HOLY SMOKES! CAN THE GOVERNMENT COMPEL TOBACCO COMPANIES TO ENGAGE IN INFLAMMATORY COMMERCIAL SPEECH?

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In 2009, President Obama signed the Federal Smoking Prevention and Tobacco Control Act, permitting the FDA to include textual and photographic warnings about the perils of smoking on cigarette packs. The health risks of cigarettes are well known by the American people. Courts are split, however, on whether the inclusion of these warnings violates First Amendment protection of freedom of speech. This Note examines the history of America's regulation of the tobacco industry. It then analyzes the different conclusions reached by the Sixth Circuit and D.C. Circuit on the constitutionality of these warnings, scrutinizing the tests that each court used. Finally, this Note argues that, if the Supreme Court chooses to resolve this circuit split, it should use a modified version of the D.C. Circuit's test. If this test is applied, the Supreme Court will find that mandating such warnings on cigarette packs is unconstitutional.

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I. INTRODUCTION

It is widely known that significant health risks are associated with using tobacco products such as cigarettes. It is also well established that the First Amendment protects persons from improper governmental in-

fringement on their speech.[1] A conflict arises, however, when the federal government requires tobacco companies to place large, graphic images of dead bodies and cancer-infected mouths on cigarette packages in order to "educate" consumers about these health risks.

In June 2009, President Barack Obama signed the Federal Smoking Prevention and Tobacco Control Act (Act or FSPTCA), which gave the Food and Drug Administration (FDA) the explicit authority to regulate tobacco products.[2] In accordance with the Act, the FDA issued a rule that requires, among other provisions, that all cigarette packages contain one of nine textual warnings and one of nine graphic images that depict the negative health consequences of smoking, along with the telephone number, 1-800-QUIT-NOW.[3]

In August 2009, before the FDA had chosen the nine images, six tobacco companies filed suit in the U.S. District Court for the Western District of Kentucky, alleging that the Act violated their First Amendment right to free speech.[4] Because the FDA had not yet chosen the graphics, the plaintiffs challenged the requirement as a whole, not the specific images themselves.[5] On March 19, 2012, the Sixth Circuit Court of Appeals upheld the Act's requirement of graphic images and text in *Discount Tobacco City & Lottery, Inc. v. United States*.[6] The defendants appealed to the U.S. Supreme Court, which denied *certiorari* on April 22, 2013;[7] thus, the Sixth Circuit's decision upholding the graphics requirements still stands. In 2011, after the FDA had selected the specific images, five tobacco companies sued the FDA in the U.S. District Court for the District of Columbia.[8] The district court granted the tobacco companies' motion for summary judgment, and the government appealed to the D.C. Circuit Court of Appeals. On August 24, 2012, five months after the Sixth Circuit upheld the pictorial requirements, the D.C. Circuit struck down the images as a violation of the First Amendment, in *R.J. Reynolds Tobacco Co. v. FDA*.[9] On March 15, 2013, Attorney General Eric Holder informed the U.S. House of Representatives that the Solicitor General would not seek Supreme Court review of the D.C. Circuit's decision in *R.J. Reynolds*.[10] Holder also stated that the Department of

1. *See* U.S. CONST. amend. I.

2. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009) (amending Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301–399 (2006)); 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, 232 (2012).

3. *See infra* notes 47–56 and accompanying text.

4. Commonwealth Brands, Inc. v. United States, 678 F. Supp. 2d 512, 521 (W.D. Ky. 2010).

5. Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 552 (6th Cir. 2012).

6. *Id.* at 518.

7. Am. Snuff Co., LLC v. U.S., 133 S. Ct. 1996 (2013).

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

9. *See generally* 696 F.3d 1205 (D.C. Cir. 2012).

10. Letter from Eric Holder to John Boehner (Mar. 15, 2013), http://www.mainjustice.com/files/2013/03/Ltr-to-Speaker-re-Reynolds-v-FDA.pdf.

Health and Human Services would "undertake research to support a new rulemaking consistent with the Tobacco Control Act."[11]

This Note analyzes the constitutionality of the FSPTCA's graphic warning requirement and evaluates the different approaches of the Sixth Circuit and the D.C. Circuit. In doing so, it examines current commercial speech jurisprudence and suggests that certain changes to the doctrine are necessary. This Note proceeds in four main parts. Part II discusses the history of tobacco regulation in the United States and the provisions of the FSPTCA. Part III describes the conclusions that the Sixth Circuit and the D.C. Circuit reached in analyzing the Act's graphic warning requirement. It also considers the two tests the Supreme Court currently applies to commercial speech. Based on these considerations, Part V recommends that if the Supreme Court considers future rules implemented by the FDA (or a similar case of compelled commercial speech), it should reject the *Zauderer* test used by the Sixth Circuit in favor of a modified version of the *Central Hudson* test that the D.C. Circuit applied. Part IV then applies this modified test to the original graphics and concludes that they are unconstitutional.

II. BACKGROUND

Although tobacco has been grown and sold in the United States since long before the founding of the nation,[12] it was not extensively regulated until the mid to late twentieth century.[13] This Part outlines the history of tobacco use and regulation in the United States, and also examines current First Amendment jurisprudence. Section A provides information about the health and economic effects of tobacco and the history of governmental attempts to regulate tobacco and cigarettes. Section A also provides an overview of the FSPTCA's graphic image requirement. Section B discusses the First Amendment protections afforded to noncommercial speech. Section C discusses commercial speech jurisprudence and outlines the tests that the Supreme Court uses to decide whether government restrictions and government-compelled disclosures of commercial speech violate the First Amendment.

11. *Id*.

12. Matthew R. Herington, *Tobacco Regulation in the United States: New Opportunities and Challenges*, 23 HEALTH LAW 13, 13 (2010) (explaining that tobacco is believed to have originated in the Americas and stating that the "history of tobacco is inextricably linked with the history of the United States").

13. *Id.*

A. History of Tobacco and Tobacco Regulation in the United States

1. Tobacco Products and Use in the United States

More people in the United States "are killed by smoking tobacco . . . than by HIV/AIDS, motor vehicle crashes, heroin use, cocaine use, and intentional injuries combined."[14] Cigarette smoking is the primary cause of preventable deaths in the United States, with 440,000 deaths attributable each year to smoking.[15] The Centers for Disease Control and Prevention (CDC) estimates that 43.8 million adults, or 19.0% of the adult population, smoke cigarettes.[16] The CDC also estimates that from 2000 to 2004, cigarette smoking caused $193 billion a year in medical and productivity-related losses.[17]

The tobacco industry spends billions of dollars each year on advertising and promotions.[18] Additionally, in 2012 it was estimated that global tobacco revenues generated about $500 billion.[19] The tobacco industry, however, was not significantly regulated until the middle of the twentieth century.[20]

2. Early Legislation

The Pure Food and Drugs Act of 1906 gave the U.S. Department of Agriculture's Bureau of Chemistry, the predecessor to the FDA, the power to regulate food and drugs.[21] The Act defined drugs as "all medicines and preparations recognized in the United States Pharmacopoeia or National Formulary . . . intended to be used for the cure, mitigation, or prevention of disease . . . ."[22] The Bureau announced, however, that it had no authority to regulate tobacco products unless the products

14. *Id.*

15. *Adult Cigarette Smoking in the United States: Current Estimate*, CTRS. FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/tobacco/data_statistics/fact_sheets/adult_data/cig_smoking/index.htm (last updated June 5, 2013).

16. *Id.*

17. *Economic Facts About U.S. Tobacco Production and Use*, CTRS. FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/tobacco/data_statistics/fact_sheets/economics/econ_facts/ (last updated Aug. 15, 2013).

18. *See id.* (stating that, in 2011, "the tobacco industry spent $8.4 billion on cigarette advertising and promotional expenses in the United States alone, and 83.6% ($7 billion) of this expenditure was spent on price discounts").

19. Simon Bowers, *Global Profits for Tobacco Trade Total $35bn as Smoking Deaths Top 6 Million*, GUARDIAN (Mar. 21, 2012), http://www.guardian.co.uk/business/2012/mar/22/tobacco-profits-deaths-6-million. The six largest firms in the world reported combined profits of $35.1 billion. *Id.*

20. *See* Herington, *supra* note 12, at 13.

21. *See* Pure Food and Drug Act, Pub. L No. 59-384, Ch. 3915, 34 Stat. 768 (1906).

22. *Id.*; Laura M. Farley, *With the Passage of the Family Smoking Prevention and Tobacco Control Act, Will Commercial Speech Rights Be Up in Smoke?*, 7 J.L. ECON. & POL'Y 513, 519–20 (2011). The 1890 edition of the United States Pharmacopoeia (USP) included tobacco as a drug, but it removed tobacco from its list before the Pure Food and Drugs Act of 1906 was passed. *Id.* For more information about the connection between the USP and the Pure Food and Drugs Act of 1906, see David A. Rienzo, *About Face: How FDA Changed Its Mind, Took on the Tobacco Companies in Their Own Back Yard, and Won*, 53 FOOD & DRUG L.J. 243, 244 (1998).

claimed to cure, mitigate, or prevent disease.[23] In 1927, the Bureau of Chemistry was separated into two entities: the Food, Drug, and Insecticide Administration, which had regulatory powers, and the Bureau of Chemistry and Soils, which conducted nonregulatory research.[24] Three years later, the Food, Drug, and Insecticide Administration was shortened to the Food and Drug Administration (FDA), and in 1988, the FDA became an agency of the Department of Health and Human Services.[25] In 1938, the Federal Food, Drug, and Cosmetic Act (FDCA) expanded the definition of a drug to include items "intended to affect the structure or any function of the body."[26] The FDA, however, still only claimed authority to regulate tobacco products that asserted a particular health benefit.[27]

In 1964, the Surgeon General released a report titled *Smoking and Health: Report of the Advisory Committee to the Surgeon General*, which became "the impetus for change."[28] The report described the link between smoking cigarettes and lung cancer, and after its issuance, there was a public push for legislation regarding tobacco and cigarettes.[29] In 1965, Congress enacted the Federal Cigarette Labeling and Advertising Act (FCLAA), which gave the Federal Trade Commission (FTC) the power to regulate cigarette labels and the Federal Communications Commission (FCC) the authority to regulate tobacco advertising on radio and television.[30] The FCLAA required cigarette packages to contain the following warning on their side panels: "Caution: Cigarette Smoking May Be Hazardous to Your Health."[31] Congress amended the FCLAA in 1970 with the Public Health Cigarette Smoking Act, which changed the required warning on packages to: "WARNING: The Surgeon General Has Determined that Cigarette Smoking is Dangerous to Your Health."[32] It also prohibited cigarette advertisements from being broadcast on the radio and on television.[33]

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23. Farley, *supra* note 22, at 519.

24. *Significant Dates in U.S. Food and Drug Law History*, U.S. FOOD AND DRUG ADMINISTRATION, http://www.fda.gov/AboutFDA/WhatWeDo/History/Milestones/ucm128305.htm (last updated Nov. 6, 2012).

25. *Id.*

26. 21 U.S.C. § 321(g)(1)(C).

27. Letter to Dir. of Bureaus & Div., & Dir. of Dist. From FDA Bureau of Enforcement (May 24, 1963), *reprinted in* Public Health Cigarette Amendments of 1971: Hearing on S. 1454 Before the Consumer Subcomm. of the S. Comm. on Commerce, 92d Cong. 240 (1972)) ("The statutory basis for the exclusion of tobacco products from FDA's jurisdiction is the fact that tobacco marketed for chewing or smoking without accompanying therapeutic claims, does not meet the definitions in the Food, Drug, and Cosmetic Act for food, drug, device or cosmetic."). Ironically, the FDA had to argue its lack of authority to regulate tobacco products in court when an antitobacco group asserted that the FDA did in fact have this power. Action on Smoking and Health v. Harris, 655 F.2d 236, 237 (D.C. Cir. 1980).

28. Herington, *supra* note 12, at 13.

29. *Id.*

30. Pub. L. No. 89-92, 79 Stat. 282 (1965) (codified as amended at 15 U.S.C. §§ 1331–1341 (1970)); Sempeles, *supra* note 2, at 229.

31. 15 U.S.C. § 1333.

32. *Id.*

33. *See id.* at § 1335.

3. Post-1995 Legislation

The FDA did not claim authority to regulate tobacco products until 1995,[34] when it published a rule declaring that it had authority under the FDCA. The FDCA authorizes the FDA to regulate drugs, devices that deliver drugs to the body, or products that are a combination of the two.[35] In its jurisdictional statement, the FDA stated that cigarettes are "combination products" because they are made up of both a drug (nicotine) and a device (the cigarette itself).[36] The FDA then used its newfound power to issue regulations restricting the sale, advertisement, and distribution of cigarettes to adolescents.[37]

In 2000, in *FDA v. Brown & Williamson Tobacco Corp.*, the U.S. Supreme Court held that the FDA had overstepped its jurisdiction, and rejected the agency's authority to regulate tobacco products.[38] The Court applied the test established by *Chevron U.S.A. Inc. v. Natural Res*ources *Defense Council Inc.*, in which the Court held that if "Congress has directly spoken to the precise question at issue,"[39] then it "must give effect to the unambiguously expressed intent of Congress."[40] The Court found that Congress had spoken directly to the FDA's authority to regulate tobacco products and had in fact expressed its intent that it not be allowed to do so.[41] The Court also determined that if the FDA were to uphold the requirements of the FDCA, which required the FDA to ban unsafe products, then the FDA would have to completely ban cigarettes from entering interstate commerce.[42] This, the Court concluded, was clearly against Congressional intent.[43]

4. Overview of the Family Smoking Prevention and Control Act

Congress gave the FDA explicit statutory authority to regulate tobacco products in 2009 when President Obama signed the Family Smoking Prevention and Tobacco Control Act.[44] The stated purpose of the Act is to discourage the sale of tobacco products to minors and to promote consumer awareness of the health risks associated with tobacco use.[45]

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34. *See* Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396, 44,397 (Aug. 28, 1996).

35. *Id*.

36. *Id.* at 44,396.

37. *See generally id.*

38. 529 U.S. 120, 157–58 (2000).

39. *Id.* at 132 (quoting Chevron USA Inc. v. Natural Res. Def. Council Inc., 467 U.S. 837, 842 (1984)).

40. *Id.* (quoting *Chevron*, 467 U.S. at 843).

41. *Id.* at 133. ("[W]e find that Congress has directly spoken to the issue here and precluded the FDA's jurisdiction to regulate tobacco products.").

42. *Id.* at 135.

43. *Id*. at 137–39, 161.

44. Pub. L. No. 111-13, 123 Stat. 1776 (2009) (amending Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301–399 (2006)); Sempeles, *supra* note 2, at 232.

45. Pub. L. No. 111-13, §3, 123 Stat. 1776.

The Act requires all cigarette packages to include the word "WARNING," followed by one of the following nine admonitions: (1) "Cigarettes are addictive"; (2) "Tobacco smoke can harm your children"; (3) "Cigarettes cause fatal lung disease"; (4) "Cigarettes cause cancer"; (5) "Cigarettes cause strokes and heart disease"; (6) "Smoking during pregnancy can harm your baby"; (7) "Smoking can kill you"; (8) "Tobacco smoke causes fatal lung disease in nonsmokers"; or (9) "Quitting smoking now greatly reduces serious risks to your health."[46] The nine textual warnings must be in "conspicuous and legible 17-point type"[47] and together with the pictorial warnings, must "comprise the top 50 percent of the front and rear panels of the package."[48] Additionally, each package of cigarettes must contain the phone number, 1-800-QUIT-NOW.[49]

Furthermore, the Act requires the Secretary of the U.S. Department of Health and Human Services to issue regulations within twenty-four months after the Act's enactment that require cigarette packages to display "color graphics depicting the negative health consequences of smoking."[50] The Secretary was given discretion as to the type size, text, and format of the label statements so that "both the graphics and the accompanying label statements are clear, conspicuous, legible and appear within the specified area."[51]

In accordance with the statute, on November 12, 2010, the FDA issued for comments a Proposed Rule that included thirty-six potential graphic images.[52] The FDA received and considered over 1700 comments in response to the Proposed Rule, including comments from "cigarette manufacturers, retailers and distributors, industry associations, health professionals . . . [and] individual consumers."[53] In June 2011, the FDA issued its Final Rule, in which it selected the final nine images based on the results of its 18,000-person Internet-based consumer study.[54] In the Final Rule, the FDA stated that the "U.S. Government has a substantial interest in reducing the number of Americans, particularly children and adolescents, who use cigarettes and other tobacco products in order to prevent the life-threatening health consequences associated with tobacco use."[55]

The chosen images are: (1) a man with a large hole in his throat holding a cigarette, (2) a parent holding a baby about to be enveloped by

46. *Id.* at § 201(a)(1) (codified as amended at 15 U.S.C. § 1333 (Supp. V 2011)).
47. *Id.* at § 201(a).
48. *Id.*
49. Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628, 36,681 (June 22, 2011).
50. § 201(a), 123 Stat. at 1845.
51. *Id.*
52. Required Warnings for Cigarette Packages and Advertisements, 75 Fed. Reg. 69,524 (Nov. 12, 2010) (codified at 21 C.F.R. p. 1141).
53. Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. at 36,629.
54. *Id.* at 36,637.
55. *Id.* at 36,629.

smoke, (3) a pair of healthy-looking pink lungs next to a pair of diseased lungs, (4) a mouth with yellowed, stained teeth and a large, brown sore on the lips, (5) a man with a breathing apparatus strapped to his face, (6) a drawing of a crying baby in an incubator hooked up to some kind of machine, (7) what appears to be a cadaver of a man with surgical staples running down his chest, (8) a sobbing woman; and finally, (9) a grim-faced man wearing a shirt that says "I QUIT."[56]

B. Overview of First Amendment Doctrine

The First Amendment to the U.S. Constitution declares that "Congress shall make no law . . . abridging the freedom of speech."[57] In order to understand and contextualize the controversy regarding the compelled warning labels, it is necessary to review Supreme Court precedent regarding the First Amendment. First Amendment doctrine has been described by Justice Stevens as "an elaborate mosaic of specific judicial decisions, characteristic of the common law process of case-by-case adjudication."[58] Nevertheless, the Supreme Court has established a basic framework used to analyze cases involving free speech.[59] The Supreme Court affords speech different levels of protection based on its value to society and the harms caused to society when the government regulates it.[60] For example, there are certain categories of speech that are not protected by the First Amendment because of their negligible value; these include fighting words, perjury, obscenity, and child pornography.[61]

1. Restrictions on Speech

The First Amendment's protection of traditional speech is the most robust because it protects citizens' "participation in the process of democratic self-governance." When the state restricts speech based on its content, the Court will strictly scrutinize the regulation. That is, content-based restrictions, or "regulations enacted for the purpose of restraining speech on the basis of its content,"[62] "presumptively violate the First Amendment."[63] Content-based restrictions are subject to strict scrutiny, which requires the regulation to be narrowly tailored to further a com-

56. FDA, CENTER FOR TOBACCO PRODUCTS STAKEHOLDER DISCUSSION SERIES: DISTRIBUTORS/WHOLESALERS, IMPORTERS, AND RETAILERS (2011), http://www.fda.gov/downloads/tobaccoproducts/newsevents/ucm270212.pdf.

57. U.S. CONST. amend. I.

58. John Paul Stevens, Address, *The Freedom of Speech*, 102 YALE L.J. 1293, 1300 (1993).

59. For a detailed analysis of First Amendment doctrine, see KEITH WERHAN, FREEDOM OF SPEECH: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION (2004).

60. *See id.* at 70–72.

61. *See id.* at 81–118.

62. City of Renton v. Playtime Theatres, Inc. 475 U.S. 41, 46–47 (1986).

63. *Id.* at 47.

pelling state interest.[64] Content-based restrictions of speech rarely pass this test.[65]

On the other hand, the Court will apply intermediate scrutiny to content-neutral restrictions.[66] These are regulations that do not prohibit the content of speech but instead regulate the "time, place or manner" of speech; that is, when, where, and how speech can be expressed.[67] To survive a First Amendment challenge, content-neutral restrictions must further an "important or substantial governmental interest" that is "unrelated to the suppression of free expression" and be "no greater than is essential to the furtherance of that interest."[68] Time, place, and manner restrictions must also "leave open ample alternative channels for communication of the information."[69]

2. Compelled Speech

State-compelled speech is treated in the same manner as restricted speech because the Supreme Court has determined that the First Amendment protects a speaker's right to *not* speak just as much as it protects the right *to* speak.[70] That is, there is a "constitutional equivalence of compelled speech and compelled silence in the context of fully protected expression."[71] The Supreme Court's rationale for equating compelled speech and compelled silence is that "at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State."[72] In *West Virginia State Board of Education v. Barnette*, the Supreme Court struck down a state law that required public school children to salute the flag and recite the pledge of allegiance.[73] Similarly, in *Wooley v. Maynard*, the Court found unconstitutional a state law that required its citizens to display the state's motto, "Live Free or Die" on their license plates or else face misdemeanor charges.[74] As Professor Jennifer L. Pomeranz explains, at the heart of these cases is the Supreme Court's determination

64. WERHAN, *supra* note 59, at 73.

65. *See* Burson v. Freeman, 504 U.S. 191, 199–200 (1992) ("To survive strict scrutiny, however, a State must do more than assert a compelling state interest—it must demonstrate that its law is necessary to serve the asserted interest . . . [and] we readily acknowledge that a law rarely survives such scrutiny . . . .").

66. WERHAN, *supra* note 59, at 75–76.

67. *Id.* at 74.

68. United States v. O'Brien 391 U.S. 367, 377 (1968).

69. Heffron v. Int'l Soc'y for Krishna Consciousness, Inc. 452 U.S. 640, 648 (1981) (internal citation omitted).

70. *See, e.g.*, Riley v. Nat'l Fed'n of the Blind of N.C., Inc. 487 U.S. 781, 796–97 (1988).

71. *Id.* at 797.

72. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234–35 (1977).

73. 319 U.S. 624, 640–42 (1943).

74. 430 U.S. 705, 715–17 (1977).

that "the State cannot force its citizens to foster a point of view contrary to their own beliefs."[75]

C. Commercial Speech Doctrine

In contrast to other forms of protected speech, commercial speech has historically been treated as an inferior form of expression.[76] The first part of this Section traces how courts have applied the First Amendment to commercial speech. The second and third parts discuss the two tests that the Supreme Court has devised to analyze state regulation of commercial speech: the test established by *Central Hudson Gas & Electric Corp. v. Public Service Commission* and the test created by *Zauderer v. Office of Disciplinary Counsel*. In general, the Court applies *Central Hudson* when the government restricts or prohibits commercial speech and applies *Zauderer* when the government compels disclosures in order to prevent consumers from being misled or deceived.

1. Early Treatment of Commercial Speech

At first, the Supreme Court afforded no First Amendment protection to pure commercial speech; in fact, in 1942, the Court announced that "the Constitution imposes no . . . restraint on government as respects purely commercial advertising."[77] It was not until 1976 that the Supreme Court extended First Amendment protection to commercial speech.[78] Even in that case, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Supreme Court acknowledged that it was only affording commercial speech "second-class First Amendment rights."[79] The Court specifically denied protection to clearly false speech and also to speech that was "deceptive or misleading."[80]

Professor Robert Post explains that commercial speech is different from traditional speech "because it is constitutionally valued merely for the information it disseminates, rather than for being itself a valuable way of participating in democratic self-determination."[81] Furthermore, the Supreme Court has contended that commercial speech is heartier than other kinds of speech and because "advertising is the Sine qua non of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely."[82]

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75. Jennifer L. Pomeranz, *Compelled Speech Under the Commercial Speech Doctrine: The Case of Menu Label Laws*, 12 J. HEALTH CARE L. & POL'Y 159, 172 (2009).

76. DANIEL A. FARBER, THE FIRST AMENDMENT 151 (2d ed. 2003) (noting that not until the mid-1970s was commercial speech "brought firmly under First Amendment protection"). For an analysis of the definition of commercial speech, see Tamara R. Piety, *Against Freedom of Commercial Expression*, 29 CARDOZO L. REV. 2583, 2592 (2008).

77. Valentine v. Chrestensen, 316 U.S. 52, 54 (1942).

78. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

79. *Id.* at 786.

80. *Id.* at 771.

81. Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 4 (2000).

82. *Va. State Bd. of Pharmacy*, 425 U.S. at 11 n.24.

2. *The* Central Hudson *Test*

In 1980, four years after *Virginia State Board*, the Court once again addressed the issue of government-prohibited commercial speech in *Central Hudson*.[83] The Court considered the constitutionality of the New York Public Service Commission's total ban on advertising by electric utility companies.[84] The Court ultimately held that the ban was unconstitutional and enumerated the following four-part test:

> [First], we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. [Second], we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, [third] we must determine whether the regulation directly advances the governmental interest asserted, and [fourth] whether it is not more extensive than is necessary to serve that interest.[85]

The *Central Hudson* test is an intermediate scrutiny test because the government need only have a substantial interest, not a compelling interest, and because the government does not have to use the least restrictive means available in order to further its interest.[86] In applying *Central Hudson*, the Supreme Court has found that a governmental interest was not substantial in only two cases.[87] Instead, much of the controversy centers on the application of the third and fourth prongs of the test.

a. Third Part of *Central Hudson*: Direct Advancement

In applying the third part of the *Central Hudson* test, the Supreme Court has, over time, seemingly moved from a lenient interpretation to a stricter application of direct advancements.[88] Nevertheless, the "amount and sufficiency of evidence of direct advancement [that the Supreme Court requires] remains somewhat unclear."[89]

One year after deciding *Central Hudson*, the Court considered the City of San Diego's restrictions on outdoor advertising, including billboards. In applying the third prong of *Central Hudson*, the Court "hesi-

83. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n., 447 U.S. 557 (1980).

84. *Id.* at 558.

85. *Id.* at 566.

86. *Id.* at 573 (Blackmun, J., concurring); Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 TEX. L. REV. 777, 791 n.57 (1993).

87. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 72 (1983) (finding that the government's interest in shutting "off the flow of mailings to protect those recipients who might potentially be offended" has never been protected); *see also* Rubin v. Coors Brewing Co., 514 U.S. 476, 486 (1995) (finding that the government's "interest in preserving state authority is not sufficiently substantial to meet the requirements of *Central Hudson*").

88. Michael Hoefges, *Protecting Tobacco Advertising Under the Commercial Speech Doctrine: The Constitutional Impact of Lorillard Tobacco Co.*, 8 COMM. L. & POL'Y 267, 306 (2003) (noting that "it is increasingly clear that the government needs to submit a sufficient evidentiary record in support of its case").

89. *Id.*

tate[d] to disagree with the accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety."[90] Similarly, in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, the Court "assumed without evidence"[91] that Puerto Rico's ban on casino gambling advertising would directly advance the "asserted regulatory goal of reducing social harms related to compulsive gambling."[92] Instead of requiring evidence, the Court deferred to the legislature's belief, which it deemed "reasonable."[93]

In more recent cases, however, the Court seems to have moved towards a stricter approach, but it is still not entirely clear how much evidence is necessary to establish a connection between the regulation and the stated interest. In a 1993 case, *Edenfield v. Fane*, the Court demanded evidence that restrictions on speech advance the government interest in a "direct and material way"[94] and required that a "governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."[95] The Court stressed the importance of this requirement because without it, "a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression."[96]

Additionally, in *Rubin v. Coors Brewing Co.*, a 1995 opinion, the Court considered a federal law that prohibited beer labels from displaying alcohol percentage information.[97] The Court decided that the government's interest in reducing societal ills related to alcohol consumption was substantial, but it found that the prohibition did not directly advance the government's interest.[98] As the Court explained, "various tidbits" of "anecdotal evidence and educated guesses" do not constitute "convincing evidence."[99] Similarly, during the next Term, the Court also found unconstitutional a Rhode Island law that banned retail price advertising of liquor.[100] The Court again regarded the state's interest in reducing alcohol consumption as substantial but decided that the law failed the third

90. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 509 (1981).

91. Hoefges, *supra* note 88, at 282.

92. *Id.* (referring to Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 341–42 (1986) (The Court explained: "Step three asks the question whether the challenged restrictions on commercial speech 'directly advance' the government's asserted interest. In the instant case, the answer to this question is clearly 'yes.' The Puerto Rico Legislature obviously believed, when it enacted the advertising restrictions at issue here, that advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised. We think the legislature's belief is a reasonable one . . . .")).

93. *Posadas*, 478 U.S. at 342.

94. Edenfield v. Fane, 507 U.S. 761, 767 (1993).

95. *Id.* at 770–71.

96. *Id.* at 771; *see also* Rubin v. Coors Brewing Co. 514 U.S. 476, 487 (1995) ("[In *Edenfield v. Fane*] [w]e cautioned that this requirement was critical.").

97. *Rubin*, 514 U.S. at 478.

98. *Id.* at 489.

99. *Id.* at 490.

100. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 489 (1996).

prong of the *Central Hudson* test because "the State has presented no evidence to suggest that its speech prohibition will *significantly* reduce marketwide consumption."[101]

In 1995, the Court also considered whether an evidentiary record was sufficient in *Florida Bar v. Went For It, Inc.*, in which the state of Florida prohibited lawyers from soliciting accident victims via direct mail within thirty days of their accidents.[102] Florida argued that the ban protected the privacy of accident victims and their relatives and ensured that they were not unduly influenced.[103] The state provided a detailed summary of its two-year study on attorney advertising, which included anecdotes, newspaper articles, and summaries of studies in support of its attorney advertising regulation.[104] The majority opinion rejected the dissent's suggestion that the Court needed to review the actual studies or consider their methodological soundness.[105]

In *Lorillard Tobacco*, a 2001 case, the Court considered state tobacco regulations that prohibited outdoor advertising of cigarettes, smokeless tobacco, and cigars within a one thousand-foot radius of a school or playground and also required point-of-sale advertisements to be at least five feet off the ground in retail establishments that allowed children.[106] In applying the third factor of the *Central Hudson* test to the regulations regarding cigar and smokeless tobacco advertisements,[107] the Court determined that Massachusetts had cited enough studies that showed a relationship between advertising and tobacco use by minors, and it thus concluded that the one thousand-foot restriction on advertising directly advanced the state's interest.[108] The Court determined, however, that the five-foot height rule did not directly advance the state's interest because "[n]ot all children are less than 5 feet tall, and those who are certainly have the ability to look up and take in their surroundings."[109] The Court reiterated that a "regulation cannot be sustained if it 'provides only inef-

101. *Id.* at 506.

102. 515 U.S. 618, 620 (1995).

103. *Id.* at 621.

104. *Id.* at 626–28.

105. *Id.* at 628. In his dissent, Justice Kennedy strongly criticized the majority's approach: "This document includes no actual surveys, few indications of sample size or selection procedures, no explanations of methodology, and no discussion of excluded results. There is no description of the statistical universe or scientific framework that permits any productive use of the information the so-called Summary of Record contains. The majority describes this anecdotal matter as 'noteworthy for its breadth and detail,' but when examined, it is noteworthy for its incompetence." *Id.* at 640 (Kennedy, J., dissenting) (citation omitted).

106. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 533–36 (2001).

107. The Court did not consider the First Amendment challenge to the prohibitions on cigarette advertising because it found that the FCLAA preempted the state statute and invalided the outdoor and point-of-sale advertising cigarette regulations completely. *Id.* at 551. The Court, however, found that the regulations regarding cigar and smokeless tobacco advertisements were not preempted. *Id.* at 553 .

108. *Id.* at 555–61.

109. *Id.* at 566.

fective or remote support for the government's purpose'"[110] or if there is "'little chance' that the restriction will advance the State's goal."[111]

b. Fourth Prong of *Central Hudson*: Not More Extensive than is Necessary

In order to meet the fourth factor of the *Central Hudson* test, the regulation cannot be "more extensive than is necessary" to serve the governmental interest.[112] In 1989, however, in *Board of Trustees of State University of New York v. Fox*, the Court explained that this part of the test did not limit the government to using the least restrictive means available to it.[113] Instead, the Court concluded that the test was "something short of a least-restrictive-means standard."[114]

Nevertheless, recent opinions suggest that satisfying the fourth prong is more difficult than *Fox* might otherwise suggest. In 1996, in striking down a ban on advertisements displaying alcohol prices, the Court in *44 Liquormart v. Rhode Island* listed multiple alternatives that the state could have employed to reduce alcohol consumption, including raising prices or conducting educational campaigns.[115] As Justice Clarence Thomas observed in his concurrence, the opinion "would appear to commit the courts to striking down restrictions on speech whenever a direct regulation . . . would be an equally effective method of dampening demand by legal users."[116] Similarly, in *Coors Brewing*, the Court decided that because there were a variety of ways in which the state could have directly regulated the undesirable conduct in order to achieve the desired result, the regulation was "more extensive than necessary."[117]

3. The Zauderer *Test*

In 1985, the Supreme Court considered a commercial speech mandate for the first time in *Zauderer v. Office of Disciplinary Counsel*.[118] In this case, the Supreme Court considered the constitutionality of an Ohio Supreme Court Disciplinary Rule that required attorneys who advertised contingent fee services to disclose that clients would still have to pay certain costs, even if their lawsuits were not successful.[119] In considering this

110. *Id.* (internal quotation marks omitted).
111. *Id.* (internal quotation marks omitted).
112. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980).
113. Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 477 (1989).
114. *Id.*
115. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 507 (1996).
116. *Id.* at 524 (Thomas, J., concurring).
117. Rubin v. Coors Brewing Co., 514 U.S. 476, 490–91 (1995). The Court highlighted alternatives such as "directly limiting the alcohol content of beers, prohibiting marketing efforts emphasizing high alcohol strength (which is apparently the policy in some other western nations), or limiting the labeling ban only to malt liquors, which is the segment of the market that allegedly is threatened with a strength war." *Id.*
118. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 631–32 (1985); *see also* Pomeranz, *supra* note 75, at 173.
119. *Zauderer*, 471 U.S. at 632–33.

requirement, which compelled attorneys' speech, the Court differentiated between prohibiting commercial speech and compelling commercial speech by noting that Ohio "has not attempted to prevent attorneys from conveying information to the public; it has only required them to provide somewhat more information than they might otherwise be inclined to present."[120] The Court acknowledged, however, that compelling commercial speech might potentially violate the First Amendment.[121]

The Court then distinguished statutes that compel private speech from those that compel commercial speech by examining the interests at stake in each situation.[122] In cases where the Court has held that compelled speech offended the First Amendment, the government had mandated religious, political, and other opinion-based speech of private individuals.[123] In *Zauderer*, however, the Court explained that the principal justification for extending First Amendment protection to commercial speech was to protect the flow of information to consumers.[124] Consequently, an advertiser's "constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal."[125] The Court thus held that "purely factual and uncontroversial" compelled disclosures are permissible as long as they are "reasonably related to the State's interest in preventing deception of consumers,"[126] and are not "unjustified or unduly burdensome" so as to chill protected commercial speech.[127]

a. Interest in Preventing Deception

In deciding whether a state has an interest in preventing consumer deception, the Supreme Court analyzes whether the commercial speech's potential for deceit is self-evident.[128] In *Zauderer*, the Supreme Court upheld the state's mandated disclosure without requiring any evidence that the attorney's advertisement would be misleading without it.[129] The Court explained that "[w]hen the possibility of deception is as self-evident as it is in this case, we need not require the State to 'conduct a

120. *Id.* at 650.
121. *Id.*
122. *Id.* at 651.
123. *See, e.g.*, Wooley v. Maynard, 430 U.S. 705, 717 (1977) ("[W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message.").
124. *Zauderer*, 471 U.S. at 651.
125. *Id.*
126. *Id.*
127. *Id.*
128. Dayna B. Royal, *The Skinny on the Federal Menu-Labeling Law & Why It Should Survive a First Amendment Challenge*, 10 FIRST AMEND. L. REV. 140, 188 (2011).
129. *See* R. Michael Hoefges, *Regulating Professional Services Advertising: Current Constitutional Parameters and Issues Under the First Amendment Commercial Speech Doctrine*, 24 CARDOZO ARTS & ENT. L.J. 953, 974 (2007).

survey of the . . . public before it [may] determine that the [advertisement] had a tendency to mislead.'"[130]

In cases where commercial speech's potential for deceit is not inherently self-evident, the Court considers whether there is a "potentially real, not purely hypothetical" threat of deceit.[131] It is not clear, however, how much evidence the Court will require the government to provide in order to demonstrate that there is the potential for deceit without the disclosure.[132] Nevertheless, in his concurring opinion in *Milavetz, Gallop & Milavetz, P.A. v. United States*, Justice Thomas cautioned that:

> *Zauderer* does not stand for the proposition that the government can constitutionally compel the use of a scripted disclaimer in any circumstance in which its interest in preventing consumer deception might plausibly be at stake. In other words, a bare assertion by the government that a disclosure requirement is "intended" to prevent consumer deception, standing alone, is not sufficient to uphold the requirement as applied to all speech that falls within its sweep.[133]

b. Reasonably Related

The Supreme Court also requires the compelled disclosure to be reasonably related to the state's interest in preventing deception. Reasonable relation is not a "particularly stringent requirement;"[134] instead, it just requires that the state's method of regulation is rationally related to the state's interest.[135]

III. ANALYSIS

The first two Sections of this Part explain how the D.C. Circuit and the Sixth Circuit analyzed the constitutionality of the FSPTCA's graphic warning requirement. Section A explains how in *Discount Tobacco City*, the Sixth Circuit decided that *Central Hudson* did not apply and instead upheld the Act's mandates under *Zauderer*. Section B describes how, in *R.J. Reynolds*, the D.C. Circuit rejected the application of the

130. *Zauderer*, 471 U.S. at 652–53 (quoting FTC v. Colgate-Palmolive Co., 380 U.S. 374, 391–392 (1965)).

131. Ibanez v. Fla. Dep't Bus. & Prof'l Regulation, 512 U.S. 136, 146 (1994); *see also* Rebecca Tushnet, *Image-Based Required Disclosures are Unconstitutional*, REBECCA TUSHNET'S 43(B)LOG, (Dec. 14, 2012, 10:55 AM), http://tushnet.blogspot.com/2012/12/image-based-required-disclosures-are.html ("*Ibanez* also suggests that *Zauderer* only applies when the government 'affirmatively demonstrates' a threat of deception, since it found that the state hadn't shown that use of an attorney's Certified Financial Planner designation was 'potentially misleading'; the state's posited harm was 'purely hypothetical.'"). Professor Tushnet is a law professor at the Georgetown University Law Center.

132. *See* Royal, *supra* note 128, at 188–89 (suggesting that if "the possibility of harm absent government intervention is not self-evident, then perhaps the state must offer some evidence to satisfy *Zauderer's* standard").

133. Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 257 (2010) (Thomas, J., concurring).

134. Royal, *supra* note 128, at 187.

135. *Id.*

Zauderer test and instead applied the four-part *Central Hudson* test, under which it found that the requirements of the Act were unconstitutional. Section C examines why each court chose the test that it did and concludes that the Sixth Circuit erred in applying *Zauderer* instead of *Central Hudson*. This Section also analyzes the requirements of each test in more detail and explains why an addition to and clarification of the *Central Hudson* test is needed.

A. Discount Tobacco City & Lottery, Inc. v. United States

In 2009, shortly after the FSPTCA was passed, six tobacco companies sued the United States in federal district court, alleging, among other things, that the graphic warning requirement of the FSPTCA violated their First Amendment rights.[136] In 2010, the district court granted in part and denied in part cross motions for summary judgment,[137] and both parties appealed to the Sixth Circuit Court of Appeals.[138]

1. Facial Versus an As-Applied Challenge

The Sixth Circuit considered the Act's graphic warning requirement on their face instead of considering the graphics that were actually chosen[139] because the images had not yet been selected by the FDA at the time the suit was filed.[140] Accordingly, the court's subsequent analysis only applied to the requirement of graphic images in general instead of to the nine images actually chosen by the FDA.

2. Rejection of Central Hudson *in Favor of* Zauderer

As explained in detail below, the court determined that without the mandated disclosures, cigarette packages would mislead consumers.[141] Thus, although the court considered the *Central Hudson* four-part test, it concluded that *Zauderer* was the applicable test: "Because the *Central Hudson* test does not govern commercial speech that is false, deceptive or misleading, if commercial speech is so categorized, we apply a different test to determine whether a restriction or disclosure requirement is unconstitutional."[142]

136. Commonwealth Brands, Inc. v. United States, 678 F. Supp. 2d 512 (W.D. Ky. 2010). In addition to the graphic images requirement, the tobacco companies also challenged various other aspects of the FSPCTA, including marketing restrictions on tobacco companies, bans on the companies sponsoring events, and restrictions of tobacco advertising to black and white text. Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 518 (6th Cir. 2012).

137. *Id.* at 519.

138. *See id*. at 552–53.

139. *Id.*

140. *Id.* at 553. The court also noted that three of the plaintiffs, R.J. Reynolds Tobacco, Lorillard, and Commonwealth Brands, admitted that they were only challenging the warnings facially. *Id.*

141. *See infra* text accompanying notes 158–62.

142. Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 523 (6th Cir. 2012).

a. Purely Factual and Uncontroversial

The court began its analysis by addressing the first element of the *Zauderer* test, which requires disclosures to be "purely factual and uncontroversial."[143] As stated earlier, the court only considered the requirement of graphic warnings as a whole and not the individual images that were later selected by the FDA.[144] The court thus explained that the plaintiffs' burden was to show that there was "no set of circumstances . . . under which [the statute] would be valid, or that the statute lacks any plainly legitimate sweep."[145] The court further explained that to meet this burden, the plaintiffs would "have to establish that a graphic warning cannot convey the negative health consequences of smoking accurately, a position tantamount to concluding that pictures can never be factually accurate."[146] Not surprisingly, the court found this position to be "at odds with reason."[147]

The court considered potential graphic images, such as a smoker's cancerous lungs or "some other part of the body presenting a smoking related condition."[148] It rejected the argument that images representing medical conditions cannot be factual simply because such conditions manifest themselves differently in different people.[149] Instead, the court reasoned that although symptoms vary from person to person, the images depicting them are not automatically "nonfactual and opinion-based."[150] The court also pointed to *Zauderer* in support of this conclusion by citing to the statement that "the use of illustrations or pictures in advertisements serves important communicative functions: it attracts the attention of the audience to the advertiser's message, and it may also serve to impart information directly."[151]

b. Government Interest

The court next identified the government's interest in preventing deception, although it made it clear that a finding of deceit was not necessary to satisfy the test.[152] That is, the court ostensibly extended the literal holding of *Zauderer*, which states that the regulation must be reasonably related to "preventing deception of consumers."[153] The court first declared that the "genesis of the stated purpose [of the Act] is self-evident" and detailed the history of deception that the tobacco industry

143. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985).
144. *Disc. Tobacco City*, 674 F.3d at 552–53.
145. *Id.* at 522 (quoting United States v. Stevens, 130 S. Ct. 1577, 1587 (2010)).
146. *Id.* at 559.
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.* at 560 (quoting Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 647 (1985)).
152. *See infra* notes 162–63 and accompanying text.
153. *Zauderer*, 471 U.S. at 651.

has engaged in, including how "[t]obacco manufacturers and tobacco-related trade organizations . . . knowingly and actively conspired to deceive the public about the health risks and addictiveness of smoking for decades."[154] The court found that in "the face of this deception stand the existing warnings required before the Act,"[155] and explained that the government thus had an interest in promoting the dissemination of accurate information about the health effects of smoking.[156]

The court also seemingly identified another "strong reason for the new graphic warnings required by the Act":[157] to promote "greater understanding of tobacco-related health risks" among people who are illiterate, do not read well, or do not speak English.[158] The court described how the current warnings are "ineffective" by noting that the currently required warnings take up less than five percent of cigarette packaging and are written at a college reading level.[159] The court explained that given "these ineffective warnings, the evidence unsurprisingly shows that most people do not understand the full dangers of tobacco use."[160] It is not entirely clear whether the court considered education about the dangers of tobacco to be an interest distinct from preventing consumer deception. That is, the court did not explain whether consumers lack full knowledge of the dangers of tobacco use because of the tobacco companies' prior deception or because they are simply uneducated as to the risks.[161]

Even if the Sixth Circuit did not explicitly identify a government interest separate from an interest in preventing deception, however, it announced that *Zauderer* does not require such an interest.[162] The court cited to other circuit court cases that have determined that "*Zauderer*'s framework can apply even if the required disclosure's purpose is something other than or in addition to preventing consumer deception."[163] The court principally relied on *National Electric Manufacturers Ass'n v. Sorrell*, a Second Circuit case that identified the government's interest in protecting "human health and the environment" by reducing mercury contamination.[164]

The court rejected the plaintiffs' argument that the graphic warnings were unjustified because consumers already understand the health risks of using tobacco.[165] In doing so, it did not require the government to offer any proof that consumers are misled because of the companies'

154. *Disc. Tobacco City*, 674 F.3d at 562.
155. *Id.* at 563.
156. *Id.*
157. *Id.* at 562.
158. *Id.* at 565.
159. *Id.* at 563.
160. *Id.*
161. *See id.*
162. *See id.* at 556.
163. *Id.*
164. Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 115 n.6 (2001).
165. *Disc. Tobacco City*, 674 F.3d at 563.

prior advertising practices and that without remedial measures, they will continue to be deceived.[166] The court emphasized the language of *Zauderer*, which concluded that "unjustified or unduly burdensome disclosure requirements *might* offend the First Amendment by chilling protected commercial speech. *But* we hold that *an advertiser's rights are* adequately *protected as long as disclosure requirements are reasonably related* to the State's interest in preventing deception of consumers."[167] The court interpreted this statement as holding that it was permissible for some disclosures to violate the First Amendment because "[d]eciding whether a disclosure requirement is reasonably related to the purpose is all the law requires to assess constitutionality."[168]

c. Reasonable Relation

The court next analyzed whether the requirement of the new graphics is reasonably related to these two interests and concluded that it was. The court explained that there is no need for "some quantum of proof that a disclosure will realize the underlying purpose."[169] Instead, the court concluded that a "common-sense analysis will do."[170] The court decided that by virtue of "being larger and including graphics," the requirement was reasonably related to preventing consumer deception and increasing the understanding of tobacco's health risks.[171] To support this conclusion, the court cited both studies and to "common sense," which showed that "larger warnings incorporating graphics will better convey the risks of using tobacco to consumers."[172]

Finally, the court did not consider the last element of the *Zauderer* test, which prohibits the mandated disclosures from being "unjustified or unduly burdensome."[173] The court stated: "Plaintiffs' final argument that the warnings are unduly burdensome because their size drowns out their speech is unpersuasive. Again, to the extent that Plaintiffs argue that we must separately analyze whether the warnings are unduly burdensome, they are mistaken."[174]

B. R.J. Reynolds Tobacco Co. v. FDA

In 2011, five tobacco companies filed suit against the FDA in the U.S. District Court for the District of Colombia, alleging that the graphic

166. *See supra* text accompanying notes 160–61.
167. *Disc. Tobacco City*, 674 F.3d at 566–67 (quoting Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985)).
168. *Id.* at 567.
169. *Id.* at 557.
170. *Id.*
171. *Id.* at 564.
172. *Id.*
173. Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 651 (1985).
174. *Disc. Tobacco City*, 674 F.3d at 567.

warnings chosen by the FDA violated the First Amendment.[175] The district court first granted the plaintiffs' motion for a preliminary injunction[176] and later granted their motion for summary judgment.[177] The FDA appealed to the U.S. Court of Appeals for the D.C. Circuit.

1. Rejection of Zauderer

The D.C. Circuit Court first considered the *Zauderer* test and decided that it was not applicable to the case before it.[178] The court emphasized that the Supreme Court has "never applied *Zauderer* to disclosure requirements not designed to correct misleading commercial speech"[179] and relied on Supreme Court precedent, discussed below,[180] in support of this conclusion. On the basis of these precedents, the court concluded that *Zauderer* only applies to disclosure requirements when "the government shows that, absent a warning, there is a self-evident—or at least 'potentially real'—danger that an advertisement will mislead consumers."[181]

The court then addressed whether cigarette packages that do not have warnings are inherently misleading and concluded that they are not.[182] First, the court pointed out that the Act itself bans cigarette advertisements and packages from containing misleading or deceptive statements, such as 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," that it "contains a reduced level of a substance or presents a reduced exposure to a substance," or that it "does not contain or is free of a [harmful] substance."[183] Because of these prohibitions and because there were no specific Congressional findings regarding the misleading nature of cigarette packaging, the court concluded that there was "no justification under *Zauderer* for the graphic warnings."[184]

The court also rejected the argument made by amicus states that the warnings serve to combat years of prior deception.[185] The amicus states relied on *Warner-Lambert Co. v. FTC*,[186] a 1977 case in which the D.C. Circuit upheld a cease and desist order issued by the FTC to Warner-Lambert, the manufacturer of the mouthwash Listerine.[187] Since 1921, the company had claimed in its advertisements that its product helped

175. *See* R.J. Reynolds Tobacco Co. v. FDA, 845 F. Supp. 2d 266 (D.D.C. 2012).
176. R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1211 (D.C. Cir. 2012).
177. *Id.*
178. *Id.* at 1213–17.
179. *Id.* at 1213.
180. *See infra* Part III.C.1.a.
181. *R.J. Reynolds*, 696 F.3d at 1214.
182. *Id.* at 1214–15.
183. *Id.* at 1214.
184. *Id.* at 1215.
185. *Id.* at 1215–16.
186. Warner-Lambert Co. v. FTC, 562 F.2d 749 (D.C. Cir. 1977).
187. *R.J. Reynolds*, 696 F.3d at 1215 (internal citation omitted).

alleviate sore throats and the common cold.[188] Following an investigation of these claims before an administrative law judge that revealed their inaccuracy, the FTC order required the company to include in future advertisements the statement: "Contrary to prior advertising, Listerine will not help prevent colds or sore throats or lessen their severity."[189]

The court acknowledged that prior cigarette advertisements were deceitful or misleading by having claimed, among other things, that certain products with "light" or "mild" levels of tar were less harmful than regular products.[190] The court, however, distinguished *Warner-Lambert* from the facts of this case. First, the court noted that in contrast to the FTC in *Warner-Lambert*, the FDA did not (1) assert or show that the graphic warnings "were designed to correct any false or misleading claims made by cigarette manufacturers in the past," (2) frame the rule "as a remedial measure," or (3) show that consumers would likely be deceived by the future cigarette advertising if they did not contain the mandated disclosures.[191] That is, the court determined that *Warner-Lambert* only applies to disclosure requirements necessary to "combat *specific* deceptive claims."[192] It found, however, that the FDA's disclosure requirements were framed "as general disclosures about the negative health effects of smoking" that were not shown to be necessary to prevent consumer deception.[193] As a result, the court concluded, *Warner-Lambert* did not apply.[194]

Finally, the court rejected the view that the graphic warnings were the kind of "purely factual and uncontroversial information" upheld by *Zauderer*.[195] In contrast to the disclosures in *Zauderer*, which were "indisputably accurate" and "not subject to misinterpretation by consumers," the court determined that the FDA's images were "a much different animal" that could easily be misinterpreted by consumers.[196] The court explained that the graphic of a man smoking through a tracheotomy hole could be misinterpreted as implying that a tracheotomy is a common consequence of smoking.[197] The court emphasized that the warnings were "primarily intended to evoke an emotional response, or, at most, shock the viewer into retaining the information in the text warning."[198] Instead of being purely factual and uncontroversial, the court found the

188. *Warner-Lambert*, 562 F.2d at 752.
189. *Id*. at 753. Although the D.C. Circuit Court of Appeals upheld the order, it struck the beginning phrase, "Contrary to prior advertising" from the requirement. *Id.* at 762.
190. *R.J. Reynolds*, 696 F.3d at 1214.
191. *Id.* at 1215–16.
192. *Id.* at 1216 (emphasis added).
193. *Id.*
194. *Id.*
195. *Id*. (internal citation omitted).
196. *Id.*
197. *Id.*
198. *Id.*

images to be "inflammatory" and "unabashed attempts to evoke emotion (and perhaps embarrassment) and browbeat consumers into quitting."[199]

2. *Application of the* Central Hudson *Test*

Having rejected *Zauderer* as the applicable test, the court next concluded that *Central Hudson* was the governing standard.[200] The court began its application of the four-part test by identifying a government interest in reducing smoking rates among current smokers, especially among children.[201] The court expressed hesitation as to whether this interest was substantial but applied the rest of the test with the assumption that it was.[202] Nevertheless, the mandated graphics requirement did not pass the *Central Hudson* test because it failed the third part.[203]

The court noted that it is the government's burden to justify its efforts to regulate commercial speech and observed that this burden "is not light."[204] The court relied on the standard described in *Coors Brewing*, namely that it is critical that the government provide more than "ineffective or remote support for [its] purposes" and that it offer more than "mere speculation or conjecture."[205] After an analysis of the studies offered by the FDA, however, the court concluded that the agency did not provide "a shred of evidence . . . showing that the graphic warnings will 'directly advance' its interest in reducing the number of Americans who smoke."[206]

The court first considered a study cited by the FDA that looked at the impact on Canadian and Australian youth smokers of similar graphic warnings required by their respective governments.[207] The studies showed that the warnings caused a significant number of participants in the study to think, or at least think more seriously, about quitting, but the court pointed out that thinking about quitting is not the same as actually quitting.[208] Therefore, the court concluded that the study was not evidence of direct advancement because it did not show that the use of large graphic warnings "has *actually* led to a reduction in smoking rates."[209]

The court also rejected data regarding smoking rates in Canada because although the data showed a reduction in rates, the FDA admitted that it could not attribute the reduction to the warnings because there were other significant variables that could have been responsible.[210]

199. *Id.* at 1216–17.
200. *Id.* at 1217.
201. *Id.* at 1218.
202. *Id.*
203. *Id.* at 1219–21.
204. *Id.* at 1218.
205. *Id.* at 1218–19 (internal citations omitted).
206. *Id.* at 1219.
207. *Id*.
208. *Id.*
209. *Id.*
210. *Id.* at 1220. Some of these variables include "an increase in the cigarette tax and new restrictions on public smoking," which both occurred during the same period. *Id.* at 1219.

Finally, the court also disregarded the FDA's own Regulatory Impact Analysis (RIA) because of methodological flaws in its approach, which the FDA itself admitted was "rudimentary."[211] The court also drew on the fact that notwithstanding these flaws, the RIA ultimately concluded that the graphic warnings would only reduce smoking rates in the United States by 0.088%,[212] which the FDA acknowledged was "not statistically distinguishable from zero."[213] Consequently, the Court concluded that the "Rule thus cannot pass muster under *Central Hudson*."[214]

C. Analysis and Comparison of the Sixth Circuit and D.C. Circuit Approaches

The Sixth Circuit and the D.C. Circuit reached different conclusions on a number of key issues when evaluating the graphics requirement imposed by the FDA. This Section will identify the points on which the circuits differed and will also consider the implications of the courts' conclusions. The first Subsection will discuss the courts' opinions on whether the only government interest implicated by *Zauderer* is the prevention of public deception or if the holding can be extended to include other state interests. This Subsection will also discuss the First Amendment values at stake when commercial speech is restricted or compelled. The second Subsection will analyze how each court determined whether cigarette packages were potentially misleading. The third Subsection will discuss the circuits' opposing opinions on whether the graphics were "purely factual and uncontroversial" as required by *Zauderer*.[215] The fourth Subsection will address the third and fourth requirements of the *Central Hudson* test, and the fifth Subsection will discuss why the same First Amendment values are not at stake when the state's interest is in preventing deception.

1. Compelled Speech Versus Restricted Speech and the Extent of Zauderer

There is no strong consensus among courts or scholars as to whether the *Zauderer* test applies only when the state compels commercial speech in the interest of preventing deception, or if other government interests, such as providing educational information, are also allowed.[216] Likewise, the Supreme Court has not clearly articulated the extent of the *Central Hudson* test; as Professor Dayna Royal points out: "It is unclear whether

211. *Id.* at 1220 (internal citation omitted).
212. *Id.* (internal citation omitted).
213. *Id.* (internal citation omitted).
214. *Id.* at 1222.
215. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985).
216. For an analysis of why *Zauderer* is not limited to an interest in preventing deception, see Royal, *supra* note 128, at 162–71. *But see* Leslie Gielow Jacobs, *What the Abortion Disclosure Cases Say About the Constitutionality of Persuasive Government Speech on Product Labels*, 87 DENV. U. L. REV. 855, 874 n.133 (2010).

[the *Central Hudson* test] applies only to the situation addressed in *Central Hudson*—where a law restricts speech—or whether it is a default framework for commercial speech that applies generally, save rare instances."[217] Courts other than the D.C. and Sixth Circuits have also taken alternative approaches.[218]

In *R.J. Reynolds*, the D.C. Circuit found that *Zauderer* only applies when the government has an interest in preventing consumers from being deceived.[219] The court declined to apply the *Zauderer* test because it found that cigarette packages are not inherently misleading and because the government offered no proof that prior misleading cigarette advertisements continue to cause consumers to be deceived.[220] Instead, the court applied the *Central Hudson* test to the Act's requirements.[221] In contrast, in *Discount Tobacco City*, the Sixth Circuit held that *Zauderer* also applies to state-compelled disclosures even when the state interest is something other than the prevention of deception.[222] In its opinion, the Sixth Circuit seems to have found that the state had two legitimate interests: (1) an interest in preventing deception, and (2) an interest in the dissemination of educational information.[223]

If *Zauderer* were to apply to compelled disclosures even when the government's interest is something other than preventing deception, then the rational basis test of *Zauderer* would be the applicable test in all cases in which the state compels speech.[224] Correspondingly, the intermediate scrutiny test of *Central Hudson* would apply to all cases in which the state restricts speech.[225] The result would be that restricted commercial speech would be given more First Amendment protection than compelled commercial speech.[226] The text of *Zauderer* and its progeny are

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

218. Multiple circuit courts have found that *Zauderer* is not limited to preventing consumer deception. *See, e.g.*, N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health, 556 F.3d 114, 132 (2d Cir. 2009) ("In light of *Zauderer*, this Circuit thus held that rules 'mandating that commercial actors disclose commercial information' are subject to the rational basis test.") (citation omitted); Pharm. Care Mgmt. Ass'n v. Rowe, 429 F.3d 294, 310 n.8 (1st Cir. 2005) ("[W]e have found no cases limiting *Zauderer* in such a way."); Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 115 (2d Cir. 2001) (finding a government interest in protecting health and the environment).

219. *R.J. Reynolds*, 696 F.3d at 1214 (2012) ("*Zauderer*, *Ibanez*, and *Milavetz* thus establish that a disclosure requirement is only appropriate if the government shows that, absent a warning, there is a self-evident—or at least "potentially real"—danger that an advertisement will mislead consumers.").

220. *Id.* at 1216–17.

221. *Id.* at 1217 (applying the *Central Hudson* standard instead of the stricter *Zauderer* standard).

222. Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 556 (6th Cir. 2012) ("*Zauderer*'s framework can apply even if the required disclosure's purpose is something other than or in addition to preventing consumer deception.").

223. *Id.* at 564.

224. For a case that treats restrictions on commercial speech differently than compelled commercial speech, see Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 113–14 (2d Cir. 2001) (stating that "[c]ommercial disclosure requirements are treated differently from restrictions on commercial speech because mandated disclosure of accurate, factual, commercial information does not offend the core First Amendment values of promoting efficient exchange of information or protecting individual liberty interests").

225. *See id.* at 115.

226. *See id.* at 113.

ambiguous as to the proper extension of the opinion, but there are policy reasons that suggest that compelled commercial speech should be afforded the same First Amendment protections as restricted commercial speech.

a. *Zauderer* and Supreme Court Precedent

To begin with, there is nothing in the holding of *Zauderer* that suggests that a state interest could be extended to something other than the prevention of deception.[227] The holding of *Zauderer* provides that compelled disclosures are permissible as long as they are "reasonably related to the State's interest in preventing deception of consumers."[228] The language of the opinion suggests that the Court only had the prevention of deception in mind when constructing the test. The Court did not expressly limit its holding in this way, but it also did not suggest that the category of interests could be expanded.[229]

Subsequent Supreme Court opinions involving compelled commercial speech are also not clear. As Professor Leslie Gielow Jacobs commented: "In the 25 years since *Zauderer*, the Court's decisions and the statements of various justices have muddied, rather than clarified, the decision's meaning with respect to the appropriate standard of review for disclosure requirements imposed on commercial speech."[230] Indeed, several Justices have recognized the lack of clarity of the compelled commercial speech doctrine and have suggested that the Court "clarify some oft-recurring issues in the First Amendment treatment of commercial speech and . . . provide lower courts with guidance on the subject of state-mandated disclaimers."[231] The principal problem is that in cases in which the Court has applied or rejected *Zauderer*, it does not use language that expressly limits its application to cases in which the government does not have an interest in preventing deception.

In *Meese v. Keene*, decided one year after *Zauderer*, the Supreme Court upheld a federal law that required certain Canadian movies to be labeled "political propaganda."[232] The Court's reasoning emphasized the government's interest in preventing deception: "By compelling some disclosure of information and permitting more, the Act's approach recognizes that the best remedy for misleading or inaccurate speech contained within materials subject to the Act is fair, truthful, and accurate

227. *See* Jennifer M. Keighley, *Can You Handle the Truth? Compelled Commercial Speech and the First Amendment*, U. PA. J. CONST. L. 539, 542 (2012) (noting that "Zauderer's language is less than clear").

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

229. For example, the Court did not say that compelled disclosures are permissible if *and only if* they are reasonably related to the State's interest in preventing deception of consumers.

230. Gielow Jacobs, *supra* note 215, at 863.

231. Borgner v. Fla. Bd. of Dentistry, 284 F.3d 1204 (11th Cir. 2002), *cert. denied*, 537 U.S. 1080, 1080 (2002) (Thomas, J., dissenting).

232. 481 U.S. 465, 485 (1987).

speech."[233] The Court, however, did not necessarily suggest that *Zauderer* was limited to cases of misleading or inaccurate speech.[234]

In *Ibanez v. Florida Department of Business and Professional Regulation*, a 1994 case, the Florida State Board of Accountancy required an attorney to include a disclaimer in her advertisements that included her designation as a Certified Financial Planner because the Board had found that the advertisements were "potentially misleading" without the disclaimer.[235] The Supreme Court declined to apply *Zauderer* because the Board could not "point to any harm [of deceit] that is potentially real, not purely hypothetical."[236] The Court, however, cautioned that it was not expressing an opinion on whether such a disclaimer "might serve as an appropriately tailored check against deception or confusion."[237] This statement might suggest that a compelled disclosure would only be appropriate when there was a possibility of deception or confusion, but it could also simply be an example of one instance in which a disclosure would be permissible.

In 2001, the Court rejected the *Zauderer* test in *United States v. United Foods*, when it considered the constitutionality of a federal law that required mushroom growers to pay a fee to support generic industry advertising.[238] The Court rejected the test because there was "no suggestion . . . that the mandatory assessments imposed to require one group of private persons to pay for speech by others are somehow necessary to make voluntary advertisements nonmisleading for consumers."[239] Professor Dayna B. Royal notes that this language "suggests *Zauderer* may be limited strictly to preventing consumer deception"[240] but also points out that *United Foods* involved a compelled subsidy, not compelled speech, so it is not "expressly controlling."[241]

The Supreme Court's most recent application of the *Zauderer* test occurred in 2010, in *Milavetz, Gallop & Milavetz, P.A. v. United States*.[242] The Court upheld a state's advertising disclosure requirement designed to prevent deception because the requirement "shared the essential features of the rule at issue in *Zauderer*."[243] Additionally, it is interesting to note that in 1997, four dissenting Supreme Court justices in *Glickman v. Wileman Bros. & Elliot, Inc.* opined that *Zauderer* "carries no authority

233. *Id.* at 481.
234. *See* Gielow Jacobs, *supra* note 216, at 863–65.
235. 512 U.S. 136, 146 (1994).
236. *Id.*
237. *Id.*
238. 533 U.S. 405, 416–17 (2001).
239. *Id.* at 416.
240. Royal, *supra* note 128, at 164.
241. *Id.* at 164–65.
242. 559 U.S. 229, 249 (2010).
243. R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1214 (D.C. Cir. 2012) (internal citation omitted).

for a mandate unrelated to the interest in avoiding misleading or incomplete commercial messages."[244]

b. First Amendment Values at Stake

In the absence of clear Supreme Court guidance, it is necessary to examine the effects of restricting and compelling commercial speech. This analysis reveals that many of the same values are at stake when commercial speech is either restricted or compelled.[245] The Supreme Court has declared that one of the most important functions of the First Amendment is to protect the "freedom of communicating information and disseminating opinion."[246] Another often espoused purpose of the First Amendment is to promote and protect individual autonomy.[247]

Restrictions on commercial speech are problematic because they restrict the quantity and quality of information that is available in the marketplace.[248] Similarly, although compelled speech puts more information into the marketplace of ideas than would occur otherwise, it can have an adverse effect because it "distorts the marketplace of ideas and democratic decision-making by misrepresenting the views of speakers forced to propound a viewpoint that is not their own."[249] For example, if consumers do not understand that the images on cigarette packages do not represent the commercial speakers' viewpoints, then the consumer could attribute more meaning or authority to them than is accurate.[250] And, as the Supreme Court has noted, "free and robust debate cannot thrive if directed by the government."[251]

Additionally, both compelled and restricted commercial speech affect individual autonomy and raise concerns about government paternalism. Current free speech doctrine tends to be strongly antipaternalistic: "[E]xisting free speech jurisprudence rejects paternalistic regulations . . . because they treat listeners as less than fully rational agents able to make their own decisions about what to hear and what to choose. The bottom line is that current free speech jurisprudence has a strong an-

244. 521 U.S. 457, 491 (1997).

245. It is important to note the Court has routinely applied the same level of scrutiny to compelled speech and restricted speech outside the commercial speech context. Robert Wann, Jr., "*Debt Relief Agencies:" Does the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 Violate Attorneys' First Amendment Rights?*, 14 AM. BANKR. INST. L. REV. 273, 296 (2006).
With respect to noncommercial speech, the Supreme Court has said that "the difference [between compelled speech and restricted speech] is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." Riley v. Nat'l Fed'n of the Blind of N.C., Inc. 487 U.S. 781, 796–97 (1988).

246. Valentine v. Chrestensen, 316 U.S. 52, 54 (1934).

247. Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 970–72 (2009). Mala Corbin also identifies a third purpose of the First Amendment: to facilitate democratic self-government. *Id.* at 969–70.

248. *Id.* at 993–94.

249. *Id.* at 979.

250. *See id.*

251. Riley v. Nat'l Fed'n of the Blind of N.C., Inc. 487 U.S. 781, 791 (1988).

tipaternalism streak . . . ."[252] This norm is especially prevalent in First Amendment cases in which the state has restricted commercial speech, as the Court has routinely struck down restrictions when the government's purpose is to keep information from citizens "for their own good."[253] That is, the Court consistently "reject[s] the notion that the Government has an interest in preventing the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with the information."[254]

The same principle applies to compelled commercial speech because government-mandated information interferes with the individual's right to make fully independent decisions. As Professor Caroline Mala Corbin explains, forcing the public to view or listen to commercial speech "undermines the integrity of thought processes essential to our capacity for autonomy. Part of being an autonomous decision maker is deciding what information is relevant for one's decision. It is not just the ultimate decision that must be respected but also the decision making process itself."[255] By compelling warnings about the health risks of cigarettes, the government is essentially telling consumers what kind of information they should have to consider before making a decision to purchase and use the product. The government, however, infringes on individual autonomy and acts paternalistically by presuming that it knows best.[256]

c. *Zauderer*'s Rational Basis Test and the Protection of First Amendment Values

If the rational basis test of *Zauderer* were applied to every case in which the state compels speech, then the previously articulated First Amendment values would not be safeguarded. There are very few cases of compelled speech that would not meet *Zauderer*'s rational basis standard because, under *Zauderer*, the mandated speech must only be reasonably related to the government's interest.[257] It is true that the First Amendment provides "minimal protection" of a commercial speaker's autonomy because commercial speech is not a protected form of self-expression.[258] However, because there is no requirement that the government use the least restrictive means possible to further its interest,

252. Mala Corbin, *supra* note 247, at 988.

253. *See id.*

254. Thompson v. W. States Med. Ctr., 535 U.S. 357, 374 (2002).

255. Mala Corbin, *supra* note 247, at 987.

256. *See* Seana Valentine Shiffrin, *What Is Really Wrong with Compelled Association*, 99 NW. U. L. REV. 839, 874 (2005). Shiffrin writes that freedom of speech "encompasses a right to resist certain forms of mental interference and mind control and to make up one's own mind, even if the exercise of that right may sometimes lead a person to ignore important information, to emerge with incorrect judgments, and to make poor decisions." *Id.*

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

258. Aleta G. Estreicher, *Securities Regulation and the First Amendment*, GA. L. REV. 223, 271 (1990); *Id.* at 271 n.200 ("Since the advertiser is not engaged in an expression of its views or any other revelation of its personality, forcing the advertisement to carry a message not its own does not violate the integrity of the expressive, thinking self . . . .").

Zauderer's rational basis test places few limits on the information the government can require commercial speakers to include with their products or services.

For example, *Zauderer* would seem to permit the government to require all packages of candy bars, chips, and ice cream to bear the message: "It is recommended that adults perform 150 minutes of aerobic exercise per week."[259] The government certainly has a substantial interest in encouraging citizens to maintain a healthy lifestyle, and putting this message on unhealthy food is arguably a reasonable way to achieve this interest. It is not difficult, however, to imagine a point at which state requirements would interfere with a commercial speaker's ability to market its products effectively. Applying the rational basis test of *Zauderer* to all compelled disclosure statutes could easily result in forcing companies to subsidize messages that may be more appropriate for government-sponsored campaigns.[260] Because the *Zauderer* test seemingly imposes so few restraints on what the state could compel, there is a substantial danger of marketplace distortion and state paternalism.[261]

Theoretically, *Zauderer's* requirement that disclosures not be unjustified or unduly burdensome could act as a limitation on what government could mandate.[262] Courts' treatment of this supposed constraint, however, demonstrates how it can easily be overlooked or ignored altogether. The Supreme Court did not consider whether compelled disclosures were justified and not unduly burdensome when it upheld disclosures in *Milavetz*, a position that the Sixth Circuit endorsed in *Discount Tobacco City*.[263] As previously noted, the Sixth Circuit declared that the plaintiffs were "mistaken" to think that it needed to consider whether a disclosure was unjustified or unduly burdensome.[264] As a result, this requirement does not seem to limit what the state can do.

2. Determining Whether Commercial Speech is Likely to Deceive

As previously discussed, when the D.C. Circuit considered the *Zauderer* test, it found that the government did not have an interest in preventing deception because cigarette packages are not inherently mislead-

259. *See How Much Physical Activity Do Adults Need?*, CTRS. FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/physicalactivity/ everyone/guidelines/adults.html (last updated Dec. 1, 2011).

260. It is true that the producers of products or services are often in the best position to provide information to consumers, such as nutritional or product safety information "[b]ecause the commercial speaker has access to the facts regarding their products and services." Pomeranz, *supra* note 75, at 175. Subjecting cases of compelled commercial speech to intermediate scrutiny, however, would not change this because appropriate forms of compelled information would presumably pass the test.

261. *See* discussion *supra* at III.C.1.b.

262. *See Zauderer*, 471 U.S. at 651.

263. Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 556 (6th Cir. 2012) (noting that "[s]ignificantly, the Court upheld the required disclosures without separately analyzing whether they were unjustified or unduly burdensome").

264. *See Disc. Tobacco City*, 674 F.3d at 556.

ing[265] and because the government did not show that "absent disclosure, consumers would likely be deceived by the Companies' packaging in the future."[266] In contrast, the Sixth Circuit concluded that it was not necessary for the government to justify its requirements for preventing deception.[267] The court thus rejected the argument that consumers already "know—and in some cases overestimate—the health risks of using tobacco products."[268] The court explained that *Zauderer* does not require any kind of justification and instead merely requires compelled disclosures to be reasonably related to preventing deception:

> First, to the extent Plaintiffs argue that we must separately analyze whether the warnings are unjustified, they are mistaken. The test, as set forth in *Zauderer* and confirmed in *Milavetz* and *Sorrell*, is that the warnings (the means) be reasonably related to the purpose (here, preventing consumer deception). . . . Deciding whether a disclosure requirement is reasonably related to the purpose is all the law requires to assess constitutionality.[269]

This approach, which does not require the government to provide evidence that consumers would continue to be deceived without some kind of disclosure, is troubling for several reasons. If the government is not required or only has a minimal burden to show that the public would likely be misled without a factual disclosure, then there would be few checks on what the government could regulate in the context of commercial speech.[270] Consequently, the government could point to *any* instance of prior deception, even from decades ago, and declare that compelled disclosures were required to correct the misleading statements without having to show that consumers were still likely to be misled by the previous deception.[271] Any commercial speech that had previously contained potentially misleading statements could thus be the target of government regulation and intervention even if there were no danger of ongoing deceit. The resulting unrestrained power of the state to compel commercial speech implicates the previously discussed concerns about government abuse and overreach, state paternalism, intrusions on autonomy, and interference with commercial speakers' ability to market and sell goods.[272]

265. *See supra* notes 176–78 and accompanying text.

266. R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1216 (D.C. Cir. 2012).

267. *Disc. Tobacco City*, 674 F.3d at 562, 566.

268. *Id.*

269. *Id.* at 566–67.

270. Recall that the Supreme Court has suggested that the state has some evidentiary burden, but it is not clear what that burden is. *See supra* notes 128–129 and accompanying text.

271. *See* Nicole B. Cásarez, *Don't Tell Me What to Say: Compelled Commercial Speech and the First Amendment*, 63 MO. L. REV. 929, 969–71 (1998) (noting that "[s]everal times, the Court has emphasized that the state cannot be allowed to run roughshod over commercial speech just by announcing that it is eliminating fraud").

272. *See supra* Part III.C.1.b–c.

3. Purely Factual and Uncontroversial

Another point on which the Sixth Circuit and the D.C. Circuit diverge is in deciding whether the mandated graphics are "purely factual and uncontroversial," as required by *Zauderer*.[273] The Sixth Circuit did not have the actual graphics to consider but decided that it was possible for graphics to be purely factual and uncontroversial.[274] The D.C. Circuit, however, considered the actual images that were selected; it emphasized their "emotional" and "inflammatory" nature and found that they were controversial.[275] Because the FDA has chosen the graphics it originally would require, it is possible to evaluate them.

There is a fundamental difference between a label on a box of cereal that contains nutritional information and a picture of a carton of cigarettes that shows a dead human being with gruesome stiches running down his bare stomach, accompanied by the text, "SMOKING CAN KILL YOU" and "1-800-QUITNOW." If the image is given the benefit of the doubt—that is, if we accept that it only conveys the fact that smoking can kill you—then both the image and the text are technically factual. After all, study after study has shown this to be true.[276] The graphic and text on the cigarette package, however, are not just purely factual information; instead, they strongly convey the opinion that people should not smoke.

While this may be a laudable viewpoint, it is not purely factual and is certainly not one that tobacco companies would embrace. The Supreme Court has made it clear that "a speaker does have an autonomy interest in not being required to spread the government's normative message, even when engaging in commercial speech."[277] This is not to suggest that the government should only be able to mandate detached and emotionless disclosures, but if the messages approach the far end of the spectrum, then they are not uncontroversial.[278] However, it may sometimes be particularly difficult to discern if images convey a normative, or opinion-based, message. As Professor Rebecca Tushnet has argued, "The power of images comes not just from the emotions they evoke but also from the linked feature that they are hard to see as arguments: they persuade without overt appeals to rhetoric."[279] As the D.C. Circuit found, however, it may be difficult to conceive of the images as purely factual and uncontroversial when the Commissioner of the FDA

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

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

275. *See supra* notes 189–93 and accompanying text.

276. *See, e.g.*, *Health Effects of Cigarette Smoking*, CTRS. FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/tobacco/data_statistics /fact_sheets/health_effects/effects_cig_smoking/index.htm (last updated Feb. 6, 2014). The CDC gives an overview of the health effects of smoking and also provides a list of reports and studies that it used in compiling this data.

277. Keighley, *supra* note 227, at 570.

278. *See id.*

279. Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683, 692 (2012).

herself declared that with the passage of the Act "every single pack of cigarettes in the country" will, in effect, become a "mini billboard for the government's anti-smoking message."[280] Furthermore, as Professor Jennifer Keighley notes, "[T]he common reaction to these images is disgust and shock," which "strongly suggest[s] that the government's purpose was not to inform tobacco users about smoking's health risks, but rather to discourage individuals from smoking . . . ."[281]

4. Intermediate Scrutiny under Central Hudson

The Sixth Circuit did not apply the *Central Hudson* test in *Discount Tobacco City* because it found that *Zauderer* was the appropriate test.[282] On the other hand, the D.C. Circuit rejected *Zauderer* as the appropriate standard and instead applied *Central Hudson*.[283] The court quickly disposed of the first two parts of the *Central Hudson* test;[284] instead, the bulk of its analysis centered on whether the government met the third and fourth requirements. As discussed above,[285] Supreme Court precedent does not clearly articulate how strictly to interpret the third part of the *Central Hudson* test, which requires the regulation to directly advance the asserted state interest.[286]

The D.C. Circuit scrutinized the evidence more closely than Supreme Court precedent suggests is necessary. If the Court, however, does not require affirmative evidence that a compelled disclosure would materially advance the government's interest, then the *Central Hudson* test would resemble the rational basis test of *Zauderer*.[287] But, as previously discussed, the same level of scrutiny should apply to both compelled speech and restricted speech with the exception of compelled speech that prevents deception.[288] Thus, placing a higher burden on the government to justify regulations that compel disclosures, including mandated warnings on cigarette packages, would safeguard the values that the First Amendment protects. As noted, these values include en-

280. R.J. Reynolds Tobacco Co. v. Food and Drug Admin. 696 F.3d 1205, 1212 (D.C. Cir. 2012) (citing Graphic Health Warning Announcement, U.S. FOOD AND DRUG ADMIN. (Nov. 10, 2010), http://www.fda.gov/TobaccoProducts/NewsEvents/ucm232556.htm; Press Briefing by Press Secr'y Jay Carney, Health and Human Services Sec'y Kathleen Sebelius, and FDA Comm'r Margaret Hamburg (June 21, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/06/21/press-briefing-press-secretary-jay-carney-secretary-health-and-human-ser).

281. Keighley, *supra* note 227, at 582.

282. Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 523 (6th Cir. 2012).

283. *R.J. Reynolds*, 696 F.3d 1205, 1217 (2012).

284. *See supra* notes 200–01 and accompanying text.

285. *See supra* Part II.C.2.a.

286. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980).

287. *See* Shannon M. Hinegardner, *Abrogating the Supreme Court's De Facto Rational Basis Standard for Commercial Speech: A Survey and Proposed Revision of the Third Central Hudson Prong*, 43 NEW ENG. L. REV. 523, 561 (2009) (arguing that the "'material evidence' test, by requiring more than common sense, restores the level of *Central Hudson* third prong scrutiny to the level at which it belongs: intermediate scrutiny, not rational basis").

288. *See supra* Part III.C.1.

suring the free flow of truthful information and protecting individual autonomy.

5. The State's Interest in Preventing Deception

State-compelled disclosures designed to prevent deception do not implicate the same First Amendment concerns as compelled disclosures that concern other interests. When the state acts to protect consumers from deceptive commercial speech, it is still acting paternalistically, but the context is different when it acts for purposes such as providing education or health information.[289] When the state compels commercial speech to prevent deception, it ensures that the information that consumers receive is accurate, which ensures a basic level of fairness in the bargaining process.[290]

Additionally, while the state intrudes on the rights of commercial speakers by compelling them to disclose information, the speakers have arguably invited such a requirement by engaging in deceptive speech in the first place. It seems more intrusive and burdensome, however, to require commercial speakers to disclose government-mandated information when all they have done is offer a product or service for sale. Finally, it is difficult to conceive of alternative practical methods that the government could use to counteract deceptive commercial speech. While it is certainly feasible for the government to conduct antismoking campaigns,[291] it is less effective and also impractical for it to correct misleading commercial speech out of the context of the original misleading speech.[292]

IV. RECOMMENDATION

Attorney General Eric Holder indicated that the Department of Health and Human Services will not implement the graphics that the D.C. Circuit considered in *R.J. Reynolds* and will instead choose new

289. For a discussion of the theory that *all* paternalistic regulations, no matter what their purpose, cross the line, see Mala Corbin, *supra* note 247, at 986–87. Professor Mala Corbin gives an example of this theory's application in the context of tobacco advertising: "Under this view, if the only person at risk when a cigarette is lit is the smoker, the government should mind its own business. If a smoker wishes to learn about the perils of tobacco, she can look it up on the Internet." *Id.*

290. This idea is especially salient in the context of restrictions of commercial speech but is equally applicable when speech is compelled. *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501 (1996) ("[W]hen a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands.").

291. For a discussion of government anti-smoking campaigns, see James G. Hodge, Jr. & Gabriel B. Eber, *Tobacco Control Legislation: Tools for Public Health Improvement*, 32 J. L. MED. & ETHICS 516 (2004).

292. *But see* Ahron Leichtman, *The Top Ten Ways to Attack the Tobacco Industry and Win the War Against Smoking,* 13 ST. LOUIS U. PUB. L. REV. 729, 734 (1994) (discussing how California implemented an advertising program that was "built on the theme that smokers are being duped by the cigarette companies" and that informed consumers about tobacco companies' misleading advertising practices).

graphics.[293] The first Section of this Part explains that if the new images are challenged, or if there is a similar case regarding commercial speech compelled by the government, the Supreme Court should reject the *Zauderer* test and apply a slightly modified version of the *Central Hudson* test. The Court should also use such a case as an opportunity to clarify several aspects of each test. The second Section will apply the test enumerated in the first Section to the original graphics requirement.

A. Clarification of Zauderer *and* Central Hudson

In a future case regarding new graphics or other instances of compelled commercial speech, the Court should first clarify that *Zauderer* only applies when the government's interest is in preventing consumer deception and should extend *Central Hudson* to all other cases of compelled speech. As previously explained, if *Zauderer* applies when the government has interests beyond preventing deception, then *Zauderer*'s rational basis scrutiny would apply whenever the state compels speech, and *Central Hudson*'s intermediate scrutiny would apply when the state restricts speech.[294] The First Amendment principles behind compelled and restricted speech, however, including protecting the free flow of accurate information and preventing undue government intrusion and paternalism, are substantially similar. Consequently, the Court should apply *Central Hudson*'s intermediate scrutiny test to statutes that compel speech as long as the government interest is not correcting deception.

In deciding whether the government has an interest in preventing deception, the Court should carefully consider whether deception was present. If the government argues that the subject of the regulation is inherently misleading, the Court should require evidence to support this claim. If the Court relies on the prior misleading advertising of a company or industry, it should require affirmative proof that without the mandated disclosures the public will likely continue to be deceived. Without such a requirement, the government would presumably have unfettered discretion to compel disclosures from any company that had engaged in deceptive advertising in the past.

If the government is able to make an affirmative showing that consumers would be misled without the mandated disclosures, the Court should next closely scrutinize whether the compelled speech is purely factual and uncontroversial.

If the Court finds that deception is not present, it should apply *Central Hudson*. However, it should add the additional requirement that disclosures must be purely factual and uncontroversial, as required by *Zauderer*. Because this requirement would prevent the government from compelling information that is based on opinion, it seems logical to add this layer of scrutiny to the *Central Hudson* test. The Supreme Court

293. *See supra* note 10.
294. *See supra* note 229.

should also clarify the third part of the test (which requires the regulation to directly advance the governmental interest) and explain that the amount of proof it requires is substantial. This will help prevent commercial speech regulations from violating First Amendment values.

B. Application of the Test to the Original Graphic Image Requirement

Even though the Department of Health and Human Services is not implementing the graphics,[295] it is useful to consider how the Supreme Court should decide whether they are constitutional. This hypothetical analysis will provide a framework for the Supreme Court should it consider future images or other forms of compelled speech. With respect to the original graphics, the Court should reject the *Zauderer* test, apply the modified *Central Hudson* test, and find that the images are unconstitutional.

To apply *Zauderer*, the Court must first find that consumer deception is present. As previously discussed, however, there is no evidence that cigarette packages themselves are inherently misleading. In addition, if the Court relies on tobacco companies' prior misleading advertising as evidence of deception, it should require affirmative proof that the public would continue to be deceived without a disclosure.

However, even if the government makes an affirmative showing that consumers would be misled without the disclosures, the Court should still find that the mandated graphics and text fail the *Zauderer* test because they are not purely factual and uncontroversial. The text that screams "QUITNOW" and the inflammatory graphics clearly seem more akin to propaganda that encourages smokers to quit smoking than to uncontroversial facts simply relating the negative health benefits of cigarettes.

Because the Court should find that deception is not present, it should apply the *Central Hudson* test with the additional requirement that disclosures be purely factual and uncontroversial. With respect to the first part of the test, it seems likely that the Court would accept the government's stated interests, which include an interest in reducing youth smoking rates[296] (even though the D.C. Circuit Court questioned the validity of a government interest that seemed to be aimed at reducing the number of adults who purchase a lawful product[297]). The Court, however, should decide that the graphics do not directly advance this interest because there was no substantial proof that they did. As the D.C. Circuit concluded, the proof that the government offered in support of its posi-

295. *See supra* note 10.

296. Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,629 (June 22, 2011) ("The U.S. Government has a substantial interest in reducing the number of Americans, particularly children and adolescents, who use cigarettes and other tobacco products in order to prevent the life-threatening health consequences associated with tobacco use.").

297. R.J. Reynolds Tobacco Co. v. Food and Drug Admin. 696 F.3d 1205, 1218 n.13 (D.C. Cir. 2012).

tion only provided "ineffective or remote support for [its] purpose," and thus the government failed to meet its burden.[298] If the Court were to reach the fourth and suggested fifth parts of the *Central Hudson* test, it should find that the requirement fails these parts as well. With respect to the fourth part, which requires the government's regulation to not be more extensive than necessary,[299] the Court should find that the government has alternative means at its disposal to reduce smoking rates. The Court does not require the least restrictive means possible, as strict scrutiny does, but it has suggested that if the state could use an equally effective method in order to further its interest, then the regulation is more extensive than necessary.[300] In this case, the federal government could seemingly achieve its goal of reducing smoking rates by conducting educational campaigns or producing its own advertisements that warn about the health risks of cigarettes. In the alternative, the government could change the content of the currently mandated graphics to something less controversial and inflammatory. Finally, as discussed above, the chosen graphics are not purely factual and uncontroversial given their inflammatory nature and message.[301]

Thus, under this hypothetical analysis, the Supreme Court should find that the original graphics chosen by the FDA are unconstitutional. The Court should use this analysis as a guideline for evaluating new images or other forms of compelled speech in order to protect First Amendment values.

V. CONCLUSION

The Act's graphics requirement implicates significant questions about the position of commercial speech within the current First Amendment framework. The D.C. and Sixth Circuits have evaluated the graphics and reached two different conclusions as to whether they are constitutional. Each court applied a different test to the graphics based on their interpretation of Supreme Court precedent regarding state regulations of commercial speech and, as a result, each reached different conclusions. The D.C. Circuit concluded that the rational basis test of *Zauderer* only applies when the government compels disclosures to correct potentially deceitful commercial speech. The court found that cigarette packages are not inherently misleading and that the government had not provided affirmative evidence that consumers may still be deceived by prior deceptive advertising practices. It also decided that the graphics are controversial because of their inflammatory nature. The court then applied a strict interpretation of the *Central Hudson* test to the mandated graphics and concluded that they did not directly advance the government's interest in reducing smoking rates and were more extensive than

298. *Id.* at 1218 (internal citation omitted).
299. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980).
300. *See* discussion *supra* Part II.C.2.b.
301. *See* discussion *supra* Part III.C.3.

necessary. In contrast, the Sixth Circuit decided that *Zauderer* applied when the government has compelled speech in order to correct deception or, when it did so, to advance other interests. In applying *Zauderer*'s rational basis test, the court concluded that consumers may still be misled by prior cigarette advertising practices, although it did not require conclusive proof of these practices. The court then found that the compelled disclosures are reasonably related to the government's interests.

If the Supreme Court decides whether a new set of graphics and text is constitutional, it should also clarify its commercial speech precedent. The Court should consider the First Amendment values at stake when commercial speech is either compelled or restricted. It should conclude that whenever the government restricts or compels commercial speech, it potentially affects the free flow of accurate information and raises concerns about government paternalism. As a result, it should clarify that the same level of scrutiny, intermediate scrutiny, should apply when the government either compels or restricts commercial speech. To protect these First Amendment values, the Court should require affirmative evidence that prior deception continues to mislead consumers; if it does not find that this is true, then it should apply *Central Hudson*'s intermediate scrutiny test and add the requirement that disclosures be purely factual and uncontroversial. Furthermore, the Court should clarify that affirmative and conclusive evidence is needed in order to satisfy the third part of the test. By making these clarifications, the Supreme Court will prevent the government from having nearly unlimited and unjustified regulatory power.