 2006).

50. *See Current Cigarette Smoking Among Adults—United States, 2011*, 61 MORBIDITY & MORTALITY WKLY. REP. 889, 892 (2012).

51. In addition to increased awareness of smoking’s health consequences, smoke-free buildings, price increases by tobacco companies, and excise taxes have also played a role in decreasing the prevalence of smoking. *See* Dennis Cauchon, *Tax Hike Cuts Tobacco Consumption*, USA TODAY (Sept. 13, 2012), <http://usatoday30.usatoday.com/news/nation/>

Recently, however, this downward trend has leveled off, hovering around 20 percent for the past five years.⁵² Among other reasons, this can be attributed to two factors. First, each day thousands of young people try cigarettes for the first time and many become regular smokers.⁵³ Second, research indicates that the textual labels are ineffective⁵⁴ because they are easily overlooked⁵⁵ and require a college reading level, thus making them inappropriate for youth, those with poor reading abilities and low levels of education, and non-English speakers.⁵⁶

On June 22, 2009, President Barack Obama signed into law the TCA,⁵⁷ the most sweeping federal tobacco legislation in over twenty-five years.⁵⁸ Rebutting Congress's original denial of FDA jurisdiction over tobacco regulation and the Agency's unsuccessful attempt to regulate tobacco

story/2012-09-10/cigarette-tax-smoking/57737774/1 (reporting that a 22 percent increase of the federal cigarette tax in 2009 led three million people to stop smoking in 2010 and mentioning other possible causes for the decrease). *See generally* Serginio Sylvain, *The Effects of Excise Tax on Cigarette Consumption: A Divergence in the Behavior of Youth and Adults*, 1 MICH. J. BUS. 87 (2008) (arguing that the percentage of adult smokers does not change with taxation whereas the percentage of underage smokers decreases significantly when excise taxes on cigarettes increase).

52. *See Current Cigarette Smoking Among Adults—United States, 2011*, *supra* note 50, at 889–94.

53. The government estimates that 4,000 young people between the ages twelve and seventeen try their first cigarette each day. *See* CTRS. FOR DISEASE CONTROL & PREVENTION, TOBACCO USE AND THE HEALTH OF YOUNG PEOPLE (2008), available at http://www.cdc.gov/HealthyYouth/tobacco/pdf/tobacco_factsheet.pdf.

54. *See generally* Bethany K. Dumas, *Adequacy of Cigarette Package Warnings: An Analysis of the Adequacy of Federally Mandated Cigarette Package Warnings*, 59 TENN. L. REV. 261 (1992) (analyzing the linguistic and psychological effect of the rotational textual warnings and questioning their adequacy and effectiveness). *But see* Davis et al., *supra* note 46 (examining the increased efficacy that resulted from the introduction of the CSEA's labeling regime).

55. *See, e.g.*, INST. OF MED. OF THE NAT'L ACADS., ENDING THE TOBACCO PROBLEM: A BLUEPRINT FOR THE NATION 291 (2007) [hereinafter INST. OF MED. REPORT], available at http://www.nap.edu/openbook.php?record_id=11795 (reporting that since the introduction of the 1984 warning labels, "evidence regarding the ineffectiveness of the prescribed warnings has continued to accumulate," supporting the conclusion that these warnings "are unnoticed and stale, and they fail to convey relevant information in an effective way"); U.S. DEP'T OF HEALTH & HUMAN SERVS., YOUTH & TOBACCO: PREVENTING TOBACCO USE AMONG YOUNG PEOPLE—A REPORT OF THE SURGEON GENERAL 167–69 (1995), available at <http://profiles.nlm.nih.gov/ps/access/NNBCLQ.pdf> (detailing the numerous empirical studies regarding the ineffectiveness of warning labels and concluding that these studies show that the 1984 labels are easily overlooked).

56. INST. OF MED. REPORT, *supra* note 55, at 437.

57. Pub. L. No. 111-31, 123 Stat. 1776 (2009) (codified in scattered sections of 5, 15, and 21 U.S.C.); *see also* Jeff Zeleny, *Occasional Smoker, 47, Signs Tobacco Bill*, N.Y. TIMES, June 23, 2009, at A15 (discussing President Barack Obama's signing of the TCA into law and his smoking habit).

58. *See* Duff Wilson, *Senate Approves Tight Regulation over Cigarettes*, N.Y. TIMES, June 12, 2009, at A1 (characterizing the TCA as "the first big federal step against smoking since the 1971 ban against tobacco advertising on television and radio and the 1988 rules against smoking on airline flights—but potentially much more sweeping than either of those moves").

products in 1996,⁵⁹ the TCA gives the FDA exclusive jurisdiction to regulate the tobacco industry.⁶⁰ In exchange, however, the TCA prohibits the FDA from banning the sale of tobacco or mandating the elimination of nicotine from cigarettes.⁶¹ Among other provisions, the TCA affects the ability of tobacco companies to sell and market their products.⁶² These limitations include restricting the marketing of “modified risk tobacco products,”⁶³ outlawing claims that a tobacco product is safe or safer as a result of FDA regulation;⁶⁴ prohibiting color and imagery in tobacco

59. In 1996, the FDA unsuccessfully attempted to regulate the tobacco products under the Federal Food, Drug, and Cosmetics Act (FDCA). *See* Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396, 44,615–18 (Aug. 28, 1996). The FDCA prohibits any misbranded food, drug, or device from entering into interstate commerce. 21 U.S.C. § 331(a) (2006). After extensive fact-finding, the FDA determined that nicotine was a “drug” and cigarettes and smokeless tobacco were “devices” that deliver nicotine to the body within the meaning of the FDCA, and thus tobacco products were within its regulatory purview. *See* 21 U.S.C. § 321(h)(2)–(3) (defining a “device” as having an “intended” effect on the structure or function of the body or an “intended” use in the cure or prevention of disease). Tobacco companies objected, and the Supreme Court addressed the issue in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). Applying the two-step executive statutory interpretation test introduced in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Court held that the FDA’s attempted regulation exceeded its authority. *Brown & Williamson Tobacco Corp.*, 529 U.S. at 132–33.

60. 21 U.S.C. § 387a(a) (Supp. V 2011).

61. *Id.* § 387g(d)(3) (restricting the FDA’s authority to reduce nicotine levels to zero or to ban tobacco products).

62. The TCA’s advertising and marketing provisions may address the perceived shortcomings of the \$206 billion “master settlement” agreement reached between seven tobacco companies and forty-six states in 1998. *See* Wilson, *supra* note 58. That agreement resolved lawsuits and banned a number of the industry’s marketing practices, including the use of cartoons in advertisements and advertising on billboards and public transportation, in sports stadiums, shopping malls, and video game arcades. *See Master Settlement Agreement, NAT’L ASS’N ATT’YS GEN.*, § III(b)–(d) (Nov. 25, 1998), <http://www.naag.org/backpages/naag/tobacco/msa/msa-pdf/MSA%20with%20Sig%20Pages%20and%20Exhibits.pdf>. In the years since the settlement’s signing and the implementation of these industry-imposed sanctions, tobacco companies have nearly doubled their marketing spending and increased their advertising in stores, an advertising space not addressed by the agreement. *See* Wilson, *supra* note 58.

63. *See* Pub. L. No. 111-31, § 101(b), 123 Stat. 1776, 1784 (2009) (codified in scattered sections of 5, 15, and 21 U.S.C.) (amending the FDCA to add § 911(b)(2)(A)) (prohibiting (1) “the label, labeling, or advertising” of a tobacco product from “explicitly or implicitly” suggesting that the product is less harmful than other tobacco products, and (2) a “tobacco product manufacturer” from taking “any action directed to consumers through the media or otherwise . . . respecting the product that would be reasonably expected to result in consumers believing that the tobacco product or its smoke may” be less harmful than other tobacco products, without prior FDA approval of the product as “modified risk”).

64. *See id.* §§ 103(b), 301(tt) (amending the FDCA to add § 331(tt)) (prohibiting tobacco companies from making “any express or implied statement or representation directed to consumers . . . through the media or advertising” that “conveys, or misleads or would mislead consumers into believing, that (1) the product is approved by the [FDA]; (2) the [FDA] deems the product to be safe for use by consumers; (3) the product is endorsed by the [FDA] for use by consumers; or (4) the product is safe or less harmful by virtue of [either] its regulation or inspection by the [FDA]; or its compliance with regulatory requirements set by the [FDA]”).

advertising;⁶⁵ and banning event sponsorship,⁶⁶ the branding of nontobacco merchandise,⁶⁷ and the distribution of free sample cigarettes.⁶⁸

The TCA also mandates a new, three-element warning label that replaces the previous labeling format. First, the TCA requires all cigarette packages to bear one of the following nine textual warnings:

“Cigarettes are addictive”

“Tobacco smoke can harm your children”

“Cigarettes cause fatal lung disease”

“Cigarettes cause cancer”

“Cigarettes cause strokes and heart disease”

“Smoking during pregnancy can harm your baby”

“Smoking can kill you”

“Tobacco smoke causes fatal lung disease in nonsmokers”

“Quitting smoking now greatly reduces serious risks to your health.”⁶⁹

Second, the TCA specifies that the labels “shall comprise the top 50 percent of the front and rear panels of the package” and that the word “WARNING” should appear in capital letters in seventeen-point font.⁷⁰ Third, the TCA requires “color graphics depicting the negative health consequences of smoking” to accompany the textual warnings.⁷¹ The FDA states that the purpose of these new graphic labels is to convey information about the

65. Section 102(a)(2) requires the Secretary of Health and Human Services to promulgate a regulation that “shall be identical in its provisions to part 897 of the regulations promulgated by the Secretary . . . in the August 28, 1996, issue of the Federal Register (61 Fed. Reg. 44,615–18).” *Id.* § 102(a)(2). Section 897.32(a) of those regulations prohibits every “manufacturer, distributor, and retailer” of tobacco products from “advertising, . . . disseminating or causing to be disseminated, any labeling or advertising for cigarettes or smokeless tobacco” unless such labeling or advertising consists of “only black text on a white background.” 61 Fed. Reg. 44,617, § 897.32(a) (Aug. 28, 1996).

66. *See* TCA § 102(a) (adopting 61 Fed. Reg. at 44,615–18, § 897.34(c)) (prohibiting any “manufacturer, distributor, or retailer” of tobacco products from “sponsor[ing] or caus[ing] to be sponsored any athletic, musical, artistic, or other social or cultural event, or any entry or team in any event, in the brand name . . . , logo, symbol, motto, selling message, recognizable color or pattern of colors, or any other indicia of product identification identical or similar to, or identifiable with, those used for any brand of cigarettes or smokeless tobacco”).

67. *See id.* § 102(a) (adopting 61 Fed. Reg. at 44,617, § 897.34(a)) (prohibiting any manufacturer of tobacco products from marketing, distributing, or selling any promotional item bearing the “brand name . . . , logo, symbol, motto, selling message, [or] recognizable color or pattern of colors” of any tobacco product brand)).

68. *See id.* § 102(a)(1), (a)(2)(G) (adopting and amending 61 Fed. Reg. 44,616–17, § 897.16(d)) (prohibiting any “manufacturer, distributor, or retailer” of “cigarettes, smokeless tobacco, or other tobacco products” from “distribut[ing] or caus[ing] to be distributed any free samples of cigarettes or smokeless tobacco.”).

69. *Id.* § 201 (amending 15 U.S.C. § 1333).

70. *See id.*

71. *See id.*

negative health consequences of smoking to consumers and to decrease smoking rates.⁷²

3. The FDA Selects the Nine Images

Pursuant to the TCA, the FDA issued a proposed rule on November 12, 2010⁷³ and sought comment on thirty-six potential images to accompany the nine textual warnings.⁷⁴ During the comment period that followed, the FDA received, reviewed, and responded to over 1,700 comments.⁷⁵ Also, the FDA commissioned an 18,000-person, internet-based consumer study to research the efficacy of the thirty-six proposed images.⁷⁶ Finally, the FDA considered empirical evidence from research studies that explored the efficacy of the graphic warning labels already in place in Australia and Canada.⁷⁷ Based on this evidence, the FDA selected nine images and promulgated a final rule on June 22, 2011.⁷⁸

The graphics chosen by the FDA to appear on cigarette labeling include photos of (1) a man smoking a cigarette through a tracheotomy; (2) diseased lungs; (3) a mouth with stained teeth and an open sore; (4) a cadaver with chest staples laying on an autopsy table; (5) a woman crying; (6) a man wearing a T-shirt with the words “I Quit” on it; (7) a baby and an adult, presumably a parent, surrounded by curling cigarette smoke; (8) a patient hooked up to an oxygen mask; and (9) a drawing of a crying newborn in an incubator.⁷⁹ Additionally, the final rule requires the new

72. See Final Rule, *supra* note 5, at 36,633 (discussing the “primary goal” of the larger, graphic warnings in response to a comment questioning the new labeling format’s efficacy).

73. Required Warnings for Cigarette Packages and Advertisements, 75 Fed. Reg. 69,524, 69,534 (Nov. 12, 2010).

74. See Final Rule, *supra* note 5, at 36,636.

75. See *id.*

76. This FDA-sponsored study “quantitatively examined the relative efficacy of the 36 proposed color graphic images in communicating the harms of smoking.” *Id.* at 36,637. The D.C. Circuit in *R.J. Reynolds Tobacco* described the setup of this study succinctly:

The study divided respondents into two groups: a control group that was shown the new text in the format of the current warnings (located on the side of cigarette packages), and a separate treatment group that was shown the proposed graphic warnings, which included the new text, the accompanying graphic image, and the 1-800-QUIT-NOW number. Each group then answered questions designed to assess, among other things, whether the graphic warnings, relative to the text-only control, (1) increased viewers’ intention to quit or refrain from smoking; (2) increased viewers’ knowledge of the health risks of smoking or secondhand smoke; and (3) were “salient,” which FDA defined in part as causing viewers to feel “depressed,” “discouraged,” or “afraid.”

R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1209 (D.C. Cir. 2012) (citation omitted).

77. See Final Rule, *supra* note 5, at 36,642.

78. See generally *id.* But see *infra* note 317 and accompanying text (explaining that the government abandoned this final rule, and thus the nine images and textual warnings, as a result of litigation and tobacco industry opposition).

79. See Duff Wilson, *U.S. Releases Graphic Images To Deter Smokers*, N.Y. TIMES (June 21, 2011), http://www.nytimes.com/2011/06/22/health/policy/22smoke.html?_r=0 (displaying the nine images).

warnings to list the phone number of a smoking cessation hotline, 1-800-QUIT-NOW.⁸⁰

B. The First Amendment: The Freedom To Speak and Not To Speak

The First Amendment provides, “Congress shall make no law . . . abridging the freedom of speech, or of the press.”⁸¹ The freedom of expression is a fundamental, foundational right⁸² and is central to the democratic process and individual participation in it.⁸³ As such, the Supreme Court has held that the First Amendment protects individuals from federal, state, and local governmental interference with this right.⁸⁴

Constitutional scholars argue that the First Amendment was a reaction against political speech and press restrictions in English society.⁸⁵ Outside this narrow realm, however, it is unclear what the drafters intended the First Amendment to protect.⁸⁶ As such, the Supreme Court has had to opine on the speech that the First Amendment protects, the speech that the government can regulate, and the proper framework for scrutinizing the constitutionality of such acts.⁸⁷ This section briefly introduces the First Amendment, as well as the Court’s approach to evaluating measures that

80. See Final Rule, *supra* note 5, at 36,674. Individual states and the U.S. Department of Health and Human Services sponsor this “quitline.” See *Frequently Asked Questions About Quitlines*, SMOKEFREE.GOV, <http://www.smokefree.gov/quitlines-faq.aspx> (last visited Mar. 19, 2013).

81. U.S. CONST. amend. I.

82. See *Palko v. Connecticut*, 302 U.S. 319, 326–27 (1937) (characterizing the freedom of thought and speech as “the matrix, the indispensable condition, of nearly every other form of freedom.”); see also 5 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* 14 (4th ed. 2007) (calling First Amendment freedom a “touchstone of individual liberty”).

83. See, e.g., EDWIN P. ROME & WILLIAM H. ROBERTS, *CORPORATE AND COMMERCIAL FREE SPEECH: FIRST AMENDMENT PROTECTION OF EXPRESSION IN BUSINESS* 36 (1985) (noting that free speech is an integral part of democratic society).

84. See DANIEL A. FARBER, *THE FIRST AMENDMENT* 1–2, 13–16 (2d ed. 2003) (discussing the scope of First Amendment protection); Akhil Reed Amar, *The Document and the Doctrine*, 114 HARV. L. REV. 26, 58–59 (2000) (noting that the U.S. Supreme Court has used the Fourteenth Amendment to apply all First Amendment protections to state and local governments).

85. See ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 952 (4th ed. 2011) (“There is . . . little doubt that the First Amendment was meant to prohibit licensing of publication such as existed in England and to forbid punishment for seditious libel.”); see also ROTUNDA & NOWAK, *supra* note 82, at 15–24 (describing the English background of the First Amendment).

86. See RODNEY A. SMOLLA, *SMOLLA AND NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT* 1-18 to -19 (1994) (“One can keep going round and round on the original meaning of the First Amendment, but no clear, consistent vision of what the framers meant by freedom of speech will ever emerge.”); see also ZECHARIAH CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* 16 (1941) (noting that the drafters found free speech to be important, but that they did not define the specific meaning of the First Amendment).

87. See CHERMERINSKY, *supra* note 85, at 953; see also JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 1130 (7th ed. 2004) (stating that the Court developed its framework for First Amendment analysis in the last quarter of the twentieth century).

compel speech, measures that restrict commercial speech, and measures that require factual disclosures.

1. An Introduction to the First Amendment

The First Amendment's language is simple and unqualified.⁸⁸ Despite this simplicity and absoluteness,⁸⁹ however, the Supreme Court has never taken an absolutist approach in interpreting it.⁹⁰ Rather, it has held that the First Amendment allows restraints on free speech for "appropriate reasons."⁹¹ The Court's approach to determining the legitimate instances in which speech may be restricted is one based on content neutrality.⁹² According to this framework, regulations affecting speech are classified either as content based or content neutral.⁹³

Content-based laws, as the moniker suggests, restrict or compel speech based on the speech's content.⁹⁴ With some categorical exceptions,⁹⁵ these regulations are "presumptively invalid"⁹⁶ unless they pass muster under strict scrutiny, the highest level of judicial review.⁹⁷ To survive strict scrutiny, the government must (1) show a compelling interest in promulgating the regulation, (2) narrowly tailor the regulation to promote that interest, and (3) demonstrate that no less restrictive alternative is available.⁹⁸ Underlying this hardline approach is the core belief that "each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence" and that "Government action

88. *See generally* KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 767–72 (17th ed. 2010) (outlining the Court's First Amendment jurisprudence).

89. Justice Hugo Black argued that the First Amendment should be interpreted literally and thus that speech should never be subject to restrictions. *See* Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 880 (1960) (arguing that the plain language of the Constitution shows that the First Amendment did not contain "any qualifications").

90. *See* *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 49 (1961) (rejecting the view that First Amendment freedoms are absolute). *See generally* GEOFFREY R. STONE ET AL., THE FIRST AMENDMENT 3 (3d ed. 2008).

91. *Elrod v. Burns*, 427 U.S. 347, 360 (1976).

92. *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 99 (1972). The Court articulated this principle of content neutrality in its statement that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.* at 95.

93. *See* NOWAK & ROTUNDA, *supra* note 87, at 1131.

94. An example of a content-based speech restriction is a ban on sexually explicit speech. Eugene Volokh, *Content Discrimination and the First Amendment (Including the "Secondary Effects" Doctrine)*, VOLOKH CONSPIRACY (June 21, 2010, 12:36 PM), <http://www.volokh.com/2010/06/21/content-discrimination-and-the-first-amendment-including-the-secondary-effects-doctrine/>. In this example, other types of speech are not banned. Because this restriction treats speech differently based on the subject matter of the speech, the restriction is "content-based." *Id.*

95. *See infra* notes 106–09 and accompanying text (noting the categorical exceptions to the content-based/content-neutral analytical framework).

96. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

97. *See* *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994). *See generally* CHERMERINSKY, *supra* note 85, at 960–61.

98. *See* *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000) (defining the strict scrutiny standard for content-based restrictions).

that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right.”⁹⁹ So severe is this burden that the government rarely meets it.¹⁰⁰

In contrast to content-based laws, content-neutral regulations affect speech without regard to the speech’s content.¹⁰¹ The Court allows the government to place reasonable content-neutral time, place, and manner restrictions on speech.¹⁰² Accordingly, such measures are examined under intermediate scrutiny, which is a more lenient form of judicial review.¹⁰³ To survive intermediate scrutiny, the government must show that (1) the regulation is within its constitutional power, (2) the regulation furthers an important or substantial governmental interest, (3) the interest is unrelated to the suppression of free expression, and (4) the restriction is no greater than necessary to further that interest.¹⁰⁴

This is not to imply, however, that all speech and all laws that regulate speech fall neatly into this either-or framework.¹⁰⁵ Indeed, the Court has deemed certain classes of speech as having “lower value” and thus entitled to less or no protection under the First Amendment.¹⁰⁶ These categories include obscenity, defamation, fraud, incitement, and speech relating to criminal conduct.¹⁰⁷ Additionally, commercial speech¹⁰⁸ and compelled speech that corrects potentially misleading information¹⁰⁹ are two subsets of content-based expression that the Court reviews less stringently.¹¹⁰

99. *Turner Broad. Sys., Inc.*, 512 U.S. at 641.

100. *See* NOWAK & ROTUNDA, *supra* note 87, at 1131.

101. *See* *Boos v. Barry*, 485 U.S. 312, 320 (1988). Examples of content-neutral speech are bans on loudspeakers or leafleting. Volokh, *supra* note 94. Because the restriction treats speech the same regardless of what the speech says, it is “content-neutral.” *Id.*

102. *See* NOWAK & ROTUNDA, *supra* note 87, at 1132.

103. *See* *Turner Broad. Sys., Inc.*, 512 U.S. at 642.

104. *See* *United States v. O’Brien*, 391 U.S. 367, 377 (1968) (establishing a four-part standard to test if a content-neutral regulation passes intermediate scrutiny).

105. *See* *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.” (citations omitted)).

106. *See* Daniel A. Farber, *The Categorical Approach to Protecting Speech in American Constitutional Law*, 84 IND. L.J. 917, 928 (2009) (exploring the Court’s categorical approach to the First Amendment and noting that “when people speak about the categorical approach, they are referring to the rules that give lesser protection to certain content based on its supposed lack of value”).

107. *See* *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010) (enumerating categories of “lower value” speech); *see also* Louis J. Virelli III, *Permissible Burden or Constitutional Violation? A First Amendment Analysis of Congress’ Proposed Removal of Tax Deductibility from Tobacco Advertisements*, 2 U. PA. J. CONST. L. 529, 534–35 & n.31 (2000) (noting that libel, slander, obscenity, and incitement fall outside First Amendment protection).

108. *See infra* Part I.B.3 (discussing commercial speech and the framework for analyzing the First Amendment constitutionality of laws that restrict it).

109. *See infra* Part I.B.4 (discussing mandated factual disclosures and the standard for evaluating their constitutionality).

110. *See infra* Part I.B.3.b (explaining that the Supreme Court’s examination of measures that restrict commercial speech is a test of intermediate scrutiny); *infra* Part I.B.4 (examining

2. Compelled Speech

The First Amendment not only protects the right to speak freely; it also protects the right to refrain from speaking.¹¹¹ This right is so strong, in fact, that the Court has found the distinction between compelled speech and compelled silence “without constitutional significance.”¹¹² Two cases form the core of the Court’s compelled speech doctrine: *West Virginia State Board of Education v. Barnette*¹¹³ and *Wooley v. Maynard*.¹¹⁴ A third compelled speech case, *Pacific Gas & Electric Co. v. Public Utilities Commission of California*,¹¹⁵ is germane as it illustrates the Court’s application of *Barnette* and *Wooley* in the commercial context.

In 1943, the Court in *Barnette* examined a regulation adopted by the West Virginia State Board of Education that required students to salute the American flag while reciting the Pledge of Allegiance.¹¹⁶ A student’s noncompliance with this rule would result in expulsion.¹¹⁷ A group of Jehovah’s Witnesses sued to enjoin the law, arguing that it infringed on their First Amendment rights.¹¹⁸ The Court agreed, finding that the law impermissibly invaded the students’ “intellect and spirit,” which the First Amendment protects from “official control.”¹¹⁹

Justice Robert Jackson, writing for the Court, articulated this idea and, in the process, established the Court’s compelled speech doctrine:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.¹²⁰

Forty-four years later in 1977, the Court reaffirmed *Barnette*’s central precept in *Wooley*.¹²¹ In *Wooley*, a husband and wife challenged a New Hampshire law that made it a crime to block out any part of that state’s automobile license plate, including the state motto embossed on it.¹²² The couple considered that motto, “Live Free or Die,” repugnant to their moral,

the Court’s approach to required disclosures that correct potential misleading speech, which is rational basis review).

111. See *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). See generally CHEMERINSKY, *supra* note 85, at 1001 (summarizing the Court’s approach to compelled speech); Anna M. Taruschio, Note, *The First Amendment, the Right Not To Speak and the Problem of Government Access Statutes*, 27 FORDHAM URB. L.J. 1001 (2000).

112. *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988).

113. 319 U.S. 624 (1943).

114. 430 U.S. 705 (1977).

115. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n of Cal.*, 475 U.S. 1 (1986) (plurality opinion).

116. See *Barnette*, 319 U.S. at 627–29.

117. See *id.* at 629.

118. See *id.*

119. See *id.* at 642.

120. See *id.*

121. See *Wooley v. Maynard*, 430 U.S. 705 (1977).

122. See *id.* at 707.

religious, and political beliefs and covered it up, resulting in multiple misdemeanor charges.¹²³

Reviewing the law for First Amendment defects, the Supreme Court found the law to be unconstitutional, explaining: “The right to speak and the right to refrain from speaking are complementary components of the broader concept of individual freedom of mind.”¹²⁴ This core value thus prohibited New Hampshire from compelling the couple to “use their private property as a ‘mobile billboard’ for the State’s ideological message.”¹²⁵

As *Barnette* and *Wooley* illustrate, the Court treats identically laws that compel content-based speech and laws that restrict content-based speech and subjects both to strict scrutiny review.¹²⁶ In *Pacific Gas & Electric Co. v. Public Utilities Commission*, the Court made clear that this right not to speak extends not only to individuals but also to corporations.¹²⁷ In that case, the Court scrutinized a decision by a California regulator that forced Pacific Gas and Electric (PG&E), a private utility company, to print on its billing envelopes the views of a private advocacy organization with which the company disagreed.¹²⁸ Equating the envelopes at issue with the automobile in *Wooley*, the Court determined that strict scrutiny applied, held that the regulator could not order the utility to use its private property to distribute the third party’s message,¹²⁹ and struck down the regulation.¹³⁰

3. Commercial Speech: “The Stepchild of the First Amendment”¹³¹

Although the text of the First Amendment does not differentiate between commercial and noncommercial speech, the Supreme Court has recognized such a distinction.¹³² The Court has yet to establish the exact contours of

123. *See id.* at 707–08.

124. *Id.* at 714 (internal quotation marks omitted).

125. *Id.* at 715.

126. *See id.* at 715–16.

127. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n of Cal.*, 475 U.S. 1, 16 (1986) (plurality opinion) (“For corporations as for individuals, the choice to speak includes within it the choice of what not to say.”).

128. *See id.* at 4–7. This organization, called Toward Utility Rate Normalization (TURN), was a consumer activist organization that regularly opposed PG&E in ratemaking proceedings. *See* David Yassky, *Eras of the First Amendment*, 91 COLUM. L. REV. 1699, 1739 (1991). The state regulator ordered that the “space remaining in the [PG&E] billing envelope, after inclusion of the monthly bill” had to be divided between the utility and TURN. *Pac. Gas & Elec. Co.*, 475 U.S. at 6.

129. *See Pac. Gas & Elec. Co.*, 475 U.S. at 17–18 (“[In *Wooley*,] [t]he ‘private property’ that was used to spread the unwelcome message was the automobile, not the license plates. Similarly, the Commission’s order requires appellant to use its property—the billing envelopes—to distribute the message of another.”).

130. *See id.* at 20–21.

131. Comment, *Developments in the Law: Deceptive Advertising*, 80 HARV. L. REV. 1005, 1027–29 (1967) (discussing the constitutional status of commercial speech).

132. *See* Alex Kozinski & Stuart Banner, *The Anti-history and Pre-history of Commercial Speech*, 71 TEX. L. REV. 747, 757–58 (1993).

what constitutes commercial speech;¹³³ however, it has said that, at the very least, it is speech that “propose[s] a commercial transaction,” such as advertising.¹³⁴

a. From “No Protection” to “Limited Protection”: The Beginning of the Court’s Commercial Speech Doctrine

Initially, the Supreme Court held that the First Amendment did not protect commercial speech.¹³⁵ This changed in 1975, when the Court offered commercial speech limited constitutional protection.¹³⁶ A year later, the Court clarified its position in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,¹³⁷ striking down a state law that prohibited pharmacists from advertising the price of prescription drugs.¹³⁸ In doing so, the Court emphasized that the First Amendment protects both the right to disseminate and receive information¹³⁹ and that a speaker’s economic interests do not affect those rights.¹⁴⁰

133. *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985) (noting that “the precise bounds” of commercial speech “are subject to doubt”).

134. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976); *see also* *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473–74 (1989) (noting that the test for whether speech is commercial is whether it proposes a commercial transaction). The Court also has said that commercial speech (1) is an advertisement of some kind, (2) refers to a specific product, and (3) represents the speaker’s economic motivation. *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66–68 (1983) (finding unsolicited mailings of contraceptive information to be commercial speech and holding that a federal statute prohibiting distribution of such information violated the First Amendment).

135. *See Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (upholding a city ordinance that outlawed the circulation of handbills and explaining that “the Constitution imposes no . . . restraint on government as respects purely commercial advertising”); *see also* Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 450 (1971) (“[The Court in *Chrestensen*,] without citing precedent, historical evidence, or policy considerations, . . . effectively read commercial speech out of the First Amendment.”). *See generally* Kozinski & Banner, *supra* note 132, at 754–59 (giving an overview of the development of the commercial speech doctrine).

136. Interestingly, commercial speech protection first arose in the public health context. *See Bigelow v. Virginia*, 421 U.S. 809, 818 (1975) (holding that advertisements for abortion services in newspapers are protected by the First Amendment and that “speech is not stripped of First Amendment protection merely because it appears” as a commercial advertisement); *see also* M. Neil Browne et al., *Advertising to Children and the Commercial Speech Doctrine: Political and Constitutional Limitations*, 58 DRAKE L. REV. 67, 91–92 (2009) (noting that *Bigelow* clarified commercial speech protection for certain activities). Later cases would solidify this connection. *See infra* notes 137–44, 169 and accompanying text (detailing the Court’s decisions in cases regarding speech restrictions in the public health context, including acts regulating the advertising of the price of prescription drugs, alcohol, and cigarettes).

137. 425 U.S. 748 (1976); *see also* Alex Kozinski & Stuart Banner, *Who’s Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 629–31 (1990) (discussing the evolution of commercial speech starting in 1976).

138. *Va. Pharmacy*, 425 U.S. at 749–50.

139. *See id.* at 756–57.

140. *See id.* at 762.

The Court also recognized that the consumer's interest in the free flow of commercial information, particularly information regarding drug prices, may surpass her interest in political discourse,¹⁴¹ a realm of speech long deemed by the Court as deserving of First Amendment protection.¹⁴² For these reasons, the Court held that the First Amendment protects speech that "does no more than propose a commercial transaction,"¹⁴³ as long as that speech is not false, deceptive or misleading.¹⁴⁴

b. The Court Establishes a Standard with Central Hudson

Four years after the Supreme Court decided that the First Amendment protected commercial speech in *Virginia Pharmacy*, the Court articulated a test to evaluate the constitutionality of government regulation of commercial speech in *Central Hudson*.¹⁴⁵ This four-part test, which the Court later identified as one of intermediate scrutiny,¹⁴⁶ asks: (1) Is the speech at issue not deceptive or false and does it concern lawful activity?¹⁴⁷ (2) Is the government's restriction justified by a substantial government interest?¹⁴⁸ (3) Does the regulation directly advance the government's asserted interest?¹⁴⁹ (4) Is the restriction no more extensive than necessary?¹⁵⁰ Answering "yes" to each of these queries yields a regulation that constitutionally restricts commercial speech; any "no" answer indicates a regulation that is unconstitutional.¹⁵¹

At issue in *Central Hudson* was a New York law that prohibited promotional advertising by utility companies.¹⁵² An energy shortage had prompted the New York Public Service Commission to order this ban.¹⁵³

141. In *Virginia Pharmacy*, Justice Blackmun opined eloquently on the value of commercial speech: "As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Id.* at 763–64; *see also* Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 1–4 (2000) (contending that commercial speech is constitutionally protected because of the informational function that advertising serves). *But see* Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 486 (1985) (contending that commercial speech should not be constitutionally protected because it is unaffiliated with the political process); Martin H. Redish, *Tobacco Advertising and the First Amendment*, 81 IOWA L. REV. 589, 606–07 (1996) (arguing that commercial speech should not be afforded the same protection as noncommercial speech).

142. *See supra* note 83 and accompanying text (discussing the high value placed on the free flow of political discourse in First Amendment jurisprudence).

143. *Va. Pharmacy*, 425 U.S. at 762 (citation omitted).

144. *See id.* at 771–72.

145. 447 U.S. 557 (1980).

146. *See Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995) ("[The Court] engage[s] in 'intermediate' scrutiny of restrictions on commercial speech, analyzing them under the framework set forth in [*Central Hudson*].").

147. *Central Hudson*, 447 U.S. at 566.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *See id.* at 558.

153. *See id.* at 558–59.

The thinking behind it was that advertising promoted the use of electricity, which increased consumer demand despite insufficient sources of supply.¹⁵⁴ Three years after the ban, the energy crisis had passed, but the advertising restriction remained in force.¹⁵⁵ Central Hudson Gas and Electric Corporation filed suit, alleging that the ban violated its First and Fourteenth Amendment rights.¹⁵⁶

In this context, the Court developed and applied its four-prong test.¹⁵⁷ The Court found that the first two prongs of the test were satisfied¹⁵⁸: the utility's promotional advertising was not misleading or unlawful,¹⁵⁹ and the State's asserted interests in conserving energy and maintaining fair and efficient electricity rates were substantial.¹⁶⁰ Under the third prong, the Court accepted the State's argument that advertising and electricity demand were directly connected and that an advertising ban would lessen demand for it, thus establishing a link between the State's interest in conservation and the Commission's advertising ban.¹⁶¹

However, the regulation failed the fourth prong of the test.¹⁶² Under it, the Court concluded that the State had failed to establish that the regulation was not more extensive than necessary to further its substantial interest in energy conservation.¹⁶³ Troubling to the Court was that the ban implicated all promotional advertising regardless of its effect on energy consumption; the State had not shown that a less restrictive regulation would not accomplish its goal of energy conservation.¹⁶⁴ For this reason, the Court declared the law unconstitutional.¹⁶⁵

With *Central Hudson*, the Court established a test for examining measures that regulate commercial speech.¹⁶⁶ In doing so, however, the Court did not specify the scope of this test.¹⁶⁷ It was therefore unclear if the standard should apply solely to the type of restriction addressed in *Central Hudson*—a law that restricts speech—or if the standard should apply more generally to any law that affects commercial speech, regardless of whether that law restricts speech or compels it.¹⁶⁸ Of note, however, is that since its

154. *See id.* at 559.

155. *See id.*

156. *See id.* at 560–61.

157. *See id.* at 566–72; *see also supra* notes 147–51 and accompanying text.

158. *See Central Hudson*, 447 U.S. at 566–69.

159. *See id.* at 566–68.

160. *See id.* at 568–69.

161. *See id.* at 569. The Court, however, dismissed the state's argument of a connection between the energy advertising ban and fair rates as "speculative" and "tenuous." *Id.*

162. *See id.* at 569–72.

163. *Id.* at 569–70.

164. *Id.* at 570.

165. *Id.* at 570–72.

166. *Id.* at 566.

167. *See Dayna B. Royal, Resolving the Compelled-Commercial-Speech Conundrum*, 19 VA. J. SOC. POL'Y & L. 205, 218 (2011).

168. *See id.*

decision in *Central Hudson*, the Court has only used this standard to test measures that restrict speech.¹⁶⁹

4. Factual Disclosures that Prevent Consumer Deception

Five years after *Central Hudson*, the Supreme Court examined the constitutionality of a required disclosure provision in *Zauderer*.¹⁷⁰ The Court held that compelled disclosures of “purely factual and uncontroversial information” that aim to protect consumers from “confusion or deception” and that are not “unjustified or unduly burdensome” are to be reviewed under the rational basis standard.¹⁷¹

In so holding, the Court carved out an exception to its compelled and commercial speech doctrines: if a compelled disclosure met certain criteria, then rational basis review, the lowest level of judicial scrutiny, applied. Since that decision, courts have applied and developed this exception.

a. *The Supreme Court Creates the Zauderer Exception to Strict Scrutiny for the Correction of Potentially Misleading Speech*

Zauderer involved an Ohio attorney who published an advertisement offering to represent women who were injured by a faulty medical device.¹⁷² The advertisement featured an illustration of the medical device and asserted that losing clients would not owe legal fees;¹⁷³ it did not disclose that clients would owe court costs and expenses.¹⁷⁴

The Office of Disciplinary Counsel of the Supreme Court of Ohio disciplined the lawyer for publishing this advertisement on the grounds that he violated three Disciplinary Rules of the Ohio Code of Professional Practice: a rule prohibiting advertisements containing information or advice about a specific legal problem; a rule banning the use of illustrations in attorney advertising; and a rule forbidding attorney deception.¹⁷⁵ The

169. See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (using *Central Hudson* to examine and strike down restrictions on outdoor advertising and point-of-sale advertising of tobacco products); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (declaring unconstitutional under *Central Hudson* a law banning the advertising of alcohol prices); *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328 (1986) (upholding under *Central Hudson* a law restricting gambling casinos from advertising to residents); Michelle Silva Fernandes, Note, *Party Foul: The Fourth Circuit's Improper Application of the Commercial Speech Test in Educational Media Co. at Virginia Tech, Inc. v. Swecker*, 80 FORDHAM L. REV. 1325 (2011) (exploring restrictions on alcohol advertisements in college student publications and arguing that *Central Hudson* is the proper standard for analyzing them).

170. 471 U.S. 626 (1985).

171. See *id.* at 651 (citations and internal quotation marks omitted).

172. See *id.* at 629–31. The defective device was a Dalkon Shield Intrauterine Device. See *id.* at 630.

173. See *id.* at 630–31.

174. See *id.* at 633.

175. See *id.* at 634–35.

lawyer appealed the decision, contending that the Ohio Code violated the First Amendment.¹⁷⁶

The Supreme Court examined the three code provisions for First Amendment defects, striking down the first two but upholding the third.¹⁷⁷ Regarding the first, the Court held that a state could not prohibit advertising geared to persons with a specific legal problem.¹⁷⁸

As for the second, the Court recognized that visual components of advertisements served important communicative functions: graphics attract the attention of the audience to the advertiser's message and have the ability to impart information directly.¹⁷⁹ For this reason, images were entitled to the same First Amendment protections afforded verbal commercial speech.¹⁸⁰ Consequently, the Court held that advertisements could contain illustrations as long as those graphic were not deceptive, misleading, or confusing.¹⁸¹

The Court found, however, that the third disciplinary charge brought against the lawyer—that is, his failure to disclose in the advertisement that his clients might be liable for litigation costs even if their lawsuits were unsuccessful—was constitutional.¹⁸² Notably, the Court declined to use either strict scrutiny or the *Central Hudson* test to assess the rule's constitutionality.¹⁸³ Rather, the Court reviewed the rule using rational basis assessment.¹⁸⁴

The Court gave two reasons for taking this approach.¹⁸⁵ First, the Court distinguished the speech requirement in *Wooley* and *Barnette* from the disclosure requirement at issue in *Zauderer*.¹⁸⁶ In *Wooley* and *Barnette*, laws forced speakers to voice political, nationalistic, religious orthodoxy, or other “matters of opinion,”¹⁸⁷ while in *Zauderer*, the requirement compelled the disclosure of “purely factual and uncontroversial information” about legal services.¹⁸⁸ For the Court, this was significant, as the *Zauderer* disclosure was of importance to consumers.¹⁸⁹ The Court further explained that its justification for protecting commercial speech under the First Amendment was chiefly concerned with the information's

176. *See id.* at 636.

177. *See id.* at 639–53.

178. *Id.* at 641–42.

179. *Id.* at 647.

180. *Id.*

181. *Id.*

182. *See id.* at 650–52.

183. *See id.* at 651–52 & n.14.

184. *See id.* at 651.

185. *See id.*

186. *See id.*

187. *Id.* (quoting *W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943)).

188. *Id.*

189. *See id.* (“[B]ecause disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception.” (internal quotation marks omitted)).

value to consumers. In this case, an attorney's constitutionally protected interest in *not* providing the required factual information was "minimal."¹⁹⁰

Second, the Court found that unlike the regulation at issue in *Central Hudson*, the disclosure requirement did not restrict speech—it compelled it¹⁹¹—and thus encroached more narrowly on an advertiser's interests than an across-the-board prohibition.¹⁹² For these two reasons, the Court decided to employ rational basis review, finding that the disclosure requirement was reasonably related to the State's interest in preventing consumer deception of consumers, and upheld the rule.¹⁹³

Thus, with *Zauderer*, the Court established a rational basis standard that is applicable to certain laws that require disclosures. If (1) a compelled disclosure consists of "purely factual and uncontroversial information," (2) aims to protect consumers from "confusion or deception," and (3) is not "unjustified or unduly burdensome," then that disclosure requirement is scrutinized to determine if it reasonably relates to the state's interest, rather than the more stringent strict scrutiny standard that is applied in other First Amendment contexts.¹⁹⁴

b. Zauderer Applied: Three Instructive Cases

After the Supreme Court defined this narrow exception to its compelled and commercial speech doctrines, the Court and numerous circuit courts have ruled on the constitutionality of disclosure requirements. In doing so, the courts have delineated the reach and import of the *Zauderer* exception. Three cases in particular—*Ibanez v. Florida Department of Business and Professional Regulation, Board of Accountancy*;¹⁹⁵ *Milavetz, Gallop & Milavetz, P.A. v. United States*;¹⁹⁶ and *Entertainment Software Ass'n v. Blagojevich*¹⁹⁷—are used as authority by the parties in litigation over the graphic warning labels and thus are relevant for understanding the circuit split.

The Supreme Court decided *Ibanez* in 1994, nine years after *Zauderer*. Similar to the facts of *Zauderer*, *Ibanez* involved an attorney who was reprimanded for violating rules of professional conduct.¹⁹⁸ In addition to her membership in the Florida bar, *Ibanez* was a Certified Public Accountant and a Certified Financial Planner (CFP),¹⁹⁹ and she included this CFP designation in her yellow pages listing, on her business cards, and

190. *Id.*

191. *Id.* at 650 (noting the "material differences between disclosure requirements and outright prohibitions on speech").

192. *Id.* at 651.

193. *See id.*

194. *Id.*

195. 512 U.S. 136 (1994).

196. 130 S. Ct. 1324 (2010).

197. 469 F.3d 641 (7th Cir. 2006).

198. *See Ibanez*, 512 U.S. at 139–42.

199. *See id.* at 138.

on her law office letterhead.²⁰⁰ The Florida Board of Accountancy, a state regulator, argued that the use of this “specialist” designation was “potentially misleading” to consumers.²⁰¹ The board sought to require Ibanez to include a disclaimer on her promotional materials that explained that the accrediting agency was not affiliated with the government and that set out the agency’s accreditation requirements.²⁰²

On review, the Supreme Court found the board’s action unjustified because it had failed “to point to any harm that is potentially real, not purely hypothetical.”²⁰³ As such, the Court declined to apply the *Zauderer* standard because the board could not show that the commercial speech at issue would mislead consumers.²⁰⁴ The Court also noted that the proposed disclaimer was “unduly burdensome.”²⁰⁵

Milavetz is another case cited in litigation over the graphic warning labels. In *Milavetz*, the Court analyzed and upheld two disclosure provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) using *Zauderer*.²⁰⁶ One of the challenged provisions required debt relief agencies to “clearly and conspicuously disclose in any advertisement of bankruptcy assistance services . . . that the services or benefits are with respect to bankruptcy relief.”²⁰⁷ Another provision required qualifying professionals to state: “We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code.”²⁰⁸ The *Milavetz* law firm challenged the enforcement of BAPCPA’s disclosure requirements,²⁰⁹ arguing an intermediate scrutiny standard governed and that the State’s attempt to compel speech should be struck down.²¹⁰

The Court declined to apply *Central Hudson* for two reasons.²¹¹ First, the Court found that the BAPCPA provision “share[d] the essential features of the rule at issue in *Zauderer*.”²¹² Because the BAPCPA provision, like the rule of professional conduct at issue in *Zauderer*, was directed at correcting misleading speech, *Zauderer* governed.²¹³ Second, the Court distinguished the challenged BAPCPA disclosure requirement, which

200. *See id.*

201. *Id.* at 146.

202. *See id.*

203. *Id.*

204. *Id.*

205. *See id.* at 146–47 (“The detail required in the disclaimer currently described by the Board effectively rules out notation of the ‘specialist’ designation on a business card or letterhead, or in a yellow pages listing.”).

206. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1340–41 (2010).

207. *Id.* at 1330 (citation and internal quotation marks omitted).

208. *Id.*

209. *Id.*

210. *Id.* at 1339.

211. *See id.*

212. *Id.* at 1340.

213. *Id.* at 1339.

compelled speech, from the rule scrutinized in *Central Hudson*, which restricted speech.²¹⁴ The Court then examined the BAPCPA provision and upheld it because, like in *Zauderer*, the law firm's advertisements were "inherently misleading" because the advertisements promised "debt relief without any reference to the possibility of filing for bankruptcy, which has inherent costs."²¹⁵

Finally, *Blagojevich*, a decision from the Seventh Circuit, is also informative. At issue in *Blagojevich* was an Illinois law that required video game retailers to place a four-square-inch "18" sticker on video games that fell within the State's definition of "sexually explicit."²¹⁶ The Seventh Circuit concluded that the sticker "force[d] the game-seller to include . . . a subjective and highly controversial message—that the game's content is sexually explicit."²¹⁷ Because of the subjectivity and controversial nature of this required disclosure, the Seventh Circuit held that *Zauderer* did not apply and instead used strict scrutiny.²¹⁸ In doing so, it found that the sticker "literally fail[ed] to be narrowly tailored" because the sticker covered a substantial portion of the box and the State "failed to . . . explain why a smaller sticker would not suffice."²¹⁹ For this reason, the Seventh Circuit invalidated the law.²²⁰

II. CONFUSION IN THE COURTS: THE GRAPHIC WARNING LABELS' CONSTITUTIONALITY AND THE APPROPRIATE ANALYTICAL FRAMEWORK FOR ASSESSING IT

Part II outlines the conflict between the Sixth and D.C. Circuits over the constitutionality of the TCA's labeling requirement. It pays particular attention to the different frameworks that the circuits and district courts employed to determine the appropriate level of scrutiny and those courts' application of those standards to evaluate the graphic warning labels.

Part II.A details the Sixth Circuit's decision in *Discount Tobacco City & Lottery, Inc. v. United States*,²²¹ which affirmed a lower court judgment finding the required use of graphics constitutional. The Sixth Circuit relied on *Zauderer* in using rational basis review, rejecting the trial court's use of intermediate scrutiny under *Central Hudson*, to affirm the trial court's conclusion that the graphics-based speech could be mandated. Part II.B discusses the D.C. Circuit's decision in *R.J. Reynolds Tobacco Co. v. FDA*,²²² which affirmed a lower court ruling that the images violated the

214. *Id.* ("[B]ecause the challenged provisions impose a disclosure requirement rather than an affirmative limitation on speech, . . . the less exacting scrutiny described in *Zauderer* governs our review.").

215. *Id.* at 1340.

216. *See Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 643 (7th Cir. 2006).

217. *Id.* at 652.

218. *See id.*

219. *Id.*

220. *Id.*

221. 674 F.3d 509 (6th Cir. 2012).

222. 696 F.3d 1205 (D.C. Cir. 2012).

First Amendment. The D.C. Circuit, however, rejecting the strict scrutiny standard that had been employed by the district court, examined the images using the *Central Hudson* factors.

A. *The Sixth Circuit: Discount Tobacco City & Lottery, Inc. v. United States*

In *Discount Tobacco City*, the Sixth Circuit considered a facial challenge²²³ to the TCA's labeling requirement.²²⁴ The court determined that the provision was subject to the strict scrutiny required by the First Amendment unless the speech was designed to correct misleading information, in which case *Zauderer* controlled.²²⁵ Applying this framework, the court determined that the *Zauderer* rational basis test governed²²⁶ and held that the regulation passed this review and was constitutional.²²⁷ In doing so, the panel majority upheld the district court's judgment.²²⁸ One judge, after examining the rule under *Zauderer*, dissented, argued that the provision was not rationally related to a legitimate governmental interest.²²⁹

1. The District Court: The Graphic Warning Label Requirement Is Constitutional Using *Central Hudson* Intermediate Scrutiny

In late August 2009, approximately two months after President Obama signed the TCA into law,²³⁰ six tobacco manufacturers and retailers²³¹ filed suit in the Western District of Kentucky.²³² The tobacco companies challenged several of the TCA's provisions, including the graphic warning label requirement,²³³ which they argued violated their rights to free speech

223. A "facial challenge" is "[a] claim that a statute is unconstitutional on its face—that is, that it always operates unconstitutionally." BLACK'S LAW DICTIONARY 261 (9th ed. 2009).

224. The lawsuit in the D.C. Circuit, on the other hand, was an as-applied challenge. *See infra* Part II.B.

225. *See infra* note 252 and accompanying text.

226. *See infra* notes 253–63 and accompanying text.

227. *See infra* note 264 and accompanying text.

228. *See infra* Part II.A.1.

229. *See infra* Part II.A.3.

230. The TCA became law in June 2009. *See supra* note 57 and accompanying text.

231. The six plaintiff companies in the suit were Commonwealth Brands, Conwood, Discount Tobacco City and Lottery, Lorillard, National, and R.J. Reynolds. *See Commonwealth Brands, Inc. v. United States*, 678 F. Supp. 2d 512 (W.D. Ky. 2010), *aff'd in part, rev'd in part sub nom.* *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509 (6th Cir. 2012). Altria Group, Inc., the United States' largest tobacco company, openly supports the TCA and is not a party to any of the litigation challenging it. *See* Press Release, Altria Grp., Altria Group Supports Senate Approval of Tobacco Industry Regulation (June 11, 2009), *available at* <http://investor.altria.com/phoenix.zhtml?c=80855&p=RssLanding&cat=news&id=1298458> (calling the TCA "an important step forward" and "tough but reasonable" but "not perfect" because of some of its provisions infringe on the First Amendment).

232. *See Commonwealth Brands, Inc.*, 678 F. Supp. 2d at 529.

233. The tobacco companies challenged four other provisions of the TCA: (1) restrictions on the marketing of "modified-risk tobacco products"; (2) a ban on claims that convey the

under the First Amendment.²³⁴ Because of this timing, the suit constituted a facial challenge to the labeling provision.²³⁵ As such, the district court assessed the First Amendment constitutionality of the provision itself; it did not examine the particular images that the FDA eventually chose for the labels.²³⁶

The tobacco companies put forth three arguments in support of their claim.²³⁷ First, relying on *Ibanez* and citing data demonstrating that the public was aware of smoking's risks and overestimated them,²³⁸ the companies argued that because there was no real harm for the warnings to remedy, the warning provision was unnecessary.²³⁹ Second, the companies claimed that the warnings required by the TCA were unlawful because they were larger and more prominent than the disclosures invalidated in *Blagojevich*²⁴⁰ and *Ibanez*.²⁴¹ Finally, the companies contended that, because the disclosure requirement did not fall within the *Zauderer* exception, the graphics requirement should be assessed using strict scrutiny and struck down.²⁴²

The district court dismissed each of these arguments.²⁴³ First, citing studies that illustrated both the ineffectiveness of the purely textual warnings and the improved efficacy expected to come from the TCA labels, the court found the labeling requirement to be justified.²⁴⁴ Second, the court found that the government had provided reasons for the particular size and format of the TCA warnings, distinguishing them from the warnings struck down in *Blagojevich*, in which the State failed to explain why a smaller warning would be inappropriate.²⁴⁵ Finally, the court rejected the companies' argument to review the restriction under strict scrutiny.²⁴⁶ The court reasoned that because the textual element of the TCA warnings was objective and uncontroversial, the additional graphic element was too.²⁴⁷

impression that tobacco products are approved by, or safer by virtue of being regulated by, the FDA; (3) prohibitions on color and imagery in tobacco product advertising; (4) bans of event sponsorship, branding nontobacco merchandise, and free sampling. *See id.* at 519–20.

234. *See id.* at 521.

235. Since the suit in the district court was filed two months after the passage of the TCA, the FDA had not yet selected the images for the labels. *See Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 552–54 (6th Cir. 2012). A facial challenge was thus the only challenge that the tobacco companies could mount. *See id.*

236. *Id.* at 552–53.

237. *See Commonwealth Brands*, 678 F. Supp. 2d at 528–31.

238. *See supra* notes 198–205 and accompanying text (striking down an attorney disclosure requirement as not rationally related to state's interest under *Zauderer*).

239. *See Commonwealth Brands*, 678 F. Supp. 2d at 529.

240. *See supra* notes 216–20 and accompanying text (using strict scrutiny to invalidate a law requiring video game retailers to place a warning sticker on video games that fell within the state's definition of "sexually explicit").

241. *See Commonwealth Brands*, 678 F. Supp. 2d at 529–30.

242. *See id.* at 530.

243. *See id.* at 530–32.

244. *See id.* at 530–31.

245. *See id.* at 531.

246. *See id.* at 531–32.

247. *See id.*

After rejecting these arguments, the court subjected the provision to intermediate scrutiny under *Central Hudson*.²⁴⁸ In doing so, the court found that the warnings were sufficiently tailored to advance the government's substantial interest.²⁴⁹ As a result, on January 5, 2010, the district court granted summary judgment to the government on the labeling requirement claim.²⁵⁰

2. The Sixth Circuit Affirms, but Does So Using Rational Basis Review Under *Zauderer*

On March 19, 2012, the Sixth Circuit affirmed the district court's judgment.²⁵¹ The court examined the law using a two-step framework: if the disclosure fit within *Zauderer*, rational basis review applied; if it did not, strict scrutiny applied under the Supreme Court's compelled speech doctrine.²⁵² The Sixth Circuit did not consider applying the *Central Hudson* intermediate scrutiny standard.

Debunking arguments that images could never be factual or accurate, the court determined that the provision ought to be assessed under *Zauderer*.²⁵³ The court cited three reasons for this. First, the court referenced images found in textbooks, from which students learn factual information about the body and disease.²⁵⁴ Despite the possibility that people could have medical conditions that deviate from the depictions found in a textbook, those images remain factual; they do not become nonfactual or opinions.²⁵⁵

Second, the court of appeals relied on *Zauderer* itself, reasoning that, because the Supreme Court had deemed the illustration of the medical device in that case to be constitutionally permissible,²⁵⁶ pictures that accurately represent the negative health consequences of smoking were acceptable, too.²⁵⁷

Finally, the court distinguished the TCA's labeling requirement from the disclosure struck down in *Blagojevich*. The TCA's required warning was

248. *Id.* at 532.

249. *Id.*

250. *See id.* at 519.

251. *See Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 569 (6th Cir. 2012). Like the district court, the Sixth Circuit considered a facial challenge to the TCA's labeling provision. *See id.* at 552–54. By the time this case reached the circuit court, the FDA had selected the nine images to appear on the warning label and had published its final rule regarding the new warnings. *See id.* at 552–53. Citing judicial restraint, the language of the district court's decision, the tobacco companies' admission that the challenge was a facial one, and Supreme Court precedent, the Sixth Circuit declined to review the labeling provision as-applied—that is, to review the specific images themselves for constitutional defects. *See id.* at 553.

252. *See id.* at 554.

253. *See id.* at 558–61.

254. *See id.* at 559.

255. *See id.*

256. *See supra* notes 179–80 and accompanying text (holding that images are entitled to the same First Amendment protections afforded verbal commercial speech).

257. *See Disc. Tobacco City*, 674 F.3d at 560.

designed to provide factual information, while the *Blagojevich* disclosure communicated the opinion of the government.²⁵⁸ For these reasons, the court concluded that the TCA's labeling provision should be assessed using *Zauderer* rational basis review and was not subject to strict scrutiny.²⁵⁹

After determining that *Zauderer* governed, the court examined the labeling requirement to determine whether the government had established a rational relationship between the provision and the goal of preventing consumer deception.²⁶⁰ The court determined that the government had successfully carried its burden, citing the tobacco industry's "decades-long deception" of the public about the health risks and the addictiveness of smoking;²⁶¹ evidence that the existing warning requirements ineffectively conveyed the risks of tobacco use, particularly to youths and adults with low levels of education;²⁶² and evidence that larger warnings that incorporate images led to a greater understanding of smoking's health consequences.²⁶³ For these reasons, the court of appeals found that the requirement passed muster under rational basis and was constitutionally permissible.²⁶⁴ The tobacco companies petitioned for a rehearing en banc, which was denied on May 31, 2012,²⁶⁵ and filed a petition for a writ of certiorari on October 26, 2012.²⁶⁶

3. The Dissent: The Requirement Fails Rational Basis Review Under *Zauderer*

The dissenting judge in *Discount Tobacco City*, Judge Eric L. Clay, agreed with the panel majority that the provision should be scrutinized under *Zauderer*.²⁶⁷ However, after doing so, Judge Clay concluded that the government had not shown that the warning labels were a reasonably tailored response to addressing tobacco consumers' ignorance of smoking's harms.²⁶⁸ Specifically, Judge Clay was troubled that the graphic warning

258. *See id.* at 560–61.

259. *Id.*

260. *See id.* at 562.

261. *See id.* ("Tobacco manufacturers and tobacco-related trade organizations . . . knowingly and actively conspired to deceive the public about the health risks and addictiveness of smoking for decades.")

262. *See id.* at 562–64 ("[T]he evidence unsurprisingly shows that most people do not understand the full dangers of tobacco use.")

263. *See id.* at 565 ("[A]bundant evidence establishes that larger warnings incorporating graphics promote a greater understanding of tobacco-related health risks and materially affect consumers' decisions regarding tobacco use.")

264. *See id.* at 569.

265. *See* Petition for Writ of Certiorari at 1, *Am. Snuff Co., LLC v. United States*, No. 12-521 (U.S. Oct. 26, 2012).

266. *See id.* As of this writing, the Supreme Court has not yet decided whether it will hear the appeal.

267. *Disc. Tobacco City*, 674 F.3d at 527–28 (Clay, J., dissenting).

268. *See id.* at 527–29.

labels appeared calculated to provoke emotion and frighten consumers, rather than educating them or correcting misinformation.²⁶⁹

Judge Clay identified a difference between providing truthful and sometimes frightening information to the public and “flagrantly manipul[at]ing” the emotions of consumers, and found it dispositive.²⁷⁰ For Judge Clay, the latter was “less clearly permissible” than the former.²⁷¹ This was because the images provoked differing emotions among those who view them: some viewers inevitably interpret them in one fashion, while other viewers saw them another way.²⁷² Because of this incongruence, Judge Clay concluded that the labels “cannot accurately convey all of the health risks associated with tobacco use” and were thus not reasonably tailored.²⁷³

B. *The D.C. Circuit: R.J. Reynolds Tobacco Co. v. FDA*

In *R.J. Reynolds Tobacco*, the D.C. Circuit considered an as-applied challenge²⁷⁴ to the TCA’s labeling requirement and examined the nine images themselves for violations of the First Amendment. After concluding that the labels were not subject to review under *Zauderer* (i.e., they constituted mandated speech that was noncorrective), the court examined the labels using *Central Hudson*’s intermediate scrutiny standard and found that the warnings offended the First Amendment.²⁷⁵ In doing so, the court of appeals affirmed the judgment of the D.C. District Court, which held that the images were unconstitutional because they failed strict scrutiny.²⁷⁶ One judge dissented from the majority opinion, arguing that the labels, with the exception of the 1-800-QUIT-NOW hotline number, were both constitutional under *Zauderer* and *Central Hudson*.²⁷⁷

1. The District Court Holds That the Images Do Not Survive Strict Scrutiny and Are Unconstitutional

On August 16, 2011, two months after the FDA issued its final rule about the warnings and images, five tobacco manufacturers²⁷⁸ filed suit in the District Court for the District of Columbia, alleging that the TCA’s labeling

269. *See id.* at 528. Unlike the panel majority, Judge Clay addressed the graphic warning label requirement both facially and as applied. *See id.*

270. *Id.* at 529.

271. *Id.*

272. *See id.* at 530.

273. *Id.*

274. An “as-applied challenge” is “[a] claim that a law or governmental policy, though constitutional on its face, is unconstitutional as applied.” BLACK’S LAW DICTIONARY, *supra* note 223, at 261.

275. *See infra* notes 294–315 and accompanying text.

276. *See infra* notes 283–86 and accompanying text.

277. *See infra* notes 318–27 and accompanying text.

278. The five plaintiff companies in the suit were R.J. Reynolds, Lorillard, Commonwealth Brands, Liggett, and Santa Fe. *See R.J. Reynolds Tobacco Co. v. FDA*, 845 F. Supp. 2d 266 (D.D.C. 2012).

provision, and the FDA's implementation of it, violated their First Amendment rights.²⁷⁹ Judge Richard J. Leon concluded that, because the provision forced speech, it was subject to strict scrutiny under the Supreme Court's compelled speech doctrine unless an exception—specifically, rational basis review under *Zauderer*—applied.²⁸⁰ Judge Leon found that an exception was not warranted because the images were not designed to correct the same kind of misleading speech at issue in *Zauderer* and its progeny.²⁸¹ Accordingly, the court applied strict scrutiny.²⁸²

Judge Leon determined that the TCA labels failed all three parts of the strict scrutiny analysis.²⁸³ Regarding the first element, Judge Leon found that although the government's interest in warning consumers about the dangers of smoking was compelling, its interest in advocating that the public not purchase cigarettes, a legal product, was not.²⁸⁴ As for the second, Judge Leon concluded that the “sheer size and display requirements for the graphic images are anything but narrowly tailored.”²⁸⁵ Finally, Judge Leon accepted the five alternatives for reducing smoking rates that the tobacco companies offered as viable, less burdensome, and less restrictive than the warning labels.²⁸⁶

For these reasons, Judge Leon determined that the FDA failed to meet its burden in proving that the graphic warning labels were narrowly tailored to achieve a compelling government interest.²⁸⁷ As a result, on February 29, 2012, Judge Leon found the graphic labels unconstitutional and enjoined their rollout.²⁸⁸

2. The D.C. Circuit Affirms but Uses Intermediate Scrutiny Under *Central Hudson*

On August 25, 2012, a divided panel affirmed Judge Leon's judgment.²⁸⁹ The circuit court first determined the applicable level of scrutiny under which it would examine the labeling requirement.²⁹⁰ Like the district court, the D.C. Circuit recognized that content-based speech regulations—

279. *See id.* at 268.

280. *See id.* at 272.

281. *See id.*

282. *See id.*

283. *See id.* at 274–77.

284. *See id.* at 274–75.

285. *Id.* at 275 (quoting *R.J. Reynolds Tobacco Co. v. FDA*, 823 F. Supp. 2d 36, 48 (D.D.C. 2011)).

286. *See id.* at 276. These five alternatives are: (1) the government could disseminate its antismoking message itself; (2) the government could reduce the label display requirements from 50 percent of the package to 20 percent; (3) the government could choose purely factual and uncontroversial images; (4) the government could increase cigarette taxes; and (5) the government could improve its efforts to prevent the unlawful sale of cigarettes to minors. *See id.*

287. *See id.* at 275–77.

288. *See id.* at 277.

289. *See R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012).

290. *See id.* at 1211–17.

including compelled speech—were subject to strict scrutiny with some exceptions.²⁹¹ Unlike the district court, the D.C. Circuit enumerated two exceptions in the commercial speech context: *Zauderer* and *Central Hudson*.²⁹² The court then examined the images to see if they fell into one of these exempt categories.²⁹³

The court concluded that *Zauderer* was inapplicable.²⁹⁴ It reasoned that because the TCA banned the practices and descriptors that would make cigarette advertising and labeling misleading,²⁹⁵ and because of the absence of congressional findings on the misleading nature of cigarette packaging itself, scrutinizing the labels under *Zauderer* was unjustified.²⁹⁶ The court then dismissed the argument that the failure to display the negative health consequences of smoking in label disclosures was misleading²⁹⁷ and also rejected the argument that the warning labels should be evaluated in the context of the historical deception that preceded them.²⁹⁸

Finally, the court held that the graphic warnings did not constitute the type of “‘purely factual and uncontroversial’ information”²⁹⁹ or “accurate statement[s],” to which the *Zauderer* standard applied.³⁰⁰ Rather, the court characterized the images as “inflammatory”³⁰¹ and as “unabashed attempts to evoke emotion (and perhaps embarrassment) and browbeat consumers into quitting.”³⁰² It also determined that the images were subject to misinterpretation by consumers.³⁰³

Because the case did not fall under *Zauderer*, the court then determined whether strict or intermediate scrutiny was appropriate.³⁰⁴ Citing circuit precedent³⁰⁵ and recognizing that other circuits held contrary views—specifically, the Sixth Circuit in *Discount Tobacco City* and the Seventh

291. *See id.* at 1212.

292. *See id.*

293. *See id.*

294. *See id.* at 1217.

295. *Id.* at 1214 (“The [TCA] bans any labeling or advertising representing that any tobacco product ‘presents a lower risk of tobacco-related disease or is less harmful than one or more other commercially marketed tobacco products,’ ‘contains a reduced level of a substance or presents a reduced exposure to a substance,’ or ‘does not contain or is free of a substance.’ The Act also bans advertising or labeling using the descriptors ‘light,’ ‘mild,’ ‘low,’ or similar descriptors.” (citation omitted)).

296. *See id.* at 1214–15.

297. *See id.* at 1215–16.

298. *See id.*

299. *Id.* at 1216 (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985)).

300. *Id.* (quoting *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324 (2010)).

301. *Id.*

302. *Id.* at 1217.

303. *Id.* at 1216.

304. *See id.* at 1217.

305. *See id.* (citing *United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1142–43 (D.C. Cir. 2009)) (noting that compelled commercial speech disclosures are subject to intermediate scrutiny under *Central Hudson* in the D.C. Circuit).

Circuit in *Blagojevich*—the court held that *Central Hudson* was the appropriate standard.³⁰⁶

The court then scrutinized the labels using *Central Hudson*.³⁰⁷ Applying *Central Hudson*'s first prong, the court examined the administrative record and found that the government's primary goal in adopting the graphic warning rule was to "discourage nonsmokers from initiating cigarette use and to encourage current smokers to consider quitting."³⁰⁸ The court assumed that this interest was substantial and moved on.³⁰⁹

As for the second prong, the court evaluated whether the FDA had shown "substantial evidence" that the graphic warnings would "directly" reduce smoking rates.³¹⁰ The court concluded that there was "no evidence showing that [similar] warnings have *directly caused* a material decrease in smoking rates in any of the countries that now require them."³¹¹ The court also took issue with the Canadian and Australian studies that the FDA had relied on in promulgating the final rule, noting that while these studies "indicated that large graphic warnings *might* induce individual smokers to reduce consumption, or to help persons who have already quit smoking remain abstinent," the studies "did not purport to show that the implementation of large graphic warnings has actually led to a reduction in smoking rates."³¹²

For these reasons, the court concluded that the FDA had not provided "a shred of evidence—much less the 'substantial evidence' . . . —showing that the graphic warnings will 'directly advance' its interest in reducing the number of Americans who smoke."³¹³ The court thus held that because the graphic warnings did not satisfy *Central Hudson*'s second prong that the restriction be sufficiently related to a legitimate government interest,³¹⁴ they were an unconstitutional restriction on the tobacco companies' First Amendment rights.³¹⁵ The government petitioned for a rehearing en banc, which was denied on December 5, 2012,³¹⁶ and did not appeal the decision to the Supreme Court.³¹⁷

306. *See id.*

307. *See id.* at 1217–21.

308. *Id.* at 1218 (internal quotation marks omitted).

309. *Id.*

310. *Id.*

311. *Id.* at 1219.

312. *Id.* (emphasis omitted).

313. *Id.* at 1219.

314. *See id.* at 1219.

315. *See id.* at 1222.

316. *See* Brett Norman, *Court Blocks FDA Tobacco Warning Labels Appeal*, POLITICO (Dec. 6, 2012), <http://www.politico.com/story/2012/12/court-blocks-fda-tobacco-warning-labels-appeal-84656.html> (noting the denial of the FDA's request for a rehearing en banc).

317. *See* Brady Dennis, *Government Quits Legal Battle over Graphic Cigarette Warnings*, WASH. POST (Mar. 19, 2013), http://www.washingtonpost.com/national/health-science/government-quits-legal-battle-over-graphic-cigarette-warnings/2013/03/19/23053ccc-90d7-11e2-bdea-e32ad90da239_story.html ("Attorney General Eric H. Holder Jr. said in a letter to House Speaker John A. Boehner dated March 15[:] 'In these circumstances, the Solicitor General has determined, after consultation with [the Department of Health and

3. The Dissent: The Images Fall Within *Zauderer*'s Ambit, Survive Both Rational Basis and *Central Hudson* Review, and Are Constitutional

In her dissenting opinion, Judge Judith W. Rogers found that the labels were constitutional under both *Zauderer* and *Central Hudson*, except with regard to inclusion of the smoking cessation phone number, which she found unconstitutional.³¹⁸

To Judge Rogers, because the labels were “indisputably commercial speech,” the question was whether *Zauderer* or *Central Hudson* applied.³¹⁹ Judge Rogers argued that the labels presented factually accurate information and addressed misleading commercial speech, so *Zauderer* applied.³²⁰ Accordingly, she then subjected the labeling requirement to rational basis review under *Zauderer* and found that it survived this basic level of scrutiny.³²¹

Additionally, Judge Rogers found the warnings constitutional under *Central Hudson*.³²² In reaching this conclusion, she took issue with the majority's articulation and examination of the government's stated interests in promulgating the labeling rule.³²³ Judge Rogers argued that the FDA had articulated two complementary but distinct interests—decreasing smoking rates and effectively communicating the negative health consequences of smoking³²⁴—and that the majority erred in dismissing the latter interest as “too vague.”³²⁵ By doing so, Judge Rogers argued, the majority sidestepped much of the substantial evidence supporting the warning label requirement³²⁶ and thus disregarded the “voluminous findings” that illuminated a legitimate government interest to which the labeling requirement was reasonably related.³²⁷ For this reason, Judge Rogers determined that the government also met its burden under the heightened scrutiny test of *Central Hudson*.³²⁸

Human Services] and FDA, not to seek Supreme Court review of the First Amendment issues at the present time . . .”). The government cited the appeal deadline and the fierce opposition to the labels from the tobacco industry in making this decision. *Id.* By abandoning this legal battle, the government abandoned the final rule that it promulgated and thus the nine images and textual warnings that it chose. *Id.* Writing in response to this decision, Dr. Howard K. Koh, Assistant Secretary for Health, U.S. Department of Health and Human Services, vowed that “[t]he FDA . . . will undertake research to support new rulemaking on graphic warning labels consistent with the [TCA].” Howard K. Koh, *A Steadfast Commitment To End the Tobacco Epidemic*, HUFFINGTON POST (Mar. 19, 2013, 2:43 PM), http://www.huffingtonpost.com/dr-howard-k-koh/a-steadfast-commitment-to_b_2901521.html.

318. *R.J. Reynolds Tobacco*, 696 F.3d at 1222–23 (Rogers, J., dissenting).

319. *Id.* at 1222.

320. *See id.* at 1233.

321. *See id.*

322. *See id.* at 1234–36.

323. *See id.*

324. *Id.*

325. *Id.* at 1223.

326. *See id.* at 1234–36.

327. *Id.* at 1223.

328. *Id.* at 1233–36.

Finally, Judge Rogers found that requiring the tobacco companies to include the 1-800-QUIT-NOW smoking cessation number on the graphic labels was unconstitutional, reasoning that the government had not explained why a less burdensome alternative was inadequate.³²⁹ She concluded that the requirement was more extensive than necessary, thus violating *Central Hudson*'s fourth prong.³³⁰

III. THE TCA'S GRAPHIC WARNING LABELS SHOULD BE FOUND UNCONSTITUTIONAL

As discussed in Part II, the Sixth and D.C. Circuits disagree over the constitutionality of the TCA's graphic warning labels, the appropriate level of scrutiny for analyzing these labels, and the appropriate framework for selecting that scrutiny. This part argues that the Sixth Circuit and the District Court for the District of Columbia pinpointed the correct framework for analyzing the graphic warning labels but that only the D.C. District Court applied it correctly. The D.C. District Court determined that the graphic labels did not fall within the *Zauderer* exception and thus analyzed them under strict scrutiny. The court then found that the labels did not satisfy strict scrutiny and determined that they were unconstitutional.

Accordingly, this part first asserts that the graphic warnings at issue in this split should be examined under strict scrutiny unless the *Zauderer* exception applies. *Central Hudson* is inapposite because it has been applied chiefly when commercial speech is restricted. This part then argues that the graphic labels do not qualify for the *Zauderer* exception and therefore must be strictly scrutinized. Finally, it concludes that the TCA warning labels do not survive this level of review and are thus unconstitutional.

A. A Framework for Analysis: The Labels Should Be Subjected to Strict Scrutiny Unless the *Zauderer* Exception Applies

The legal controversy over the TCA's graphic warning labels exposes the current messy state of First Amendment jurisprudence in the area of commercial speech.³³¹ This section argues that the Sixth Circuit and the D.C. District Court identified the correct paradigm for assessing the labels' constitutionality: *Zauderer*'s rational basis standard applies if the graphic warnings are corrective, uncontroversial, and justified.³³² *Central Hudson*'s test of intermediate scrutiny examines laws that restrict speech, not laws that compel it,³³³ and thus is inappropriate for this analysis. As

329. *See id.* at 1236–37.

330. *See id.*

331. *See supra* Part II.

332. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).

333. *See supra* notes 166–69 and accompanying text.

such, should *Zauderer* not govern, the labels should be examined according to strict scrutiny.

1. *Zauderer* Applies If the Warnings Are Corrective

Amid the confusion over the proper analytical framework for assessing the graphic warnings, the place of the *Zauderer* exception is unambiguous.³³⁴ Indeed, each of the decisions that form this circuit split—the Sixth and D.C. Circuit majorities, the dissenting opinions, and the district court judgments alike—include the *Zauderer* exception as a part of their analytical frameworks.³³⁵ This is most certainly because the Supreme Court is clear about *Zauderer*'s applicability: if a compelled commercial disclosure (1) consists of “purely factual and uncontroversial information,” (2) aims to protect consumers from “confusion or deception,” and (3) is not “unjustified or unduly burdensome,”³³⁶ the disclosure falls within *Zauderer*'s ambit.³³⁷ Subsequent disclosure cases like *Ibanez*,³³⁸ *Milavetz*,³³⁹ and *Blagojevich*³⁴⁰ confirm this. Thus, because the requirement at issue in this split compels a disclosure of commercial speech, the *Zauderer* exception is a necessary component in the conversation regarding the First Amendment constitutionality of the labels. For this reason, if the labels fall within the confines of the *Zauderer* exception, they should be analyzed under it.

2. If *Zauderer* Does Not Apply, the Warning Labels Should Be Subjected to Strict Scrutiny, Not Intermediate Scrutiny Under *Central Hudson*

Unlike the uncontested role of *Zauderer* within the analytical framework, the second step in this constitutional analysis—the level of scrutiny that should govern if *Zauderer* does not—is a source of considerable contention among the four courts that have examined the TCA labels. As discussed in Part II, the district court in *Discount Tobacco City*³⁴¹ and the D.C. Circuit in *R.J. Reynolds Tobacco* determined that *Central Hudson* applied if *Zauderer* did not.³⁴² The Sixth Circuit³⁴³ and the D.C. District Court, in contrast, held that strict scrutiny applied.³⁴⁴ Thus, a critical element in resolving the circuit split is to determine the default level of scrutiny should *Zauderer* not apply: intermediate scrutiny under *Central Hudson* or strict scrutiny as in *Wooley* and *Barnette*?

334. See *supra* notes 182–94 and accompanying text.

335. See *supra* notes 242, 252, 267, 280, 292, 320 and accompanying text.

336. *Zauderer*, 471 U.S. at 651 (citations and internal quotation marks omitted).

337. See *supra* Part I.B.4.a.

338. See *supra* notes 198–205 and accompanying text.

339. See *supra* notes 206–15 and accompanying text.

340. See *supra* notes 216–20 and accompanying text.

341. See *supra* Part II.A.1.

342. See *supra* Part II.B.2.

343. See *supra* Part II.A.2.

344. See *supra* Part II.B.1.

The confusion over *Central Hudson*'s relevance to assessing the labels can be attributed in part to the fact that the Court did not specify the scope of the *Central Hudson* standard in *Central Hudson* itself.³⁴⁵ As such, *Central Hudson*'s role in the analysis is unclear from that decision alone.³⁴⁶ Later decisions employing *Central Hudson* do not expressly define the standard's contours.³⁴⁷ The Supreme Court should clarify this ambiguity to avoid further disagreement and confusion.

This being said, the Court has implied that *Central Hudson* is inapplicable when examining laws that compel commercial speech like the TCA's warning label requirement. First, in subsequent application of the *Central Hudson* standard, the Court has only used it to determine the constitutionality of laws that restrict speech, not compel it.³⁴⁸ This suggests that the Court does not intend for *Central Hudson* to be the default standard for assessing any and all laws that touch upon commercial speech. Instead, it appears that *Central Hudson* should be used only to scrutinize regulations that restrict commercial speech.

Second, in its required disclosure jurisprudence, the Court has emphasized the significant differences between laws that restrict speech and laws that compel it when deciding what standard of scrutiny to employ. The Court cited this difference in *Zauderer* itself as one reason for establishing a standard independent of *Central Hudson*.³⁴⁹ And in *Milavetz*, the Court used the *Zauderer* standard because the challenged provision in that case imposed a disclosure requirement; it expressly noted that *Central Hudson* was inapplicable precisely because *Central Hudson* involved an affirmative limitation on commercial speech.³⁵⁰

Although this second point is rooted in the Court's rationale for applying *Zauderer* in disclosure cases, it also highlights that a challenged provision's effect on commercial speech—that is, whether a law prohibits or forces commercial speech—is of crucial importance and must be taken into account. Furthermore, it suggests that *Central Hudson*'s scope is limited to laws that dampen commercial speech, not to laws that compel it. For these reasons, *Central Hudson* should not be used if *Zauderer* does not apply.³⁵¹ Accordingly, strict scrutiny must be used to assess the warning labels' First Amendment fitness.

Strict scrutiny should apply not only because of deductive logic, but also because the Court's compelled speech doctrine requires it. This doctrine, exemplified by *Barnette*, *Wooley*, and *Pacific Gas & Electric Co.*, declares that the state cannot force private individuals and corporations to express

345. See *supra* notes 167–68 and accompanying text.

346. See *supra* notes 167–68 and accompanying text.

347. See *supra* note 169 and accompanying text.

348. See *supra* notes 166–69 and accompanying text.

349. See *supra* notes 192–93 and accompanying text.

350. See *supra* note 214 and accompanying text.

351. But see Jennifer M. Keighley, *Can You Handle the Truth? Compelled Commercial Speech and the First Amendment*, 15 U. PA. J. CONST. L. 539 (2012) (arguing that the graphic warning labels should be examined under *Central Hudson*).

views that are repugnant to them unless the government can satisfy strict scrutiny review.³⁵²

Given that the TCA labeling provision compels speech in the commercial context, the compelled speech doctrine should be used to analyze its constitutionality. Furthermore, the issue addressed in *Pacific Gas & Electric Co.*—the constitutionality of a government regulation that compelled a private company to voice the message of a third party with which it disagreed—is identical to the controversy sparked by TCA’s labeling provision.³⁵³ Therefore, just as the Sixth Circuit and the D.C. District held, courts should apply the compelled speech doctrine unless the *Zauderer* exception requires rational basis review.

B. Applying the Framework: The Labels Do Not Fall Within Zauderer’s Ambit, Strict Scrutiny Applies, and the Labels Fail Under It

The previous section determined the appropriate framework for examining the labels’ constitutionality. This section first applies this structure to the labels and determines that *Zauderer* does not apply. It then analyzes the labels under strict scrutiny and concludes that they do not pass muster under this heightened form of review.

1. *Zauderer* Does Not Apply

The first step in the analysis is to determine whether the labels should be assessed under the *Zauderer* standard. This Note concludes that *Zauderer* is inapplicable for three reasons.

First, *Zauderer* applies only under narrow circumstances. For *Zauderer* to govern, the compelled commercial disclosure must consist of “purely factual and uncontroversial information” aimed to protect consumers from “confusion or deception” that is not “unjustified or unduly burdensome.”³⁵⁴ Thus, the disclosure requirement in question must be “reasonably related to the State’s interest in preventing deception of consumers.”³⁵⁵ Rather than preventing deception, the government’s stated interest in promulgating the new graphic labels is to warn consumers about the dangers of smoking and to decrease smoking rates.³⁵⁶ Moreover, the government’s inclusion of the 1-800-QUIT-NOW number indicates that the purpose of the labels is not to prevent deception but is instead to advocate an antismoking message. Thus, while commendable as a public health strategy, the warning labels’ goals differ significantly from the interest required to trigger the *Zauderer* standard.

352. See *supra* Part I.B.2.

353. See *supra* notes 127–30 and accompanying text.

354. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (citations and internal quotation marks omitted).

355. *Id.*

356. See *supra* note 72 and accompanying text.

Second, even if the government's interest in promulgating the graphic labels were to prevent consumer deception, the graphic labels are not "reasonably related" to this interest. In *Zauderer* and *Milavetz*, the Supreme Court upheld provisions that required disclaimers that, if absent, would lead to almost certain deception and confusion in the marketplace.³⁵⁷ The graphic warnings labels are distinguishable from those disclaimers because there is nothing inherently misleading about a cigarette package without an additional graphic warning label. Cigarette packages already possess textual warnings that convey factual information about smoking's dangers,³⁵⁸ and the absence of a graphical element does not alter this. The disclaimers at issue in *Zauderer*, *Ibanez*, *Milavetz*, and *Blagojevich* all aimed to correct present and immediate deception, not past corporate deception. Thus, although the argument that the graphic labels correct the tobacco industry's history of deception is a compelling one, it does not fit within the narrow confines of *Zauderer*'s applicability. Also, evidence that indicates that consumers do not read the current cigarette warnings does not mean that cigarette packages are therefore deceptive or misleading, merely that the current labels are ineffective.³⁵⁹

Third, the images chosen by the FDA do not necessarily convey "purely factual and uncontroversial information" as required for a disclosure to be governed by *Zauderer*.³⁶⁰ Rather, the FDA selected the nine images specifically to shock and provoke emotions like depression, discouragement, and fear.³⁶¹ Of course, the boundary between fact and emotion is not a clear one. The presentation of facts often spurs emotion, and vice versa. To fall within *Zauderer*'s ambit, a disclosure must impart "purely factual and uncontroversial information."³⁶² The FDA's chosen images,³⁶³ in contrast, have the potential to be controversial and misleading. Consider, for example, the photograph of a crying woman, which is coupled with the phrase "Warning: Tobacco smoke causes fatal lung disease in nonsmokers."³⁶⁴ It has been proven that tobacco smoke leads to lung disease in nonsmokers,³⁶⁵ and the textual warning that accompanies the graphic image imparts this fact to the reader. The connection between the photo of the distraught woman and the consequences of second-hand smoke are not at all clear, especially when viewed without the accompanying textual component. This is problematic, as one of the major reasons for introducing the new graphic labels is to address the documented inadequacy

357. See *supra* notes 189, 215 and accompanying text.

358. See *supra* notes 45–47 and accompanying text.

359. See *supra* notes 54–56 and accompanying text.

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

361. See *supra* note 76 and accompanying text (describing the survey employed by the FDA to select the graphic images, which in part measured "salience," which the FDA defined in part as causing viewers to feel "depressed," "discouraged," or "afraid").

362. *Zauderer*, 471 U.S. at 651 (emphasis added).

363. See *supra* note 79 and accompanying text (describing the nine warning images chosen by the FDA).

364. See *supra* notes 69, 79 and accompanying text.

365. See *supra* note 22 and accompanying text.

of the current labeling regime, which requires college-level readings skills to be understood.³⁶⁶ Many of the other images are similarly controversial and misleading.³⁶⁷ Taken together, the images cannot be said to impart “purely factual and uncontroversial information.” For these reasons, the warning labels do not fall within the *Zauderer* exception and therefore strict scrutiny should apply.

2. The Labels Do Not Survive Strict Scrutiny and Are Thus Unconstitutional

Because *Zauderer* does not apply in this situation, strict scrutiny must be used to analyze the labels. To survive strict scrutiny, the government must (1) show a compelling interest, (2) narrowly tailor the regulation to promote that interest, and (3) demonstrate that no less restrictive alternative is available.³⁶⁸ The D.C. District Court’s application of this standard is reasonable and should be adopted.

As discussed previously, the D.C. District Court determined that the TCA labels fail each of the three elements of strict scrutiny.³⁶⁹ First, although the government’s stated interest in educating consumers about the dangers of smoking may be compelling, its actual interest in advocating that the public not purchase cigarettes is not.³⁷⁰ Cigarettes are legal products, and the TCA itself forbids the FDA from banning their sale or mandating the elimination of nicotine from them.³⁷¹

Second, the labels are not narrowly tailored because their size and display requirements turn cigarette packages into a “mini-billboard” for the government’s antismoking agenda.³⁷² The graphic warnings are thus similar to the four square inch sticker struck down in *Blagojevich*, which “literally fail[ed] to be narrowly tailored” because the sticker covered a substantial portion of the box.³⁷³

Finally, five less burdensome and less restrictive alternatives are available to the government.³⁷⁴ These alternatives include the government disseminating its antismoking message itself by increasing its antismoking advertisements and issuing additional statements in the press urging consumers to quit smoking.³⁷⁵ These options alone burden and restrict First Amendment rights less than forcing the tobacco companies to advocate against their economic interests through the graphic labeling regime.

366. *See supra* notes 54–56 and accompanying text (detailing the drawbacks of the current labeling requirement).

367. *See supra* note 79 and accompanying text.

368. *See supra* note 98 and accompanying text.

369. *See supra* notes 283–87 and accompanying text.

370. *See supra* note 284 and accompanying text.

371. *See* 21 U.S.C. § 387g(d)(3) (Supp. V 2011) (restricting the FDA’s authority to reduce nicotine levels to zero or to ban tobacco products).

372. *See* R.J. Reynolds Tobacco Co. v. FDA, 845 F. Supp. 2d 266, 276 (D.D.C. 2012).

373. *See* Entm’t Software Ass’n v. Blagojevich, 469 F.3d 641, 643 (7th Cir. 2006).

374. *See* R.J. Reynolds Tobacco, 845 F. Supp. 2d at 276.

375. *Id.*

Consequently, the labels fail this part of the strict scrutiny test. For these reasons, the graphic labels do not survive strict scrutiny and are thus unconstitutional compulsions of commercial speech.

CONCLUSION

Cigarette smoking is one of the deadliest and costliest public health crises in the United States, a fact exacerbated by the tobacco industry's financial might and history of consumer deception. Because of this, the American public is entitled to factually accurate information about the health consequences of smoking. For these reasons, it may be hard to accept this Note's conclusions regarding the application of the law. Nevertheless, the government's means of warning the public of smoking's dangers and encouraging Americans not to smoke must be balanced with respect for the fundamental freedoms protected by the First Amendment. Consistent with Supreme Court precedent, this Note supports an analytical framework that subjects the labels to strict scrutiny unless the *Zauderer* exception applies. Using this framework, the graphic labels do not fall within the *Zauderer* exception, and they must be examined under strict scrutiny. The labels fail to meet this standard because the government's interest is not compelling, the labels are not narrowly tailored, and less burdensome restrictions are available. Consequently, the TCA's graphic cigarette warning labels are unconstitutional compulsions of commercial speech.