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The Family Smoking Prevention and Tobacco Control Act, Graphic Warning Labels, and the Future of Compelled Commercial Speech

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I. INTRODUCTION

In the 2005 satirical comedy Thank You for Smoking, tobacco industry spokesman Nick Naylor engages in a theatrical presentation at a Senate committee hearing about warning labels on tobacco products. In an exchange that leaves Vermont Senator Ortolan Finistirre—an unabashed anti-smoking crusader—nearly speechless, Naylor posits:

I just don't see the point in a warning label for something people already know . . . [T]he real demonstrated #1 killer in America is cholesterol. And here comes Senator Finistirre whose fine state is, I regret to say, clogging the nation’s arteries with Vermont Cheddar Cheese. If we want to talk numbers, how about the millions of people dying of heart attacks? Perhaps Vermont Cheddar should come with a skull and crossbones. While the movie is satirical, this particular dialogue presents a thought-provoking point, especially in light of recent developments in First Amendment law concerning compelled commercial disclosures and tobacco warning labels. Few industries get as much...
attention by government regulators as the tobacco industry. Since 1965, when the United States became the first nation to require health warnings on tobacco packages, the government has continuously regulated the industry’s practices. At one point, the United States Food and Drug Administration (FDA) was so concerned with tobacco usage that it attempted to assert its own jurisdiction—without explicit congressional authorization—to regulate the industry, a practice eventually struck down by the Supreme Court. The most recent regulation of the tobacco industry is by far the most dramatic yet—a requirement of a full-color graphic warning label that takes up half of the front and back panels of cigarette packages, effectively turning the packaging into, what some would say, an anti-smoking billboard.

Circuit courts have split on the constitutionality of the new graphic warning labels. The Court of Appeals for the Sixth Circuit, in Discount Tobacco City & Lottery, Inc. v. United States, upheld the regulation on a First Amendment facial challenge, while the D.C. Circuit, in R.J. Reynolds Tobacco Co. v. Food & Drug Administration, struck down the government’s action on an as-applied challenge. Taking into consideration the Supreme Court’s

3. This author cannot think of any other consumer product within the United States that requires a full-color warning label.
8. 674 F.3d 509 (6th Cir. 2012).
10. Compare Disc. Tobacco City & Lottery Inc., 674 F.3d at 558–59 (upholding graphic warning labels on a facial challenge) with R.J. Reynolds
prior holdings that commercial speech is subject to a lesser degree of First Amendment protection, the Sixth Circuit applied rational basis review while the D.C. Circuit applied a slightly heightened scrutiny after adopting a very narrow interpretation of the commercial disclosure exception to the First Amendment.

While the two decisions might be reconciled by the differing nature of their challenges, the two opinions are especially significant because of the diverging frameworks they apply in addressing compelled commercial disclosures. The cases also bring to a head the question of how much protection commercial speech should get when government disclosure requirements are not aimed at mitigating the effects or the possibility of consumer deception. Over the past few decades, the Supreme Court has addressed the topic of commercial speech on many opportunities. Unfortunately, these opinions have not always been consistent, and some have left a patchwork of tea leaves that present important, unanswered questions on commercial speech's exact position among other First Amendment speech rights.

Because there is substantial confusion as to the current state of law for commercial speech and government-compelled commercial disclosures, the Supreme Court should have embraced this opportunity to clarify its line of cases regarding what standard is appropriate for compelled disclosures not aimed at mitigating misleading commercial speech. Until it does so, we are left with a constant guessing game as to how to evaluate the constitutional limitations of such speech. This Recent Development will review the D.C. and the Sixth Circuit opinions on the graphic warning labels and the two vastly different approaches they take in assessing the limits of compelled commercial speech.

_Tobacco Co._, 696 F.3d at 1208 (striking down the government's action on an as-applied challenge).

13. _See infra_ Part V.A.
14. _See infra_ Parts III.B and C.
II. BACKGROUND

Since 1970, as a result of extensive regulations of the tobacco industry, the percentage of Americans who smoked tobacco dropped from nearly 40 percent to about 20 percent in 2004, when the descending pattern began to stall. A study from the National Academy of Sciences, an independent, nonprofit research organization established by Congress, found that the once-effective textual warning labels had become "unnoticed and stale, and they fail to convey relevant information in an effective way." Further, a finding that "virtually all new users of tobacco products are under the minimum legal age to purchase such products" and that adolescents "misperceive the magnitude of smoking harms and the addictive properties of tobacco and fail to appreciate the long-term dangers of smoking," compelled Congress to revise the tobacco warning labels for the first time in over twenty-five years.

In 2009 with overwhelming, bipartisan support, Congress enacted, and President Barack Obama signed, the Family Smoking Prevention and Tobacco Control Act. In addition to a host of provisions regulating the sale, manufacture, and advertising of cigarettes, the Act also called for a dramatic change in the warning...
labels on cigarette packaging. While tobacco companies previously were required only to include a textual "Surgeon General's Warning" on their package labels and advertisements, the new regulations require a graphic warning comprising of the top half of both the front and back panels of the package, as well as twenty percent of every advertisement. Additionally, the language within the textual warnings was changed to be more direct and explicit of the negative consequences of smoking.

In 2011, after reviewing over 1900 public comments, scientific literature, and the results of an 18,000-person study, the FDA selected nine final warning labels out of thirty-six proposed. The vivid warning labels include images of a corpse, a man exhaling smoke through a tracheotomy hole in his neck, a heavily damaged lung, and a close-up of a mouth with damaged and tarred teeth and a lesion on the lips. In addition, each image includes a statutorily established warning message and the number “1-800-QUIT-NOW,” a hotline for smoking cessation services.

25. For example, one warning was altered from “SURGEON GENERAL’S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema And May Complicate Pregnancy,” Comprehensive Smoking Education Act § 4(a)(2), to “WARNING: Smoking can kill you.” Family Smoking Prevention and Tobacco Control Act § 4(a)(1).
27. The other, less graphic images include a crying woman, a cartoon baby crying in an incubator, a man wearing a t-shirt with the words “I Quit” emblazoned across the front, and a baby enveloped in a cloud of smoke. See Health Warnings for U.S. Food and Administration regulation “Required Warnings for Cigarette Packages and Advertisements,” http://www.fda.gov/downloads/TobaccoProducts/Labeling/UCM259401.pdf; see also Wilson, supra note 4.
28. Id.
Tobacco companies responded to the new graphic warning labels by filing suits in both the District Courts of D.C.\textsuperscript{29} and Western Kentucky\textsuperscript{30} alleging a violation of their First Amendment rights.\textsuperscript{31} Applying strict scrutiny, the D.C. District Court held the new warning labels to be a violation of the First Amendment,\textsuperscript{32} while the Western District of Kentucky applied intermediate scrutiny and held the regulations to be permissible.\textsuperscript{33} On appeal, while disagreeing with their respective district courts’ selected standards of review, both the D.C. Circuit\textsuperscript{34} and the Sixth Circuit Court of Appeals\textsuperscript{35} affirmed the rulings of their lower courts on the issue of the constitutionality of the new warning labels, creating a circuit split on the question of what is the proper standard of review for commercial disclosure requirements.


\textsuperscript{32} R.J. Reynolds Tobacco Co., 823 F. Supp. 2d at 47–49 (“To withstand strict scrutiny, the Government carries the burden of demonstrating that the FDA’s Rule is narrowly tailored to achieve a compelling government interest.”).

\textsuperscript{33} See Commonwealth Brands, 678 F. Supp. 2d at 532 (“[W]here the statute regulates speech it regulates commercial speech and must therefore satisfy the requirements set forth in Central Hudson Gas & Electric Corp. v. Public Service Comm’n, 447 U.S. 557 (1980)”.

\textsuperscript{34} R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1221–22 (D.C. Cir. 2012).

\textsuperscript{35} Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 523–24, 531 (6th Cir. 2012), aff’d sub nom., Commonwealth Brands, Inc. v. United States, 678 F. Supp. 2d 512 (W.D. K.Y. 2010), reh’g denied.
III. THE EXISTING FRAMEWORK

As a general matter, the Constitution protects both individuals and commercial entities from government attempts to compel speech. The law began to chip away at this general proposition, however, after the Supreme Court established commercial speech as a type of speech that was to be afforded some, but not as much, protection under the First Amendment as other forms of speech. Before 2001, it was generally recognized that the existing jurisprudence had separated compelled speech and commercial speech into two distinct frameworks. However, between 1997 and 2001, the Supreme Court issued three seemingly inconsistent decisions regarding the forced subsidization of commercial speech, bringing the commercial speech and compelled speech doctrines closer together, with some arguing that the Supreme Court had created a hybrid compelled commercial speech doctrine.

A. Barnette and the Creation of the Compelled Speech Doctrine

One of the most important values underlying the First Amendment is that, in a democracy, the people retain the ultimate authority to decide matters of public policy. In order for the people to effectively exercise that self-determination, all relevant

37. Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 16 (1943) (plurality opinion) (citations omitted) (“[S]peech does not lose its protection because of the corporate identity of the speaker . . . . Were the government freely able to compel corporate speakers to propound political messages with which they disagree, this protection would be empty . . . .”).
38. See infra Part III.B.
41. Royal, supra note 39, at 206.
information must be out in the open and freely considered.\textsuperscript{42} Consequently, the more that information and ideas are made public, the better. The Supreme Court has adopted this underlying principle in its First Amendment jurisprudence.\textsuperscript{43} A second, related, First Amendment principle is that it protects not only the speaker, but also the listener's interest in receiving information in the marketplace of ideas.\textsuperscript{44} "As the Supreme Court has explained, '[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.' The government may not distort that marketplace with forced messaging."\textsuperscript{45} These two central First Amendment tenets form the basis of the doctrine of compelled speech.

In 1943, the Supreme Court established the compelled speech doctrine in \textit{West Virginia State Board of Education v. Barnette},\textsuperscript{46} striking down a state policy requiring all students in the public schools to salute the flag and recite the Pledge of Allegiance.\textsuperscript{47} In holding that the First Amendment protected both the right to speak and the right to remain silent, the Court grounded its opinion on the notion that saluting the flag indicated consent or approval of the government and its actions, and "the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority."\textsuperscript{48} With the backdrop of World War II and the nation's global war against totalitarianism, the Court ominously warned, "[t]hose who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the

\begin{itemize}
  \item \textsuperscript{42} ALEXANDER MEIKLEJOHN, \textit{FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT} 15-16 (1948).
  \item \textsuperscript{43} See, \textit{e.g.}, \textit{N.Y. Times v. Sullivan}, 376 U.S. 254, 270 (1964) ("[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . .").
  \item \textsuperscript{44} Royal, supra note 39, at 210.
  \item \textsuperscript{45} Id. at 210 (quoting \textit{Red Lion Broad. Co. v. FCC}, 395 U.S. 367, 390 (1969)).
  \item \textsuperscript{46} 319 U.S. 624 (1943).
  \item \textsuperscript{47} Id. at 627–29, 642.
  \item \textsuperscript{48} Id. at 641.
\end{itemize}
The Court was concerned that compelling citizens to adopt political positions would violate their “freedom of mind,” a concept that the Court adopted from its previous freedom of religion cases. In closing, the Barnette Court eloquently declared the principle:

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.

Thus, the principle that would eventually form out of Barnette was that given the importance of the speech interests, government attempts to compel speech would only survive if they passed strict scrutiny. Under strict scrutiny, the government can only restrict fundamental constitutional rights if such restrictions are narrowly tailored to achieve a compelling government interest.

The landmark Barnette case did not settle the compelled speech question, but rather set off a half-century of debate on what limits, if any, existed on the prohibition of government enforced speech. For example, Barnette dealt with issues of public opinion on important public policy and political matters, arguably the most important form of protected speech under the First Amendment. But does commercial speech have the same “constitutional value” under the First Amendment? The Court answered this question in the negative.

49. Id.
54. See supra notes 42-43 and accompanying text.
55. See infra notes 56–60 and accompanying text.
B. Zauderer, Central Hudson, and the Commercial Speech Doctrine

While the Supreme Court has been zealous in its protection of compelled speech relating to matters of public opinion and political debate, it has limited constitutional protection for commercial speech, generally defined as speech that "does no more than propose a commercial transaction," to a level "commensurate with its position in relation to other constitutionally guaranteed expression." Advertising, as opposed to political speech, was given less protection because it was viewed as an "economic right" rather than actual "speech."

One year before its decision in *Barnette*, the Supreme Court declared that "the Constitution imposes no . . . restraint on government as respects purely commercial advertising." That commercial speech was completely outside the scope of First

56. See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978). The Court stated in *Ohralik*:

We have not discarded the common-sense distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.

*Id.* (citation omitted) (internal quotation marks omitted).


Amendment protection was the prevailing belief until the
Supreme Court dispelled this notion in Virginia State Board of
Pharmacy v. Virginia Citizens Consumer Council, which clarified
that commercial speech was subject to a limited degree of
protection under the First Amendment. To reach that conclusion,
the Court emphasized that the First Amendment not only protected
the speaker, but also the receiver of speech. In this case, a
resident of Virginia challenged the State’s ban on the advertisement
and promotion of prices for prescription drugs by pharmacists. Affirming principles from earlier cases, the Court pointed out that
the First Amendment included the right to “receive information
and ideas,” and specifically cited a case where it struck down a ban
on advertising that “contained factual material of clear ‘public
interest.’” Because the Court considered prices of prescription
drugs essential to consumer decision-making in a free market
economy, it was a “matter of public interest” that such consumer
decisions “be intelligent and well informed,” and therefore they
could not be prohibited without ample justification. Perhaps most
importantly for future commercial speech cases, the Court made
clear its disapproval of regulations that were based on government
paternalism and the idea that government protection of citizens
depended on “their being kept in ignorance.” A better
alternative, according to the Court, was:

dication that commercial speech is unprotected”).
63. Id. at 770.
64. Id. at 756.
65. Id. at 751–52.
66. Id. at 757 (quoting Kleindienst v. Mandel, 408 U.S. 753, 762–763
(1972)).
67. Id. at 760 (quoting Bigelow v. Virginia, 421 U.S. 809, 822 (1975)). It is
important to point out that, in this case, the Supreme Court struck down a ban
on receiving factual information—that is, the actual price of prescription
drugs. See id. at 752, 762–64. And thus, the holding should be interpreted as
stating that the government cannot keep consumers from finding out factual
information about a product. See id. at 764–65.
68. Id. at 765.
69. Id. at 769-770.
To assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.\(^70\)

Foreshadowing future holdings, the Court spelled out instances in which government could subject commercial speech to regulation.\(^71\) These instances included time, place, and manner restrictions, as well as commercial speech that was false or misleading.\(^72\) Within a decade after the Court's holding in *Virginia State Board of Pharmacy*, the Court would further elaborate on the different types of levels of protection for commercial speech.\(^73\) When it comes to regulation of commercial speech, there are two classes of regulation, creating two different standards of review, depending on the nature of the speech being regulated and the means of regulation being used.\(^74\)

1. *Central Hudson* and Intermediate Scrutiny

The first class of commercial speech regulation encompasses restrictions on commercial speech that is both lawful and not misleading or deceptive.\(^75\) In *Central Hudson Gas and Electric Corporation v. Public Service Commission*,\(^76\) the Court struck down a permanent ban on advertising that promoted electricity use.\(^77\) Nothing in the prohibited advertising was inaccurate or misleading.\(^78\) Giving substantial weight to the consumer's interest in

\(^70\) Id. at 770.

\(^71\) Id. at 770–72.

\(^72\) Id. at 771.

\(^73\) See infra Parts III.B.i and III.B.ii.


\(^75\) Discount Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 522–23 (6th Cir. 2012).

\(^76\) 447 U.S. 557 (1980).

\(^77\) Id. at 558–59, 571–72.

\(^78\) Id. at 566.
receiving accurate information, the Court applied intermediate scrutiny. While it found that energy conservation was a substantial state interest, the Court held that an outright, blanket ban on all advertising was impermissibly overbroad because it failed to show that "a more limited restriction on the content of promotional advertising would not serve adequately the State's interests." Thus, Central Hudson established that commercial speech that is lawful and not misleading or inaccurate is afforded a higher level of protection, and government restrictions on such speech are subject to intermediate scrutiny. When regulating speech within this category, the government must prove: (1) a substantial interest, (2) that the "regulation directly advances the governmental interest asserted," and (3) that the regulation "is not more extensive than is necessary to serve that interest." In carrying its burden, the government cannot use "mere speculation or conjecture; rather . . . [it] must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." This demonstration does not have to be overly exacting; rather, it can be made "by reference to studies and anecdotes pertaining to different locales," and, in some circumstances, speech restrictions can be justified "solely on history, consensus, and 'simple common sense.'" In addition, the Supreme Court has subsequently made clear that the standard as to the third prong is not the least restrictive means, but instead requires a "reasonable 'fit between the legislature's ends and the means chosen to accomplish those ends, . . . a means narrowly tailored to achieve the desired objective.'"

79. Id. at 563-64.
80. Id. at 570.
81. See id. at 564 ("If the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed.").
82. Id. at 566.
85. Id. (quoting Burson v. Freeman, 504 U.S. 191, 211 (1992)).
2. Zauderer and Rational Basis Review

The second class of commercial speech regulation encompasses compelled factual disclosures aimed at correcting or mitigating false, misleading, or deceptive commercial speech. The "misleading information" doctrine arose out of Zauderer v. Office of Disciplinary Counsel of the Supreme Court. In this case, the Supreme Court upheld a disciplinary action against an attorney who advertised to potential clients that they would not pay any legal fees, but failed to disclose that they would have to pay legal costs. The attorney was punished under a state regulation requiring attorneys to fully disclose the cost of their services. The Court held that "[b]ecause the extension of First Amendment protection to commercial speech is justified principally by the value to consumers . . . appellant's constitutionally protected interest in not providing any particular factual information in his advertising is minimal."

The Court presented two reasons for the application of a more lenient standard than Central Hudson. First, factual disclosures are not the same as outright restrictions on speech. Second, the regulation did not involve matters of public discourse. Perhaps the most important distinction the court made is that "when the State requires purely factual disclosures, it does not prevent speakers from stating anything, but merely requires that they provide more information."

88. Id. at 633.
89. Id. at 631.
90. Id. at 651.
91. Id. "[B]ecause disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, warning[s] or disclaimer[s] might be appropriately required...in order to dissipate the possibility of consumer confusion or deception." Id. (quoting In re R.M.J., 455 U.S. 191, 201 (1982)) (internal quotation marks omitted).
92. Id. ("Ohio has not attempted to '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.' The State has attempted only to prescribe what shall be orthodox in commercial advertising . . . ").
93. Royal, supra note 39, at 220.
Thus, a speech regulation in the form of a factual disclosure to correct or mitigate commercial speech that is false, misleading, or deceptive is subject to a different standard of review than that applied to restrictions on non-misleading commercial speech. The Supreme Court has endorsed government regulation of commercial speech that requires compulsion of factual disclosures if they are "reasonably related to the State's interest in preventing deception of consumers." This exception is considered necessary to allow States to "insur[e] that the stream of commercial information flow[s] cleanly as well as freely."

C. The Compelled Subsidy Cases

Since Barnette, the compelled speech doctrine has developed into two distinct categories: "true compelled speech" cases, where an individual is compelled to directly express a message he disagrees with, and "compelled subsidy" cases, where an individual is forced to express a belief with which he disagrees by mandatory payment of a fee to support the expression of that belief. The Supreme Court has recognized a limited right against compelled subsidization since 1977. The compelled subsidy line of cases must be considered when assessing the limits of commercial speech protections because the Court has often evaluated several such cases in the context of commercial speech. Unfortunately, the Court has been inconsistent in ruling on such cases and it has

94. See Zauderer, 471 U.S. at 651 (stating that requirements "reasonably related to the State's interests in preventing deception of consumers" are constitution); Discount Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 522–523 (6th Cir. 2012).
95. Zauderer, 471 U.S. at 651.
99. See infra notes 106–22.
added more confusion to the constitutional status of commercial speech.\textsuperscript{100}

In \textit{Abood v. Detroit Board of Education},\textsuperscript{101} the Court struck down a state statute requiring teachers to either join the union or pay a fee to the union equal to the dues of union members.\textsuperscript{102} The fees collected would go towards funding, among other activities, the union's legislative lobbying and support for political candidates.\textsuperscript{103} The Court reasoned that the principles of the First Amendment "prohibit a State from compelling any individual . . . to associate with a political party, . . . as a condition of retaining public employment."\textsuperscript{104} The Court, however, did not outlaw all compelled subsidies. Instead, the Court in \textit{Abood} used the germaneness test: individuals can be compelled to subsidize speech that is germane to a sufficiently important state interest.\textsuperscript{105}

In \textit{Glickman v. Wileman Brothers. & Elliot, Inc.},\textsuperscript{106} the Supreme Court had an opportunity to analyze a compelled subsidy case in the context of commercial speech. In that case, a federal regulation required tree-fruit producers to contribute funds to an advertising campaign to market tree-fruit as "wholesome, delicious, and attractive to discerning shoppers."\textsuperscript{107} The Court upheld the regulation primarily on the commercial nature of the regulation, reasoning that the First Amendment is primarily concerned with compulsion of political and ideological views, and not generic advertising.\textsuperscript{108} \textit{Glickman} is interpreted to mean "where a message is commercial it cannot be ideological, and therefore cannot implicate the compelled speech doctrine. Thus, when the

\textsuperscript{100} See Post, supra note 40, at 555; see also Gregory Klass, The Very Idea of a First Amendment Right Against Compelled Subsidization, 38 U.C. DAVIS L. REV. 1087, 1090 (2004).
\textsuperscript{101} 431 U.S. 209 (1977).
\textsuperscript{102} \textit{Id.} at 212.
\textsuperscript{103} \textit{Id.} at 215.
\textsuperscript{104} \textit{Id.} at 234.
\textsuperscript{105} See Post, supra note 40, at 564–65.
\textsuperscript{106} 521 U.S. 457 (1997).
\textsuperscript{107} \textit{Id.} at 462.
\textsuperscript{108} \textit{Id.} at 469–70.
government requires propagating [a] commercial message, it does not compel speech under the First Amendment.  

Just four years after Glickman, the Court decided United States v. United Foods,\textsuperscript{110} assessing the constitutionality of a government-compelled assessment to pay for the generic advertising of mushrooms, similar to the type of advertising program presented in Glickman.\textsuperscript{111} In this case, however, the Court struck down the regulation based on the lack of a broader regulatory scheme.\textsuperscript{112} More importantly for the constitutional status of commercial speech, however, was that the Court included language in the opinion that directly undermined the central premise in Glickman.\textsuperscript{113} The Court recognized that commercial speech could be ideological in some circumstances because such speech could be "laden with value judgments and opinions."\textsuperscript{114} Accordingly, United Foods began to undermine the then-prevailing case law by suggesting that First Amendment concerns are raised "whenever government forces 'individuals to pay subsidies for speech to which they object,'" even if it is commercial speech, and thus courts should not be so quick to defer to regulations as compelled commercial speech.\textsuperscript{115} As one scholar has pointed out, the decision in United Foods—that compelled subsidization of commercial speech implicates more than minimal First Amendment interests—seems to be in direct tension with the holding from Zauderer that the constitutionally protected interest in not providing any particular factual information in advertising is minimal.\textsuperscript{116} Perhaps most importantly, United Foods is seen as a shift away from audience-centered constitutional values, as was the case in Zauderer, and towards speaker-centered values.\textsuperscript{117}

\textsuperscript{109} Royal, supra note 39, at 225.
\textsuperscript{110} 533 U.S. 405 (2001).
\textsuperscript{111} Id. at 408.
\textsuperscript{112} Id. at 411–12.
\textsuperscript{113} Royal, supra note 39, at 226.
\textsuperscript{114} Id. at 225.
\textsuperscript{115} Post, supra note 40, at 557 (quoting United Foods, 533 U.S. at 410).
\textsuperscript{116} Id. at 576.
\textsuperscript{117} Id. at 577.
The Court added yet another factor to be considered in the compelled subsidy line of cases in *Johanns v. Livestock Marketing Association*.

In this case, the Court upheld the assessment of a marketing fee on beef producers to support promotional advertising campaigns for beef. Instead of deciding the case based on the purposes of the subsidy, the manner of distribution, the broader regulatory scheme, or whether the subsidized expression was commercial speech, as the Court had done in the past, the *Johanns* Court upheld the subsidy on grounds that compelled support of government expression was permissible under the government speech doctrine. Whereas the previous cases dealt with the government compelling support for speech of third parties, the federal government controlled the regulation in question in *Johanns*, and citizens "have no First Amendment right not to fund government speech."

The compelled subsidy cases have brought a considerable amount of confusion to the limits of compelled commercial speech. As one scholar notes, theses cases left important questions unanswered. The first is how courts should determine whether to apply the compelled commercial speech doctrine or whether to apply *Zauderer*. This is particularly troublesome because the Supreme Court has not set out a specific way to distinguish between a mandatory factual disclosure and compelled speech. Second, if courts are to apply the compelled commercial speech doctrine, should they consider such speech under the "true compelled speech" doctrine or the "compelled subsidy" doctrine, or something else?

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119. *Id.* at 553–54.
120. *Id.* at 562.
121. *Id.* at 560.
122. *Id.* at 562.
124. *Id.*
125. *Id.* "Skilled attorneys may argue that the same regulation falls into either category. A commercial speaker who does not want to disseminate information will argue that she disagrees with it, and that it therefore constitutes compelled speech." *Id.* at 232.
126. *Id.*
IV. CIRCUIT COURT SPLIT

With so much uncertainty as to the exact status of compelled commercial speech disclosures in different contexts, it is unsurprising that, when applying the existing commercial speech case law to the new tobacco warning labels, the lower courts have reached differing conclusions. Two federal appeals courts have recently had an opportunity to weigh the constitutionality of the government’s new graphic cigarette labels—the Sixth Circuit and the D.C. Circuit. The Sixth Circuit, by a 2-1 majority, upheld the regulation on a facial challenge. The D.C. Circuit, also by a 2-1 majority, struck down the regulation on an as-applied challenge. The difference in approaches to the central framework for commercial speech taken by the two courts is indicative of the uncertain state of the law concerning compelled commercial speech.

A. The Sixth Circuit

In Discount Tobacco City & Lottery, Inc. v. United States, Discount Tobacco City and Lottery, a group of manufacturers and sellers of tobacco products, brought a claim arguing that on their face, the graphic warning labels violated their rights to freedom of speech under the First Amendment. The Sixth Circuit began its analysis with a threshold inquiry of whether the regulation in question was a restriction on speech or a mandatory disclosure requirement. According to the court, Central Hudson could only be applied to restrictions on speech and never to disclosure requirements. Mandatory disclosures instead would be subjected

129. 674 F.3d 509 (6th Cir. 2012).
130. Id. at 518.
131. Id. at 552.
132. See id.
to Zauderer analysis. After distinguishing between restrictions on speech and disclosures, the court found the regulation in question to be a disclosure since it required compelling additional information, and the court proceeded to review it under Zauderer. Under this standard, the court explained, a disclosure requirement would be afforded rational basis review if it met two requirements: (1) the disclosure must present factual information, rather than personal or political opinion, and (2) the disclosure must target speech that is inherently or potentially misleading. A disclosure requirement that fails to meet these two requirements, under the court’s framework, would be subject to strict scrutiny.

Because the case presented a facial challenge, to show that the graphic images were not factual, the tobacco company had to show that “no set of circumstances exist[ed] under which the statute would be valid.” In this case, that required a showing that “graphic warnings [could not] convey the negative health consequences of smoking accurately.” In other words, the tobacco companies had to show that it was impossible for pictures to show factual information. The court found that graphic warning labels did not meet this standard, using an analogy to students learning about the body and diseases:

Students in biology, human-anatomy, and medical-school courses look at pictures or drawings in textbooks of both healthy and damaged cells, tissues, organs... because those pictures convey factual information about medical conditions and biological systems... By virtue of our genes and environment, every person is different. And yet medical students learn valuable factual information in part by

133. Id. at 554.
134. Id. at 552.
135. See id. at 555.
136. See id. at 558.
137. Id. at 554.
138. Id. at 558–59 (quoting U.S. v. Stevens, 559 U.S. __, __, 130 S. Ct. 1577, 1587 (2010)).
139. Id. at 559.
examining pictures and images of the human body and the various illnesses that may befall it. So arguing that a representation of a medical condition becomes an opinion when people could have that medical condition in ways that deviate from the representation would lead to the insupportable conclusion that textual or pictorial descriptions of standard medical conditions must be opinions as well. People with the same illness can and often will suffer a variety of differing symptoms. But one wouldn’t say that a list of symptoms characterizing a particular medical condition is nonfactual and opinion-based as a result. So too with graphic images.\textsuperscript{140}

Further, the court noted that the Supreme Court’s holding in \textit{Zauderer} itself rejected the argument that graphics could not be factual.\textsuperscript{141} In \textit{Zauderer}, the Court rejected the state’s attempt to regulate the use of pictures based on the argument that the use of illustrations in advertisements created a risk that the public would be misled by “subtle uses of illustrations to play on emotions.”\textsuperscript{142} The Supreme Court explained that “the use of illustrations or pictures in advertisements serves important communicative functions: it attracts the attention of the audience to the advertiser’s message, and it may also serve to impart information directly.”\textsuperscript{143} While the Supreme Court was addressing the broader question of whether government could restrict commercial speech, the Sixth Circuit interpreted the opinion to imply that pictures in general could be accurate and factual.\textsuperscript{144}

Next, the court addressed the question of whether there was a threat of consumer deception. The Sixth Circuit first pointed out that there was an ongoing threat of deception due to the fact that

\begin{thebibliography}{99}
\bibitem{140} \textit{Id.} at 559.
\bibitem{141} \textit{Id.} at 560.
\bibitem{142} \textit{Id.} (quoting \textit{Zauderer}, 471 U.S. at 648).
\bibitem{143} \textit{Id.} (quoting \textit{Zauderer}, 471 U.S. at 647).
\bibitem{144} \textit{Id.}
\end{thebibliography}
the tobacco companies "knowingly and actively conspired to
deceive the public about the health risks and addictiveness of
smoking for decades." The court was persuaded by the
government's contention that the existing text-only warning labels
failed to "effectively convey the risks of smoking" for several
reasons, including that they were easily overlooked, not prominent,
stale, and that they required a college reading level and, thus, were
inappropriate for the young Americans that the government
intended to target. In response to the tobacco company's
argument that the warnings could not be justified on the basis of
preventing consumer deception because consumers knew the health
risks of tobacco, the court said that even if it were true that
consumers were fully aware of the health risks, an advertiser's
rights are adequately protected as long as the requirements were
reasonably related to the government's interest in preventing
consumer deception, and no further inquiry was needed.

Thus, having established that the threshold requirements for
Zauderer were met, the court proceeded to apply rational basis
review. In examining whether the graphic warning labels were
reasonably related to the purpose of preventing consumer
deception, the court looked to the experience of other jurisdictions,
finding that the government's solution of graphic labels was
reasonable based on the success that Canada, Brazil and Thailand
had with the adoption of similar warnings. In response to the
argument that the graphic labels would not actually reduce tobacco
use, the court cited a Second Circuit opinion, holding that under
Zauderer the government only needed to show that "it was
probable that some consumers would change their behavior in
response to the disclosures." Finally, the court countered that
even if it were true that the graphic labels would not actually reduce
tobacco use, that was irrelevant:

145. Id. at 562.
146. Id. at 563–64.
147. Id. at 566–67.
148. Id.
149. Id.
150. Id. at 564 (citing Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 115
(2d Cir. 2001)) (emphasis in original).
The purpose of the warnings is to prevent consumers from being misled about the health risks of using tobacco. What matters in our review of the required warnings is not how many consumers ultimately choose to buy tobacco products, but that the warnings effectively communicate the associated health risks so that consumers possess accurate, factual information when deciding whether to buy tobacco products.151

After extensive analysis of the problems with the existing warning labels’ failure to effectively convey health warnings, the court concluded that “based on common sense . . . larger warnings incorporating graphics will better convey the risks of using tobacco to consumers.”152 What is clear from the Sixth Circuit opinion is that the court is very willing to defer to the judgments of the government regarding the state of consumer information and the means necessary to address any deficiencies. This deference, as will be seen, varies substantially from the approach the D.C. Circuit took.153

B. The D.C. Circuit

Contrary to the holding in the Sixth Circuit, in R.J. Reynolds Tobacco Co. v. Food & Drug Administration,154 the D.C. Circuit adopted a narrow construction of Zauderer along with an expansive application of Central Hudson to hold that the graphic warning label provision was a violation of the tobacco company’s commercial speech rights.155 In the D.C. Circuit’s view, the threshold question to determine the level of review was whether there was a threat of consumer deception.156 According to the

151. Id. at 567.
152. Id.
153. See supra Part IV.B.
154. 696 F.3d 1205 (D.C. Cir. 2012).
155. Id. at 1221–22.
156. See id. at 1213–14 (beginning analysis of the proper level of review based on the question of whether there was a threat of consumer deception).
court, "a disclosure requirement is only appropriate if the government shows that, absent a warning, there is a self-evident — or at least 'potentially real' — danger that an advertisement will mislead consumers." Additionally, the court adopted the view that "Zauderer does not stand for the proposition that government 'can constitutionally compel the use of a scripted disclaimer in any circumstance in which its interest in preventing consumer deception might plausibly be at stake." Based upon this narrow view, the court held that "in the absence of any congressional findings on the misleading nature of cigarette packaging itself, there [was] no justification under Zauderer for the graphic warnings." Furthermore, the court held that even if cigarette packaging contained misleading information, the graphic warnings would still not be held to the Zauderer standard because they did "not constitute the type of 'purely factual and uncontroversial' information . . . or 'accurate statement[s]' . . . to which the Zauderer standard may be applied." As an example, the court turned to the image of a man smoking through a tracheotomy hole. This image, the court found, could easily be misinterpreted as "suggesting that such a procedure is a common consequence of smoking — a more logical interpretation than the FDA's contention that it symbolizes 'the addictive nature of cigarettes.'" The court also questioned the messages within the graphics, such as "I QUIT," and the "1-800-QUIT-NOW" number. To the court, this information did not offer any unbiased information about the health effects of smoking. The images were not perceived as attempts by the government to convey purely factual, accurate, or uncontroversial information, but

157. Id. at 1214 (citing Ibanez v. Florida Dep't of Bus. & Prof'l Regulation, 512 U.S. 136, 146 (1994)).
158. Id. at 1214 (citing Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. ___, ___, 130 S. Ct. 1324, 1343-44 (2010) (Thomas, J., concurring in part and concurring in the judgment)).
159. Id. at 1214–15.
160. Id. at 1216.
161. Id.
162. Id.
were instead "unabashed attempts to evoke emotion (and perhaps embarrassment) and browbeat consumers into quitting."¹⁶³

Having established that the graphic labels were not subject to rational basis review because the commercial speech being regulated was not misleading and the disclosures were not sufficiently factual,¹⁶⁴ the court proceeded to evaluate the government regulation under Central Hudson's intermediate scrutiny standard.¹⁶⁵ First, the court proceeded with the assumption that the government had a substantial interest in encouraging smokers to quit and in reducing the number of Americans who use tobacco.¹⁶⁶ The court then turned to the critical inquiry of whether the graphic warning requirements directly advanced the government's interest to a material degree. The court found that the government had "not provided a shred of evidence . . . that the graphic warnings [would] 'directly advance' its interest in reducing the number of Americans who smoke."¹⁶⁷

The court was not swayed by evidence that countries with graphic warnings had successfully reduced smoking rates because, according to the court, there was no evidence showing that such warnings "directly caused" the results.¹⁶⁸ The court further rejected Australian and Canadian studies that found: (1) the warnings caused a substantial number of participants to consider quitting smoking, and (2) the warnings caused increased attempts to quit smoking.¹⁶⁹ The court reasoned that "it is mere speculation" to equate thoughts about quitting smoking or attempts to quit smoking with actual cessation.¹⁷⁰ Such "questionable social science," the court concluded, purports to show only that the warnings "might induce individual smokers to reduce consumption" but not that they "actually led to a reduction in smoking rates."¹⁷¹ Thus, the

¹⁶³  Id. at 1217.
¹⁶⁴  Id. at 1216.
¹⁶⁵  Id. at 1217.
¹⁶⁶  Id. at 1218.
¹⁶⁷  Id. at 1219.
¹⁶⁸  Id. (emphasis in original).
¹⁶⁹  Id.
¹⁷⁰  Id.
¹⁷¹  Id. (emphasis in original).
court held, absent the necessary direct evidence that the graphic warnings will accomplish the government's objective of reducing smoking rates, the government did not meet its burden under *Central Hudson* was not met, and the provision was therefore an infringement on the tobacco companies' First Amendment rights.\(^{172}\)

V. ANALYSIS

The opinions arising out of the Sixth Circuit and the D.C. Circuit present drastic diverging viewpoints about the extent of protection afforded to commercial speech. First, the two courts are split on the proper framework for determining which standard of review to apply to differing types of regulations on commercial speech. Second, even if they were in agreement on how to determine the standard, the two courts also diverge on their conceptions of how to apply the different standards.

A. Different Frameworks for Commercial Speech

In reaching their conclusions, the two courts based their analyses on two fundamentally different conceptions of the proper framework for commercial speech. The Sixth Circuit bifurcated commercial speech regulations between outright bans on speech and mandatory informational disclosures, paying no attention to the content or threat of consumer deception until after the threshold inquiry. The D.C. Circuit, on the other hand, bifurcated commercial speech between its misleading and nonmisleading nature, with special attention on the content of the required disclosure itself during the threshold inquiry. The two divergent approaches present drastically different results.

Under the Sixth Circuit's framework, the threshold inquiry is whether the government's action is a restriction on commercial speech or a mandatory disclosure.\(^{173}\) If it is a restriction on commercial speech, then *Central Hudson*’s intermediate scrutiny

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172. *Id.* at 1222.
standard applies.\textsuperscript{174} If it is a mandatory commercial disclosure, \textit{Zauderer} applies, and then whether rational basis review or strict scrutiny is employed depends upon whether the disclosure is a factual statement or opinion.\textsuperscript{175}Interestingly, the Sixth Circuit’s framework proves to be both under-protective of commercial speech in that it adopts a broad interpretation of \textit{Zauderer}’s requirements,\textsuperscript{176} and overprotective of commercial speech in that it applies strict scrutiny for nonfactual disclosures.\textsuperscript{177}

Under the D.C. Circuit’s approach, the threshold inquiry is whether a threat of consumer deception exists.\textsuperscript{178} If the answer is in the affirmative, \textit{Zauderer} applies.\textsuperscript{179} If the answer is in the negative, \textit{Central Hudson} applies.\textsuperscript{180}

The first major difference between these approaches is that under the Sixth Circuit’s character-of-the-regulation approach, \textit{Central Hudson} and intermediate scrutiny is completely irrelevant in the analysis if the regulation in question is initially deemed to be a disclosure requirement.\textsuperscript{181} Instead, courts must first decide whether to apply rational basis review or strict scrutiny.\textsuperscript{182} Under the D.C. Circuit’s threat-of-deception approach, in contrast, \textit{Central Hudson} is relevant regardless of whether the regulation is a disclosure or a restriction.\textsuperscript{183}

A second major difference is that under the D.C. Circuit’s approach, commercial speech regulations can never be subjected to strict scrutiny.\textsuperscript{184} Thus, the D.C. Circuit’s approach effectively

\textsuperscript{174} \textit{Id.}
\textsuperscript{175} \textit{Id.} at 555.
\textsuperscript{176} \textit{See infra} Part V.B.
\textsuperscript{177} \textit{See supra} notes 135–37.
\textsuperscript{178} R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1212 (D.C. Cir. 2012).
\textsuperscript{179} \textit{Id.}
\textsuperscript{180} \textit{Id.}
\textsuperscript{181} \textit{Supra} note 132.
\textsuperscript{182} \textit{Supra} notes 135–37.
\textsuperscript{183} The \textit{Central Hudson} standard can apply to both restrictions on speech and mandatory disclosures. The focus is on whether there is a threat of consumer deception.
\textsuperscript{184} This logically follows from the bifurcated framework: if a regulation targets a threat of consumer deception, it is subject to rational basis review. If
solidifies commercial speech's position as subordinate to other types of speech protected by the First Amendment. The Sixth Circuit, on the other hand, calls for strict scrutiny under the compelled speech doctrine if a required disclosure is not factual or there is no threat of consumer deception. Thus, the D.C. Circuit's approach recognizes the increasingly held view that commercial speech can have high value in public debate, and that it can be ideological.

B. Differing Interpretations of Standards of Review

Even if the Sixth and D.C. Circuits could agree on which standard of review to apply, the two courts' interpretations of each standard suggests that the courts would nevertheless come out on different sides. The Sixth Circuit unanimously determined that Zauderer was the proper standard of review at the outset and proceeded under that analysis without discussing Central Hudson in any great detail. The D.C. Circuit, however, did extensively analyze Zauderer before settling on applying Central Hudson. A review of the two courts' diverging understandings of Zauderer presents a stark contrast, as the D.C. court adopted a very narrow view of the standard, while the Sixth Circuit adopted a fairly broad view.

It does not target a threat of consumer deception, it is subject to intermediate scrutiny. Nowhere does strict scrutiny come into the picture in this analysis.

185. See supra notes 135–37.
188. Even the lone dissenter, Judge Clay, agreed that Zauderer was the proper standard to apply. Judge Clay dissented based on his belief that the majority's application of the standard was too broad. Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 530 (6th Cir. 2012) (Clay, J., dissenting in part).
190. For reference, the standard that the two courts are interpreting is: "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing
First, the two courts differed on their assessment of whether a threat of consumer deception with regard to the tobacco industry existed at all. In the D.C. Circuit’s view, disclosures are only appropriate where there is a “potentially real” danger that an advertisement will mislead consumers. The D.C. Circuit seems to view this inquiry as limited solely to the advertisement at the time the consumer views it. In the case of the tobacco labels, the court found no threat of deception because the tobacco companies were already prevented from using descriptors on packages and advertisements such as “light,” “mild,” or “low,” so there was nothing misleading about the cigarette packaging or advertisements themselves that would require disclosure in order to protect against consumer deception. The court goes on to brush aside the government’s remedial justification because the government did not “frame” the rule as a corrective measure.

In contrast, the Sixth Circuit embraced a far broader view of what constituted deception, considering not just the commercial speech at the time the consumer sees it, but the surrounding circumstances of the speech. The court found the government’s remedial justification sufficient based on a legislative record showing that the tobacco companies had previously engaged in a “[conspiracy] to deceive the public about the health risks and addictiveness of smoking,” and “in a scheme to defraud smokers and potential smokers.” Additionally, the court cited with approval a Second Circuit interpretation of Zauderer holding that the “framework can apply even if the required disclosure’s purpose is something other than or in addition to preventing consumer deception” as long as it is reasonably related to the purpose of

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192. Id. at 1214–15.
193. Id.
194. See infra notes 145–46.
preventing such deception. The court also directly refuted the idea embraced by the D.C. Court that Zauderer required a separate analysis, beyond whether a disclosure was reasonably related to the State interest in preventing deception of consumers, of whether the mandated disclosure was "justified."

A second significant difference between the D.C. and the Sixth Circuit's interpretation of Zauderer is the permissible content of the compelled disclosure. The D.C. Circuit set a high bar, requiring that the government's disclosure contain only "purely factual and uncontroversial" information. The graphic warning labels, according to the court, failed this test because "they [were] primarily intended to evoke an emotional response, or, at most, shock the viewer into retaining the information in the text warning." Additionally, the court found the labels to be problematic because the images could be misinterpreted as health results that will happen rather than results that may happen. In contrast, the Sixth Circuit requires neither that the disclosure be purely factual nor uncontroversial. Rather, the court makes only a distinction between a fact and a personal or political opinion. The court found it beyond question, both practically and constitutionally, that images could convey factual information effectively. According to the court, because the health risks associated with smoking were supported by scientific evidence, they were factual. And while the images that the D.C. Circuit analyzed were not yet available at the time of the Sixth Circuit's

196. Id. at 556 (citing Nat’l Elec. Mfrs. Ass’n v. Sorrell, 272 F.3d 104 (2d Cir. 2001)).
197. Id. at 566–67.
198. R.J. Reynolds Tobacco Co., 696 F.3d at 1212.
199. Id. at 1216.
200. Id. ("For example, the image of a man smoking through a tracheotomy hole might be misinterpreted as suggesting that such a procedure is a common consequence of smoking; a more logical interpretation than the FDA’s contention that it symbolizes the ‘addictive nature of cigarettes.’").
202. Id. at 559–60.
203. Id. at 561.
opinion, the Sixth Circuit predicted with fair accuracy\textsuperscript{204} what the images might look like, and concluded that they would convey factual information accurately without \textit{Zauderer} concerns.\textsuperscript{205} In sum, the Sixth Circuit's approach to reviewing the content of a disclosure to determine whether it falls within \textit{Zauderer}'s ambit is far more permissive than the probing inquiry into whether a message can be misinterpreted or controverted that is characteristic of the D.C. Circuit's interpretation.

\textit{C. Problems with the Two Frameworks}

While the conflicting frameworks proposed by the two courts each have aspects that are in accord with existing precedent, they also each have their flaws.

An important distinction between the two courts' opinions is the fact that, under current precedent, \textit{Central Hudson}'s intermediate scrutiny standard only applies to \textit{bans} on commercial speech, and not to commercial speech disclosures.\textsuperscript{206} The Sixth Circuit opinion immediately disposed of analysis under \textit{Central Hudson} after an initial determination that the regulation in question was a disclosure.\textsuperscript{207} On the other hand, the D.C. Circuit applied \textit{Central Hudson} after determination that \textit{Zauderer} did not apply.\textsuperscript{208} As a general matter, it is important to note that in every instance the Supreme Court has ever applied \textit{Central Hudson}, the Court has analyzed statutes or ordinances that ban outright some sort of commercial speech.\textsuperscript{209} Furthermore, there are important

\textsuperscript{204} Examples that the court put forward as sufficiently "factual" included an image of a smoker's lung, and a picture of a person suffering from a smoking-related medical condition. \textit{Id.} at 559.

\textsuperscript{205} \textit{Id.} at 559–60.

\textsuperscript{206} \textit{See infra} notes 209–13 and accompanying text.

\textsuperscript{207} \textit{Disc. Tobacco City and Lottery}, 674 F.3d at 554.

\textsuperscript{208} R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1217 (D.C. Cir. 2012).

differences between bans on speech and compelled disclosures that support different standards of review.

The Supreme Court has explicitly noted the "material differences" between the two types of commercial speech regulations. The heightened scrutiny in Central Hudson was principally justified on the rejection of the "highly paternalistic view that government has complete power to suppress or regulate commercial speech," and the preference for not restricting information from consumers. Subsequent applications of Central Hudson have reiterated "the general rule . . . that the speaker and the audience, not the government, assess the value of the information presented." Thus, disclosure requirements, because they mandate more information, do not implicate the same concerns as those restrictions that restrict the flow of information to the consumer. This concept was affirmed in a recent case where the Supreme Court upheld a disclosure requirement after explicitly refusing to apply Central Hudson because the regulation was not "an affirmative limitation on speech." The main problem with the D.C. Circuit's framework is that it completes the inferential jump arising from United Foods that compelled commercial speech not aimed at mitigating misleading or deceptive speech should be subject to heightened scrutiny, a jump that the Supreme Court has not yet made.

A second questionable result from these cases is the Sixth Circuit's introduction of the possibility of strict scrutiny for mandatory commercial disclosures if it is determined that there is no threat of consumer deception. This is a problem because the

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214. Post, supra note 40, at 583.
Supreme Court has long recognized that commercial speech is in a subordinate position to other forms of protected First Amendment speech. If the government was compelling corporate speech in a forum that went beyond the mere proposal of a commercial transaction, then that forum would not fall into the category of commercial speech and it would be afforded full First Amendment protection. Commercial disclosures, however, are commercial speech, and affording strict scrutiny (i.e., full First Amendment protection) to such speech would seem to go against the intentional distinction the Court has long recognized between commercial and non-commercial speech.

Another problem with applying strict scrutiny to commercial speech that is not aimed at consumer deception is that accepting such a rule would lead to broad-sweeping consequences since "commercial speech is routinely and pervasively compelled for reasons that have little to do with" such an end. As Professor Post has pointed out, the government currently imposes a litany of disclosure requirements for products under the objective of transparent markets, in order to "reduce information costs and thereby establish a more educated and efficient marketplace." One prime example of such consumer education is the government’s mandate of nutrition labels on food products. Studies have shown that such labels have a direct effect on consumer purchase decisions, helping consumers to make better-educated choices about the foods they purchase and eat. Such disclosures, although having little, if anything, to do with protecting against misleading advertising or the deception of consumers, serve a vitally important purpose in educating consumers, and are fully consistent with the Supreme Court’s underlying commercial speech principle that consumers should have as much access to truthful

218. See supra Part III.B.
219. Post, supra note 40, at 584.
220. Id. at 584–85.
information as possible to make informed decisions. If strict scrutiny were applied to disclosure requirements not aimed at correcting misleading speech, such requirements would become suspect under the First Amendment, and would likely be struck down, resulting in a marketplace populated with less-informed consumers.

D. Problems with the D.C. Circuit's Application of Zauderer

As previously discussed, the D.C. and Sixth Circuits presented divergent views of how to apply the Zauderer standard. The D.C. court’s narrow reading of the standard is problematic because it seems to be more protective of commercial speech than the current Zauderer line of cases suggest.

First, the D.C. court’s determination that no threat of consumer deception existed is problematic when viewed in context of the Supreme Court’s most recent opportunity to apply Zauderer in Milavetz v. United States. In Milavetz, the Supreme Court upheld a federal requirement that bankruptcy professionals disclose in all advertisements the statement: “We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code.” The Supreme Court upheld the disclosure requirement because the advertisements were “inherently misleading” in that they “promis[ed] . . . debt relief without any reference to the possibility of filing for bankruptcy, which has inherent costs.” In R.J. Reynolds, the D.C. court briefly referenced Milavetz in its discussion of the distinction between “potentially real” versus “purely hypothetical” threats to consumer deception, but it ignores some important passages from the seven-Justice majority opinion, which seemed to construe the Zauderer standard broadly,

222. See supra notes 66–70.
223. See supra Part V.B.
225. Id. at 1330.
226. Id. at 1340 (emphasis added).
in favor of more restrictive language than that used in the concurrence.\textsuperscript{228} For example, the D.C. court found the concurrence's statement in \textit{Milavetz} that \textit{Zauderer} does not allow government to "constitutionally compel the use of a scripted disclaimer in any circumstance in which its interest in preventing consumer deception might plausibly be at stake" to be persuasive,\textsuperscript{229} but it did not mention the \textit{Milavetz} majority's seeming willingness to defer to congressional judgment:

Milavetz makes much of the fact that the Government . . . has adduced no evidence that its advertisements are misleading. \textit{Zauderer} forecloses that argument: When the possibility of deception is as self-evident as it is in this case, we need not require the State to conduct a survey of the . . . public before it [may] determine that the [advertisement] had a tendency to mislead. Evidence in the congressional record demonstrating a pattern of advertisements that hold out the promise of debt relief without alerting consumers to its potential cost is adequate to establish that the likelihood of deception in this case "is hardly a speculative one . . .\textsuperscript{230}

Thus, the D.C. court set a high threshold for the amount of threat of deception needed before applying \textit{Zauderer}\textsuperscript{231}, while the Supreme Court has suggested that the threshold is much lower, requiring merely a showing of "possibility of deception," or a "tendency to mislead."\textsuperscript{232}

The tobacco warning labels in this case are more analogous to cases where the Supreme Court has applied \textit{Zauderer} review

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\item \textsuperscript{228} \textit{Id.} (quoting \textit{Milavetz}, 130 S. Ct. at 1343–44 (Thomas, J., concurring in part and concurring in the judgment)).
\item \textsuperscript{229} \textit{Id.}
\item \textsuperscript{230} \textit{Milavetz}, 130 S. Ct. at 1340 (internal citations and quotation marks omitted).
\item \textsuperscript{231} \textit{Id.} (quoting \textit{Milavetz}, 130 S. Ct. at 1340).
\item \textsuperscript{232} \textit{R.J. Reynolds Tobacco Co.}, 696 F.3d at 1227 (Rogers, J., dissenting) (quoting \textit{Milavetz}, 130 S.Ct. at 1340).
\end{itemize}
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than those where the Court has refused to do so. In both Zauderer and Milavetz, the Supreme Court focused on the concept of "inherent costs," where the government could compel disclosure on an advertisement because the advertisement did not fully disclose the actual price of the product.\(^{233}\) As the dissenting opinion in R.J. Reynolds aptly pointed out, "[e]ven absent any affirmatively misleading statements, cigarette packages and other advertisements that fail to display the final costs of smoking" are misleading.\(^{234}\) Under this reasoning, the long-term medical consequences of tobacco use are an inherent cost, and failure to disclose those costs make the packaging and advertisements inherently misleading.\(^{235}\)

Another problem with the finding that no threat of consumer deception existed is that in searching for whether an actual or potential threat of consumer deception existed, the court untenably divorced product advertising from product packaging; instead, it looked exclusively at the cigarette labels themselves at the time the consumer sees the product in the store.\(^{236}\) The D.C. Circuit explained that since tobacco companies were prevented from deceiving consumers by using descriptors on packages such as "light," "mild," or "low," there was nothing misleading about the cigarette packaging itself that would require disclosure in order to protect against consumer deception.\(^{237}\) In so holding, the majority fails to recognize two important considerations. First, in most circumstances, a consumer has likely decided to purchase the product in advance of entering the store and seeing the product and its packaging.\(^{238}\) Second, the court's approach discounts the effect of

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\(^{233}\) Milavetz, 130 S. Ct. at 1340.

\(^{234}\) R.J. Reynolds Tobacco Co., 696 F.3d at 1228 (Rogers, J., dissenting) (internal citations omitted).

\(^{235}\) Even though tobacco packaging and advertisements already contain a textual warning, the inquiry at this threshold stage is only whether there is a threat of deception. If such threat exists, then the regulation is subject to rational basis review, where the court will defer to legislative judgment as to the means employed to meet the threat of consumer deception. See supra note 95.

\(^{236}\) See R.J. Reynolds Tobacco Co., 696 F.3d at 1214–15.

\(^{237}\) Id.

\(^{238}\) A broadly accepted theory of consumer decision-making is the "hierarchy of effects" model, whereby a consumer goes through several
an industry's extensive history of defrauding the public of the health effects of its product.\textsuperscript{239} The significance of these two factors is that any deception to the consumer has been completed long before the consumer actually sees and purchases the product at the store, and a standard that measures deception at the point of sale construes the consumer deception interest far too narrowly.

The dissent in \textit{R.J. Reynolds} points out that the majority goes against a previous case in the D.C. Circuit concerning remedial commercial disclosures,\textsuperscript{240} \textit{Warner-Lambert Co. v. FTC.}\textsuperscript{241} In that case, the D.C. Circuit upheld a compelled disclosure as a remedial measure where the manufacturers of Listerine mouthwash previously engaged in an advertising campaign promoting its product as being beneficial for colds, cold symptoms, and sore throats.\textsuperscript{242} The court acknowledged that commercial disclosures could be compelled where an advertisement, "although not misleading if taken alone, becomes misleading considered in light of past advertisements."\textsuperscript{243} The dissent read \textit{Warner-Lambert} as saying that "a tendency to mislead may arise through efforts to capitalize on . . . prior deceptions by continuing to advertise in a manner that builds on consumers' existing misperceptions."\textsuperscript{244} In other words, "it is the accumulated impact of past advertising that necessitates disclosure in future advertising."\textsuperscript{245} Thus, under this theory, the tobacco industry's extensive history of intentionally deceiving the public about the side effects of tobacco use created a

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\bibitem{239}See infra note 250 and accompanying text.
\bibitem{240}R.J. Reynolds Tobacco Co., 696 F.3d at 1228–29 (Rogers, J., dissenting).
\bibitem{241}562 F.2d 749 (D.C. Cir. 1977).
\bibitem{242}Id. at 752.
\bibitem{243}Id. at 760.
\bibitem{244}R.J. Reynolds Tobacco Co., 696 F.3d at 1229 (Rogers, J., dissenting) (internal citations and quotation marks omitted).
\bibitem{245}Warner-Lambert Co., 562 F.2d at 761 (emphasis omitted).
\end{thebibliography}
consumer misperception that lingers to this day, and therefore the existence of a threat of consumer deception is further supported.

Another problem with the D.C. Court's narrow Zauderer standard is its requirement that any disclosures under the standard must be "purely factual and uncontroversial." A close reading of Zauderer reveals that the Supreme Court was more likely describing a sufficient, rather than a necessary, condition to receive rational basis review. While the disclosure in Zauderer was "purely factual and uncontroversial," the Zauderer Court emphasized the "value to consumers of the information" as the principal justification of the disclosure. If the focal point is information value, it does not make sense to require a factual disclosure to be "uncontroversial." As the tobacco industry has shown, the manufacturers of the dangerous product itself can be the creator of the controversy. Given this power, it would be questionable to read Zauderer as creating a standard whereby the deceptive commercial speaker can himself render a factual disclosure unconstitutional.

246. See supra notes 15-18, 195 and accompanying text.  
247. R.J. Reynolds Tobacco Co., 696 F.3d at 1229 (Rogers, J., dissenting).  
248. Id. at 1212.  
249. Zauderer, 471 U.S. at 651.  
250. Id.  
251. In one federal case against the tobacco industry, the D.C. Circuit Court of Appeals made a factual finding that:

Despite knowledge of "the negative health consequences of smoking, the addictiveness and manipulation of nicotine, [and] the harmfulness of secondhand smoke," tobacco company executives "made, caused to be made, and approved public statements contrary to this knowledge"...Specifically, they "publicly denied and distorted the truth about the addictive nature of their products, suppressed research revealing the addictiveness of nicotine, and denied their efforts to control nicotine levels and delivery."

R.J. Reynolds Tobacco Co., 696 F.3d at 1224 (Rogers, J., dissenting) (quoting United States v. Philip Morris USA, 556 F.3d 1095, 1121-1124 (D.C. Cir. 2009)).  
252. For example, if an entity is being compelled to disclose a health consequence of its product, that entity can simply fund a study that shows that
VI. COMPELLED DISCLOSURES OF NONMISLEADING COMMERCIAL SPEECH

Given the stark divisions between the two Circuit Courts, which is the correct framework to apply for evaluating a regulation on commercial speech? Based on existing precedent, the answer seems to be neither. Both the D.C. and the Sixth Circuit opinions seem to correctly apply existing precedent and principles at some points, yet deviate at others. At the same time, however, it is difficult to fully answer this question because the Supreme Court has left important questions unanswered. For the reasons presented above, it seems that the Sixth Circuit was correct in creating a threshold inquiry based on the bifurcation of restrictions on commercial speech and compelled disclosures of commercial speech, while the D.C. Circuit was correct in refusing to apply the demanding standard of strict scrutiny in any instance of commercial speech regulation. The question that remains is what standard should apply for compelled disclosures that are not aimed at mitigating the effects or the threat of misleading commercial speech. The exact answer is not entirely clear based on the existing precedent, and this Recent Development will not go too deep in searching for an answer because many commentators have already explored the question extensively. It will instead provide a brief overview of what has been suggested.

One option is to integrate the compelled subsidy cases. Doing so seems logical because they are so closely related to compelled disclosures. In the case of compelled disclosures, like for the product is safe. Does this make the fact of the health consequences controversial?

253. See supra Part V.C.
254. See supra Part V.B.
255. See e.g., Nicole B. Casarez, Don’t Tell Me What to Say: Compelled Commercial Speech and the First Amendment, 63 Mo. L. Rev. 929, 932 (1998) (arguing for heightened scrutiny); Jennifer Keighley, Can You Handle the Truth? Compelled Commercial Speech and the First Amendment, 15 U. PA. J. CONST. L. 539, 543 (2012) (arguing for the application of Zauderer standard); Sweetland, supra note 59, at 478 (arguing that disclosure requirements should not be subjected to First Amendment scrutiny).
compelled subsidies, the government is forcing a private party to give up a resource—in the form of advertisement or packaging space—to recite the government’s message. But the one major difference between compelled subsidies and compelled disclosures is what makes it necessary to include additional protections for the commercial speaker.

In the case of compelled subsidies, the speaker’s resource is being turned over to a third party, which then uses that resource to spread a message that is not directly affiliated with the compelled speaker. On the other hand, in the case of a compelled disclosure, the speaker is forced to directly espouse the compelled message, and its products are forced to brand a sort of scarlet letter conveying that message. This distinction is significant, as the Supreme Court recognized in *Wooley v. Maynard*, because significant constitutional questions arise whenever a private party is used as “an instrument for fostering public adherence to an ideological point of view he finds unacceptable.” Whereas in a compelled subsidy case, the subsidizer of speech can shed himself from the subsidized message by conveying an opposing message, such opportunity for disassociation is far more limited (if not impossible) when the disclosure is directly attached to speech itself.

The Supreme Court recently had an opportunity to address this distinction in *Johanns v. Livestock Marketing Association*, where the objecting cattle ranchers argued that crediting of the subsidized advertising to “America’s Beef Producers” implied their endorsement of a message with which they did not agree. While recognizing a distinction between compelled subsidy and compelled disclosure, the Court found that the ranchers could challenge the subsidization of the advertising campaign in a case brought under the *Latrope v. California Processing Association* framework.

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256. For example, in *Johanns v. Livestock Marketing Association*, 544 U.S. 550 (2005), cattle sellers and importers pay a mandatory assessment for each head of cattle, which is then used in an advertising campaign to promote the consumption of beef. Id. at 553–55.

257. Sometimes, that message can be harmless, such as a nutrition label. Other times, it can be one that is intended to shame those who manufacture and those who purchase the product, such as graphic tobacco warning labels.


259. Id. at 715.


261. Id. at 564.
speech, the Court rejected the opportunity to clarify the First Amendment significance of such a distinction.\textsuperscript{262} Even if the Court had answered the question, a compelled disclosure on a speaker’s product is arguably more intrusive of First Amendment rights than a third party message being affiliated to the subsidizer because the speaker is actually forced to directly spread the controversial message.

Another option is to expand the application of \textit{Zauderer} from disclosures of potentially misleading information to all commercial disclosures, as the Sixth Circuit does,\textsuperscript{263} and as other commentators have suggested.\textsuperscript{264} This approach makes sense because, as convincingly argued by Professor Post, \textit{Zauderer’s} central holding was not that the speaker’s interest was minimal because of the state’s interest in preventing consumer deception, but because the “constitutional value of commercial speech lies in the circulation of information.”\textsuperscript{265} Thus, even if there is no threat of deception, there is still an important interest in increasing the amount of information in the marketplace.

One of the primary concerns of compelled speech, and the reason for applying heightened scrutiny in such circumstances, is that it is a vehicle by which “government can distort the marketplace of ideas.”\textsuperscript{266} Such concerns, however, are minimal when the speech being compelled is for the purposes of increasing the amount of factual information upon which the marketplace operates.\textsuperscript{267} If a consumer chooses not to purchase a product or use a service because he or she learns of a truthful piece of information about the product or service, then the marketplace of ideas is working exactly as it should be. Thus, the corporate speaker’s

\textsuperscript{262} Id. at 565.
\textsuperscript{263} Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 556 (6th Cir. 2012) (“\textit{Zauderer’s} framework can apply even if the required disclosure’s purpose is something other than or in addition to preventing consumer deception.”) (citing Nat’l Elec. Mfrs. Ass’n v. Sorrell, 272 F.3d 104 (2d Cir. 2011)).
\textsuperscript{264} See, e.g., Keighley, supra note 254, at 558–59.
\textsuperscript{265} Post, supra note 40, at 577.
\textsuperscript{266} Sacharoff, supra note 50, at 333.
\textsuperscript{267} See, e.g., supra notes 64–70, 220–22 and accompanying text.
interest in not disclosing factual commercial information is not nearly as significant as its interest in not being compelled to speak non-commercial information. On the other hand, the problem with applying *Zauderer* is that doing so would not supply as much protection of the commercial speaker as the Supreme Court seems to be moving towards after *United Foods*.

A third option is to apply intermediate scrutiny, as the D.C. Circuit did. On the one hand, it is faithful with the concerns of *United Foods*, where the Court put forward the idea that commercial speakers retain "constitutional interests that must be balanced against state interests in compelling subsidization of commercial speech." On the other hand, government has a substantial interest in an educated and efficient marketplace, which requires the ability to ensure that consumers know about the products and services they purchase. By going beyond intermediate scrutiny, both of these concerns are considered and addressed. A counterargument to intermediate scrutiny would be the possibility that heightened review could "amount to an insurmountable barrier" to commercial regulation, and put in jeopardy a number of disclosure requirements that provide important consumer information. Such a result, it has been argued, could undermine integrity in the marketplace and undermine the free flow of societal information.

One final possibility is to apply strict scrutiny. At least one Justice has suggested dismantling the distinctions between commercial and noncommercial speech altogether, proposing instead that all commercial speech regulations be subjected to the

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269. R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1217 (D.C. Cir. 2012)
270. Post, *supra* note 40, at 582.
271. *Id.* at 583.
273. See *supra* notes 220–22 and accompanying text.
highest standard of review. The idea that strict scrutiny should be applied in commercial speech cases has also has been supported by at least one commentator, who argues that although compelled commercial speech outside the consumer protection context does not result in "ideological traumas," they still invoke concerns about violations of the speaker's freedom of expression. The primary concern is that, absent a consumer protection context, a commercial speaker's First Amendment rights would be subject to majority rule. Strict scrutiny is further supported because, as seen above, such disclosure requirements bear close resemblance to the compelled speech cases such as Wooley v. Maynard, where the speaker becomes an instrument for spreading the objectionable speech. Such a solution, however, would have severe consequences for the consumer market. Just as with the problem of intermediate scrutiny, strict scrutiny would bring into question an innumerable amount of essential disclosure requirements currently in place to keep consumers informed about the products they use and consume. Furthermore, it would undermine long standing First Amendment precedent and principles that recognize the value of commercial information to consumers.

275. See e.g., Liquormart v. Rhode Island, 517 U.S. 484, 522 (1996) (Thomas, J., concurring) ("I do not see a philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech.").

276. Casarez, supra note 255, at 932. The commentator argues that strict scrutiny should be used for compelled disclosures not aimed at preventing consumer deception. Id.

277. Id. at 962.

278. Id.

279. Supra notes 256–58.

280. Casarez, supra note 255, at 931 ("If compelled commercial speech is given the same First Amendment scrutiny as forced ideological speech, the fear is that the government will be unable to mandate disclosure requirements to prevent fraud, deception, or other commercial harms.")

281. See supra notes 220–22 and accompanying text.

The Sixth Circuit's opinion in *Discount Tobacco City & Lottery* and the D.C. Circuit's opinion in *R.J. Reynolds* bring to the forefront a question that the Supreme Court has struggled with for over four decades. Based on the Supreme Court's vague and sometimes inconsistent precedent, neither the D.C. nor the Sixth Circuit seems to be completely correct in their frameworks. We cannot be sure what the proper standard is to apply for commercial speech disclosures not aimed at consumer deception, however, because there are so many questions left unanswered under the current line of cases. The vastly divergent approaches to commercial speech taken by the two circuit courts in the graphic tobacco warning labels cases, and other circuit courts in other cases of commercial disclosure, indicate that it is time that the Supreme Court clear up once and for all the position that commercial speech occupies among other First Amendment protections.

A few of the graphic warning labels at issue in Discount Tobacco City & Lottery Inc. v. United States and R.J. Reynolds Tobacco Co. v. Food & Drug Administration.\textsuperscript{284}

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**FIRST AMENDMENT LAW REVIEW**

**WARNING:** Cigarettes cause cancer.

[Image: Photo of lungs and teeth with text overlaying them.]

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WARNING: Cigarettes cause strokes and heart disease.

WARNING: SMOKING DURING PREGNANCY CAN HARM YOUR BABY.
WARNING: Tobacco smoke causes fatal lung disease in nonsmokers.
WARNING:
Quitting smoking now greatly reduces serious risks to your health.

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