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Towards a More Rigorous Application of Tobacco Warnings Consistent with First Amendment Standards

I. Introduction

Tobacco use is a scourge of modern health.¹ The drug's negative effects reach far into society and are well documented. In an effort to educate the public on the dangers of tobacco, the federal government required that cigarette packages, as well as other types of tobacco packaging, contain a warning from the Surgeon General describing the danger of tobacco use.² In 2009 President Obama signed the Family Smoking Prevention and Tobacco Control Act ("Act") into law, which among other things, would require cigarette packages to contain a colorful graphic taking up fifty percent of the package depicting the dangers of smoking along with supplemental warning text.³

The legislation outraged tobacco companies, who claimed the graphics violated their First Amendment right against compelled speech. The litigation has resulted in a circuit split, with the District Court for the District of Columbia finding that the legislation violates the First Amendment rights of tobacco companies and should be struck down while the Court of Appeals for the Sixth Circuit upheld the legislation,

¹ Health Effects of Cigarette Smoking, http://www.cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/effects_cig_smoking/ (last visited April 28, 2013)

² Highlights: Warning Labels, http://www.cdc.gov/tobacco/data_statistics/sgr/2000/highlights/labels/ (last visited April 27, 2013)

³ TOBACCO REGULATION, FEDERAL RETIREMENT REFORM, PL 111-31, June 22, 2009, 123 Stat 1776

finding that the First Amendment affords tobacco companies less protection for commercial speech.⁴

This paper will attempt to show that while the Sixth Circuit reached the correct ruling, it did not go far enough, because it only considered and endorsed the propriety of the textual warnings, without getting to the permissibility of the FDA-mandated graphics. The legislation should be deemed constitutional; the pictures too should not be considered a violation of the tobacco companies' First Amendment rights. To justify that conclusion, this paper will explore the constitutional requirements of compelled speech and how these requirements differ when applied to personal or commercial speech. It will also explore the history of tobacco warning labels, the statistics on tobacco use in the United States, and the history of commercial speech in an effort to show that the pictures and warnings do not violate the First Amendment and are a necessity from a public health point of view.

II. The Problem with Tobacco

America's love affair with tobacco started before the founding of the country; however, health statistics related to the use of the drug paint a very one-sided relationship. In 2011, 8.6 million Americans were suffering from tobacco related illnesses.⁵ Tobacco use causes more deaths annually than HIV, illegal drug use, motor vehicle accidents, suicides, and murders combined.⁶ The Center for Disease Control

⁴ Bill Mears, *Federal Appeals Court Strikes Down FDA Tobacco Warning Label Law*, CNN.com (Aug. 25, 2012, 11:38 AM),

http://www.cdc.gov/tobacco/data_statistics/sgr/2000/highlights/labels/

⁵ Toll of Tobacco Use in the United States of America,

<http://www.tobaccofreekids.org/research/factsheets/pdf/0072.pdf> (last visited April 28, 2013)

⁶ Tobacco Related Mortality

http://www.cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/tobacco_related_mortality/ (last visited April 28, 2013)

states that people who use tobacco die 14 years earlier on average than non-users, and studies estimate that based on current use, up to 25 million Americans currently alive could die prematurely of smoking related illnesses.⁷ These statistics become even more grim considering that up to 5 million of those who use tobacco and could die prematurely are under the age of 18.⁸ Even those who choose not to smoke are affected by the health risks of cigarettes, almost fifty thousand people a year die of diseases caused by exposure to second hand-smoke.⁹

In addition to the human cost, the economic impact of tobacco use is extremely negative. The negative health effects of tobacco use are proven, and unsurprisingly these health problems result in a high cost for medical and insurance providers. Federal Medicare payments for smoking related illnesses were over \$27 billion in 2011, while annually, smoking related illnesses cost state and federal Medicaid programs over \$30 billion.¹⁰ Other federal health systems, such as the Veterans Administration, expend over \$9 billion on tobacco related illness annually.¹¹ Care for those exposed to second hand smoke, including children exposed to tobacco use in utero or during childhood, costs an additional \$4.9 billion dollars.¹² Additionally, Social Security Survivors Insurance payments to children who have lost at least one parent to tobacco related illness costs \$2.6 billion annually.¹³

⁷ Id.

⁸ Id.

⁹ Id.

¹⁰ Toll of Tobacco Use in the United States of America, *supra* note 5.

¹¹ Id.

¹² Id.

¹³ Id.

Combined with the cost to private insurance companies, tobacco related illnesses cost over \$90 billion dollars annually.¹⁴ Government spending on smoking related issues results in a burden on taxpayers of over \$70 billion, while deaths caused by smoking result in a productivity loss of \$97 billion a year.¹⁵ This productivity loss does not take into account time lost to companies from smoking related illnesses, disability, or work time lost due to cigarette use. Property loss caused by smoking related fires and maintenance and cleanup due to cigarette use also cost both government and private businesses and individuals.¹⁶

In the face of negative health statistics, tobacco use continues to persist among Americans.¹⁷ An estimated 43 million adults in the United States smoke cigarettes, while a smaller, but still significant portion of the population uses other types of dangerous tobacco products.¹⁸ Children represent one of the most fertile grounds for tobacco companies to find new users of their product. Over sixty percent of adult smokers began smoking before their 18th birthday and eighty five percent of smokers said they began smoking before they turned 21.¹⁹ Each day approximately 3,500 children try smoking for the first time and almost 1,000 will become daily smokers.²⁰

While environmental exposure certainly plays a role, the likelihood that children and teens will begin smoking doubles when they are exposed to pro-tobacco media and

¹⁴ Id.

¹⁵ Id.

¹⁶ Toll of Tobacco Use in the United States of America, *supra* note 5.

¹⁷ Id.

¹⁸ Id.

¹⁹ Children and Teens, American Lung Association <http://www.lung.org/stop-smoking/about-smoking/facts-figures/children-teens-and-tobacco.html> (last visited April 28, 2013)

²⁰ Toll of Tobacco Use in the United States of America, *supra* note 5.

marketing.²¹ It does not seem that this phenomenon is a secret to tobacco companies, who have been accused of marketing to children numerous times.²² While tobacco companies will not admit to marketing to children, their marketing techniques might give a different impression. Although representing a product made only for adult use, Joe the Camel, the mascot for Camel brand cigarettes, was found to be almost as recognizable to young children as Mickey Mouse in a 1991 study.²³ Similarly, in 2007 Camel began promoting a new line of cigarettes aimed at women, and advertised the brand through free lip gloss and cell phone jewelry.²⁴ These promotions resulted in a 60 percent increase in 10-13 year old girls who identified Camel as their favorite brand of cigarette.²⁵

III. Government's Attempts to Regulate the Advertisement of Tobacco

Advertising by tobacco companies is certainly not new. Lorillard Tobacco Co. is believed to be the first tobacco company to advertise their products in a 1789 newspaper advertisement, and tobacco advertising only continued to increase over the next two centuries.²⁶ It was not until the 1950s and 1960s that science regarding the dangers of tobacco use started to come to light, although tobacco companies continued to deny the

²¹ Children and Teens-American Lung Association, *supra* note 19

²² Tobacco Companies Marketing to Kids, Tobacco Free Kids
<http://www.tobaccofreekids.org/research/factsheets/pdf/0008.pdf>, (last visited April 28, 2013)

²³ Laura B. Dowgin, UNLUCKY STRIKE: BIG TOBACCO'S FIRST AMENDMENT CHALLENGE TO THE FAMILY SMOKING PREVENTION AND TOBACCO CONTROL ACT, 35 Seton Hall Legis. J. 411, 411 (2011) (Outrage from public interest groups and the threat of a lawsuit over targeting minors eventually led to the end of the Joe Camel campaign in 1997.)

²⁴ See Kathleen Sebelius, *New Tobacco Rules Good for Kids*, CNN.com (Mar. 19, 2010), <http://www.cnn.com/2010/OPINION/03/19/sebelius.tobacco.rule/index.html> (Discussing the effects of tobacco marketing on children)

²⁵ *Id.*

²⁶ Jeremy R. Singer, TAKING ON TOBACCO: THE FAMILY SMOKING PREVENTION AND TOBACCO CONTROL ACT, 34 Nova L. Rev. 539, 541 (2010)

hazards of smoking for decades.²⁷ In 1964, the Surgeon General issued a general warning about the dangers of smoking and by the early 1960s tobacco companies were required to add a label with a health warning to cigarette packages.²⁸

Even as information about the dangers of tobacco became common knowledge, Congress still struggled to control the advertisement and distribution of dangerous tobacco products. Federal and state governments have been successful limiting tobacco and tobacco advertisements perceived to be aimed at children and adolescents.²⁹ In 1992 the federal government offered grants to states that prohibited the sale of tobacco to children.³⁰ State lawsuits against tobacco companies in 1998 also led to the voluntary cessation of certain tobacco advertisements aimed at children.³¹ Tobacco companies agreed to no longer use cartoons, distribute free products at events with children present, give gifts in consideration of tobacco purchases without checking proof of age, or pay media companies to reference their products when not aimed at adults.³² These concessions were made in the 1998 Master Settlement after the Attorneys General of 46 states agreed to settlements of lawsuits against tobacco companies.³³

²⁷ Id. (“In 1964, the U.S. surgeon general issued a report linking smoking with cancer, yet as late as 1994, tobacco executives testified before Congress that smoking neither caused cancer nor was addictive.”)

²⁸ Id.

²⁹ *see* Dowgin at 416-417, *supra* note 23. (“In addition to government regulation of conduct and product usage, the tobacco industry voluntarily ceased certain advertising and marketing practices in a November 1998 Master Settlement Agreement with the Attorneys General of forty-six states. In exchange for the settlement of lawsuits against the tobacco industry, the manufacturers agreed to cease targeting children in the advertisement and promotion of tobacco products. Additionally, tobacco companies agreed to refrain from lobbying against legislation aimed at reducing youth smoking, and also contributed funds to set up a National Foundation to support programs aimed at reducing youth tobacco usage.”)

³⁰ Id.

³¹ Id. at 417

³² Id. at 410, 442

³³ Id. at 417

The Food and Drug Administration struggled to regulate tobacco products; in 1996 the agency issued “Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents” as its first attempt to regulate tobacco.³⁴ Although the FDA claimed the right to regulate in the Federal Food Drug and Cosmetics Act, the legislation was overruled in *FDA v. Brown and Williamson Tobacco Corp.*, which challenged the agency on jurisdictional and First Amendment grounds.³⁵ While the FDA had never had jurisdiction over tobacco products before, they claimed the FDCA granted the agency the right to categorize tobacco as a drug and therefore regulate it under language allowing the regulation of drugs and drug delivery devices.³⁶ There, the Court found that it was unconstitutional for the FDA to regulate tobacco under that legislation, as Congress had not granted them that power in the legislation.³⁷ Under the FDCA, the FDA attempted to regulate marketing and advertising to reduce its affect on children, specifically by limiting the type of advertising that could be used, as well as the manner in which advertisements could be viewed.³⁸ However, because the Court found that the agency was never granted the power from Congress to regulate tobacco use under the FDCA, the First Amendment issue was not ruled upon.³⁹

The effort to educate consumers about the dangers of tobacco use and to curb tobacco advertising has not been fruitless. Congress passed legislation in the 1970s

³⁴ *see Id.* at 412.

³⁵ *Dowgin*, at 410-413, *supra* note 23. (The Court found “an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress . . . we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop.”)

³⁶ *Id.* at 412, Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 301 (1938)

³⁷ *Dowgin*, at 410-413, *supra* note 23, 21 U.S.C.A. § 387a (West); 529 U.S. 120 (2000)

³⁸ *Dowgin* at 412-413, *supra* note 23

³⁹ *Id.*

requiring labels outlining the dangers of tobacco use on the outside of products and prohibiting the advertisement of cigarettes on “any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission.”⁴⁰ This allowed the federal government to keep tobacco advertisements off television; a dramatic change from twenty years earlier when tobacco companies often sponsored television shows.⁴¹

Congress also passed the Comprehensive Smoking Education Act in 1984 order to “establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health.”⁴² Congress intended this legislation help inform the public of the adverse effects of cigarette smoking on the health through warning notices on packages and advertisements of cigarettes, as well as protect commerce and the national economy “to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.”⁴³

In 2009, Congress passed the Act in an effort to provide the FDA with the jurisdiction it lacked under the FDCA.⁴⁴ In addition to adopting “Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents”, Congress added language to expressly give the FDA jurisdiction over

⁴⁰ 15 U.S.C.A. § 1335 (West)

⁴¹ Randy James and Scott Olstad, *A Brief History of Cigarette Advertising*, TIME MAGAZINE (June 15, 2009), <http://www.time.com/time/magazine/article/0,9171,1905530,00.html>

⁴² 15 U.S.C.A. § 1331 (West)

⁴³ Id.

⁴⁴ Dowgin at 413, *supra* note 23

tobacco regulation and stated that the regulations were consistent with the First Amendment.⁴⁵

In the legislation, Congress notes that the regulations are substantially related to accomplishing public health goals and,

“Will directly and materially advance the Federal Government's substantial interest in reducing the number of children and adolescents who use cigarettes and smokeless tobacco and in preventing the life-threatening health consequences associated with tobacco use...Tobacco advertising and promotion play a crucial role in the decision of these minors to begin using tobacco products. Less restrictive and less comprehensive approaches have not and will not be effective in reducing the problems addressed by such regulations. The reasonable restrictions on the advertising and promotion of tobacco products contained in such regulations will lead to a significant decrease in the number of minors using and becoming addicted to those products.”⁴⁶

Additionally, Congress notes that the regulations are narrowly tailored in order to restrict access of advertising to youth and convey the dangers of smoking while allowing tobacco companies to impart information to older consumers.⁴⁷

Among many important additions to the 1996 legislation, one addition that received a great deal of attention was the requirement that cigarette packages contain graphic pictures depicting the dangers of using tobacco.⁴⁸ Following the passage of the Act, the FDA released the nine pictures that tobacco companies would be compelled to place on their cigarette cartons, along with accompanying text. The Act “requires that tobacco manufacturers reserve a significant portion of their packaging—the top 50% of the front and back of cigarette packaging, 30% of the front and back of smokeless

⁴⁵ TOBACCO REGULATION, FEDERAL RETIREMENT REFORM, PL 111-31, June 22, 2009, 123 Stat 1776

⁴⁶ Id.

⁴⁷ Id.

⁴⁸ Id.

tobacco packaging, and 20% of tobacco advertising—for full color, graphic health warnings issued by the FDA.”⁴⁹

In response to the Act, tobacco companies filed suit against the FDA, claiming the new requirements violated their First Amendment rights.⁵⁰ The government has required warning labels on cigarette cartons and the packaging of other types of tobacco since 1964, and tobacco companies have come to terms with the fact that the text warnings attached to their products will warn of health problems or death associated with their use. The new warnings, however, go much farther than any earlier requirements. Before addressing the new pictures and warnings that are to be included on the packaging, the Act sets out new requirements about the manner in which the tobacco companies can design cigarette cartons.⁵¹ The legislation now limits the color and designs that may be used by the companies when they create the packaging for their products.⁵² The government justifies this rule by citing the influence that tobacco advertisements have on children and adolescents and stating that a cigarette carton should be considered an advertisement for the product in and of itself.⁵³ The Act applied similar rules about colors and designs to tobacco advertisements other than cigarette cartons as well, hoping to make advertisements more sedate and less noticeable, and therefore make tobacco use less appealing to impressionable adolescents.⁵⁴

⁴⁹ Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 524 (6th Cir. 2012)

⁵⁰ Id., R.J. Reynolds Tobacco Co. v. Food & Drug Admin., 696 F.3d 1205 (D.C. Cir. 2012)

⁵¹ Overview of the Family Smoking Prevention and Tobacco Control Act: Consumer Fact Sheet, <http://www.fda.gov/tobaccoproducts/guidancecomplianceregulatoryinformation/ucm246129.htm> (Last visited April 27, 2013)

⁵² Id.

⁵³ Id.

⁵⁴ Id.

In addition to the rules regarding the design of cigarette cartons and the packaging of other tobacco products, tobacco companies also claimed the addition of more stringent warnings and graphic pictures on cigarette cartons as required by the act also violated their First Amendment rights.⁵⁵ The Act updated the types of warnings to be found on cigarette cartons as well as the packaging for other types of tobacco products.⁵⁶ The legislation required the font size of the warning labels be increased, the text of the warning could only be black font on a white background or white font on a black background, and mandated the addition of graphic images depicting the outcome of smoking be prominently included on the cigarette carton.⁵⁷

These changes led tobacco companies to file two separate lawsuits. In *R.J. Reynolds Tobacco Co. v. U.S. Food & Drug Admin* a group of tobacco companies sued the FDA in the District of Columbia claiming that the Act's requirement that companies include graphic pictures and new warnings violated their First Amendment rights.⁵⁸ Around the same time, a group of tobacco companies filed suit in the Sixth Circuit, claiming that the new rules regarding advertisements and warnings of tobacco products were a violation of the First Amendment.⁵⁹

In *R.J. Reynolds Tobacco Co.* the United States District Court for the District of Columbia ruled in favor of the tobacco companies, finding that the images and warnings required by the FDA violated the First Amendment rights of the tobacco companies.⁶⁰

The court in *R.J Reynolds Tobacco Co.* found that the warnings violated the First

⁵⁵ *Disc. Tobacco City & Lottery, Inc.*, at 546-547, *supra* note 49

⁵⁶ *Id.*

⁵⁷ *Id.* at 520.

⁵⁸ *R.J. Reynolds Tobacco Co.*, *supra* note 50

⁵⁹ *Disc. Tobacco City & Lottery, Inc.*, *supra* note 49

⁶⁰ *R.J. Reynolds Tobacco Co.*, at 466, *supra* note 50

Amendment right of the tobacco companies under the *Central Hudson* test, and declined to apply the *Zauderer* standard when considering the commercial speech.⁶¹

The Court of Appeals for the Sixth Circuit, where the tobacco companies had also sued for a violation of their First Amendment and due process rights, found for the government, holding that as commercial speech, the requirements laid forth in the Act did not violate the First Amendment rights of the tobacco companies.⁶² The Court of Appeals for the Sixth Circuit and the District Court for the District of Columbia found themselves split on similar issues: if the graphics and warnings required for the cigarette cartons were commercial speech, how much First Amendment protection should they be granted and can they be compelled?

IV. Jurisprudential Underpinnings for the Regulation of Commercial Speech: The Propriety of Restrictions on Commercial Speech and the Right Not to Speak as Applied to Government Regulations of the Tobacco Industry

The First Amendment enshrines some of the most important rights guaranteed to Americans, among them the right to free speech. Freedom from compelled speech holds as important a place in the right to free speech as does the right to expression. In two cases the Supreme Court addressed the freedom from compelled speech. In *West Virginia State Board of Education v. Barnette* the Court held that a school district and the state violated the First Amendment when they required school children to salute the American flag.⁶³ In *Wooley v. Maynard* the Supreme Court again addressed the right against compelled speech, in a case involving a Jehovah's Witness who took issue with the requirement that vehicles in New Hampshire use a license plate with the motto "Live

⁶¹ *Id.* at 446, (*Zauderer* standard discussed *infra* note 95)

⁶² *Disc. Tobacco City & Lottery, Inc.*, at 536-537, *supra* note 49

⁶³ *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)

Free or Die”, arguing that the State was forcing him to advertise a slogan he disagreed with on all fronts.⁶⁴ The Court notes that,

“The right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of “individual freedom of mind.”⁶⁵

In holding thus, the Court found that the State may not “require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public.”⁶⁶

Barnette and *Wooley* show the breadth of the First Amendment right against compelled speech, from something as active as saluting the flag to as passive as driving with a license plate with the state motto. Because the First Amendment protects the right not to speak, it may seem that a law that requires a company to make certain statements is constitutionally invalid. Just as one has a right to decline to speak, one should have a right to be free from compulsory governmentally imposed warning labels. However, the Supreme Court has held that the freedom from compelled speech does not apply as broadly in the instance of commercial speech.

Barnette makes clear the right not to speak, even when the government compels one to do so.⁶⁷ Because the freedom from compelled speech is not an absolute one when

⁶⁴ Jennifer M. Keighley, CAN YOU HANDLE THE TRUTH? COMPELLED COMMERCIAL SPEECH AND THE FIRST AMENDMENT, 15 U. Pa. J. Const. L. 539, 545 (2012)

⁶⁵ Id. at 545-546

⁶⁶ Wooley v. Maynard, 430 U.S. 705, 713 (1977)

⁶⁷ Barnette at 642, *supra* note 63. (“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,

the speech being compelled is commercial, *Barnette* is inapposite to the issue at hand, which deals with speech of a commercial nature. Instead, the traditional first case to look to when considering commercial speech and its constitutionality is *Central Hudson Gas and Electric Company v. Public Service Commission*.⁶⁸ *Central Hudson*, the case from which the doctrine of commercial speech emerged, traditionally contains the test for determining the constitutionality of protection of commercial speech.⁶⁹ In *Central Hudson* the Court found, “Commercial speech that is not false or deceptive and does not concern unlawful activities...may be restricted only in the service of a substantial government interest, and only through means that directly advance that interest.”⁷⁰ Before *Central Hudson*, no definitive rule existed regarding commercial speech, which led to confusion surrounding the issue.⁷¹

With *Central Hudson*, the Supreme Court issued a four-part test used to determine whether government regulation violated the First Amendment rights of a company.⁷² In *Central Hudson*, the Court found that a New York Public Service Commission ban involving all promotional advertising by utility companies was unconstitutional.⁷³ To determine this, the Court applied a four-prong test still in use today. The first prong to be satisfied is whether the expression is protected by the First Amendment, and second

religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”)

⁶⁸ Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 638 (1985)

⁶⁹ Id.

⁷⁰ Id.

⁷¹ Kristin M. Sempeles, 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)

⁷² Id.

⁷³ Id.

whether the governmental interest used to justify the rule is substantial.⁷⁴ If both the first and second prongs are satisfied, the next step is determining whether the regulation directly advances the asserted governmental interest.⁷⁵ Finally, is the required regulation more extensive than necessary to advance the government's interest.⁷⁶ If the regulation in question fails any part of the test, then the Court says it is unconstitutional.⁷⁷

The Court in *Central Hudson* found the disputed regulation failed the fourth prong of the test; it was overly broad, specifically because the government could not show that a less restrictive measure would not accomplish the same interest.⁷⁸ The ruling in *Central Hudson* established the intermediate scrutiny standard by which commercial speech is judged.⁷⁹ The courts have only found a handful of exceptions where anything other than strict scrutiny is appropriate when considering content-based speech regulations, including compelled commercial speech.⁸⁰ Two exceptions exist when considering compelled commercial speech. First, "Purely factual and uncontroversial disclosures are permissible if they are reasonably related to the State's interest in preventing deception of consumers, provided the requirements are not unjustified or unduly burdensome."⁸¹ This standard, very similar to rational basis, is the standard put forth in *Zauderer*. The second exception is a restriction on commercial speech, if the government can show that the asserted interest is substantial, that the restriction directly

⁷⁴ Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 566 (1980)

⁷⁵ Id.

⁷⁶ Id.

⁷⁷ Id.

⁷⁸ Id.; Sempeles at 238, *supra* note 71

⁷⁹ Sempeles at 238, *supra* note 71

⁸⁰ R.J. Reynolds Tobacco Co. at 1212, *supra* note 50

⁸¹ Id. citing *Zauderer*

and materially advances the interest, and that the restriction is narrowly tailored.⁸² This is the basis for the *Central Hudson* test.⁸³

In *R.J. Reynolds* the court inappropriately applied the intermediate standard of scrutiny found in *Central Hudson*.⁸⁴ Although the change was an improvement over the finding by the District Court, which applied strict scrutiny, the level of scrutiny that was applied was incorrect. Previously, the District Court incorrectly applied strict scrutiny when considering the required graphics and warnings, which required the FDA to show that the regulation was narrowly tailored to achieve a compelling government interest.⁸⁵

The District Court held this way because the judge believed that the labels were compelled speech and were not “purely factual and uncontroversial information.”⁸⁶ The District Court said that if the warnings had been purely factual and uncontroversial information, they would have instead been subject to the *Zauderer* test, and therefore the least strict standard of scrutiny.⁸⁷ The judge believed that the warnings warranted strict scrutiny and were not purely factual because they were “graphic images . . . crafted to evoke a strong emotional response calculated to provoke the viewer to quit or never start smoking.”⁸⁸ In his view, because the images were intended to provoke an emotional response, they could not be intended to educate and warn. When one considers the dangers of tobacco use and the health problems caused by smoking, it is not hard to see how an image depicting the dangers of smoking could be educational and emotional at

⁸² Id.

⁸³ Keighley at 545, *supra* note 64

⁸⁴ R.J. Reynolds Tobacco Co. at 1212, *supra* note 50

⁸⁵ Id.

⁸⁶ Jonathan Mincer, *Court Misapplies First Amendment to Strike Down FDA Cigarette Warning Labels*, RegBlog (March 3, 2012), <https://www.law.upenn.edu/blogs/regblog/2012/03/court-misapplies-first-amendment-to-strike-down-fda-cigarette-warning-labels.html>

⁸⁷ Id.

⁸⁸ Id.

the same time. The court found that parts of the compelled speech seemed to be government advocacy rather than information to increase public awareness.⁸⁹ While some the images chosen are graphic, they depict well-established consequences of smoking and tobacco use.

On appeal, the court in *R.J. Reynolds* chose to apply intermediate scrutiny as found in *Central Hudson*.⁹⁰ The court in *R.J. Reynolds* felt that the *Central Hudson* standard and not the *Zauderer* standard was appropriate because in their reading *Zauderer* requires compelled speech only when without the warning there is a real danger that an advertisement will mislead a consumer.⁹¹ The Court of Appeals for the District of Columbia erred when they held that such a risk did not exist.

Both *Central Hudson* and *Zauderer* deal with compelled commercial speech, which is exactly what the Act presents. While the District Court for the District of Columbia chose to apply the *Central Hudson* Test, the appropriate test to apply to the Act is the test laid out in *Zauderer*.

In *Zauderer*, the Court considered the constitutionality of compelling a lawyer to disclose certain information in an advertisement for contingent-fee legal services.⁹² At issue in *Zauderer* was the constitutionality of the government compelling speech that was factual commercial information.⁹³ Unlike cases concerning personal compelled speech, the issue in *Zauderer* was not whether the speaker was compelled to adopt the view of the

⁸⁹ Id.

⁹⁰ R.J. Reynolds Tobacco Co. at 1216, *supra* note 50

⁹¹ Id. at 1213

⁹² Jennifer L. Pomeranz, J.D., M.P.H., COMPELLED SPEECH UNDER THE COMMERCIAL SPEECH DOCTRINE: THE CASE OF MENU LABEL LAWS, 12 J. Health Care L. & Pol'y 159, 173-174 (2009) (At issue in *Zauderer* was a law requiring attorneys to state whether 'contingent-fee' percentages were computed before or after the deduction of court costs and expenses in advertisements.)

⁹³ Id.

government; but whether the compelled speech was intended to ensure that the customer received factual and uncontroversial information.⁹⁴

In examining compelled commercial speech, the Court held that “requirements to disclose factual commercial information would be subjected to something resembling rational basis review: to pass constitutional muster, the requirements must be “reasonably related to the State's interest in preventing deception of consumers.”⁹⁵ This differentiated compelled commercial speech from compelled personal speech, which necessitates strict scrutiny, and restricted commercial speech, in which intermediate scrutiny is applied.⁹⁶

Under the *Zauderer* standard, the requirement to disclose factual information is reviewed under the reasonable relationship test.⁹⁷ Under this standard, the Court looks at whether the compelled information bears a reasonable relationship to the government’s stated interest in passing the regulation. If a reasonable relationship existed, then the compelled speech was constitutional.⁹⁸ When discussing the First Amendment issue, the Court stresses the importance of protecting the consumer,

“We do not suggest that disclosure requirements do not implicate the advertiser's First Amendment rights at all. We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech. But we hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers.”⁹⁹

Because the textual and graphic warnings required in the Act are compelled commercial speech and intend to inform consumers of the dangers of smoking, the reasonable

⁹⁴ *Id.* at 174

⁹⁵ *Zauderer* at 2282, *supra* note 68

⁹⁶ *Pomeranz* at 170, *supra* note 92

⁹⁷ *Id.* at 174

⁹⁸ *Zauderer* at 2282, *supra* note 68

⁹⁹ *Id.*

relationship test laid out in *Zauderer* should be applied to determine if there is a First Amendment violation.

Like tobacco, alcohol is also used widely throughout the United States and can cause a number of health problems. Since 1988 all containers of alcoholic beverages have been required to carry a warning label, as mandated by the Alcoholic Beverage Labeling Act.¹⁰⁰ The label warns that drinking can cause health problems, is dangerous for pregnant women, and can impair one's ability to operate a motor vehicle.¹⁰¹ Unlike tobacco labels there has not been the same outcry against these labels. One reason that there has been such a push to increase warnings on tobacco while alcohol warnings have remained the same for a number of years may be that alcohol, in moderation, is not harmful and in some cases may even benefit the health, while any amount of tobacco harms the health and can lead to addiction.¹⁰²

Tobacco is not the only industry compelled to issue warnings about products or limited in what they can say by the FDA. Pharmaceutical companies regularly find their speech limited by FDA regulations. The FDA maintains strict control over what pharmaceutical companies can and cannot say about certain drugs.¹⁰³ Once a drug has been approved by the FDA for a certain use, the company can then market that drug for the approved use.¹⁰⁴ Pharmaceuticals often have more than one use, but because of the time and cost of clinical trials and approval, they are often only submitted and approved

¹⁰⁰ 27 U.S.C.A. § 215 (West)

¹⁰¹ Id.

¹⁰² Alcohol in Moderation 'Can Help Prevent Heart Disease' <http://www.bbc.co.uk/news/health-12531837> (last visited April 28, 2013)

¹⁰³ Regulatory Information: Prescription Drug Marketing Act, <http://www.fda.gov/RegulatoryInformation/Legislation/FederalFoodDrugandCosmeticActFDCAAct/SignificantAmendmentstotheFDCAAct/PrescriptionDrugMarketingActof1987/>

¹⁰⁴ Id.

by the FDA for one use.¹⁰⁵ Often, physicians and researchers find that the drug can also safely treat other ailments, a practice known as off-label use.¹⁰⁶ However, FDA rules prohibit pharmaceutical companies from marketing secondary usage of the drug, even to physicians who could use the information to help patients.¹⁰⁷ A justification for this action can be seen in *Zauderer*, which allows compelled commercial speech, and therefore also the limitation of commercial speech, to keep consumers safe from inaccurate information.¹⁰⁸

However, in December 2012 the Court of Appeals for the Second Circuit held that laws limiting the marketing of off-label use violated the First Amendment rights of the pharmaceutical companies and their employees.¹⁰⁹ Although the Second Circuit found that the *Central Hudson* test weighed in favor of a violation of the pharmaceutical company's First Amendment rights, the court relied on *Sorrell v. IMS Health*, a Supreme Court Case that dealt specifically with pharmaceuticals and free.¹¹⁰ While their basis for supporting a First Amendment violation may be different than the basis for supporting the Act, it will be interesting to see whether the Supreme Court decides to grant cert to this case and if so, whether the Court references *Central Hudson* or *Zauderer* when

¹⁰⁵ *Id.*

¹⁰⁶ Katie Thomson, *Ruling is Victory for Drug Companies in Promoting Medicine for Other Uses*, THE NEW YORK TIMES (Dec. 3, 2012), <http://www.nytimes.com/2012/12/04/business/ruling-backs-drug-industry-on-off-label-marketing.html>

¹⁰⁷ *Id.*

¹⁰⁸ *Zauderer* at 2282, *supra* note 68

¹⁰⁹ *United States v. Caronia*, 703 F.3d 149, 162 (2d Cir. 2012) (“Speech in aid of pharmaceutical marketing ... is a form of expression protected by the Free Speech Clause of the First Amendment.” (Quoting *Sorrell v. IMS Health*, *infra* note 111)).

¹¹⁰ *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2663, 180 L. Ed. 2d 544 (2011) (“The law on its face burdens disfavored speech by disfavored speakers.”), *Caronia* at 162, 165-166, *supra* note 110.

reaching their decision. A ruling in the favor of the FDA may provide more support for warning labels on tobacco packaging should it ever reach the Supreme Court.

The FDA also requires at times that pharmaceutical companies add warnings to drug packaging to notify consumers of side effects that could occur from use and to list any possibly negative interactions that may occur.¹¹¹ The most serious of these warnings is the black box warning, which signifies that the drug is one step away from being removed from the market because of safety concerns.¹¹² The FDA requires that the warning be carried on the product itself and on the information given to the doctor, and that the warning be surrounded by a black box.¹¹³ A strong state interest in this in making sure that consumers of pharmaceuticals and physicians who prescribe them know possible dangers associated with their use makes this compelled commercial speech permissible.

Menu labeling laws also represent the government compelling speech in order to educate consumers. New York City passed a menu labeling law in 2008 that required that certain restaurants post the caloric values of food served in the restaurant on menus or menu boards.¹¹⁴ The New York State Restaurant Association challenged the law, claiming that it violated the First Amendment rights of the restaurants included by

¹¹¹ *A Guide to Drug Safety Terms at FDA*, FDA Consumer Health Info (Nov. 2012), <http://www.fda.gov/downloads/ForConsumers/ConsumerUpdates/ucm107976.pdf>

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Dayna B. Royal, THE SKINNY ON THE FEDERAL MENU-LABELING LAW & WHY IT SHOULD SURVIVE A FIRST AMENDMENT CHALLENGE, 10 FIRST AMEND. L. REV. 140, 146 (2011) (“New York City Ordinance 81.50 requires that certain food service establishments in the city (those included in groups of 15 or more that operate nationally and either do business under the same name, operate under common ownership, or are franchises) must display calorie content on their menus and menu boards. The ordinance affects approximately ten percent of all restaurants in the city.”)

compelling them to speak.¹¹⁵ However, the courts did not agree, and then Court of Appeals for the Second Circuit applied *Zauderer* when they found that the government needed only to show a reasonable relationship between the compelled speech and their goals.¹¹⁶ The city said they were implementing the law in hopes of lowering obesity and because they could show research that showed the danger of obesity and the role that eating meals outside the home played in the epidemic, the court applied the most lenient standard and upheld the compelled commercial speech.¹¹⁷

A. Reasonable Relationship: Why Compelled Tobacco Warnings are Reasonably
Related to a State Interest

Under the test put forth in *Zauderer*, compelled commercial speech does not violate the First Amendment as long as it is reasonably related to a state interest.¹¹⁸ The government has a strong state interest in educating consumers on the dangers of using tobacco for health reasons and history suggests that compelled speech is necessary to balance out the misinformation put forth by tobacco companies.

The tobacco industry represents a unique case for compelling commercial speech; although it sells a completely legal substance, its product kills hundreds of thousands of people every year. While the dangers of tobacco are no longer hidden, this was not always the case. For many years the tobacco industry engaged in marketing intended to convince consumers that tobacco use was not harmful, and even in some cases healthy. Even after internal studies showed the dangers of tobacco use, the companies went out of

¹¹⁵ Id.

¹¹⁶ New York State Rest. Ass'n v. New York City Bd. of Health, 556 F.3d 114, 134 (2d Cir. 2009) (“However, the First Amendment does not bar the City from compelling such “under-inclusive” factual disclosures, *see Zauderer*, where as discussed below, the City’s decision to focus its attention on calorie amounts is rational.”)

¹¹⁷ Id.

¹¹⁸ Id.

their way to mislead the public to maintain profits.¹¹⁹ Tobacco companies sponsored studies intended to produce positive results and used these to lull Americans into a false sense of security regarding smoking.¹²⁰ While information regarding the dangers of tobacco use is widely available, it is important to note that the tobacco industry spends over \$8 billion a year on advertising for its products.¹²¹ This dwarfs the amount of money available to the government and anti-smoking groups to spend educating consumers. The Supreme Court has found tobacco advertisements, which promote smoking without warning of the health consequences, deceive consumers on the dangers of tobacco use.¹²²

When arguing against the Act, tobacco companies claimed the new warnings would create a consumer base that is unduly alarmed regarding the risks of tobacco. Moreover, the court in *Disc. Tobacco City & Lottery Inc.* stated that the Act is necessary to fight against the tobacco companies' history of promoting their products as healthy.¹²³ The advertising of "low tar" cigarettes" as less harmful than regular cigarettes misled any smoker who chose to switch for health reasons, as studies show that these cigarettes are equally as harmful.¹²⁴ The change in the market share for "low tar" cigarettes from 2% of sales in 1967 to 81% of sales in 1998 indicates that tobacco company marketing

¹¹⁹ *Disc. Tobacco City & Lottery, Inc.*, at 534-535, *supra* note 49. ("For several decades, [the major tobacco manufacturers] have marketed and promoted their low tar brands as being less harmful than conventional cigarettes. That claim is false ... and by making these false claims, [the major tobacco manufacturers] have given smokers an acceptable alternative to quitting smoking, as well as an excuse for not quitting").

¹²⁰ *Id.*

¹²¹ Toll of Tobacco in the United States of America, *supra* note 5

¹²² *Disc. Tobacco City & Lottery, Inc.*, at 535, *supra* note 49

¹²³ *Id.*

¹²⁴ *Id.*

specifically mislead consumers into believing certain cigarettes were safer than others, which provides stark evidence as to why the Act is both necessary and constitutional.¹²⁵

Tobacco advertisements demonstrate the need for the *Zauderer* standard of scrutiny when allowing the government to compel speech to prevent inaccurate or fraudulent information being conveyed to the consumer.¹²⁶ To prohibit such advertisements, “the burden lies with the government to “demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.”¹²⁷ Evidence abounds for the government to prove that tobacco companies purposefully marketed certain cigarettes as less dangerous or a more healthy choice when no such evidence existed, and in fact at times evidence to the contrary existed. In 2006 in a trial involving the tobacco company Phillip Morris, the District Court for the District of Columbia found, “For several decades, Defendants have marketed and promoted their low tar brands as being less harmful than conventional cigarettes. That claim is false, as these Findings of Fact demonstrate. By making these false claims, Defendants have given smokers an acceptable alternative to quitting smoking, as well as an excuse for not quitting.”¹²⁸ Evidence also abounds that the tobacco companies knew of the dangers of their products but continued to market them as a safer alternative.¹²⁹

¹²⁵ *Id.* at 535-536

¹²⁶ *Id.* at 551. (“In the context of tobacco products, any statement explicitly declaring, or even implying, that compliance with FDA procedures has ensured safety is inherently misleading and patently false. Therefore, this regulation survives under either *Zauderer*, as prevention of deceptive and untrue advertising, or *Central Hudson*, as a narrowly tailored regulation of commercial speech.”)

¹²⁷ Disc. Tobacco City & Lottery, Inc. at 534 (citing Ibanez v. Fla. Dep't of Bus. & Prof'l Reg., Bd. of Accountancy, 512 U.S. 136, 146, (1994)), *supra* note 49

¹²⁸ United States v. Philip Morris USA, Inc., 449 F. Supp. 2d 1, 430 (D.D.C. 2006) on reconsideration in part, 783 F. Supp. 2d 23 (D.D.C. 2011)

¹²⁹ Disc. Tobacco City & Lottery, Inc., at 534-535, *supra* note 49

Actions by tobacco companies such as this demonstrate the need for the Act. The Court in *Zauderer* notes that compelled commercial speech is necessary to protect consumers because the commercial speaker has access to facts that the consumer may not have, but may not feel inclined to share them with the consumer.¹³⁰ This creates an inequality between the commercial speaker and the consumer. While normally this may not be a cause for concern, because of the danger and addictiveness of tobacco, consumers should be privy to all possible information.

Tobacco companies may argue that the current labels adequately address the dangers of smoking, and therefore the new labels required by the Act are unnecessary. In their brief to the court in *Disc. Tobacco City & Lottery* the tobacco companies argue that warnings and information contained on tobacco packaging will not help achieve the government's goals because consumers who already know the effects of tobacco will disregard the warnings or become overly informed.¹³¹ Statistics regarding tobacco users show this might not be true. Even with the current warnings, smokers underestimate the dangers of cigarette use.¹³² Specifically, teenagers are most likely to not fully know the dangers of using tobacco and to miscalculate the extent to which tobacco use can cause

¹³⁰ Pomeranz at 174, *supra* note 92

¹³¹ DISCOUNT TOBACCO CITY & LOTTERY, INC.; Lorillard Tobacco Company; National Tobacco Company, L.P.; R.J. Reynolds Tobacco Company; Commonwealth Brands, Inc.; American Snuff Company, LLC, fka Conwood Company, LLC, Plaintiffs-Appellants/Cross-Appellees, v. UNITED STATES OF AMERICA; United States Food and Drug Administration; Margaret Hamburg, Commissioner of the United States Food and Drug Administration; Kathleen Sebelius, Secretary of the United States Department of, 2010 WL 6510607 (C.A.6), 7

¹³² *Disc. Tobacco City & Lottery, Inc.* at 521, 525, *supra* note 49. (The Court of Appeals for the Sixth Circuit found, "Most people do not have a complete understanding of the many serious diseases caused by smoking, the true nature of addiction, or what it would be like to experience either those diseases or addiction itself. Rather, most people have only a superficial awareness that smoking is dangerous." (quoting *United States v. Philip Morris USA, Inc.*, 449 F.Supp.2d 1, 578 (D.D.C.2006))

illness and death.¹³³ When this is combined with the statistics on how many teenagers begin smoking every day, it is clear that sometime new is needed to fight the misinformation being put forth by tobacco companies.

V. Legal and Policy Justifications for Upholding Government Restrictions of Compelled Speech as it Concerns Both Mandatory Warnings and Graphics

A. Legal Safeguards

Proponents of unfettered free speech may worry that Supreme Court will hear this case and hold in the FDAs favor, allowing the government to compel commercial speech in the medium of cigarette packages. Opponents of such a ruling may see the ruling as the beginning of a crackdown on free speech by the government. While vigilance is important in the fight to uphold the Constitution, this policy does not threaten First Amendment rights in the way that detractors may fear.

Abridging rights always comes at a certain cost; the Constitution and especially the Bill of Rights embodies the backbone of the American legal system. However, this does not mean that certain safeguards should not be put into place from time to time to protect the people of the United States. While the FDA policy does compel speech from tobacco companies, it does so in order to inform the public of the dangers of tobacco use, and in doing so, to protect their health and safety. While some might view this compelled speech as the first step towards the deterioration of the First Amendment, the narrowness of the requirements to compel commercial speech ensures that this will not be the case. Tobacco provides a unique example. Not only is tobacco extremely dangerous, considering the mortality rate tied to its use, the industry also has a history of misleading its consumers. These factors create a situation that compels the government to step in to

¹³³ Id.

ensure that consumers receive the proper information. Without the history of deception and the danger posed by the product, most commercial enterprises do not have to worry about the government compelling them to speak under this exception.

B. Social Policy

Social policy justifications also support the decision to apply the lowest level of scrutiny to the government's insistence on compelled commercial speech by the tobacco companies. As discussed earlier, adolescents are particularly susceptible to tobacco advertising. Most smokers have their first cigarette before the age of 18.¹³⁴ While peer pressure may lead some adolescents to begin smoking, other factors also play a role, and tobacco companies know and exploit many of these reasons in their advertisements.¹³⁵

The desire to be thin or to stay thin may encourage young girls to begin smoking. Some people believe that cigarettes slow metabolic rate and also curb appetite.¹³⁶ For young girls who are told from their childhood that being thin is the only acceptable physical state, cigarettes might seem like the perfect solution, a fairly easy way to be the right size. Unlike exercise or dieting, smoking cigarettes takes very little effort outside of procurement. Young adults are less likely to have been exposed to the dangers of tobacco use, and may not realize how dangerous smoking is when they begin. Because of the addictive nature of cigarettes, these smokers may become addicted by the time they realize the negative consequences of smoking, and then face an uphill battle of either

¹³⁴ Teens and Smoking, http://www.lung.ca/protect-protegez/tobacco-tabagisme/facts-faits/teens-ados_e.php (Last visited April 29, 2013); Smoking and How to Quit <http://womenshealth.gov/smoking-how-to-quit/for-parents/> (Last visited April 28, 2013)

¹³⁵ Id.

¹³⁶ Smoking: Weight Watchers <http://www.economist.com/news/finance-and-economics/21576090-bad-news-advocates-higher-cigarette-taxes-weight-watchers> (Last visited April 29, 2013) (Discussing studies that say 46% of teenage girls and 30% of teenage boys smoke cigarettes to stay thin.)

quitting or having to deal with the numerous health problems that may occur. More prominent warnings could help ensure that adolescents who buy cigarettes for the first time immediately know that there are health related issues that go along with smoking. Additionally, pictures may grab their attention in a way that written warnings will not.

A desire to look or seem “cool” may also play a role in why adolescents begin smoking.¹³⁷ Although current law prohibits product placement by tobacco companies in movies and television shows, that does not mean that characters cannot be depicted using tobacco. If children and adolescents grow up seeing characters in their favorite movies and television shows smoking cigarettes, it stands to reason that they may believe that smoking will make them as “cool” or appealing as the character. Unlike the character, however, a child who begins smoking now risks becoming addicted to an extremely addictive and dangerous substance.

VI. Conclusion

The FDA should continue to fight to put graphics and more stringent warnings on cigarette packaging. By showing the pattern of deception by tobacco companies combined with the dangers posed by tobacco use, the FDA can make a strong argument to compel commercial speech by tobacco companies without violating their First Amendment Rights. While tobacco products continue to entice adolescents who do not realize the danger these products pose until after addiction sets in, stronger FDA graphics and warning labels may help stem the tide of tobacco users in the United States.

¹³⁷ Questions About Smoking, Tobacco and Health
<http://www.cancer.org/cancer/cancercauses/tobaccocancer/questionsaboutsmokingtobaccoandhealth/questions-about-smoking-tobacco-and-health-why-do-people-start> (Last visited April 29, 2013)