Compelled Commercial Speech: the Food and Drug Administration's Effort to Smoke Out the Tobacco Industry through Graphic Warning Labels

Bryan M. Haynes, Anne Hampton Andrews and C. Reade Jacob, Jr.*

Introduction

On June 22, 2009, President Obama signed into law the Family Smoking Prevention and Tobacco Control Act (the "Tobacco Control Act").[1] The Tobacco Control Act provides the Food and Drug Administration (the "FDA") with the authority to regulate the manufacturing and sale of tobacco products.[2] Among other requirements, the Tobacco Control Act mandates that the Secretary of Health and Human Services "issue regulations that require color graphics depicting the negative health consequences of smoking to accompany the label statements."[3] Pursuant to this requirement, the FDA issued a rule identified as "Required Graphic Warnings for Cigarette Packages and Advertisements" (the "Rule") in June 2011. The graphic warning images mandated by the Rule included, among others, color images of a man exhaling cigarette smoke through a tracheotomy hole in his throat; a bare-chested male cadaver lying on a table, and featuring what appears to be post-autopsy chest staples down the middle of his torso; and a man wearing a T-shirt that features a "no smoking" symbol and the words "I Quit."[4]

Tobacco companies challenged the Rule's graphic warning images, arguing that the warning labels constituted unconstitutional compelled speech in violation of the First Amendment to the United States Constitution. The tobacco companies argued that the purpose of the mandate is to disgust and discourage consumers from purchasing a legal product. They noted that by forcing tobacco manufacturers to prominently display traumatic images on their labels, the disclosures essentially forced the manufacturers to use their own product as a billboard to deter consumers from buying their products. To this, the FDA argued that the images merely conveyed information about the factual consequences of smoking in a similar fashion to former tobacco warning labels.

The graphic warning label requirement led to two separate challenges on grounds that the images violated tobacco companies' First Amendment right to free speech. In *Discount Tobacco & City Lottery, Inc. v. United States*,[5] the United States Court of Appeals for the Sixth Circuit rejected a facial challenge to the constitutionality

* Bryan Haynes is a partner at Troutman Sanders LLP, Anne Hampton Andrews is an associate at Troutman Sanders LLP and Reade Jacob was a 2013 summer associate at Troutman Sanders LLP.

1 Pub. L. No. 11-31, 123 Stat. 1776 (2009).

2 *R.J. Reynolds Tobacco Co. v. FDA*, 845 F. Supp. 2d 266, 268-69 (D.D.C. 2012).

3 15 U.S.C. § 1333(d).

4 *R.J. Reynolds Tobacco*, 845 F. Supp. 2d at 271.

5 674 F.3d 509 (6th Cir. 2012).

of the warning label requirement. By contrast, both the United States District Court for the District of Columbia, in *R.J. Reynolds Tobacco Company v. Food and Drug Administration,*[6] as well as the United States Court of Appeals for the District of Columbia Circuit, in *R.J. Reynolds Tobacco Company v. Food and Drug Administration*,[7] determined that the actual images chosen by the FDA violated the First Amendment, albeit by applying two different standards of constitutional review.

In evaluating the labels' constitutionality, the debate centers on the First Amendment's commercial speech and compelled speech doctrines. In *Central Hudson Gas & Electric Corporation v. Public Service Commission*,[8] the United States Supreme Court defined "commercial speech" as "communication (such as advertising and marketing) that involves only the commercial interests of the speaker and the audience."[9] Commercial speech is afforded less First Amendment protection than social, political or religious speech.[10] On the other hand, government compelled or required speech generally receives the same level of protection as other types of speech.[11]

This article addresses the distinction between the commercial speech doctrine and the compelled speech doctrine as it pertains to the FDA's Rule requiring tobacco companies to place graphic warning images on cigarette packages. Although a number of scholars and judges argue that the distinction is minimal, the two doctrines potentially lead to vastly different outcomes. Part I discusses the Tobacco Control Act and the Rule. Part II explores the roots of the compelled speech and commercial speech doctrines. This Part examines the three levels of scrutiny the various courts have utilized in analyzing compelled speech or restricted speech cases under the two doctrines. Part III provides a detailed summary of the two recent federal appellate cases, *Discount Tobacco & City Lottery* and *R.J. Reynolds*, along with an overview of the respective district court opinions, involving challenges to the graphic warning label requirement. The decisions offer a compelling case study into the three standards of scrutiny. Part IV argues that the tobacco warning labels should be analyzed under the standards applied in compelled speech cases and not commercial speech cases. Furthermore, Part IV argues that the constitutionality of the graphic warning labels should be analyzed under the strict scrutiny standard, similar to that applied by the Supreme Court in *Wooley v. Maynard*.[12]

I. THE TOBACCO CONTROL ACT AND THE GRAPHIC WARNING LABEL REQUIREMENT

This Part discusses the FDA's attempt to regulate tobacco products prior to the enactment of the Tobacco Control Act. It also discusses FDA's authority to regulate tobacco products under the Tobacco Control Act. This Part also outlines the graphic warning label Rule adopted by the FDA pursuant to the Tobacco Control Act.

---

[6] 845 F. Supp. 2d 266 (D.D.C. 2012).

[7] 696 F.3d 1205 (D.C. Cir. 2012).

[8] 447 U.S. 557 (1980).

[9] *Id.* at 561-62.

[10] *See, e.g.*, *Ohralik v. Ohio State Bar*, 436 U.S. 447, 456 (1978) ("Rather than subject the First Amendment to such a devitalization, we have instead afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values."); *Central Hudson.*, 447 U.S. at 563-64 ("The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation.").

[11] *See Wooley v. Maynard*, 430 U.S. 705 (1977).

[12] 430 U.S. 705 (1977).

A. *The Tobacco Control Act*

Thirteen years before the Tobacco Control Act, the FDA unsuccessfully attempted to regulate tobacco products. In 1996, the FDA issued a proposed rule asserting authority to regulate cigarettes, roll-your-own tobacco and smokeless tobacco.[13] In 2000, the United States Supreme Court, in *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*,[14] held that Congress had not granted the FDA the authority to regulate tobacco products.[15] The FDA was therefore prohibited from regulating tobacco products until Congress passed the Tobacco Control Act, giving the FDA explicit regulatory authority.

By providing the FDA with the authority to regulate tobacco products, Congress anticipated that the FDA's regulations would "address issues of particular concern to public health officials, including the use of tobacco by young people and dependence on tobacco," and "promote cessation [of tobacco use] to reduce disease risk and the social costs associated with tobacco-related diseases."[16] Along those lines, Congress mandated that all cigarette packages manufactured, packaged, sold, distributed or imported for sale or distribution within the United States contain one of the following nine textual warning labels:

> WARNING: Cigarettes are addictive.
> WARNING: Tobacco smoke can harm your children.
> WARNING: Cigarettes cause fatal lung disease.
> WARNING: Cigarettes cause cancer.
> WARNING: Cigarettes cause strokes and heart disease.
> WARNING: Smoking during pregnancy can harm your baby.
> WARNING: Smoking can kill you.
> WARNING: Tobacco smoke causes fatal lung disease in nonsmokers.
> WARNING: Quitting smoking now greatly reduces serious risks to your health.[17]

Furthermore, the Tobacco Control Act requires that these labels occupy "the top 50 percent of the front and rear panels of the package."[18] The Tobacco Control Act also mandates that the Secretary of Health and Human Services "issue regulations that require color graphics depicting the negative health consequences of smoking to accompany the label statements" within 24 months of the enactment of the Tobacco Control Act.[19]

Other requirements of the Tobacco Control Act include prohibitions on tobacco manufacturers from selling "modified risk tobacco products" without permission from the FDA.[20] "Modified risk tobacco products" are defined as tobacco products sold or distributed to reduce harm or the risk of tobacco-related disease where: (1) the labeling represents that the product is less harmful than other products; (2) the labeling represents that the product contains a reduced level of, or exposure to, a substance;

---

[13] Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44396-01 (Aug. 28, 1996) (codified at 21 C.F.R. pts. 801, 803, 804, 807, 820 & 897).

[14] 529 U.S. 120 (2000).

[15] *Id.* at 161.

[16] Pub. L. No. 11-31, § 3(2), (9).

[17] 15 U.S.C. § 1333(a)(1). Tobacco companies were first required to place textual warning labels on cigarette packages when Congress enacted the Cigarette Labeling and Advertising Act of 1965.

[18] *Id.* § 1333(a)(2).

[19] *Id.* § 1333(d).

[20] 21 U.S.C. § 387k.

(3) the labeling represents that the tobacco product or its smoke does not contain or is free of a substance; (4) the labeling or advertising uses descriptors such as light, mild or low; or (5) the manufacturer makes any claim that would be reasonably expected to lead consumers to believe that the tobacco product may present a lower risk of disease or is less harmful.[21] In other words, the FDA must ensure that modified-risk claims are supported by scientific evidence and that the advertising and labeling enable the public to understand these claims.[22]

Additionally, the Tobacco Control Act mandates a number of restrictions identified as being aimed at reducing underage tobacco use. For example, the Tobacco Control Act provides that cigarettes may not contain flavoring (other than tobacco or menthol), herbs or spices, including strawberry, grape, orange, clove, cinnamon, pineapple, vanilla, coconut, licorice, cocoa, chocolate, cherry or coffee, that is the "characterizing flavor" of the tobacco product.[23] The Tobacco Control Act also requires a tobacco company to provide thirty days' notice to the FDA before it conducts any brand name advertising in a medium other than newspapers, magazines, periodicals, billboards, posters, promotional material (including direct mail) or point-of-sale promotional material.[24] The notice must describe the medium and the extent to which the advertising may be seen by minors.[25] Additionally, the Tobacco Control Act directs the FDA to issue regulations which would prohibit outdoor advertising for cigarettes and smokeless tobacco, including through billboards, posters and placards within 1,000 feet of any playground, elementary school or secondary school.[26]

The Tobacco Control Act also specifies the appropriate form and content of advertising. All advertisements must use only black text on a white background, with the exception of advertising in adult-only facilities or adult-only publications.[27] "Adult-only facilities" and/or "adult-only publications" are defined in the Tobacco Control Act as publications where minors constitute 15 percent or less of the readership and that are read by less than two million minors.[28] Additionally, audio and video advertising may

---

[21] *Id.*

[22] U.S. Food and Drug Administration, *Less Risky Tobacco Product? Only if the Science Says So*, Mar. 30, 2012, *available at* http://www.fda.gov/ForConsumers/ConsumerUpdates/ucm297895.htm (last visited July 16, 2013).

[23] 21 U.S.C. § 387g(a)(1)(A).

[24] 21 C.F.R. § 1140.30(a)(1).

[25] *Id.* § 1140.30(a)(2).

[26] *See* 21 U.S.C. § 387a-1(2) (providing that the provisions of the Rule must be identical to 61 Fed. Reg. 44615-44618). The cited provision, 61 Fed. Reg. 44615-44618, is a rule that FDA promulgated in 1996 that prohibited outdoor advertising of tobacco products within 1,000 feet of any playground, elementary school or secondary school. Identical language was declared unconstitutional in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001). In an attempt to meet constitutional muster, the Tobacco Control Act provides that the Rule must be appropriate "in light of governing First Amendment case law, including the decision of the Supreme Court of the United States in *Lorillard Tobacco Co. v. Reilly*." 21 U.S.C. § 387a-1(2)(E). In March 2010, the FDA issued a regulation whereby it "determined that it is appropriate in light of governing First Amendment case law to solicit additional information regarding outdoor advertising in order to determine what modifications to this section, if any, are appropriate." Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco To Protect Children and Adolescents, 75 Fed. Reg. 13225-13226 (Mar. 19, 2010).

[27] 21 C.F.R. § 1140.32(a)(2). In *Disc. Tobacco City & Lottery*, the Sixth Circuit determined that the Tobacco Control Act's ban on the use of color and graphics in tobacco advertising was unconstitutional in light of *Central Hudson* because it was "vastly overbroad" and "not narrowly tailored." 674 F.3d at 548.

[28] *Id.* § 1140.32(a)(2)(i).

not have music or sound effects.[29] Video advertisements are limited to a static black text on a white background.[30]

B. *The Rule*

Consistent with the Tobacco Control Act's requirement for the FDA to develop graphic warning labels, in June 2011, the FDA introduced the Required Warnings for Cigarette Packages and Advertisements,[31] selecting nine graphic warning labels.[32] The images mandated by the FDA include: (1) color images of a man exhaling cigarette smoke through a tracheotomy hole in his throat; (2) a plume of cigarette smoke enveloping an infant receiving a kiss from his or her mother; (3) a pair of diseased lungs, next to a pair of healthy lungs; (4) a bare-chested male cadaver lying on a table, and featuring what appears to be post autopsy chest staples down the middle of his torso; and (5) a man wearing a T-shirt that features a "no smoking" symbol and the words "I Quit."[33] The FDA noted that the images were selected based on their ability evoke an emotional response to "increase the likelihood smokers will reduce their smoking, make an attempt to quit, or quit altogether."[34]

In its analysis of the proposed rule, the FDA stated that the existing research indicates that a range and variety of images is effective in increasing the likelihood of quitting the use of tobacco products.[35] For example, the FDA claimed that the use of health warnings with "frightening" or "disturbing" tonal qualities appears effective. Consistent with this research, the FDA stated that some of the images published with the proposed regulation are more "frightening" or visually disturbing than others.[36] The FDA acknowledged that the new graphic warning labels on cigarettes packages were designed to convey the negative health consequences of smoking in order to discourage the use of tobacco products.[37]

II. FIRST AMENDMENT SCRUTINY OF RESTRICTIONS ON COMMERCIAL SPEECH AND ON COMPELLED SPEECH

This Part discusses the various levels of scrutiny that the Supreme Court has applied when analyzing cases under the commercial speech and compelled speech doctrines. In reviewing First Amendment claims involving these issues, the Supreme Court has applied three different standards: (1) rational basis; (2) intermediate scrutiny; and (3) strict scrutiny. The government's burden in justifying the purpose of a law varies greatly among these three standards.

---

[29] *Id.* § 1140.32(b)(1).

[30] *Id.* § 1140.32(b)(2).

[31] Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36628 (June 22, 2011) (codified at 21 C.F.R. pt. 1141).

[32] 15 U.S.C. § 1333(a)(1).

[33] *R.J. Reynolds Tobacco*, 845 F. Supp. 2d at 271.

[34] Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36628, 36639 (June 22, 2011) (codified at 21 C.F.R. pt. 1141).

[35] *Id*.

[36] *Id*.

[37] *Id.*

A. *The Commercial Speech and the Compelled Speech Doctrines*

Among the guarantees in the First Amendment is the right to free speech.[38] The First Amendment provides that Congress shall make no law "abridging the freedom of speech, or of the press."[39] Significantly, nothing in the text of the First Amendment mentions or even alludes to a distinction between commercial and noncommercial speech.[40] However, in 1942, the Supreme Court, in *Valentine v. Chrestensen*,[41] upheld a prohibition on the distribution of any "handbill [or] other advertising matter [in] or upon the street."[42] Although the Court acknowledged that a similar prohibition on noncommercial expression would violate the First Amendment, the Court held that "the Constitution imposes no . . . restraint on government as respects purely commercial advertising."[43] Yet the Court's unanimous decision cited no authority for its holding.[44] Instead of delving into distinctions between commercial speech and public speech, the Court merely concluded that commercial speech was not afforded protection under the First Amendment. Not surprisingly, the rule articulated in *Chrestensen* did not hold water for long.[45]

Thirty-four years later, the Supreme Court overruled its decision in *Chrestensen*.[46] In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,[47] the Court held that a Virginia law banning the advertisement of prescription drugs was an unconstitutional restriction on free expression under the First Amendment.[48] The Court noted that one of the First Amendment guarantees is the right of citizens to "receive information and ideas and that freedom of speech necessarily protects the right to receive."[49] The Court also recognized that commercial advertisements, which propose purely economic commercial transactions, hardly disqualify them from protection under the First Amendment.[50] Given this, the Court concluded that advertising, "however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price."[51] Because the free flow of information is indispensable to a well-informed public, the Court concluded that the advertising restriction was unconstitutional.[52]

Although the Court in *Virginia State Board of Pharmacy* recognized that commercial speech is protected under the First Amendment, the Court did not go so far as to hold

---

[38] U.S. Const. amend I.

[39] *Id.*

[40] *See id*.

[41] 316 U.S. 52 (1942).

[42] *Id.* at 52 n.1.

[43] *Id.* at 54 ("Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment.").

[44] Alex Kozinski and Stuart Banner, *Who's Afraid of Commercial Speech*?, 76 Va. L. Rev. 627, 628 (1990).

[45] *See, e.g.*, *Cammarano v. United States*, 358 U.S. 748, 514 (1959) (Douglas, J. concurring) (noting that the holding in *Chrestensen* "was casual, almost offhand. And it has not survived reflection.").

[46] *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

[47] 425 U.S. 748 (1976).

[48] *Id.* at 773.

[49] *Id.* at 757.

[50] *Id*. at 762 ("Speech likewise is protected even though it is carried in a form that is 'sold' for profit.").

[51] *Id*. at 765.

[52] *Id.* at 773.

that commercial speech "could never be regulated in any way."[53] The Court, albeit in a footnote, announced that there are "commonsense differences" between commercial speech and noncommercial speech which suggest that a different level of scrutiny would be applied to each type of speech when assessing whether the speech is afforded protection under the First Amendment.[54] For example, the First Amendment does not prohibit the restriction of false, deceptive or untruthful information.[55] Instead, the Court acknowledged that the government possessed latitude to take measures designed to assure dissemination of "truthful and legitimate commercial information."[56]

The Court's decision in *Virginia State Board of Pharmacy* spawned an unwieldy and complex line of cases under what has since become known as the "commercial speech" doctrine.[57] In a law review article, Robert Post ("Post") aptly describes the "commercial speech" doctrine as "a notoriously unstable and contentious domain of First Amendment jurisprudence."[58] Post credits this instability to the Court's fashioning of a doctrine that rests heavily on the commonsense distinction between proposing a commercial transaction and other varieties of speech.[59] Unfortunately, these commonsense differences turned out to be quite complex. Over time, the doctrinal trunk sprouted a number of entirely new branches, each with a different standard and test. For example, compelled commercial speech may be analyzed under a different standard of review than restrictions on commercial speech. However minor the difference between compelled commercial speech and restricted commercial speech may be, the outcome of a case is often determined by a court's classification of the speech.

Three lines of cases that stem from the "commercial speech" and "compelled speech" doctrines are potentially applicable to the tobacco graphic warning requirement. Traditionally, compelled speech cases that were not within the commercial sphere were analyzed under the strict scrutiny standard of review. Conversely, where there is misleading information in the commercial setting plus a disclosure requirement by the government, courts have applied a rational basis standard of review, the lowest form of scrutiny. Falling somewhere in the middle, restrictions on speech in the commercial setting are typically reviewed under an intermediate scrutiny standard.

B. *Rational Basis Employed in Cases Involving Misleading Speech Coupled with a Disclosure Requirement*

In narrow circumstances, certain types of compelled commercial speech fall under a rational basis standard of review. A rational basis standard is applied in circumstances where the government mandates a disclosure because the speech could potentially mislead consumers. Under this standard, a law requiring a disclosure label on an

[53] *Id*. at 770. These commonsense distinctions justifying a different standard than noncommercial speech revolve around the notion that commercial speech is more objective than noncommercial speech because its truth is more easily verifiable, and commercial speech is more durable than noncommercial speech because it is engaged in for profit.

[54] Kozinski & Banner, *supra* note 45, at 629 (citing *Virginia State Bd. of Pharmacy*, 425 U.S. at 772 n.24).

[55] *Virginia State Bd. of Pharmacy*, 425 U.S. at 771-72 ("The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.").

[56] *Id*. at 772 n.24.

[57] *See, e.g.*, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986); *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985); *Central Hudson*, 447 U.S. at 557.

[58] Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. Rev. 1, 2 (2000).

[59] *Id*. at 2.

advertisement that is potentially misleading does not violate the First Amendment so long as there is a "rational connection between the warnings' purpose and the means used to achieve that purpose."[60] To date, the Supreme Court has only applied this standard in two cases which shared essentially the same facts and issues.

In *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*,[61] the Supreme Court upheld an Ohio rule that required attorneys to disclose in advertisements that losing clients may still be liable for costs if their cases were unsuccessful.[62] The attorney's advertisement stated that, "if there is no recovery, no legal fees are owed by our clients."[63] "Because the extension of the First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides," the Court reasoned, a state constitutionally may require advertisers to disclose specific information in their advertisements if that requirement is "reasonably related to the State's interest in preventing deception of consumers."[64]

Similarly, in *Milavetz Gallop & Milavetz, P.A. v. United States*,[65] the Supreme Court applied the same rational basis standard and upheld a federal statute requiring law firms engaged in the practice of debt relief to identify themselves as debt relief agencies.[66] Noting that the facts were nearly identical to the facts in *Zauderer*, the Court in *Milavetz Gallop* held that because the federal statute is directed at misleading commercial speech and imposes only a disclosure requirement, rather than an affirmative limitation on speech, the less exacting scrutiny set out in *Zauderer* governs.[67]

While the Court applied the rational basis standard in *Zauderer* and *Milavetz Gallop*, two cases with similar facts, it is important to note that both decisions applied the lower standard to circumstances where the speech potentially misled consumers. In *Zauderer*, the Court explicitly stated that it did not suggest that "disclosure requirements do not implicate the advertiser's First Amendment rights at all."[68] *Zauderer* further provided that the government may require disclosure only of "purely factual and uncontroversial information" if the mandatory disclosure is not unduly burdensome.[69] As the United States District Court for the D.C. District of Columbia noted in *R.J. Reynolds*, even under the rational basis standard, compelled disclosures containing "purely factual and uncontroversial information," that are meant to mitigate the effects of misleading speech may still offend the First Amendment if the disclosure is considered "unjustified or unduly burdensome."[70]

Although the Supreme Court has yet to utilize the strict scrutiny standard in analyzing compelled speech cases in the commercial setting, the United States Court of Appeals for the Seventh Circuit, in *Entertainment Software v. Blagojevich*,[71] applied the more rigorous standard in declaring as unconstitutional a law requiring violent and sexually

---

[60] *Disc. Tobacco City & Lottery*, 674 F.3d at 56-62.

[61] 471 U.S. 626 (1985).

[62] *Id.* at 651.

[63] *Id.* at 631.

[64] *Id*. at 651.

[65] 559 U.S. 229 (2010).

[66] *Id.* at 252-53.

[67] *Id.* at 249.

[68] 471 U.S. at 651.

[69] *Id*.

[70] *R.J. Reynolds Tobacco*, 845 F. Supp. 2d 266, 273-74 (D.D.C. 2012).

[71] 469 F.3d 641 (7th Cir. 2006).

explicit video games to carry a warning label.[72] The Seventh Circuit acknowledged that the *Zauderer* standard applies where "states required the inclusion of 'purely factual and uncontroversial information . . . as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers.'"[73] In the case of explicit video games, however, the State's definition of the term "sexually explicit" is far more opinion-based than the question of "whether a particular chemical is in any given product."[74] Because the Seventh Circuit determined that the labels were far more opinion-based, the court in *Blagojevich* applied a strict scrutiny standard of review.[75]

C. *Intermediate Scrutiny Employed in Cases Involving Restricted Speech*

Restricted commercial speech that is not untruthful or misleading is analyzed under the intermediate scrutiny standard. In *Central Hudson,* the Supreme Court for the first time applied intermediate scrutiny analysis in reviewing a First Amendment challenge based on commercial speech.[76] The Court held that an order by the public service commission prohibiting utility companies from engaging in promotional advertising designed to stimulate the use of electricity violated the First Amendment.[77] The Court noted that the "Constitution [accords] a lesser protection to commercial speech than to other constitutionally guaranteed expression."[78] The Court applied a four-part analysis for commercial speech cases.[79]

> [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. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.[80]

Applying this analysis to the ban on promotional advertising, the Court concluded that the first three prongs were satisfied.[81] However, the Court concluded that a complete ban on promotional advertising was more extensive than is necessary to serve the government's interest of conserving energy.[82] For example, the public service commission's interest in conservation could be satisfied by requiring that "the advertisements include information about the relative efficiency and expense of the offered service."[83] The Court concluded that, "in the absence of a showing that

---

[72] *Id.* at 651-52.

[73] *Id.* at 652 (quoting *Zauderer*, 471 U.S. at 651).

[74] *Id*.

[75] *Id*.

[76] Kristen M. Sempeles, Comment, *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, 236 (2012).

[77] *Central Hudson*, 447 U.S. at 570.

[78] *Id.* at 566.

[79] *Id.*

[80] *Id*.

[81] *Id.* at 566-69.

[82] *Id.* at 569-70.

[83] *Id*. at 571.

more limited speech regulation would be ineffective, we cannot approve the complete suppression of *Central Hudson*'s advertising."[84]

Application of the *Central Hudson* standard, however, is not always fatal in fact. In *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*,[85] the Court upheld a Puerto Rican statute that legalized certain forms of casino gambling but prohibited any advertisement of casino gambling aimed at the residents of Puerto Rico.[86] In a 5-4 decision, the Court determined that Puerto Rico had a substantial government interest in reducing casino gambling amongst its residents and that the law directly advanced that interest.[87] Applying *Central Hudson*, the Court concluded that the statute did not violate the First Amendment's restriction on commercial speech.[88]

In *Posadas*, the Court appeared undeterred by the argument that "the government could have enacted a wholesale prohibition of the underlying conduct" in order to stop the problems associated with casino gambling.[89] Instead, the Court determined that it was permissible for the government to take "the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising."[90] The Court concluded that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling," and that it "would be a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product of activity, but deny to the legislature the authority to forbid the stimulation of demand for the product or activity through advertising."[91]

Following the Court's reasoning in *Pasadas* may lead one to believe that a state could constitutionally ban all cigarette advertising. However, a number of more recent cases belie this notion. For example, in *44 Liquormart, Inc. v. Rhode Island*,[92] the Supreme Court invalidated a state ban on advertising of alcohol prices except for signs inside liquor stores and on the price tags so long as the prices were not visible from the street.[93] The majority opined that "*Posadas* clearly erred in concluding that it was 'up to the legislature' to choose suppression over a less speech-restrictive policy."[94] Further limiting the holding of *Posadas*, the Court noted that "a state legislature does not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes."[95] Although unanimously agreeing to invalidate the statute, the Court was divided on what standard of scrutiny to apply in doing so.[96] That said, "all of the

[84] *Id*.

[85] 478 U.S. 328 (1986).

[86] *Id.* at 348.

[87] *Id*. at 340-44.

[88] *Id*. at 348.

[89] *Id.* at 346.

[90] *Id.* "Legislative regulation of products or activities deemed harmful, such as cigarettes, alcoholic beverages, and prostitution, has varied from outright prohibition on the one hand . . . to legalization of the product or activity with restrictions on stimulation of its demand on the other hand." *Id.* (internal citation omitted). *Compare* Cal. Penal Code Ann. § 647(b) (prohibiting soliciting or engaging in act of prostitution), *with* Nev. Rev. Stat. § 244.345(1), (8) (1986) (authorizing licensing of houses of prostitution except in counties with more than 250,000 population) *and* Nev. Rev. Stat. §§ 201.430 & 201.440 (prohibiting advertising of houses of prostitution "[i]n any public theater, on the public streets of any city or town, or on any public highway," or "in [a] place of business").

[91] *Id*. at 345-46.

[92] 517 U.S. 484 (1996).

[93] *Id.* at 490 n.2.

[94] *Id.* at 509.

[95] *Id.* at 510.

[96] *Id.* at 488-89.

principal opinions expressed strong skepticism toward state regulation of advertising as a device for preventing consumers from knowing about a product in order to induce them not to buy it."[97]

Five years later, the Court reaffirmed this position in *Lorillard Tobacco Co. v. Reilly*.[98] The Court in *Lorillard* held that regulations promulgated by the Attorney General of Massachusetts that prohibited outdoor advertising of tobacco products within 1,000 feet of a public playground or elementary or secondary school violated the First Amendment.[99] The majority declared the regulations unconstitutional under the *Central Hudson* standard.[100] The Court noted that "the final step of the *Central Hudson* analysis [requires] a reasonable fit between the means and ends of the regulatory scheme. The Attorney General's regulations [with respect to outdoor advertising] do not meet this standard."[101] While conceding that preventing underage tobacco use is a substantial governmental interest, and even a compelling governmental interest, the Court determined that "the sale and use of tobacco product by adults is a legal activity" and tobacco retailers "have an interest in conveying truthful information about their products to adults."[102] Harkening back to the *Central Hudson* standard, the Court in *Lorillard* concluded that "[the] Attorney General has failed to show that [these regulations] are not more extensive than necessary to advance the State's substantial interest in preventing underage tobacco use."[103]

More recently, in *Sorrell v. IMS Health Inc.*,[104] the Supreme Court imposed a "heightened" scrutiny when evaluating the constitutionality of a Vermont law that imposed both a "content- and speaker-based" restriction on speech.[105] The Vermont law forbade the sale (absent express consent by prescribers) of "prescriber-identifiable information" by pharmacies to data mining companies for "marketing or promoting a prescription drug."[106] The law simultaneously allowed the sale of the same information to be purchased by "other speakers with diverse purposes and viewpoints."[107] The Court applied a "heightened scrutiny" standard to the law noting that the "State must show at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest."[108] The Court concluded that the "law cannot satisfy that standard" and struck down the law as a violation of the First Amendment's free speech clause.[109] The Court noted: "If pharmaceutical marketing affects treatment decisions, it does so because doctors find it persuasive. Absent circumstances far from those presented here, the fear that speech might persuade provides no lawful basis for quieting it."[110]

---

[97] Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of 44 Liquormart*, 1996 Sup. Ct. Rev. 123, 126 (1996).

[98] 533 U.S. 525 (2001).

[99] *Id*. at 533-36.

[100] *Id.* at 554-555.

[101] *Id*. at 561 (internal citation omitted).

[102] *Id.* at 564.

[103] *Id*. at 565.

[104] 564 U.S. __, 131 S. Ct. 2653 (2011).

[105] *Id.* at __, 131 S. Ct. at 2663.

[106] *Id.* at __, 131 S. Ct. at 2660.

[107] *Id.* at __, 131 S. Ct. at 2663.

[108] *Id.* at __, 131 S. Ct. at 2667-68.

[109] *Id.* at __, 131 S. Ct. at 2659.

[110] *Id.* at __, 131 S. Ct. at 2670 (citing *Brandenburg v. Ohio,* 395 U.S. 444, 447 (1969)).

Interestingly, the *Sorrell* Court declined to distinguish *Central Hudson* from the more stringent heightened scrutiny noting that "[t]he outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied."[111] The Supreme Court's emphasis on the First Amendment's aversion to content-based restraints in *Sorrell*, together with its suggestion that commercial speech restrictions often trigger "heightened" scrutiny, could suggest that the Court is "narrowing [the] gap between the principles that govern fully protected speech and those peculiar to commercial expression."[112]

While the Court continues to follow the four-part analysis set forth in *Central Hudson* in cases involving restricted commercial speech, the Court has yet to apply the *Central Hudson* analysis to a case involving compelled speech. However, the Court opined that the First Amendment requires courts to be "especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."[113] It is clear from *Virginia Board of Physicians* that the Court believes individuals possess a right to "'receive information and ideas'" under the First Amendment.[114] As a result, the Court has been hesitant to restrict the flow of truthful information. Consequently, if restrictions on speech that tends to educate the public are disfavored because they keep people in the dark, disclosures compelled by the government meant to enlighten people must be viewed under a different standard.

D. *Compelled Speech: Strict Scrutiny*

While restrictions on speech that keep people in the dark are viewed with a degree of skepticism, compelled speech reflecting a government-sanctioned ideology or opinion is viewed with significantly more suspicion by the Supreme Court.[115] Well-established precedent upholds the notion that the First Amendment fundamentally protects "both the right to speak freely and the right to refrain from speaking at all."[116] Additionally, "leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say."[117] The Supreme Court acknowledges that certain types of compelled speech are "presumptively unconstitutional" and must withstand strict scrutiny.[118] To withstand strict scrutiny in a First Amendment case based on compelled speech, the government must demonstrate that the compelled speech is narrowly tailored to achieve a compelling government interest.[119]

---

[111] *Id.* at __, 131 S. Ct. at 2667.

[112] Nat Stern and Mark Stern, *Advancing an Adaptive Standard of Strict Scrutiny for Content-Based Commercial Speech Regulation*, 47 U. Rich. L. Rev. 1171, 1186 (2013).

[113] *44 Liquormart*, 517 U.S. at 503.

[114] 425 U.S. at 757 (quoting *Kleindienst v. Mandel,* 408 U.S. 753, 762-763 (1972)).

[115] *See*, *e.g.*, *Wooley*, 430 U.S. at 717 ("[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."); Sullivan, *supra* note 97, at 127 ("The Court would appear to view suppressing commercial speech by reason of its message or communicative impact as suspicious. . .").

[116] *R.J. Reynolds Tobacco*, 845 F. Supp. 2d at 272 (citing *Wooley*, 430 U.S. at 714).

[117] *Rumsfeld v. Forum for Academic and Institutional Rights, Inc*., 547 U.S. 47, 61 (2006) (citing *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (addressing school board resolution which required "stiff-arm" salute and pledge recitation)).

[118] *Rosenberger v. Rector & Visitors of the Univ. of Va*., 515 U.S. 819, 828 (1995) ("Discrimination against speech because of its message is presumed to be unconstitutional.").

[119] *R.J. Reynolds Tobacco*, 845 F. Supp. 2d at 272.

In *West Virginia State Board of Education v. Barnette*,[120] the Supreme Court first recognized that there is a right not to be compelled to support or express ideas with which one disagrees.[121] In *Barnette*, the Court declared unconstitutional a state law requiring that all public school children salute and pledge allegiance to the flag of the United States.[122] Justice Jackson, writing for the majority, famously stated:

> [But if] there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.[123]

In *Wooley*, the Supreme Court applied strict scrutiny to a New Hampshire state law that made it a crime to cover up part of the state's license plate that bore the official state motto, "Live Free or Die."[124] The Court noted that the New Hampshire law in effect required individuals to "use their private property as a 'mobile billboard' for the State's ideological message."[125] Such speech, the Court reasoned, is subject to strict scrutiny because "where 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."[126] Ultimately, the First Amendment protects "the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable."[127]

Similarly, in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,[128] the Supreme Court concluded that a law requiring a private organizers' parade to promote a message not of the organizers' own choosing violated the First Amendment.[129] In *Hurley*, the City Council for the City of Boston denied the GLIB, an organization formed for the purpose of expressing its members' pride as openly gay, lesbian and bisexual individuals, the opportunity to participate in the annual Saint Patrick's Day parade.[130] The GLIB sued the City Council, claiming a violation of a Massachusetts state public accommodations law, which "prohibits 'any distinction, discrimination or restriction on account of . . . sexual orientation . . . relative to the admission of any person to, or treatment in any place of public accommodation, resort or amusement.'"[131]

The Supreme Court in *Hurley* stated that "[a]lthough the state courts spoke of the parade as a place of public accommodation, once the expressive character of both the parade and the marching GLIB contingent is understood, it becomes apparent that the state courts' application of the statute had the effect of declaring the sponsors' speech itself to be the public accommodation."[132] Based on this approach, "any contingent of

[120] 319 U.S. 624 (1943).

[121] *Id.* at 642.

[122] *Id.*

[123] *Id.*

[124] 430 U.S. at 716.

[125] *Id.* at 715.

[126] *Id*. at 717.

[127] *Id.* at 715.

[128] 515 U.S. 557 (1995).

[129] *Id.* at 566.

[130] *Id.* at 560-61.

[131] *Id.* at 561 (quoting Mass. Gen Laws § 272:98 (1992)).

[132] *Id. at 573.*

protected individuals with a message would have the right to participate in petitioners' speech, so that the communication produced by the private organizers would be shaped by all those protected by the law who wished to join in with some expressive demonstration of their own."[133]

Reiterating the theme from *Pacific Gas & Electric Company v. Public Utilities Commission of California*,[134] the Court in *Hurley* opined that "[s]ince *all* speech inherently involves choices of what to say and what to leave unsaid," one important manifestation of the principle of free speech is that one who chooses to speak may also decide "what not to say."[135] Ultimately, the Court concluded that a speaker's right to tailor the speech "applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid."[136] The Court held that "this use of the State's power violates the fundamental rule of protection under the First Amendment [because] a speaker has the autonomy to choose the content of his own message."[137]

In *Pacific Gas*, the Supreme Court in a plurality opinion extended compelled speech protection to commercial speech.[138] The issue in *Pacific Gas* was whether the California Public Utilities Commission (the "Commission") could force a public utility company to include in its billing envelopes speech of a third party with which the public utility company disagreed.[139] The public utility company had been inserting political editorials and stories into its monthly bill.[140] The Commission mandated that the public utility company provide extra space for the Commission to voice its own message.[141] Although the Commission placed no limitations on what the public utility company or the organization could say, the Commission mandated that the public utility company identify the messages as its own.[142]

The Court in *Pacific Gas* held that the Commission's forced speech was unconstitutional under the First Amendment.[143] The Court applied the *Wooley* strict scrutiny standard noting that, "[f]or corporations as for individuals, the choice to speak includes within it the choice of what not to say," and "speech does not lose its protection because of the corporate identity of the speaker."[144] The Court's opinion in *Pacific Gas* offers insight as to how the Court may decide a commercial compelled speech case in the future.

III. DECISIONS ADDRESSING THE GRAPHIC WARNING LABEL REQUIREMENT

This Part explores the opinions of four different courts that have assessed the constitutionality of the requirement for tobacco companies to place graphic warning images on cigarette packages. The United States District Court for the Western District of Kentucky and the United States Court of Appeals for the Sixth Circuit were presented with a facial challenge to the graphic warning labels. By contrast, the United States

[133] *Id.*

[134] 475 U.S. 1 (1986).

[135] *Hurley*, 515 U.S. at 573 (quoting *Pacific Gas*, 475 U.S. at 11) (internal quotation marks omitted).

[136] *Id.*

[137] *Id*.

[138] 475 U.S. at 16.

[139] *Id*. at 5.

[140] *Id.*

[141] *Id.*

[142] *Id.* at 5-6.

[143] *Id.* at 20-21.

[144] *Id*. at 16.

District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit were presented with an as-applied challenge to the graphic warning labels. Each of the three standards outlined in Part II was applied by at least one of these courts in analyzing the FDA's graphic warning requirement.

A. *A Facial Challenge to the Graphic Warning Labels*

1. *Kentucky District Court*

In August 2009, four tobacco companies and a tobacco retailer sued the FDA, alleging the graphic warning label requirement was facially unconstitutional.[145] Both sides filed cross-motions for summary judgment.[146] Applying the intermediate scrutiny standard from *Central Hudson* when evaluating the constitutionality of the Rule, the Kentucky District Court granted each party's motions in part.[147]

As for the warning requirements, Plaintiffs made several arguments in support of their challenge. Plaintiffs argued that the mandatory disclosure "is unconstitutional because it unjustifiably and unduly burden[s] Plaintiffs' commercial speech . . . [and] unconstitutionally compel[s] Plaintiffs to disseminate the Government's anti-tobacco message."[148] Relying on *Ibanez v. Florida Department of Business and Professional Regulation, Board of Accountancy*[149] in support of their position, Plaintiffs argued that the warnings are unjustified because the FDA "cannot point to any harm that is potentially real . . . that these warnings are needed to remedy."[150] Plaintiffs also argued that the mandatory warning disclosure was far more burdensome than the one struck down in *Ibanez*.[151] Finally, Plaintiffs argued that strict scrutiny applied "because this is not a case mandating publication of 'purely factual and uncontroversial information,' but rather a case of forcing Plaintiffs to become the mouthpieces for the Government marketing campaign designed . . . to promote the Government's subjective desire that consumers stop using tobacco products altogether."[152] The Kentucky District Court found that "Plaintiffs' entire argument rests on the idea that, since the public already appreciates the health risks associated with using tobacco products, the government's goal must be to browbeat potential tobacco consumers, including youth, over the head with its anti-tobacco message at the manufacturers' expense."[153]

The court found that the FDA's goal was to warn consumers of health risks associated with tobacco, not to stigmatize tobacco use.[154] The court cited evidence that the visibility of warning labels increases their impact.[155] For example, the Surgeon General reported

[145] Complaint, *Disc. Tobacco City & Lottery v. FDA*, 678 F. Supp. 2d 512 (W.D.K.Y. 2010) (No. 1:09CV-117-M).

[146] *Disc. Tobacco City & Lottery*, 678 F. Supp. 2d at 519. The Kentucky District Court sided with the tobacco companies on the issue of color and graphics, finding that the government should have tailored the ban apply only to marketing directed toward youth. *Id.* at 525-26. The law's "blanket ban" on use of color and images exceeded the scope of *Central Hudson*, which permits a law to "extend only as far as the interest it serves." *Id.* at 525.

[147] *Id.* at 519-20.

[148] *Id.* at 528 (internal quotation marks omitted).

[149] 512 U.S. 136, 146 (1994) (declaring unconstitutional a law where the government failed to point to a potentially real harm).

[150] *Disc. Tobacco City & Lottery*, 678 F. Supp. 2d at 529 (internal quotation marks omitted).

[151] *Id.*

[152] *Id.* at 530 (internal citation omitted).

[153] *Id.*

[154] *Id.*

[155] *Id.*

in 1994 that studies dealing "with the visibility of cigarette warnings in advertising . . . consistently indicated that the Surgeon General's warnings are given little attention or consideration by viewers" in large part because of the waning novelty of the warnings and the decreasing size of the warnings.[156] Likewise, the court also relied on a 2007 report from the Institute of Medicine that "declared that the basic problems with the U.S. warnings are that they are unnoticed and stale, and they fail to convey relevant information in an effective way."[157] Ultimately, the Kentucky District Court ruled in favor of the FDA, holding that the warning requirements were "sufficiently tailored to advance the government's substantial interest under *Central Hudson*."[158]

2. *The Sixth Circuit*

On March 19, 2012, the Sixth Circuit affirmed the Kentucky District Court's decision.[159] The Sixth Circuit applied the *Zauderer* rational basis standard and concluded the Tobacco Control Act's warnings are reasonably related to the government's interest in preventing consumer deception and are therefore constitutional.[160]

The court noted that a facial challenge on the constitutionality of a law faces an uphill battle. Unlike a typical as-applied challenge, "'[t]o succeed in a typical facial attack, [a plaintiff] would have to establish that no set of circumstances exists under which [the statute] would be valid, or that the statute lacks any plainly legitimate sweep.'"[161] As a result, facial challenges tend to be disfavored.[162]

With one strike already against the Plaintiffs, the Sixth Circuit concluded that the commercial disclosures should be analyzed under either a *Zauderer* rational basis standard or a *Wooley* strict scrutiny standard.[163] The majority dismissed the applicability of the *Central Hudson* test by relying on the conclusion in *Zauderer* that mandated disclosures merit a less stringent level of protection than commercial speech restrictions, which typically fall under the intermediate scrutiny test.[164] Instead of falling back on the more stringent strict scrutiny standard, the Sixth Circuit broadly construed the narrow holding of *Zauderer* to apply to the disclosure requirements for non-misleading commercial speech. In contrast to the actual holding of *Zauderer* and its progeny, the Sixth Circuit determined that *Zauderer* could apply even if the statute's "purpose is something other than or in addition to preventing consumer deception."[165]

---

[156] *Id.* (internal quotation marks omitted).

[157] *Id.* (internal quotation marks omitted).

[158] *Id.* at 532.

[159] *Disc. Tobacco & City Lottery*, 674 F.3d at 569.

[160] *Id.*

[161] *Id*. at 554 (quoting *United States v. Stevens*, 559 U.S. 460, 472 (2010)).

[162] While the Sixth Circuit Court reviewed the case under a facial challenge, the majority opinion in dicta stated that it could envision graphic warnings that would fall under the factual disclosure requirement of *Zauderer*. *See Disc. Tobacco City & Lottery*, 674 F.3d at 559. The examples provided by the Court mirrored a number of the proposed FDA graphic warning labels, which had been released after the District Court's ruling but prior to the Sixth Circuit's ruling. *Id*.

[163] *Disc. Tobacco City & Lottery*, 674 F.3d at 554.

[164] *Id.* at 555. "Protecting commercial speech under the First Amendment is principally justified by protecting the flow of accurate information, and requiring factual disclosures furthers that goal." *Id.* (citing *Zauderer*, 471 U.S. at 650-51). "Thus, a commercial speaker's 'constitutionally protected interest in not providing any particular factual information in his advertising is minimal.'" *Id.* (quoting *Zauderer*, 471 U.S. at 651).

[165] *Id*. at 556.

The Sixth Circuit justified this extension by relying on *National Electrical Manufacturers Association v. Sorrell,*[166] an opinion from the United States Court of Appeals for the Second Circuit.[167] In *Sorrell*, the Second Circuit evaluated the constitutionality of a statute that required manufacturers of mercury-containing lamps to disclose this fact on their products and packing.[168] The court reasoned that the disclosure's purpose was not to prevent deception, but to better protect "human health and environment" by reducing the amount of mercury released, a purpose closely related to "better inform[ing] customers about the products they purchase."[169] Because the required disclosure provided accurate, factual commercial information, it protected the "robust and free flow of accurate information [which] is the primary First Amendment justification for protecting commercial speech."[170]

Following the Second Circuit's decision in *Sorrell*, the court in *Discount Tobacco City & Lottery* focused on whether the graphic warnings could provide accurate and factual information to the consumer.[171] The court then examined whether there were any set of circumstances "under which [the statute] would be valid, or that the statute lack[ed] any plainly legitimate sweep."[172] The Sixth Circuit identified a number of examples of potentially factually accurate pictures such as a drawing of a nonsmoker's and of a smoker's lungs displayed side by side.[173] Images such as healthy and unhealthy lungs, in the court's opinion, represented a factual representation of potential medical conditions caused by smoking.[174] Because the Sixth Circuit case involved a facial challenge to the Tobacco Control Act and the court noted a number of potential images that could be considered accurate and factual, the court determined that the *Zauderer* rational basis standard applied rather than the compelled speech standard.[175]

Under the *Zauderer* standard, the court considered whether the required graphic warnings are "constitutional if there is a rational connection between the warnings' purpose and the means used to achieve that purpose."[176] The court answered this in the affirmative.[177] After acknowledging the validity of the FDA's argument of the necessity for the new graphic warning requirements, the court noted that the "warnings' purpose is to prevent consumers from being misled about the health risks of using tobacco" and that "the warnings are designed to 'promote greater public understanding of [those] risks.'"[178] Predictably, the court concluded that there was a rational connection between the warnings' purpose and the means used to achieve that purpose.[179]

The Sixth Circuit's opinion in *Discount Tobacco City & Lottery* acknowledged that compelled-speech outside the framework of *Zauderer* should be analyzed under

---

[166] 272 F.3d 104 (2d Cir. 2001).

[167] *Disc. Tobacco City & Lottery*, 674 F.3d at 557-58.

[168] 272 F.3d at 107.

[169] *Disc. Tobacco City & Lottery*, 674 F.3d at 557 (quoting *Sorrell*, 272 F.3d at 115) (internal quotation marks omitted).

[170] *Id*. (quoting *Sorrell*, 272 F.3d at 114) (internal quotation marks omitted).

[171] *Id.* at 555-61.

[172] *Id*. at 559.

[173] *Id.* at 560-61.

[174] *Id.* at 559.

[175] *Id.*

[176] *Id*. at 561.

[177] *Id.* at 569.

[178] *Id*. at 561 (quoting 15 U.S.C. § 1333(d)).

[179] *Id.* at 569.

the *Wooley* strict scrutiny standard.[180] Although the Sixth Circuit took a much more expansive view of the parameters of *Zauderer*, the court's acknowledgment of the Seventh Circuit's opinion in *Blagojevich* -- that the *Central Hudson* standard is limited only to commercial speech restrictions and not to disclosures -- supports the notion that warning label requirements do not fall under the intermediate standard approach. This makes sense given the Court's longstanding belief that the free flow of accurate information is beneficial to the public.

Judge Clay dissented from the majority on the topic of tobacco graphic warning labels. Interestingly, Judge Clay applied the *Zauderer* standard but came to a different conclusion. He stated, "[the Government] has not adequately shown that the inclusion of color graphic warning labels is a properly or reasonably tailored response to address [the alleged] harm."[181] Judge Clay noted that "the color graphic warning labels are intended to create a visceral reaction in the consumer, in order to make a consumer less emotionally likely to use or purchase a tobacco product."[182] That said, he conceded that it could be permissible for the government to require a product manufacturer to provide truthful, even frightening information to a consumer. However, Judge Clay remained skeptical that the government provided sufficient evidence to justify its attempt "to simply frighten consumers or to otherwise attempt to flagrantly manipulate the emotions of consumers as it seeks to do here."[183] Judge Clay ultimately concluded that, "[t]hough the hurdle that *Zauderer* erects for the government is a relatively low one, it is still a hurdle the government must surmount."[184] The Government failed to do so in this instance.[185]

B. *An As-Applied Challenge to the Graphic Warning Labels*

1. *The D.C. District Court*

In August 2011, five tobacco companies filed suit in the D.C. District Court against the FDA, alleging that the Rule violated their First Amendment right to free speech.[186] This case involved a different issue than the Kentucky District Court case. The D.C. case involved an as-applied challenge to the graphic warning labels (that is, *after* the FDA determined the labels' actual content) rather than a facial challenge to the warning label requirement. Therefore, while the Sixth Circuit only needed to consider whether "no set of circumstances exists" under which the statute would be valid, the D.C. District Court analyzed the constitutionality of the FDA's actual proposed graphic images.

The D.C. District Court temporarily enjoined the FDA from enforcing any of the new requirements.[187] The parties then filed cross-motions for summary judgment.[188] On February 29, 2012, the D.C. District Court held that the tobacco graphic warning

[180] *Id.* at 554.

[181] *Disc. Tobacco City & Lottery*, 674 F.3d at 528 (J. Clay, dissenting).

[182] *Id.* at 528.

[183] *Id*. at 529.

[184] *Id* at 530.

[185] *Id*.

[186] Complaint, *R.J. Reynolds Tobacco Co. v. FDA*, 845 F. Supp. 2d 266 (D.D.C. 2011) (No. 1:11-CV-01482-RJL).

[187] Order Granting Preliminary Injunction, *R.J. Reynolds Tobacco Co. v. FDA*, 845 F. Supp. 2d 266 (D.D.C. 2011) (No. 1:11-CV-01482-RJL).

[188] *R.J. Reynolds Tobacco*, 845 F. Supp. 2d at 268.

images selected by the FDA violated the First Amendment by "unconstitutionally compelling speech."[189]

The D.C. District Court's opinion echoed the Court's central theme in *Wooley*: "[a] fundamental tenant of constitutional jurisprudence is that the First Amendment protects 'both the right to speak freely and the right to refrain from speaking at all.'"[190] From this, the D.C. District Court identified this type of compelled speech as "presumptively unconstitutional."[191] Reviewing the constitutionality of the FDA's graphic warning image requirement under a strict scrutiny analysis, the Court determined that the "rule was not narrowly tailored to achieve a compelling government interest under the First Amendment."[192]

The D.C. District Court first established that compelled speech should be analyzed under a *Wooley* strict scrutiny analysis, not the rational basis standard applied in *Zauderer*.[193] The D.C. District Court determined that the Rule's graphic image requirements clearly were not the type of disclosures reviewable under the less stringent *Zauderer* standard.[194] While the Court in *Zauderer* noted that compelled disclosure must be intended to protect consumers from confusion or deception and the disclosure must be "purely factual and uncontroversial," the D.C. District Court concluded that the FDA's proposed images were quite the opposite.[195]

The proposed images reviewed by the D.C. District Court included: (1) a plume of cigarette smoke enveloping an infant receiving a kiss from his or her mother; (2) a bare-chested male cadaver lying on a table, featuring a what appears to be post-autopsy chest staples down the middle of his torso; and (3) a man wearing a t-shirt that features a no smoking symbol and the words "I quit."[196] In referring to these images, Judge Leon stated that they:

> [W]ere neither designed to protect the consumer from confusion or deception, nor to increase consumer awareness of smoking risks; rather, they were crafted to evoke a strong emotional response calculated to provoke the viewer to quit or never start smoking.[197]

Unlike the disclosure requirement upheld in *Zauderer*, the graphic warning images did not "promote informed choice" but instead advocated to consumers that they should quit smoking altogether. Furthermore, many of the graphic images were neither factual nor accurate as required under the *Zauderer* standard.[198] The court determined that the graphic images "ultimately communicated [ ] a subjective and highly uncontroversial message" and the government crossed the line between the conveyance of factual information and advocacy.[199]

---

[189] *Id*.

[190] *Id*. at 272 (quoting *Wooley*, 430 U.S. at 714).

[191] *Id*. (quoting *Rosenberger v. Rector & Visitors of the Univ. of Va*., 515 U.S. 819, 830 (1995)).

[192] *Id*.

[193] *Id*.

[194] *Id.* at 272-76.

[195] *Id*. at 272.

[196] *Id.*

[197] *Id*.

[198] *Id*. at 273.

[199] *Id*. at 274 (quoting *Blagojevich*, 469 F.3d at 652).

Based on the foregoing, the D.C. District Court concluded that the constitutionality of the FDA's graphic warning labels should be analyzed under the strict scrutiny standard.[200] To succeed, the FDA was required to show that the Rule was "narrowly tailored to achieve a compelling government interest."[201] The FDA argued that a compelling interest in requiring the graphic warning labels existed – "conveying to consumers generally, and adolescents in particular, the devastating consequences of smoking and nicotine addiction."[202] The court rejected this argument, noting that "the Government's actual purpose is not to inform or educate, but rather to advocate a change in behavior."[203]

Further dismantling the FDA's position, the D.C. District Court noted that the Rule could not be considered narrowly tailored to achieve the Government's purpose. By requiring companies to dedicate the top 50 percent of the front and back of all cigarette packages, the plaintiffs would essentially be forced to promote the government's message.[204] The D.C. District Court cited a number of potentially less restrictive measures the FDA's could take to achieve its purpose.[205] These less restrictive measures include: (1) increasing taxes; (2) providing its own smoking-cessation campaign; (3) altering the space requirements to twenty percent of the packaging; (4) redesigning the graphics to covey only factual information; or (5) developing a smoking-cessation program specifically targeted at youths.[206] Because the FDA failed to carry both its burden of demonstrating a compelling governmental interest and its burden of demonstrating that the Rule is narrowly tailored to achieve a constitutionally permissible form of compelled commercial speech, the D.C. District Court found that the Rule violated the tobacco companies' First Amendment right to free speech. [207]

2. *D.C. Circuit*

In affirming the D.C. District Court's opinion, the D.C. Circuit declined to apply either the *Zauderer* rational basis standard utilized by the Sixth Circuit or the *Wooley* strict scrutiny standard utilized by the D.C. District Court. Instead, like the Kentucky District Court, the D.C. Circuit analyzed the constitutionality of the graphic warning labels under the *Central Hudson* intermediate scrutiny standard.[208] The D.C. Circuit shared the lower court's view that the *Zauderer* standard did not apply because: (1) the graphic warnings represented an effort by the FDA to discourage consumers from buying the tobacco companies' products, rather than to combat deceptive claims; and (2) the images "do not impart purely factual, accurate, or uncontroversial information to consumers."[209]

However, the D.C. Circuit departed from the D.C. District Court's reasoning that the compelled speech in question should be analyzed employing strict scrutiny. The D.C. Circuit followed a previously established standard in *United States v. Philip Morris*,[210] a case recently decided by that court. In *Philip Morris*, the court examined a challenge

[200] *Id.* at 277.

[201] *Id*. at 274.

[202] *Id*. (internal quotation marks omitted).

[203] *Id*. at 275.

[204] *Id*.

[205] *Id.* at 276.

[206] *Id*.

[207] *Id.* at 277.

[208] *R.J. Reynolds Tobacco*, 696 F.3d at 1216.

[209] *Id*.

[210] 566 F.3d 1095 (D.C. Cir. 2009).

to the district court's order requiring certain tobacco manufacturers to publish corrective statements on their websites, in newspapers and on major television networks.[211] The court in *Philip Morris* concluded that "the Supreme Court's bottom line is clear: the government must affirmatively demonstrate its means are narrowly tailored to achieve a substantial government goal."[212] Because the D.C. Circuit viewed the compelled disclosure requirement under the Rule in the same light as the compelled disclosure requirement in *Phillip Morris*, the D.C. Circuit applied the intermediate standard set forth in *Central Hudson*.[213]

Applying the *Central Hudson* standard, the D.C. Circuit determined that the "only explicitly asserted interest in either the Proposed or Final Rule is an interest in reducing smoking rates."[214] Under the assumption that the FDA's interest in reducing smoking rates qualified as substantial,[215] the court next determined whether the FDA offered substantial evidence demonstrating that the graphic warning requirements directly advanced the governmental interest to a material degree, as required under the *Central Hudson* standard.[216] To this the court noted that the record contained not "a shred of evidence" that the graphic warning images would "reduc[e] the number of Americans who smoke."[217] In its Rule, the FDA relied on two studies of Canadian and Australian youth smokers who viewed the graphic warning images on cigarette packages.[218] These studies claimed that the graphic warning images caused a substantial number of viewers to consider quitting smoking.[219] The D.C. Circuit found these two studies unconvincing, stating that "at no point did these studies attempt to evaluate whether the increased thoughts about smoking cessation led participants to actually quit."[220] Not only did the court appear sympathetic to the notion that the graphic warning labels would not reduce smoking rates "to a material degree," it went so far as to say "that such warnings are *not* very effective at promoting cessation and discouraging initiation."[221] Because the FDA failed to establish that the Rule would "directly advance" the FDA's interest protecting individuals from the detriments of smoking, the D.C. Circuit held that the graphic warning labels were unconstitutional.[222] Consequently, the D.C. Circuit vacated the Rule.[223]

---

[211] *R.J. Reynolds Tobacco*, 696 F.3d at 1217 (citing *Philip Morris*, 566 F.3d at 1142-43).

[212] *Id*. (quoting *Philip Morris*, 566 F.3d at 1142-43).

[213] *Id.* at 1217-21.

[214] *Id*. at 1217.

[215] In fact, the court expressed skepticism that the FDA had a substantial governmental interest in discouraging consumers from purchasing a lawful adult product. *R.J. Reynolds Tobacco*, 696 F.3d at 1238 n.13. However, the court noted that the Supreme Court has at least implied that the government could have a substantial interest in reducing smoking rates in *FDA v. Brown & Williamson Tobacco Corporation,* 529 U.S. 120, 161 (2000). *Id*.

[216] *R.J. Reynolds Tobacco*, 696 F.3d at 1218.

[217] *Id.* at 1219.

[218] *Id.* at 1219-20.

[219] *Id.*

[220] *Id*.

[221] *Id*. at 1220 ("In light of the number of foreign jurisdictions that have enacted large graphic warning labels, the dearth of data reflecting decreased smoking rates in these countries is somewhat surprising, and strongly implies that such warnings are *not* very effective at promoting cessation and discouraging initiation.").

[222] *Id.* at 1222.

[223] *Id*.

C. *Aftermath of the Courts' Rulings on the Constitutionality of the Graphic Warning Labels*

In response to the unfavorable ruling by the Sixth Circuit, the tobacco companies petitioned for rehearing *en banc*.[224] The Sixth Circuit denied the tobacco companies' request in May 2012.[225] Thereafter, the tobacco companies filed a petition for writ of *certiorari* with the Supreme Court in October 2012.[226]

The tobacco companies' request for Supreme Court review came within weeks of the FDA's request for rehearing of the D.C. Circuit case.[227] The D.C. Circuit denied the FDA's request for a rehearing *en banc* in December 2012.[228] Following the denial of its petition for rehearing, the FDA declined to further challenge the D.C. Circuit's ruling.

The decisions by the Sixth Circuit and D.C. Circuit create an arguable circuit split. However, on April 22, 2013, the Supreme Court denied the tobacco companies' petition for writ of *certiorari* from the Sixth Circuit.[229] While it may appear that the Supreme Court denied *certiorari* for a true circuit split, one could easily argue that there is in fact no split at all. The D.C. Circuit case involved a slightly different issue because it was an applied challenge to the warning labels (that is, *after* the FDA determined the labels' content); whereas, the Sixth Circuit case involved a facial challenge to the warning label requirement. It is more plausible, however, that the Court's denial of *certiorari* rests on the fact that the Solicitor General determined in March of 2013 not to seek Supreme Court review of the D.C. Circuit ruling.[230] Instead, it appears likely that the FDA will either propose new labels to replace the previously proposed labels or, according to a letter from Attorney General Eric Holder, "undertake research to support a new rulemaking consistent with the Tobacco Control Act."[231]

IV. STANDARDS FOR FUTURE REVIEW OF GRAPHIC WARNINGS — STRICT SCRUTINY AS APPLIED TO COMPELLED SPEECH

Although the Supreme Court recently declined to review the graphic warning requirement, it is likely that this issue will reach the Court when, as predicted, the FDA announces a new set of graphic warning labels. Unless the Supreme Court carves out a new doctrine, it is likely that the Supreme Court will analyze graphic warning labels under one of the three previously outlined standards.

This Part advocates that the Supreme Court should apply the strict scrutiny standard articulated in *Wooley*. Under the *Wooley* standard, the state's interest must be sufficiently compelling to justify the mandated speech. Applied to the FDA's graphic warning labels, it is clear that this form of compelled speech is in violation of the First Amendment. As the Supreme Court noted in *Wooley*, the government's interest in disseminating ideology

---

[224] Petition for Rehearing, *Disc. Tobacco City & Lottery, Inc. v. FDA*, No. 10-5234 (May 7, 2012).

[225] *Disc. Tobacco City & Lottery, Inc. v. FDA*, Nos. 10-5234 & 10-5235, 2012 U.S. App. LEXIS 11820 (6th Cir. May 31, 2012).

[226] Petition for Writ of *Certiorari*, *Disc. Tobacco City & Lottery, Inc. v. FDA*, No. 12-521 (Oct. 30, 2012).

[227] Petition for Rehearing, *R.J. Reynolds Tobacco Company v. FDA*, No. 11-5332 (Oct. 9, 2012).

[228] *R.J. Reynolds Tobacco Co. v. FDA*, Nos. 11-5332 & 12-5063, 2012 U.S. App. LEXIS 24976 (D.C. Cir. Dec. 5, 2012).

[229] *Am. Snuff Co., LLC v. United States*, 133 S. Ct. 1996 (2013).

[230] Michael Felberbaum, *US to Revise Cigarette Warning Labels*, Associated Press State & Local Wire, Mar. 19, 2013, *available at* http://www.usatoday.com/story/news/nation/2013/03/19/cigarette-warning-labels/2000549/.

[231] *Id*.

"cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message."[232] By requiring companies to act as its mouthpiece for a subjective and highly controversial marketing campaign expressing disapproval for their lawful products, the government is clearly forcing the tobacco industry to act as its courier.

A. *Rational Basis Standard as Applied in Zauderer*

An argument could be made that the tobacco graphic warning requirements should be evaluated as compelled speech under either under the *Zauderer* standard or the *Wooley* standard. Upon further examination of *Discount Tobacco City & Lottery*, one notices that the application of the *Zauderer* standard fits the graphic warning requirement poorly. The FDA's disclosures were designed with the intention to discourage consumers from buying a legal product by provoking their disgust through use of a dramatic graphic image. Educating consumers about the adverse health effects of smoking through a written disclosure is a far cry from mandating a tobacco company utilize a disgusting label imploring consumers not to purchase a product which is legal for sale to adults.

A number of problems emerge from the Sixth Circuit's application of the *Zauderer* standard to the graphic warning labels. Although the Sixth Circuit believed that the *Zauderer* framework may apply even if the required disclosure's purpose is something other than preventing consumer deception, the court ultimately concluded that the tobacco companies engaged in deceptive practices.[233] The opinion referenced a number of studies and previous court opinions discussing tobacco manufacturers' prior deceptive practices and knowledge of the dangers of smoking.[234] Ironically, however, the Sixth Circuit never identified the deceptive nature of the current tobacco package itself. Instead, the court pointed to a Supreme Court case that cited with approval the Federal Trade Commission's conclusion that, "to avoid giving a false impression that smoking [is] innocuous, the cigarette manufacturer who represents the alleged pleasures or satisfactions of cigarette smoking in his advertising must also disclose the serious risks to life that smoking involves."[235]

However, it is easy to see today that nowhere on a package of cigarettes is there any indication that the product is innocuous. Indeed, it is common knowledge that cigarettes are *not* innocuous. In fact, the Tobacco Control Act imposes a number of restrictions on what can be displayed on a tobacco package. The Tobacco Control Act bans any labeling or advertising representing that any tobacco product "presents a lower risk of tobacco-related disease or is less harmful than one or more other commercially marketed tobacco product."[236] It also bans advertising or labeling using the descriptors "light," "mild" or other similar descriptors.[237] By reviewing the entirety of the Tobacco Control Act, one can easily see that the law already prevents manufacturers' deception on the tobacco product itself.

Today, the manufacturer of Camel cigarettes holds the product out to be merely what it is -- Camel cigarettes. The packaging on Camel cigarettes merely allows a consumer to identify the brand he or she prefers. The Sixth Circuit seems to reason that because certain tobacco companies previously engaged in deceptive practices, it must follow

[232] *Id*. at 717.

[233] *Disc. Tobacco City & Lottery*, 674 F.3d at 546.

[234] *See, e.g*., *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1105 (D.C. Cir. 2009) (affirming the district court's finding of deception by nine tobacco manufacturers).

[235] *Disc. Tobacco City & Lottery*, at 674 F.3d at 562-63 (citing *Cipollone v. Liggett Group, Inc*., 505 U.S. 504, 527 (1992)).

[236] 21 U.S.C. § 387k (b)(2)(A)(i)(I).

[237] *Id.* § 387k (b)(2)(A)(ii).

that the current cigarette labels were and continue to be the catalyst of deception. But tobacco products' current packaging and advertising is a far cry from the misleading advertisements at issue in *Zauderer* and *Milavetz*.

The Sixth Circuit, in its application of *Zauderer*, further neglected an essential feature in the *Zauderer* holding: that the disclosure cannot be unduly burdensome.[238] In applying the *Zauderer* rational basis standard to conclude that the Tobacco Control Act's graphic warning labels are reasonably related to a legitimate governmental interest in preventing consumer deception, the Sixth Circuit refused to analyze whether the warnings were unduly burdensome as required in *Zauderer*.[239] The court stated that "the test is simply that the warnings be reasonably related to the government's interest in preventing consumer deception," not whether the requirements are unduly burdensome.[240] The Supreme Court in *Zauderer* offered little attention to the disclosure requirement on the advertisement, which is likely due to the small size of the disclosure at issue in the case. However, the FDA's required disclosure label and graphic design must occupy "the top 50 percent of the front and rear panels of the package."[241] The sheer size of the disclosure, coupled with the graphic nature of the photos, "impose a particularly onerous burden on speech."[242]

B. *Intermediate Scrutiny as Applied in the Central Hudson*

Although the D.C. Circuit's application of the *Central Hudson* standard leads to the correct outcome, the D.C. Circuit failed to note the important distinction between the commercial speech and compelled speech doctrines. The two doctrines are based on entirely different ideas. The commercial speech doctrine is based on promoting the free flow of information. The compelled speech doctrine is based on discouraging the government from using private property as a "mobile billboard" for the state's ideological message. It is arguable that the distinctions are unnecessary; however, the Supreme Court has yet to merge these two doctrines. Instead, it is more likely that the Supreme Court will apply either the *Zauderer* rational basis standard or the *Wooley* strict scrutiny standard.

Application of the *Central Hudson* standard to the graphic warning labels fails to account for the distinction between the commercial speech and compelled speech doctrines. Although the D.C. Circuit reached the correct outcome on the constitutionality of the FDA's graphic warning labels, it conflated the commercial speech doctrine with the compelled speech doctrine. This is understandable given that the graphic warning labels are both commercial in nature and compel speech.

In a recent law review article, Nat Stern and Mark Stern argue that the distinction between compelled speech and compelled silence "often cannot be neatly distinguished."[243] The Sterns recognize that, "as a matter of physical space or consumers'

[238] *See, e.g.*, *Milavetz, Gallop & Milavetz, P.A.*, 559 U.S. 229, 250 (2010) ("Unjustified or unduly burdensome disclosure requirements offend the First Amendment by chilling protected speech, but '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.") (quoting *Zauderer*, 471 U.S. at 651).

[239] *Disc. Tobacco City & Lottery*, 674 F.3d at 567 ("[t]o the extent that Plaintiffs argue that we must separately analyze whether the warnings are unduly burdensome, they are mistaken.").

[240] *Id*.

[241] 15 U.S.C. § 1333(a)(2).

[242] *Lorillard*, 533 U.S. at 564 (declaring unconstitutional a Massachusetts law that prohibited outdoor tobacco advertising within 1,000 feet of a school or playground because "the governmental interest in protecting children from harmful materials . . . does not justify an unnecessarily broad suppression of speech addressed to adults".).

[243] Stern & Stern, *supra* note 113, at 1188.

attention, government-required content may crowd out or overshadow an advertiser's own message."[244] The article advocates for an adaptive standard of strict scrutiny in compelled speech cases whereby the government is required "to prove why elements such as the size, style and phrasing of the disclosure are absolutely crucial in conveying the state's message."[245] This adaptive standard proffered by the Sterns could be triggered "when compelled commercial speech on its face is patently ideological or materially onerous."[246] Furthermore, "the government's burden of justification should be heightened only when compelled disclosures carry facial indicia of aims other than providing consumers with sufficient information to make informed decisions."[247]

The graphic tobacco warning labels clearly fall under the Sterns' adaptive standard of strict scrutiny. As recognized by the D.C. Circuit, the graphic warning labels "were crafted to evoke a strong emotional response calculated to provoke the viewer to quit or never start smoking."[248] Furthermore, the requirement that 50 percent of the cigarette package contain a warning imposed by the government heavily detracts from the tobacco companies' own speech. Given that tobacco is a legal product for adults, it is obvious that the government is merely requiring tobacco companies to "use their private property as a "mobile billboard" for the State's ideological message."[249] In *Wooley*, the Supreme Court concluded that "where 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."[250] Similarly, the FDA's interest in curbing the use of a legal product cannot outweigh the tobacco companies' First Amendment right to avoid supporting the government's anti-smoking message.

While the Sterns' adaptive standard theory is compelling, it too conflates the commercial speech and compelled speech doctrines in a way that the Supreme Court has yet to sanction. The two doctrines are based on entirely different ideas, one on promoting the free flow of information and the other on discouraging the government from using private property as a 'mobile billboard' for the state's ideological message. While the graphic warning label requirement arguably encompasses both compelled speech and restricted speech, the compulsion of the warning labels vastly overshadows the restriction of speech. The graphic warning labels seem much more akin to a "mobile billboard" imposed by the government than a restriction on what a tobacco company can say in an advertisement.

By analyzing the distinction between graphic warning labels and textual warning labels, one notices that the differences may indeed warrant a different standard of review. While the difference between text and graphics on a cigarette package may seem nominal, the message conveyed by text versus graphics is quite stark. In *Tobacco Advertising and the First Amendment*, Martin H. Redish described textual warnings as effectively saying to the potential consumer: "The government believes that engaging in this activity presents serious health risks, but you should choose to live for the enjoyment and pleasures of the moment, and use of our product will provide you with pleasure."[251]

[244] *Id.*

[245] *Id.* at 1196.

[246] *Id.*

[247] *Id*. at 1188.

[248] *R.J. Reynolds Tobacco*, 696 F.3d at 1216.

[249] *Wooley*, 430 U.S. at 715.

[250] *Id*. at 716.

[251] Martin H. Redish, *Tobacco Advertising and the First Amendment*, 81 Iowa L. Rev. 589, 609 (1996). As long as tobacco advertisements simultaneously include health warnings, then, the argument that such advertisements are inherently deceptive is itself false and misleading.

Textual requirements seem more in line with the "free flow of information" building block upon which *Central Hudson* sits and would likely withstand review.

Conversely, as previously mentioned, the graphic warning label is not meant to convey information. As the Sterns stated in their article, to see a post-autopsy corpse with its lungs removed is to be told: "Do not smoke."[252] The graphic warning and textual warning lead the consumer to two entirely different conclusions. The traditional textual warnings required by the government present the consumer with an option. The graphic warnings required by the government demand that the consumer not use the legal product.

A growing number of courts acknowledge that compelled speech cases belong in a different category than *Central Hudson*. These courts identify the inherent differences between compelled speech and restricted speech. For example, the Seventh Circuit in *Blagojevich* examined whether an Illinois law, requiring video game retailers to place a four square-inch label with the numerals "18" on any "sexually explicit" video game, violated the First Amendment.[253] After determining that the *Zauderer* standard was inapplicable, the court in *Blagojevich* applied a strict scrutiny standard akin to *Wooley* to conclude that the compelled speech was unconstitutional.[254] Interestingly, the Seventh Circuit in *Blagojevich* never mentioned the *Central Hudson* standard. This seems to imply that other circuit courts may view the *Central Hudson* standard to apply only to cases involving commercial speech restrictions, not mandatory disclosures. This is consistent with the Supreme Court's desire to encourage the free flow of accurate information in the public sphere. Clearly, this encouragement yields when the tobacco companies are required to engage in speech contrary to their own economic self-interest and promote the government's ideology or set of beliefs.

The Second Circuit also draws a distinction between compelled commercial speech and restricted speech. In *Sorrell*, the Second Circuit declined to apply a restricted commercial speech standard to a Vermont statute that required mercury-containing products to contain a label that informs consumers that the product contains mercury and should be disposed of properly.[255] Instead, the Second Circuit applied the reasonable-relationship rule in *Zauderer* to the compelled commercial speech doctrine.[256] Tellingly, the court in *Sorrell* noted that the compelled disclosure regarding mercury was not intended to prevent "consumer confusion or deception," as in *Zauderer,* but rather to better inform consumers about the products they purchase.[257] Accordingly, even without deception, the Second Circuit applied the *Zauderer* rational basis standard because the compelled speech informed consumers how to properly dispose of the mercury.[258]

---

[252] Stern & Stern, *supra* note 113, at 1199.

[253] 469 F.3d at 643.

[254] *Id*. at 652.

[255] 272 F.3d at 106.

[256] *Id*. at 104.

[257] *Id*. ("The overall goal of the statute is plainly to reduce the amount of mercury released into the environment, it is inextricably intertwined with the goal of increasing consumer awareness of the presence of mercury in a variety of products.").

[258] While the Second Circuit's decision in *Sorrell* is applicable to understanding the distinction between compelled speech and restricted speech in the commercial sphere, it is inapplicable to determine whether the *Zauderer* rational basis standard or the *Wooley* strict scrutiny standard applies. The Second Circuit concluded in *Sorrell* that Vermont's overall goal of the statute is plainly to reduce the amount of mercury released into the environment. 272 F.3d at 115. However, the Government's goal in the case of tobacco graphic warnings is to force tobacco companies to tell its consumers "don't buy this." Stern & Stern, *supra* note 112, at 1199.

C. *The Strict Scrutiny Standard as Applied In Wooley*

The textual warning labels first required by the Cigarette Labeling and Advertising Act of 1965, which have subsequently been amended and still are required today, serve as a balance between educating the public of the risks associated with smoking and requiring tobacco companies to engage in speech contrary to their economic self-interest. The textual warnings still afford the consumer with a choice of whether to utilize a legal adult product. By contrast, the graphic image requirement under the Rule is a far cry from the previous textual warnings. Instead, the graphic warning labels, coupled with the textual warnings, require tobacco companies to serve as a mobile billboard for the government by strongly suggesting the public not utilize a legal product.

In sum, it is clear that the standard outlined in *Wooley* provides the most appropriate framework for analyzing the constitutionality of the FDA's graphic warning labels. Mandating that tobacco companies display graphic images such as a color image of a man exhaling cigarette smoke through a tracheotomy hole in his throat or an image of a pair of diseased lungs next to a pair of healthy lungs extends far beyond the scope of educating the public.[259] The images require tobacco companies to engage in speech contrary to their economic self-interest by discouraging the use of their legal product. The D.C. Circuit echoed this contention, declaring that the graphic warning labels "were crafted to evoke a strong emotional response calculated to provoke the viewer to quit or never start smoking."[260]

Requiring tobacco companies to display government-prescribed graphic warning images and accompanying textual warnings violates the First Amendment, which secures "both the right to speak [ ] and . . . to refrain from speaking at all."[261] By converting the tobacco companies into a billboard for a subjective and highly controversial marketing campaign, the FDA is mandating that tobacco companies express disapproval of their own lawful products. With this in mind, it is hard to imagine a scenario where the FDA could successfully carry its burden of demonstrating a compelling governmental interest narrowly tailored to achieve a constitutionally permissible form of compelled commercial speech.

CONCLUSION

Traditionally, noncommercial compelled speech cases have been analyzed under strict scrutiny and commercial speech cases have been reviewed under intermediate scrutiny. FDA's graphic warning labels are compelled speech rather than restricted speech because the government is mandating a specified message.

It is well-established that the First Amendment guarantee of the right to free speech protects "both the right to speak freely and the right to refrain from speaking at all."[262] The distinction between compelled speech and commercial speech standards may appear needless because the standards sometimes bleed into each other. But it is important to have a full understanding of the two doctrines' roots in determining which legal standard applies to the graphic warning labels. The compelled speech doctrine is based on discouraging the government from using private property as a mobile billboard for its own ideological message. Compelled speech reflecting a government-sanctioned ideology or opinion is viewed with suspicion. By contrast, the commercial speech

[259] *See R.J. Reynolds Tobacco*, 845 F. Supp. 2d at 271.

[260] *Id. at 272.*

[261] *Wooley*, 430 U.S. at 714.

[262] *Id.*

doctrine is based on promoting the free flow of information. Given the Supreme Court's longstanding aversion toward allowing the government to promote its ideological message in the face of the rights guaranteed under the First Amendment, courts must be careful to not too quickly apply intermediate scrutiny review.

The graphic warning labels encompass both compelled and commercial speech. That said, by mandating graphic warning labels, the government is essentially commanding the public to "not smoke." As the Supreme Court recognized in *Wooley*, the government's interest in promoting the official state motto "cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message."[263] By requiring tobacco companies to act as its mouthpiece for a subjective and highly controversial marketing campaign expressing disapproval for their lawful products, the government is clearly forcing the tobacco industry to act as its courier. Thus, it is clear that the FDA's graphic warning labels are a form of compelled commercial speech that should be analyzed under strict scrutiny, a standard that will be difficult to survive.

[263] *Id*. at 717.