

“YOU’VE COME A LONG WAY, BABY”: CIGARETTES, GRAPHIC WARNING LABELS, AND BALANCING CONSUMER PROTECTION AND COMMERCIAL FREE SPEECH

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I. INTRODUCTION

In the 1950s, cigarette manufacturers used images of chubby, cooing babies to woo consumers.¹ Babies are great pitchmen. But can babies now convince consumers to give up cigarettes? The FDA hopes so.² The “smoke approaching baby” graphic,³ which shows a child in an adult’s arms as a plume of smoke wafts toward the child, is one of nine images the FDA has proposed to place on cigarette packages as part of its implementation of the Family Smoking Prevention and Tobacco Control Act (“Act”).⁴ Other images proposed for placement on cigarette packages include a crying woman, a body on an autopsy table, an image of a man wearing an “I QUIT” t-shirt, and an image of a diseased lung.⁵

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1. Stuart Elliott, *When Doctors, and Even Santa, Endorsed Tobacco*, N.Y. Times B3 (Oct. 7, 2008) (available at <http://www.nytimes.com/2008/10/07/business/media/07adco.html>) (noting that large tobacco brands, like Marlboro, used children and babies who appeared as “accessories for their smoking parents” in advertisements from the 1920s through the 1950s); *In Old Ads, Doctors and Babies Say ‘Smoke’*, Slide Show, N.Y. Times, http://www.nytimes.com/slideshow/2008/10/06/business/media/20081006_CigaretteAd_Slideshow_ready_index.html (2008).

2. See 76 Fed. Reg. 36628, 36628–36629 (June 22, 2011) (outlining a new rule that requires the FDA to issue regulations requiring cigarette packages to contain nine warning statements, including “[t]obacco smoke can harm your children” and “[s]moking during pregnancy can harm your baby,” in an effort to reduce the number of Americans who smoke).

3. *Id.* at 36649.

4. Pub. L. No. 111-31, § 201(a), 123 Stat. 1776, 1845 (2009).

5. 76 Fed. Reg. at 36650–36656.

The FDA says that these images are part of the government's effort to more effectively convey information about the health consequences of smoking.⁶ Tobacco companies disagree and argue that the purpose of these images is to disgust consumers and discourage them from buying cigarettes.⁷ This debate is at the center of two lawsuits challenging the graphic warning labels as unconstitutional compelled speech. In *Discount Tobacco City & Lottery, Inc. v. United States*,⁸ the Sixth Circuit Court of Appeals upheld the Act's graphic-warning-label requirement against a facial challenge.⁹ In *R.J. Reynolds Tobacco Co. v. United States FDA*,¹⁰ Judge Leon of the District Court for the District of Columbia examined the specific images selected by the FDA and determined that they violated the First Amendment.¹¹ On appeal, the District of Columbia Circuit affirmed Judge Leon in *R.J. Reynolds Tobacco Co. v. FDA*.¹² The critical question in both the *Discount Tobacco* and *R.J. Reynolds Tobacco Co.* cases was the level of scrutiny the court should apply in evaluating the graphic warning labels.¹³ The Sixth Circuit applied a rational basis test in *Discount Tobacco*,¹⁴ while the District Court for the District of Columbia applied strict scrutiny in *R.J. Reynolds Tobacco Co.*¹⁵ Although the District of Columbia Circuit affirmed the district

6. *R.J. Reynolds Tobacco Co. v. United States FDA*, 845 F. Supp. 2d 266, 274 (D.D.C. 2012).

7. *Id.* at 276.

8. 674 F.3d 509 (6th Cir. 2012).

9. *Id.* at 551–552. “This challenge means that [the tobacco companies] argue that the Act’s graphic-warnings requirement is itself unconstitutional, not that the specific images the FDA chose to implement the requirement are unconstitutional.” *Id.* at 552.

10. 845 F. Supp. 2d 266.

11. *Id.* at 276–277 (finding that with respect to the content of the graphic images, the government failed to carry its burden of demonstrating that the rule requiring cigarette manufacturers to place specific images on their packages was narrowly tailored to constitute a constitutionally acceptable form of compelled speech).

12. 696 F.3d 1205, 1208 (D.C. Cir. 2012).

13. 674 F.3d at 554; 845 F. Supp. 2d at 271–272.

14. 674 F.3d at 562. The court concluded that “graphic warnings *can* convey factual information, just as textual warnings can, and that because this case constitute[ed] a facial challenge, it [fell] within *Zauderer*’[s] ambit rather than within the compelled-speech doctrine.” *Id.*

15. 845 F. Supp. 2d at 274. Because the graphic images on the cigarette packages conveyed a very controversial and subjective message, the court concluded that the rule “d[id] not fit into the *Zauderer* exception for purely factual and uncontroversial information.” *Id.*

court’s opinion, it reached this conclusion by applying intermediate scrutiny—not strict scrutiny.¹⁶

This Article analyzes both cases and evaluates the level of scrutiny that courts should apply to the graphic warning labels. Part I discusses the Act’s graphic-warning-label requirement and explores the reasons Congress and the FDA concluded that new warnings are necessary. Part II discusses the levels of scrutiny that could apply to the graphic warning labels and examines prior commercial-disclosure cases. Part III analyzes the *Discount Tobacco* and *R.J. Reynolds Tobacco Co.* decisions, and Part IV compares the decisions and explores whether the graphic warnings should be evaluated under rational basis review or some heightened form of scrutiny should the matter proceed to the United States Supreme Court.

II. THE ACT

A. Overview of the Act’s Graphic-Warning Requirement

The Act was signed into law on June 22, 2009,¹⁷ and it directed the FDA to implement a new graphic-warning-label program that would “depict[] the negative health consequences of smoking.”¹⁸ The Act required the images to accompany nine new textual warnings:

- WARNING: Cigarettes are addictive.
- WARNING: Tobacco smoke can harm your children.
- WARNING: Cigarettes cause fatal lung disease.
- WARNING: Cigarettes cause cancer.
- WARNING: Cigarettes cause strokes and heart disease.
- WARNING: Smoking during pregnancy can harm your baby.
- WARNING: Smoking can kill you.

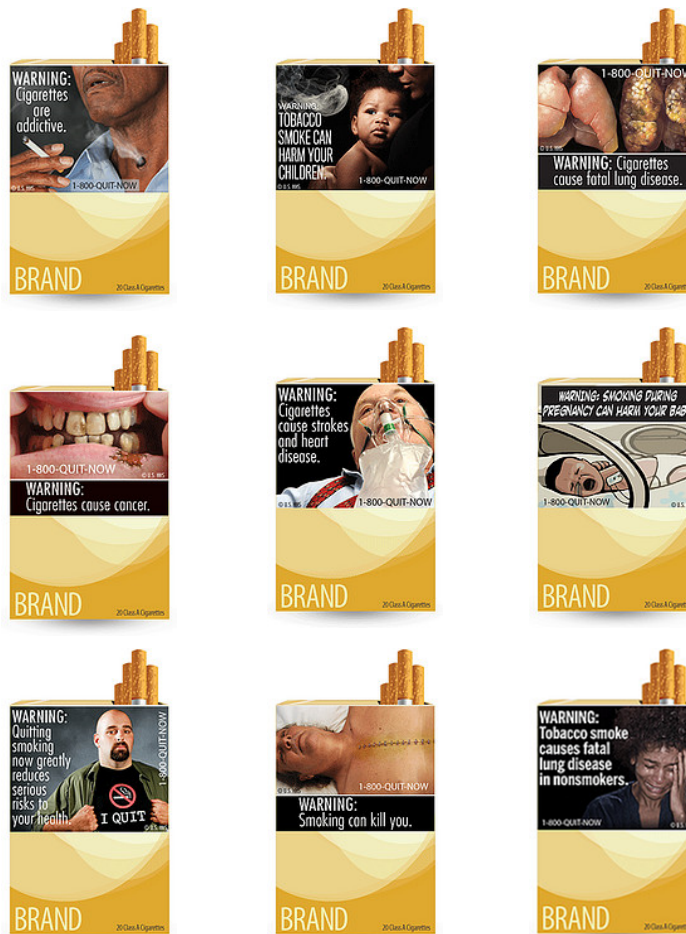
16. *R.J. Reynolds Tobacco Co.*, 696 F.3d at 1217–1222.

17. 123 Stat. at 1776.

18. *Id.* at 1845.

- WARNING: Tobacco smoke causes fatal lung disease in nonsmokers.
- WARNING: Quitting smoking now greatly reduces serious risks to your health.¹⁹

The FDA published its Final Rule on June 22, 2011,²⁰ and selected the following nine images for publication:²¹



19. *Id.* at 1842–1843.

20. 76 Fed. Reg. at 36628. The Final Rule listed an effective date of September 22, 2012. *Id.*

21. *Id.* at 36649–36656; U.S. FDA, *Overview: Cigarette Health Warnings*, http://www.fda.gov/TobaccoProducts/Labeling/ucm259214.htm#High_Resolution_Image_Formats; scroll down to High Resolution Image Formats, select Cigarette Health Warning Images on Cigarette Packs JPEG Format (14 MB) (last updated Feb. 24, 2012).

The Act required the warnings to occupy the top fifty percent of cigarette packaging and the top twenty percent of print advertisements.²² Cigarette manufacturers had fifteen months from the publication date to change their packaging to conform to the new rule, making the deadline for implementation September 22, 2012.²³

B. Previous Cigarette Warning Labels

The first cigarette warning label appeared in 1966 after Congress passed the Cigarette Labeling and Advertising Act of 1965.²⁴ That Act required manufacturers to place the following warning on cigarette packages: "CAUTION: Cigarette Smoking May Be Hazardous to Your Health."²⁵ The Public Health Cigarette Smoking Act of 1969 revised the warning to read: "WARNING: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health."²⁶

In 1984, the warnings underwent significant revision pursuant to the Comprehensive Smoking Education Act,²⁷ which created the Surgeon General's Warnings that still appear on cigarette packages today:

- SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, [a]nd May Complicate Pregnancy.
- SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks to Your Health.
- SURGEON GENERAL'S WARNING: Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, [a]nd Low Birth Weight.

22. 123 Stat. at 1843.

23. *Id.* at 1845.

24. Pub. L. No. 89-92, §§ 1-2, 4, 79 Stat. 282, 282 (1965); Lorillard, *Cigarette Smoking and Disease in Smokers*, <http://www.lorillard.com/responsibility/smoking-and-health/cigarette-smoking-and-disease-in-smokers/> (accessed Sept. 4, 2012).

25. 79 Stat. at 283.

26. Pub. L. No. 91-222, § 4, 84 Stat. 87, 88 (1970); Lorillard, *supra* n. 24.

27. Pub. L. No. 98-474, §§ 1-2, 98 Stat. 2200, 2200 (1984).

- SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.²⁸

C. A Need for New Warning Labels?

Cigarettes pose a public health threat: “cigarette smoking kills an estimated 443,000 Americans each year, most of whom began smoking when they were under the age of [eighteen].”²⁹ In light of this threat, the FDA concluded that “[t]he U.S. Government has a substantial interest in reducing the number of Americans, particularly children and adolescents, who use cigarettes and other tobacco products in order to prevent the life-threatening health consequences associated with tobacco use.”³⁰ Despite the fact that warnings have been on cigarette packages since 1966, the FDA concluded in its Final Rule that smokers still underestimate the health risks associated with smoking.³¹

According to the FDA, the current warning labels need revision because “(1) [t]hey have not changed in more than [twenty-five] years, (2) they often go unnoticed, and (3) they fail to convey [the] relevant information in an effective manner.”³² In reaching such a conclusion, the FDA relied on multiple studies that suggested that graphic warning labels are more likely than the text-only warnings to catch consumers’ attention, “influence” their awareness of the risks of smoking, and encourage consumers to modify their behavior.³³

Against this backdrop, the FDA considered thirty-six graphics before selecting the nine images published in the Final Rule.³⁴ The FDA conducted an eighteen-thousand-person consumer study to evaluate the images’ relative effectiveness.³⁵

28. *Id.* at 2201–2202; Lorillard, *supra* n. 24.

29. 76 Fed. Reg. at 36629.

30. *Id.*

31. *Id.* at 36630–36633 (discussing several of the comments that were submitted disputing smoking’s negative health consequences and comments explaining consumers’ lack of knowledge about a large variety of smoking risks).

32. *Id.* at 36631.

33. *Id.* at 36633.

34. *Id.* at 36637.

35. *Id.* The study was Internet-based and “quantitatively examined the relative efficacy of the [thirty-six] proposed color graphic images in communicating the harms of smoking to [three] target groups” of smokers: adults, young adults, and teenagers aged thirteen to seventeen. *Id.*

Effectiveness was measured by having participants evaluate the “salience” of each image, which required the FDA to analyze consumers’ emotional and cognitive reactions to the packaging and advertisements containing the health warnings.³⁶ The study also examined the participants’ ability to recall the proposed warnings, whether the proposed warnings influenced the participants’ beliefs about smoking, and whether the proposed warnings would have an impact on the participants’ behavior (i.e., how likely a participant would be to try to quit smoking).³⁷ These categories “were selected based on established theories of message processing and health-related behavior change” that support the notion that “immediate emotional and cognitive reactions to messages, and recall of messages, are part of a process that eventually leads to changes in beliefs and intentions and ultimately to behavior change.”³⁸

In selecting the final nine images, the FDA gave the most weight to the “salience” factors because images that elicit an emotional response enhance viewers’ ability to recall information³⁹ and are more likely to encourage smokers to quit.

[L]iterature suggests that risk information is most readily communicated by messages that arouse emotional reactions, and that smokers who report greater negative emotional reactions in response to cigarette warnings are significantly more likely to have read and thought about the warnings and more likely to reduce the amount they smoke and to quit or make an attempt to quit. The research literature also suggests that warnings that generate an immediate emotional response from viewers can result in viewers attaching a negative affect to smoking (i.e., feel bad about smoking), thus undermining the appeal and attractiveness of smoking.⁴⁰

In addition to selecting the nine images, the FDA chose to include a smoking-cessation hotline on each of the warning

36. *Id.* at 36638. Participants rated their responses to the packages and advertisements on two scales: their emotional reaction and their cognitive reaction. *Id.*

37. *Id.*

38. *Id.* at 36638–36639.

39. *Id.* at 36639.

40. *Id.* (internal citations omitted) (typeface altered).

labels.⁴¹ The smoking-cessation hotline was another tool to help smokers quit:

[W]e find that addition of a cessation resource is appropriate for the protection of the public health because of the benefits, and lack of risks, to the population as a whole. This is due, in part, to the increased likelihood that existing smokers will become aware of the cessation resource and, consequently, the increased likelihood that existing smokers who want to quit will be successful. It is also due to the likelihood that the reference to a smoking cessation resource will enhance the effectiveness of the warnings required under FCLAA^[42] at conveying information about the risks to health from smoking.⁴³

The efficacy of the graphic warnings, however, remains in question. Another FDA study measured the expected benefits of the rule by looking to the smoking trends in Canada, where similar graphic warning labels have been in effect for over ten years.⁴⁴ This study estimated that the graphic warning labels would result in only a 0.088% reduction in U.S. smoking rates.⁴⁵ The FDA conceded that it

has had access to very small data sets, so [its] effectiveness estimates are in general not statistically distinguishable from zero; [the FDA] therefore cannot reject, in a statistical sense, the possibility that the rule will not change the U.S. smoking rate. Therefore, the appropriate lower bound on benefits is zero.⁴⁶

III. FIRST AMENDMENT SCRUTINY

Not surprisingly, the graphic-warning-label requirement is the subject of two pieces of litigation wending their way through the federal courts: *Discount Tobacco* and *R.J. Reynolds Tobacco*

41. *Id.* at 36681. The FDA selected the National Network of Tobacco Cessation Quitlines, provided by the National Cancer Institute, which routes calls to a corresponding state quitline based on the caller's area code. *Id.*

42. Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 (2006).

43. 76 Fed. Reg. at 36682.

44. *Id.* at 36775–36776, 36710.

45. *Id.* at 36775.

46. *Id.* at 36776.

Co.⁴⁷ The central issue presented in these cases is whether the graphic warning labels violate the First Amendment.⁴⁸ For all intents and purposes, the outcome of that issue will depend on the level of scrutiny the court applies. The appropriate level of scrutiny depends on how one views the warning labels. Do they disclose factual information to prevent consumer deception,⁴⁹ or are they anti-smoking advocacy designed to dissuade consumers from purchasing a legal product?⁵⁰ Before discussing how the courts answered this question, a brief overview of the levels of scrutiny that could apply to the graphic warning labels is necessary.

A. Possible Levels of First Amendment Scrutiny Applicable to Product Warnings

1. *Strict Scrutiny under Wooley*

The first possible level of scrutiny is found in *Wooley v. Maynard*.⁵¹ *Wooley* and its progeny⁵² address the extent to which compelled disclosures expressing a state-sanctioned ideology or opinion withstand the First Amendment.⁵³ In *Wooley*, the Court applied strict scrutiny to a state law that made it a crime to cover up the State’s motto, “Live Free or Die,” which was printed on the State’s license plates.⁵⁴ The Court noted 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

47. *Discount Tobacco*, 674 F.3d 509; *R.J. Reynolds Tobacco Co.*, 845 F. Supp. 2d 266.

48. *Discount Tobacco*, 674 F.3d at 553; *R.J. Reynolds Tobacco Co.*, 845 F. Supp. 2d at 271.

49. See *Discount Tobacco*, 674 F.3d at 567 (explaining that the purpose of the graphic warning labels was “to prevent consumers from being misled about the health risks of using tobacco”).

50. See *R.J. Reynolds Tobacco Co.*, 845 F. Supp. 2d at 275 (concluding that the FDA’s actual purpose behind the graphic warning labels was to convince consumers to stop smoking).

51. 430 U.S. 705 (1977).

52. E.g. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Bos.*, 515 U.S. 557, 573 (1995) (holding that a speaker “has the autonomy to choose the content of his own message”); *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988) (finding that a statute that “[m]andat[es] speech that a speaker would not otherwise make necessarily alters the content of the speech”).

53. 430 U.S. at 713–714.

54. *Id.* at 707, 716.

from speaking at all.”⁵⁵ The *Wooley* Court found that the government cannot compel individuals to “use their private property as a ‘mobile billboard’ for the State’s ideological message.”⁵⁶ Thus, such compelled speech is subject to strict scrutiny⁵⁷ because “where the State’s interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual’s First Amendment right to avoid becoming the courier for such message.”⁵⁸

2. *Intermediate Scrutiny under Central Hudson*

The Supreme Court set forth the test for another possible level of scrutiny, intermediate scrutiny, in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.⁵⁹ In contrast to *Wooley*, which dealt with compelled speech *mandates* of an ideological nature,⁶⁰ *Central Hudson* provides the framework for analyzing the constitutionality of government *restrictions* on commercial speech,⁶¹ which is defined as “expression related solely to the economic interests of the speaker and its audience.”⁶² *Central Hudson* involved a challenge to a state regulation that effectively banned utility companies from advertising in a manner that would promote the use of electricity.⁶³ The Court recognized that commercial speech is subject to First Amendment protection to encourage “the fullest possible dissemination of information,”⁶⁴ but it also found that commercial speech does not enjoy the same

55. *Id.* at 714 (citing *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 633–634 (1943)).

56. *Id.* at 715.

57. *See id.* at 716 (stating that the State’s interest must be sufficiently compelling for the Court to uphold the requirement that the state motto be displayed on license plates); Stephanie Jordan Bennett, *Paternalistic Manipulation through Pictorial Warnings: The First Amendment, Commercial Speech, and the Family Smoking Prevention and Tobacco Control Act*, 81 *Miss. L.J.* 1909, 1925 (2012) (explaining that *Wooley* utilized the strict scrutiny standard).

58. *Wooley*, 430 U.S. at 717.

59. 447 U.S. 557, 564 (1980); Bennett, *supra* n. 57, at 1916 (explaining that *Central Hudson* employed the intermediate scrutiny standard).

60. 430 U.S. at 713.

61. 447 U.S. at 566.

62. *Id.* at 561 (citations omitted).

63. *Id.* at 558–559. The State implemented the ban in response to a fuel shortage, and an electrical utility challenged its continued existence three years later, when there was no longer a fuel shortage. *Id.*

64. *Id.* at 561–562.

protection as “other constitutionally guaranteed expression.”⁶⁵ To survive *Central Hudson*, a four-part test must be satisfied:

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.⁶⁶

Central Hudson has been criticized⁶⁷ and marginalized⁶⁸ in recent years. For example, Justice Thomas has frequently questioned whether there is any justification for applying a lower level of scrutiny to commercial-speech restrictions.⁶⁹ The waters were further muddied in *Sorrell v. IMS Health, Inc.*,⁷⁰ where the Supreme Court suggested that some form of “heightened judicial scrutiny”—beyond the intermediate scrutiny recognized in *Central Hudson*—could apply to a Vermont statute that imposed content-based restrictions on the use and dissemination of prescriber-identifying information gathered by pharmacies for marketing purposes.⁷¹ Although the Court acknowledged that intermediate scrutiny typically applies to restrictions on commercial speech, it was unclear whether the Court was actually

65. *Id.* at 562–563 (explaining that the Constitution affords “lesser protection to commercial speech than to” other types of speech).

66. *Id.* at 566.

67. See e.g. *Milavetz, Gallop & Milavetz v. United States*, 130 S. Ct. 1324, 1342–1343 (2010) (Thomas, J., concurring in part and concurring in the judgment) (stating that Justice Thomas has “never been persuaded that there is any basis in the First Amendment for the relaxed scrutiny this Court applies to laws that suppress nonmisleading commercial speech”).

68. See e.g. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2667–2668 (2011) (citing *Central Hudson* but seemingly applying a different level of scrutiny for a commercial-speech regulation).

69. E.g. *Milavetz*, 130 S. Ct. at 1342–1343 (Thomas, J., concurring in part and concurring in the judgment); *Thompson v. W. Sts. Med. Ctr.*, 535 U.S. 357, 377 (2002) (Thomas, J., concurring); *44 Liquormart, Inc. v. R.I.*, 517 U.S. 484, 523 (1996) (Thomas, J., concurring in part and concurring in judgment).

70. 131 S. Ct. 2653.

71. *Id.* at 2659.

applying *Central Hudson* or some form of “heightened scrutiny.”⁷² Ultimately, the Court found that it did not matter which test it applied because the law was unconstitutional under either test: “the outcome is the same whether a special commercial[-]speech inquiry or a stricter form of judicial scrutiny is applied.”⁷³ Although recent decisions have suggested a growing hostility toward *Central Hudson*’s intermediate scrutiny,⁷⁴ it has not been overruled and thus remains the analytical framework for evaluating the constitutionality of commercial-speech restrictions.

3. Rational Basis Review under *Zauderer*

*Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*⁷⁵ addressed the level of scrutiny that should be applied to compelled disclosures in the commercial context.⁷⁶ The Supreme Court found that neither *Central Hudson*’s intermediate scrutiny nor *Wooley*’s strict scrutiny was the appropriate test for commercial disclosures of factual information aimed at preventing consumer deception; instead, the Court applied rational basis review.⁷⁷

In *Zauderer*, the Court upheld an Ohio rule of professional conduct that required attorneys to disclose that in contingency fee matters, the client could still be responsible for litigation costs

72. *Id.* at 2667–2668; Bennett, *supra* n. 57, at 1918 n. 35 (contending that “in *Sorrell*, the Court failed to define its heightened level of judicial scrutiny and did not explain why the pharmaceutical information qualified as commercial speech”).

73. *Sorrell*, 131 S. Ct. at 2667.

74. See generally Lora E. Barnhart Driscoll, *Citizens United v. Central Hudson: A Rationale for Simplifying and Clarifying the First Amendment’s Protections for Nonpolitical Advertisements*, 19 Geo. Mason L. Rev. 213 (2011) (discussing recent Supreme Court treatment of political commercial speech and arguing that strict scrutiny should replace the *Central Hudson* test for commercial nonpolitical speech); Jennifer L. Pomeranz, *No Need to Break New Ground: A Response to the Supreme Court’s Threat to Overhaul the Commercial Speech Doctrine*, 45 Loy. L.A. L. Rev. 389 (2012) (thoroughly discussing recent Supreme Court treatment of *Central Hudson* and arguing that intermediate scrutiny should remain the test for commercial-speech restrictions).

75. 471 U.S. 626 (1985).

76. *Id.* at 638. This appeal required the Court to apply the Supreme Court’s commercial-speech progeny to three Ohio regulations imposed on attorney advertising. *Id.*

77. *Id.* at 651. “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.” *Id.*

even if the client lost the case.⁷⁸ An attorney who was subject to discipline under the rule argued that the Court should apply *Central Hudson* to evaluate whether the rule satisfied the First Amendment.⁷⁹ The Court rejected *Central Hudson* in the commercial-disclosure context because disclosure requirements do not interfere with First Amendment rights as strongly as do speech restrictions, stating that

[a]ppellant, however, overlooks material differences between disclosure requirements and outright prohibitions on speech. In requiring attorneys who advertise their willingness to represent clients on a contingent-fee basis to state that the client may have to bear certain expenses even if he [or she] loses, Ohio has not attempted to prevent attorneys from conveying information to the public; it has only required them to provide somewhat more information than they might otherwise be inclined to present.⁸⁰

The Court distinguished those cases applying strict scrutiny to compelled speech, such as *Wooley*, because the government in those cases 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.”⁸¹ In contrast, the rule at issue in *Zauderer* involved commercial advertising and required the disclosure of only factual and uncontroversial information to avoid consumer deception.⁸²

Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant’s constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal. Thus, in virtually all our commercial[-]speech decisions to date, we have emphasized that because disclosure requirements trench much more narrowly on an advertiser’s interests than do flat prohibitions on speech, “warning[s] or

78. *Id.* at 633, 653.

79. *Id.* at 650.

80. *Id.*

81. *Id.* at 651 (quoting *W. Va. St. Bd. of Educ.*, 319 U.S. at 642) (internal quotations omitted).

82. *Id.*

disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception.”⁸³

The Court recognized that some “unjustified or unduly burdensome disclosure requirements” might still offend the First Amendment but held “that an advertiser’s rights [would be] adequately protected as long as disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers.”⁸⁴

The Supreme Court recently reaffirmed *Zauderer* in *Milavetz v. United States*.⁸⁵ In that case, a bankruptcy attorney brought a First Amendment challenge to a statute that required debt-relief agencies to make certain disclosures in advertisements.⁸⁶ The parties agreed that commercial speech was involved.⁸⁷ The attorney subject to the statute argued that *Central Hudson* should apply; the Government argued that *Zauderer* should apply.⁸⁸ The Court determined that *Zauderer* was the correct test because the statute required the disclosure of only factual information; the disclosure requirements were aimed at preventing consumer deception, and the debt-relief agencies were not prevented from disclosing other information in their advertisements.⁸⁹

4. Summary

A few bright-line rules can be gleaned from these cases. Under *Wooley*, strict scrutiny applies to *compelled* speech that reflects a state-sanctioned ideology or opinion.⁹⁰ *Central Hudson*’s intermediate scrutiny applies, at least for now, to *restrictions* on *commercial* speech.⁹¹ *Zauderer*’s rational basis test applies in the

83. *Id.* (quoting *In re R.M.J.*, 455 U.S. 191, 201 (1982)) (emphasis and alteration in original) (internal citations omitted).

84. *Id.*

85. 130 S. Ct. at 1341 (majority).

86. *Id.* at 1330–1331.

87. *Id.* at 1339.

88. *Id.*

89. *Id.* at 1339–1340.

90. 430 U.S. at 714–716; Bennett, *supra* n. 57, at 1925.

91. 447 U.S. at 566; Cecil C. Kuhne, III, *Testing the Outer Limits of Commercial Speech: Its First Amendment Implications*, 23 Rev. Litig. 607, 614 (2004).

commercial context to the mandated *disclosure* of factual information in order to prevent consumer deception.⁹²

B. Levels of First Amendment Scrutiny for Product Warnings: Lower Court Decisions

The lower courts have provided further guidance on the appropriate level of scrutiny in commercial-disclosure cases. Two cases, *National Electrical Manufacturers Ass’n v. Sorrell*⁹³ and *Entertainment Software Ass’n v. Blagojevich*⁹⁴ are discussed in detail below and are of particular assistance in analyzing the First Amendment question surrounding the cigarette graphic warning labels.

One of the most frequently cited lower court decisions on commercial disclosures is *National Electric*.⁹⁵ This case involved a challenge to a statute that required manufacturers of certain light bulbs to disclose to consumers that the light bulbs contained mercury and “should be recycled or disposed of as hazardous waste.”⁹⁶ In selecting a level of scrutiny to govern disclosures on product warnings, the Second Circuit Court of Appeals drew a distinction between commercial-speech restrictions and mandated commercial disclosures.⁹⁷ The court explained that disclosures are treated differently than speech restrictions because a factual disclosure does not offend “the core First Amendment values of promoting efficient exchange of information or protecting individual liberty interests.”⁹⁸ Disclosures advance, rather than restrict, the goal of promoting the free exchange of ideas.⁹⁹ Further, factual disclosures are unlikely to impinge on liberty interests because “[r]equired disclosure of accurate, factual commercial information presents little risk that the state is forcing speakers to adopt disagreeable state-sanctioned positions, suppressing dissent, con-

92. 471 U.S. at 651; Bennett, *supra* n. 57, at 1922.

93. 272 F.3d 104 (2d Cir. 2001).

94. 469 F.3d 641 (7th Cir. 2006).

95. *E.g. Centro Tepeyac v. Montgomery Co.*, 779 F. Supp. 2d 456, 463 (D. Md. 2011), *aff’d in part and rev’d in part*, 683 F.3d 591 (4th Cir. 2012); *United States v. Wenger*, 292 F. Supp. 2d 1296, 1304 n. 37 (D. Utah 2003), *aff’d*, 427 F.3d 840 (10th Cir. 2005); *Dex Media W., Inc. v. Seattle*, 793 F. Supp. 2d 1213, 1226–1227 (W.D. Wash. 2011).

96. *Nat’l Elec. Mfrs. Ass’n*, 272 F.3d at 107–108.

97. *Id.* at 113–114.

98. *Id.* at 114.

99. *Id.*

founding the speaker's attempts to participate in self-governance, or interfering with an individual's right to define and express his or her own personality."¹⁰⁰

Given these differences, the Second Circuit held that *Zauderer*—not *Central Hudson*—“describes the relationship between means and ends demanded by the First Amendment in compelled commercial[-]disclosure cases. The *Central Hudson* test should be applied to statutes that *restrict* commercial speech.”¹⁰¹ Thus, one can conclude that “[r]egulations that compel ‘purely factual and uncontroversial’ commercial speech are subject to more lenient review than regulations that restrict accurate commercial speech and will be sustained if they are ‘reasonably related to the State’s interest in preventing deception of consumers.’”¹⁰²

Notably, the Second Circuit did not weigh in on which test should be applied if the mandated disclosures are *not* factual and uncontroversial. One could infer that this suggests that a different level of scrutiny should apply to commercial disclosures expressing state-sanctioned opinions or ideology.¹⁰³

The court in *National Electric* also examined whether *Zauderer* should be read narrowly to apply to only those disclosures aimed at preventing consumer deception.¹⁰⁴ The purpose of the mercury-disclosure statute was to “reduce the amount of mercury released into the environment . . . [and] increas[e] consumer awareness of the presence of mercury in a variety of products.”¹⁰⁵ The court found that these goals were not “inconsistent with the policies underlying First Amendment protection of commercial speech”;¹⁰⁶ accordingly, *Zauderer*'s rational basis test applied, even though the statute's purpose was something other than pre-

100. *Id.*

101. *Id.* at 115 (emphasis in original).

102. *Id.* at 113 (quoting *Zauderer*, 471 U.S. at 651).

103. *Id.* at 114 n. 5. “Our decision reaches only required disclosures of factual commercial information. Requiring actors in the marketplace to espouse particular opinions would likely raise issues not presented here.” *Id.*

104. *Id.* at 115 (indicating that the disclosure at issue was not per se intended to prevent deception but was to inform consumers). *National Electric* was not alone in contemplating the breadth to which *Zauderer* should be read. See *N.Y. St. Rest. Ass'n v. N.Y.C. Bd. of Health*, 556 F.3d 114, 133–134 (2d Cir. 2009) (discussing a broader reading of *Zauderer* and its acceptance by other courts).

105. *Nat'l Elec. Mfrs. Ass'n*, 272 F.3d at 115.

106. *Id.*

venting consumer deception.¹⁰⁷ Applying rational basis review, the Second Circuit upheld the statute.¹⁰⁸

Several cases have relied on *National Electric* in concluding that *Zauderer*—not *Central Hudson*—is the correct test when evaluating whether commercial-disclosure requirements violate the First Amendment. For instance, in *New York State Restaurant Ass’n v. New York City Board of Health*,¹⁰⁹ the Second Circuit applied the rational basis test to a health-code law that required certain restaurants to post calorie information on their menu boards.¹¹⁰ The Sixth Circuit Court of Appeals also relied on *National Electric* in *International Dairy Foods Ass’n v. Boggs*¹¹¹ when it applied the rational basis test, rather than intermediate scrutiny, to a disclosure requirement imposed on dairy producers.¹¹²

While the cases discussed above applied the rational basis test to commercial disclosures, the Seventh Circuit Court of Appeals applied *Wooley*’s strict scrutiny to opinion-based commercial disclosures in *Blagojevich*.¹¹³ In *Blagojevich*, the Seventh Circuit struck down a statute that required video-game retailers to place a four-square-inch label bearing the number “18” on video games meeting the statutory definition of “sexually explicit.”¹¹⁴ Video game retailers challenged the labeling requirement, argu-

107. *Id.* In reaching this conclusion, the *National Electric* court distinguished a previous Second Circuit decision, *International Dairy Foods Ass’n v. Amestoy (IDFA)*, in which the court applied *Central Hudson* to a commercial-disclosure case. *Id.* at 115 n. 6; 92 F.3d 67, 72–74 (2d Cir. 1996). The disclosure at issue in *IDFA* required dairy producers to disclose whether their cows were treated with the hormone rBST. *Nat’l Elec. Mfrs. Ass’n*, 272 F.3d at 115 n. 6; 92 F.3d at 69. The *National Electric* court distinguished *IDFA* by stating, “[O]ur decision was expressly limited to cases in which a state disclosure requirement is supported by no interest other than the gratification of ‘consumer curiosity.’” 272 F.3d at 115 n. 6.

108. *Nat’l Elec. Mfrs. Ass’n*, 272 F.3d at 113, 116 (finding that neither the Commerce Clause nor the First Amendment invalidated the statute, thus vacating the preliminary injunction).

109. 556 F.3d 114.

110. *Id.* at 117, 134. After applying the rational basis test, the Second Circuit held that the law did not violate the First Amendment because the disclosure was factual and bore a reasonable relation to New York City’s obesity-reduction goal. *Id.* at 118.

111. 622 F.3d 628 (6th Cir. 2010).

112. *Id.* at 632, 641–642.

113. 469 F.3d at 652.

114. *Id.* at 643, 653.

ing that it violated the First Amendment because it was compelled speech.¹¹⁵

The Seventh Circuit began its analysis by acknowledging that a lower level of scrutiny is appropriate in commercial-disclosure cases, stating that

the First Amendment's guarantee of freedom from "compelled speech" is not absolute. Particularly in the commercial arena, the Constitution permits the State to require speakers to express certain messages without their consent, the most prominent examples being warning and nutritional information labels. . . . The Court has allowed states to require the inclusion of "purely factual and uncontroversial information . . . as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers."¹¹⁶

Whether *Zauderer's* rational basis test or some other level of scrutiny applied boiled down to one straightforward question: "whether the [statute's] labeling and signage requirements [were] compelled speech in violation of the Constitution or simply requirements of purely factual disclosures."¹¹⁷ The court concluded that the "18" sticker did not convey purely factual disclosures; rather, it reflected *the State's opinion* regarding what content is "sexually explicit."¹¹⁸

115. *Id.* at 643–644. After trial, the district court concluded that the labeling requirements were unconstitutional as "compelled speech" in violation of the First Amendment." *Id.* at 644.

116. *Id.* at 651–652 (quoting *Zauderer*, 471 U.S. at 651) (internal citations omitted).

117. *Id.* at 652.

118. *Id.*

The [Act] requires that the "18" sticker be placed on games that meet the statute's definition of "sexually explicit." The State's definition of this term is far more opinion-based than the question of whether a particular chemical is within any given product. Even if one assumes that the State's definition of "sexually explicit" is precise, it is the State's definition—the video game manufacturer or retailer may have an entirely different definition of this term. Yet the requirement that the "18" sticker be attached to all games meeting the State's definition forces the game-seller to include this non-factual information in its message that is the game's packaging. The sticker ultimately communicates a subjective and highly controversial message—that the game's content is sexually explicit.

Id.

Thus, *Wooley*’s strict scrutiny applied.¹¹⁹ The court found that the “18” sticker was not “narrowly tailored to the State’s goal of ensuring that parents are informed of the sexually explicit content” of particular video games.¹²⁰ An educational campaign would be more effective at achieving this goal.¹²¹ Moreover, the court noted that the sticker was so large and occupied so much space on the package that it literally failed to be narrowly tailored.¹²² Notably, the Seventh Circuit did not address the possibility that *Central Hudson* could apply simply because the disclosure arose in the commercial context.

Blagojevich’s holding was buttressed recently by the Supreme Court’s decision in *Brown v. Entertainment Merchants Ass’n*,¹²³ where the Court applied strict scrutiny to a law that required video game manufacturers to label certain “violent” video games with an “18” sticker.¹²⁴ The Court did not address *Zauderer*’s outer bounds but found that the labeling requirement “impose[d] a restriction on the content of protected speech,” thus requiring application of strict scrutiny.¹²⁵

IV. THE GRAPHIC-WARNING-LABEL LITIGATION

A. The Sixth Circuit Opinion: *Discount Tobacco*

Against this backdrop, the Sixth Circuit Court of Appeals addressed the constitutionality of the cigarette graphic-warning-label requirement in *Discount Tobacco*.¹²⁶ The three-judge panel was divided on the issue. Judge Stranch and Judge Barrett found

119. *Id.*; see *supra* pt. III(A)(1) (discussing *Wooley*’s strict scrutiny standard).

120. *Blagojevich*, 469 F.3d at 652.

121. *Id.*

122. *Id.* “Certainly we would not condone a health department’s requirement that half of the space on a restaurant menu be consumed by the raw shellfish warning. Nor will we condone the State’s unjustified requirement of the four[-]square-inch ‘18’ sticker.” *Id.*

123. 131 S. Ct. 2729 (2011).

124. *Id.* at 2732, 2738.

125. *Id.* at 2738.

126. 674 F.3d 509. The decision also addressed numerous challenges to other portions of the Act, such as various marketing restrictions. *Id.* at 520. This Article discusses only those portions of the decision addressing the constitutionality of the graphic-warning requirements.

that the graphic-warning-label requirement was constitutional,¹²⁷ Judge Clay dissented.¹²⁸

The question presented on appeal was whether the Act's graphic-warning requirement—on its face—violated the First Amendment.¹²⁹ Because the FDA had not issued its Final Rule at the time the complaint was filed, the specific images selected by the FDA were not properly before the court; thus, the court could decide only whether the Act's warning requirement violated the First Amendment.¹³⁰

1. *The Level of Scrutiny: Central Hudson, Wooley, or Zauderer?*

The court's first task was to determine the appropriate level of scrutiny.¹³¹ The majority found that where commercial disclosures are at issue (as opposed to commercial-speech restrictions), the test should be either *Zauderer's* rational basis review or *Wooley's* strict scrutiny standard—not *Central Hudson's* intermediate scrutiny.¹³² Relying on the reasoning in the *National Electric* decision, the Sixth Circuit concluded that *Central Hudson* sets forth the test for *restrictions* on commercial speech; *Zauderer* sets forth the test for commercial *disclosures*.¹³³

After determining that *Central Hudson's* intermediate scrutiny did not apply, the court focused on whether the graphic-warning-label requirement should be subject to the rational basis test found in *Zauderer* or whether strict scrutiny applied.¹³⁴ The court considered whether it should read *Zauderer* narrowly to apply only where the government's purpose is to prevent consumer deception and concluded that *Zauderer* can apply even if the statute's "purpose is something other than or in addition to

127. *Id.* at 518, 551–569.

128. *Id.* at 518, 527–530. Judge Clay's dissent related to the color graphic-warning-label requirement. *Id.* at 530–531.

129. *Id.* at 552–553.

130. *Id.* In fact, the Final Rule was not issued until after the summary judgment decision in the trial court and after the last brief was filed in the appeal at issue before the court. *Id.* at 553.

131. *Id.* at 554, 558.

132. *Id.* at 554.

133. *Id.* at 554–558.

134. *Id.* at 558–561.

preventing consumer deception.”¹³⁵ Therefore, to determine whether *Zauderer* applied, the critical question was not whether the Act’s purpose was aimed at preventing consumer deception; instead, the linchpin was whether the mandated disclosures were facts or opinions.¹³⁶

The court then addressed the two components of the Act’s warning-label requirement—the new textual warnings and the new graphic requirement—to determine whether they were “factual” and thus subject to *Zauderer*’s rational basis test.¹³⁷ The court quickly disposed of the issue concerning the textual requirements.¹³⁸ The new textual warnings, such as “WARNING: Cigarettes cause strokes and heart disease” and “WARNING: Smoking during pregnancy can harm your baby,” were indisputably factual.¹³⁹ Accordingly, *Zauderer* applied to the textual warnings.¹⁴⁰

The new graphic requirement, however, required more extensive analysis. The court underscored that the specific images chosen by the FDA were not before the court—the only issue the court could address was the facial challenge to the Act’s graphic-warning requirement.¹⁴¹ Accordingly, the tobacco companies had to “show that ‘no set of circumstances exist[ed] under which [the statute] would be valid, or that the statute lack[ed] any plainly legitimate sweep.’”¹⁴²

To satisfy the facial-challenge burden, the tobacco companies “would have to establish that a graphic warning cannot convey the negative health consequences of smoking accurately, a position tantamount to concluding that pictures can never be factually accurate, only written statements can be.”¹⁴³ The court

135. *Id.* at 556. The court stated that the *National Electric* case showed that the *Zauderer* framework could apply outside of the narrow focus. *Id.*

136. *Id.* at 569.

137. *Id.* at 558–561.

138. *Id.* at 558.

139. *Id.* at 526 n. 3, 558. The court indicated that no evidence was submitted to dispute the content of the warnings. *Id.* at 526.

140. *Id.* at 558.

141. *Id.* at 558–559; see *supra* n. 130 and accompanying text (discussing why the specific images were not before the court).

142. *Id.* at 559 (quoting *United States v. Stevens*, 130 S. Ct. 1577, 1587 (2010)).

143. *Id.*

found that any number of graphic images could be factually accurate and thus fall under *Zauderer*.¹⁴⁴

A nonexhaustive list of some that would [be factually accurate] include a picture or drawing of a nonsmoker's and smoker's lungs displayed side by side; a picture of a doctor looking at an x-ray of either a smoker's cancerous lungs or some other part of the body presenting a smoking-related condition; a picture or drawing of the internal anatomy of a person suffering from a smoking-related medical condition; a picture or drawing of a person suffering from a smoking-related medical condition; and any number of pictures consisting of text and simple graphic images.¹⁴⁵

The court rejected the tobacco companies' argument that this case was "on all fours" with *Blagojevich*, and thus strict scrutiny should be required.¹⁴⁶ The court distinguished *Blagojevich* on the grounds that the *Blagojevich* labels involved disclosures of opinion, while the cigarette warning labels in *Discount Tobacco could* impart facts.¹⁴⁷

2. Application of *Zauderer's Rational Basis Test*

After determining that the graphic-warning requirement could present—on its face—factually accurate information, the court applied *Zauderer's* rational basis test, stating the issue as "whether graphic and textual warnings that convey factual infor-

144. *Id.*

145. *Id.*

146. *Id.* at 560–561.

147. *Id.* at 561. Specifically, the court stated:

The textual warnings in this case provide undisputed factual information about the health risks of using tobacco products. Similarly, for the reasons outlined above, there are myriad graphic images that would also provide such factual information. The health risks of smoking tobacco have been uncovered through scientific study. They are facts. Warnings about these risks—whether textual or graphic—can communicate these facts. In contrast, what constitutes a sexually explicit video game is a matter of personal taste and sexual morals that is necessarily based on opinion, as enshrined in the very definition of "sexually explicit" that *Blagojevich* examined. A required disclosure announcing that the game is sexually explicit communicates the government's *opinion* that the game is sexually explicit. *Blagojevich* and the standards it articulates are inapplicable here.

Id. (emphasis in original).

mation about the health risks of tobacco use are reasonably related to the purpose of preventing consumer deception.”¹⁴⁸

To answer this question, the court analyzed the Act’s purpose.¹⁴⁹ First, the court found that it was well established that tobacco companies had “knowingly and actively conspired to deceive the public about the health risks and addictiveness of smoking for decades.”¹⁵⁰ The court stated that new warnings were necessary because: (1) the current warnings “have not been revised since 1984”; (2) “[t]he current warnings take up less than [five percent] of cigarette packaging and advertising”; (3) the current warnings were on the side of the packaging; (4) studies suggested that consumers frequently overlooked the current warnings; and (5) the current warnings required a college-level reading ability, so adolescents may not appreciate the information that the current warnings convey.¹⁵¹ In short, the then-current warnings were ineffective.¹⁵² The court concluded that “[t]he warnings’ purpose is to prevent consumers from being misled about the health risks of using tobacco. Accordingly, the warnings are designed to ‘promote greater public understanding of [those] risks.’”¹⁵³

Second, the court evaluated whether the warning labels were reasonably related to this greater understanding.¹⁵⁴ The court examined studies on the efficacy of similar graphic warning labels in effect in Canada, Brazil, and Thailand, and concluded that there was “abundant evidence” that larger graphic warnings promote a greater understanding of health risks associated with tobacco use.¹⁵⁵ The court noted that “[a] warning that is not noticed, read, or understood by consumers does not serve its function” and held that “[t]he new warnings rationally address these problems by being larger and including graphics.”¹⁵⁶ Thus, the

148. *Id.* at 562.

149. *Id.*

150. *Id.*

151. *Id.* at 563.

152. *Id.* at 563–564. The court explained that “most people have only a superficial awareness that smoking is dangerous.” *Id.* at 563 (quoting *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1106 (D.C. Cir. 2009)) (internal quotations omitted).

153. *Id.* at 561 (quoting 123 Stat. at 1776) (alteration in original).

154. *Id.* at 562.

155. *Id.* at 565.

156. *Id.* at 564.

graphic-warning-label requirement satisfied the rational basis test.¹⁵⁷

The court rejected the tobacco companies' argument that there was no evidence that the warning labels would significantly reduce the number of smokers.¹⁵⁸ The court explained that a reduction in the number of smokers was irrelevant:

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. . . . [T]he warnings effectively convey this factual information, just as they were designed to do.¹⁵⁹

The court similarly rejected the tobacco companies' argument that *Zauderer* required the court to also analyze whether the graphic-warning requirements were unduly burdensome, stating that "[t]he test is simply that the warnings be reasonably related to the government's interest in preventing consumer deception."¹⁶⁰

3. *The Dissent*

The dissent found the graphic warning labels unconstitutional.¹⁶¹ Judge Clay agreed with the majority that strict scrutiny was not appropriate and that *Zauderer* should be applied,¹⁶² but he concluded that the government failed to satisfy its burden because it provided insufficient evidence that the "color[-]graphics requirement [wa]s a reasonably tailored solution"¹⁶³ to address

157. *Id.*

158. *Id.* at 567.

159. *Id.*

160. *Id.* This is in contrast to the Sixth Circuit's opinion in *Boggs*, where the court found that to satisfy *Zauderer*, disclosure requirements cannot be unduly burdensome. 622 F.3d at 642.

161. *Discount Tobacco*, 674 F.3d at 530 (Clay, J., dissenting). Specifically, Judge Clay stated that he would find unconstitutional "the portion of the provision requiring color graphic images to accompany the textual warnings" on cigarette packages. *Id.*

162. *Id.* at 528.

163. *Id.* at 529. While acknowledging that the biggest deficiency in the existing warnings was the fact that they were easily overlooked, the dissent analogized the FDA's

the “information deficit . . . among potential tobacco consumers.”¹⁶⁴ The color-graphics requirement was thus unconstitutional.¹⁶⁵

While it is permissible for the government to require a product manufacturer to provide truthful information, even if perhaps frightening, to the public in an effort to warn it of potential harms, it is less clearly permissible for the government to simply frighten consumers or to otherwise attempt to flagrantly manipulate the emotions of consumers as it seeks to do here.¹⁶⁶

The majority disagreed with Judge Clay’s reasoning, finding that although Judge Clay referenced the *Zauderer* test, he was actually applying “the wrong test”: intermediate scrutiny under *Central Hudson*.¹⁶⁷

B. The District Court for the District of Columbia’s Opinion:
R.J. Reynolds Tobacco Co.

While the Sixth Circuit upheld the constitutionality of the Act’s graphic-warning requirement against a facial challenge, Judge Leon (District Judge in the District of Columbia) struck down the specific images selected by the FDA in *R.J. Reynolds Tobacco Co.*¹⁶⁸ On November 7, 2011, Judge Leon entered a preliminary injunction enjoining enforcement of the FDA’s Final Rule.¹⁶⁹ On February 29, 2012, Judge Leon entered summary judgment in the tobacco companies’ favor, finding that the graphic warning labels proposed by the FDA violated the First Amendment.¹⁷⁰

In contrast to the Sixth Circuit, which applied *Zauderer*’s rational basis test to determine the facial constitutionality of the

warnings to those mandated for over-the-counter drugs, which do not require such graphic labels even if the factual information may likewise be overlooked. *Id.* at 528.

164. *Id.*

165. *Id.* at 530.

166. *Id.* at 529.

167. *Id.* at 568 (majority).

168. 845 F. Supp. 2d. at 277.

169. *R.J. Reynolds Tobacco Co. v. United States FDA*, 823 F. Supp. 2d. 36, 53 (D.D.C. 2011).

170. *R.J. Reynolds Tobacco Co.*, 845 F. Supp. 2d. at 268.

graphic-warning-label requirement, Judge Leon determined that the specific images proposed by the FDA should be reviewed under strict scrutiny.¹⁷¹ Judge Leon started from the presumption that compelled speech is unconstitutional.¹⁷² The First Amendment protects “both the right to speak freely and the right to refrain from speaking at all.”¹⁷³ In fact, “[f]or corporations[,] as for individuals, the choice to speak includes within it the choice of what not to say.”¹⁷⁴

Judge Leon explained that *Zauderer* allows only a narrow exception to this rule.¹⁷⁵ Under *Zauderer*, the government can require commercial speakers to make certain disclosures to protect consumers from “confusion or deception”; however, the government can require the disclosure of only purely “factual and uncontroversial information.”¹⁷⁶ The court also found that the *Zauderer* test had a second component: the disclosures “may still violate the First Amendment if they were ‘unjustified or unduly burdensome.’”¹⁷⁷

Judge Leon found that the graphic warning labels were not disclosures aimed at preventing consumer deception: “the graphic images here were neither designed to protect the consumer from confusion or deception, nor to increase consumer awareness of smoking risks; rather, they were crafted to evoke a strong emotional response calculated to provoke the viewer to quit or never start smoking.”¹⁷⁸

In reaching this conclusion, Judge Leon reviewed several authorities that the government relied upon, such as a report prepared by the Institute of Medicine.¹⁷⁹ According to that report,

[I]t is time to state unequivocally that the primary objective of tobacco regulation is not to promote informed choice but rather to discourage consumption of tobacco products, especially by children and youths, as a means of reducing

171. *Id.* at 274.

172. *Id.* at 272.

173. *Id.* (quoting *Wooley*, 430 U.S. at 714) (internal quotations omitted).

174. *Id.* (quoting *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 16 (1986)) (internal quotations omitted).

175. *Id.*

176. *Id.*; 471 U.S. at 651.

177. *R.J. Reynolds Tobacco Co.*, 845 F. Supp. 2d at 272.

178. *Id.*

179. *Id.* at 272–273.

tobacco-related death and disease. . . . [E]ven though tobacco products are legally available to adults, the paramount health aim is to reduce the number of people who use and become addicted to these products, through a focus on children and youths.¹⁸⁰

In light of the materials that the government relied upon, Judge Leon found that the purpose of the graphic-warning-label requirement was not to prevent consumer deception, but rather to evoke an emotional response from the viewer to dissuade consumers from purchasing cigarettes.¹⁸¹

Moreover, the specific images proposed by the FDA did not impart the factual consequences of smoking.¹⁸² For instance, one image shows a man wearing a t-shirt that states “I QUIT” with a smoking-cessation hotline beneath.¹⁸³ Judge Leon reasoned that this image does not show the consequences of smoking; it encourages smoking cessation.¹⁸⁴ The court stated that the government had crossed the line between the conveyance of factual information and advocacy.¹⁸⁵

Because the images did not convey factual information to prevent consumer deception, but rather were designed to provoke a visceral response from the viewer, Judge Leon applied *Wooley’s* strict scrutiny.¹⁸⁶ The FDA had to show that the rule was “narrowly tailored to achieve a compelling government interest.”¹⁸⁷ The FDA contended that it did have a compelling interest: to convey “to consumers generally, and adolescents in particular, the devastating consequences of smoking and nicotine addiction.”¹⁸⁸ But, as discussed above, Judge Leon determined “that the Government’s *actual* purpose [wa]s not to inform or educate, but rather to advocate a change in behavior—specifically to encourage

180. *Id.* at 273 (quoting Inst’n of Med., *Ending the Tobacco Problem: A Blueprint for the Nation* 291 (Richard J. Bonnie ed., Nat’l Acad. Press 2007)) (internal quotations omitted).

181. *Id.* at 275.

182. *Id.* at 273.

183. *Id.*

184. *Id.*

185. *Id.* at 274. “Thus, while the line between the constitutionally permissible dissemination of factual information and the impermissible expropriation of a company’s advertising space for Government advocacy can be frustratingly blurry, here the line seems quite clear.” *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

smoking cessation and to discourage potential new smokers from starting.”¹⁸⁹ Judge Leon stated that “[a]lthough an interest in informing or educating the public about the dangers of smoking *might* be compelling, an interest in simply advocating that the public not purchase a legal product is not.”¹⁹⁰

Even if the government did have a compelling interest, the graphic warning labels could not survive strict scrutiny because they were not narrowly tailored.¹⁹¹ First, the size alone of the warnings—fifty percent of the packaging—demonstrated that they (literally) were not narrowly tailored.¹⁹² In addition, there were any number of less restrictive ways in which the government could achieve its purpose, such as: (1) increasing taxes; (2) providing its own smoking-cessation campaign; (3) altering the space requirements to twenty percent of the packaging; (4) redesigning the graphics to convey only factual information; or (5) developing a smoking-cessation program specifically targeted at youths.¹⁹³ Judge Leon reasoned that any one of these possibilities would be less restrictive than the graphic warning labels selected by the FDA.¹⁹⁴ Accordingly, Judge Leon struck down the graphic warning labels.¹⁹⁵

On appeal to the District of Columbia Circuit, the FDA argued that Judge Leon erred in applying strict scrutiny to the warnings; instead, he should have applied *Zauderer’s* rational basis test.¹⁹⁶ Alternatively, the FDA argued that the warnings should be subject to intermediate scrutiny under *Central Hudson* because they involve commercial speech:

The district court erred in importing the analysis of *Wooley* and its progeny into the commercial[-]speech context. In so doing, the court adopted a dichotomy without any basis in

189. *Id.* at 275.

190. *Id.*

191. *Id.*

192. *Id.* at 275–276.

193. *Id.* at 276.

194. *Id.* Although these less restrictive measures may be more costly for the government, the court stated that “[c]itizens may not be compelled to forgo their [First Amendment] rights because officials . . . desire to save money.” *Id.* (citing *Palmer v. Thompson*, 403 U.S. 217, 226 (1971)) (alteration in original).

195. *Id.*

196. Br. for Appellants, *R.J. Reynolds Tobacco Co. v. F.D.A.*, 2011 WL 6179451 at 24, 27 (D.C. Cir. Dec. 12, 2011) (No. 11-5332).

First Amendment doctrine. In the district court’s view, the cigarette health warnings are either subject to review under the relaxed standards applied in *Zauderer*, or, alternatively, subject to strict scrutiny under *Wooley*. Because we are here dealing with commercial speech, the correct question is instead whether the warnings should be reviewed under *Zauderer* or under *Central Hudson*.¹⁹⁷

The tobacco companies responded that *Central Hudson* is wholly inapplicable because strict scrutiny applies whenever the government compels actors to “disseminate non-factual, controversial policy statements”—regardless of whether that message is placed on a commercial product.¹⁹⁸

C. The District of Columbia Circuit’s Opinion: *R.J. Reynolds Tobacco Co.*

On August 24, 2012, the District of Columbia Circuit rendered its decision in *R.J. Reynolds Tobacco Co. v. FDA*.¹⁹⁹ The panel was divided. Judges Randolph and Brown voted to strike down the graphic-warning requirement;²⁰⁰ Judge Rogers dissented.²⁰¹ The only question before the court was whether the graphic warning labels violated the First Amendment.²⁰² The court explained that although the government can engage in its own anti-smoking campaign, this case raised

novel questions about the scope of the government’s authority to force the manufacturer of a product to go beyond making purely factual and accurate commercial disclosures and undermine its own economic interest—in this case, by making ‘every single pack of cigarettes in the country [a] mini billboard’ for the government’s anti-smoking message.²⁰³

197. *Id.* at 43–44.

198. Br. for Appellees, *R.J. Reynolds Tobacco Co. v. FDA*, 2012 WL 204198 at 35–36 (D.C. Cir. Jan. 23, 2012) (No. 11-5332).

199. 696 F.3d 1205.

200. *Id.* at 1208.

201. *Id.* at 1222.

202. *Id.* at 1211.

203. *Id.* at 1212.

The court's first task was to select the appropriate level of scrutiny.²⁰⁴ *Zauderer* and *Central Hudson* provide the two main exceptions to the "general rule that content-based speech regulations—including compelled speech—are subject to strict scrutiny."²⁰⁵ Under the District of Columbia Circuit's interpretation of *Zauderer*, "'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.'"²⁰⁶

The court then addressed whether Judge Leon erred in finding the *Zauderer* standard inapplicable.²⁰⁷ The court found that *Zauderer* should be read narrowly to apply only where the disclosure requirement's purpose is to "correct misleading commercial speech."²⁰⁸ The court concluded that

a disclosure requirement is only appropriate if the government shows that, absent a warning, there is a self-evident—or at least 'potentially real'—danger that an advertisement will mislead consumers. . . . [I]n the absence of any congressional findings on the misleading nature of cigarette packaging itself, there is no justification under *Zauderer* for the graphic warnings.²⁰⁹

Moreover, the graphic warning labels did not present the type of "purely factual and uncontroversial" information permissible under *Zauderer*.²¹⁰ The court noted that the disclosures at issue in *Zauderer* and *Milavetz* were "indisputably accurate and not subject to misinterpretation by consumers."²¹¹ The graphic cigarette warnings, however, were meant to be symbolic and could thus be misinterpreted.²¹² In addition, the warnings were not "purely factual" because they were designed to provoke an emotional response or shock the viewer.²¹³ Some of the images, such as the

204. *Id.* at 1211.

205. *Id.* at 1212.

206. *Id.* (citing 471 U.S. at 651).

207. *Id.* at 1213–1214.

208. *Id.* at 1213.

209. *Id.* at 1214–1215.

210. *Id.* at 1216 (quoting 471 U.S. at 651) (internal quotations omitted).

211. *Id.*

212. *Id.*

213. *Id.*

crying-woman graphic, the smoke-approaching-baby graphic, and the “I QUIT” graphic, did not convey information about the health consequences of smoking at all.²¹⁴ Because the images did not convey “purely factual, accurate, or uncontroversial information” about smoking’s health consequences, *Zauderer* did not apply.²¹⁵

After concluding that the graphic warnings fell outside of *Zauderer*’s ambit, the court’s next task was to determine whether *Central Hudson* or strict scrutiny applied.²¹⁶ The court noted that other circuits had found *Central Hudson* inapplicable to compelled commercial disclosures; however, based on binding precedent in the District of Columbia Circuit, the court was obligated to apply *Central Hudson* to the graphic warnings.²¹⁷ The court relied on its decision in *United States v. Philip Morris USA, Inc.*,²¹⁸ “where it reviewed a district court order requiring the defendant tobacco manufacturers to publish corrective statements on their websites, in newspapers, and on major television networks.”²¹⁹ In *Philip Morris*, the District of Columbia Circuit found that commercial speech receives a lower level of First Amendment protection; accordingly, the court should apply a lower level of scrutiny.²²⁰ The *Philip Morris* court found that “the government must affirmatively demonstrate its means are ‘narrowly tailored’ to achieve a substantial government goal.”²²¹ The *R.J. Reynolds Tobacco Co.* court was bound by the *Philip Morris* decision and thus concluded that it had to apply *Central Hudson*—not strict scrutiny—to the graphic warning labels.²²²

In applying *Central Hudson*, the court first sought to identify the government’s interest.²²³ The court found that the graphic warning labels were designed to encourage smoking cessation and

214. *Id.* “These inflammatory images and the provocatively[]named hotline cannot rationally be viewed as pure attempts to convey information to consumers. They are unabashed attempts to evoke emotion (and perhaps embarrassment) and browbeat consumers into quitting.” *Id.* at 1216–1217.

215. *Id.* at 1217.

216. *Id.*

217. *Id.*

218. 566 F.3d 1095.

219. *R.J. Reynolds Tobacco Co.*, 696 F.3d at 1217.

220. *Id.*

221. 566 F.3d at 1143 (quoting *Bd. of Trustees v. Fox*, 492 U.S. 469, 480 (1989)).

222. *R.J. Reynolds Tobacco Co.*, 696 F.3d at 1217.

223. *Id.*

dissuade consumers from buying cigarettes.²²⁴ The court assumed that this interest was substantial but found that the government failed to provide even a “shred of evidence” showing that the graphic warning labels advanced this interest to a material degree.²²⁵ The government’s reliance on international studies did not persuade the court because none of those studies showed that the graphic warnings “*directly caused* a material decrease in smoking rates in any of the countries that now require them.”²²⁶ The court also took aim at the RIA report, which estimated that the “new warnings would reduce U.S. smoking rates by a mere 0.088%.”²²⁷ The court found that these studies were wholly inadequate to demonstrate that the graphic warnings advanced the government’s interest in reducing smoking rates “to a material degree.”²²⁸

The court also rejected the government’s argument that it had a substantial interest in effectively communicating smoking’s health risks.²²⁹ The court noted that this “interest” was indistinguishable from the goal of reducing smoking rates, stating that “this purported ‘interest’ describes only the *means* by which FDA is attempting to reduce smoking rates. . . . The government’s attempt to reformulate its interest as purely informational is unconvincing. . . .”²³⁰ Ultimately, the court determined that the graphic warning labels did not survive intermediate scrutiny under *Central Hudson*.²³¹

Judge Rogers dissented.²³² She argued that *Zauderer* should apply “[b]ecause the warning labels present factually accurate information and address misleading commercial speech.”²³³ In determining that *Zauderer* offered the correct level of scrutiny, Judge Rogers focused on the tobacco companies’ “decades-long campaign to deceive consumers” about the dangers of smoking.²³⁴

224. *Id.* at 1218.

225. *Id.* at 1219.

226. *Id.* (emphasis in original).

227. *Id.* at 1220.

228. *Id.* (quoting *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995)) (internal quotations omitted).

229. *Id.* at 1221.

230. *Id.*

231. *Id.* at 1221–1222.

232. *Id.* at 1222 (Rogers, J., dissenting).

233. *Id.*

234. *Id.* at 1224.

Because the government presented evidence that the current cigarette warnings are “stale” and go unnoticed by consumers, Judge Rogers found that the current cigarette warnings “remain likely to mislead consumers.”²³⁵ Further, when the graphic warnings are viewed in the context of their accompanying written warnings, they convey factual, uncontroversial information.²³⁶ She concluded that the majority of the graphic warning labels would pass muster under *Zauderer*.²³⁷ The “1-800-QUIT-NOW” label on each warning did not, however, convey factual information about smoking risks, and Judge Rogers concluded that this component of the warnings should be reviewed under *Central Hudson*.²³⁸ She found that the smoking-cessation hotline did not satisfy the fourth prong of *Central Hudson*’s intermediate scrutiny because there was no evidence that a less burdensome speech constraint would inadequately achieve the government’s interest.²³⁹

V. ANALYSIS

A. *Discount Tobacco* and *R.J. Reynolds Tobacco Co.*— Any Common Ground?

The Sixth Circuit and the District of Columbia Circuit reached very different conclusions on the constitutionality of the Act’s graphic-warning-label requirement, in part because they faced different questions. The Sixth Circuit addressed a facial challenge to the requirement,²⁴⁰ while Judge Leon and the District of Columbia Circuit addressed the specific images proposed by the FDA.²⁴¹ They also had fundamentally different takes on when the *Zauderer* test should apply. Both Judge Leon and the District of Columbia Circuit read *Zauderer* narrowly.²⁴² In their

235. *Id.* at 1228.

236. *Id.* at 1232.

237. *Id.* at 1237–1238.

238. *Id.* at 1236.

239. *Id.* “[T]he inclusion of the ‘1-800-QUIT-NOW’ number follows upon no apparent consideration of the effectiveness of alternative means of connecting smokers to cessation resources, such as a package insert.” *Id.*

240. *Discount Tobacco*, 674 F.3d at 553.

241. *R.J. Reynolds Tobacco Co.*, 696 F.3d at 1211 (majority); *R.J. Reynolds Tobacco Co.*, 845 F. Supp. 2d at 268.

242. *R.J. Reynolds Tobacco Co.*, 696 F.3d at 1213–1214; *R.J. Reynolds Tobacco Co.*, 845 F. Supp. 2d at 274.

view, the lower level of scrutiny is justified only if the government's purpose is to prevent consumer deception.²⁴³ Thus, where the government's purpose is to dissuade consumers from buying cigarettes, there is no justification for applying *Zauderer's* rational basis test.²⁴⁴

The Sixth Circuit, on the other hand, seemed willing to read *Zauderer* more broadly and suggested that *Zauderer* could be applied even if the government's purpose was something other than "preven[ting] consumer deception."²⁴⁵ Support for this broader application of *Zauderer* can be found in *National Electric*, where the statute's purpose was to reduce mercury in the environment,²⁴⁶ and in *New York State Board Restaurant Ass'n*, where the statute's purpose was to reduce obesity.²⁴⁷ Although the Sixth Circuit held in *Discount Tobacco* that the purpose of the Act's graphic-warning-label requirement was to prevent consumer deception,²⁴⁸ the court seemed open to the possibility that *Zauderer* could apply where the government had a different purpose.²⁴⁹ Ultimately, the Sixth Circuit found that *Zauderer's* application did not hinge on whether the government's purpose was preventing deception; it hinged on whether the mandated disclosure was one of fact or one of opinion.²⁵⁰

Whether the graphic warning labels impart "facts" or mandate "opinions" is the second point of departure between the

243. *R.J. Reynolds Tobacco Co.*, 696 F.3d at 1214; *R.J. Reynolds Tobacco Co.*, 845 F. Supp. 2d at 272. For an alternative viewpoint on *Zauderer*, see 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, 156 (2011) (stating that focusing primarily on consumer deception "ignores the *Zauderer* Court's repeated emphasis on the importance of factual disclosures, in general, to provide the public with information, and the minimal interest commercial speakers have to withhold this information").

244. *R.J. Reynolds Tobacco Co.*, 845 F. Supp. 2d at 272, 274. The court stated that the facts of this case were comparable to those in *Blagojevich* and found that the graphic images did not have the purpose of protecting consumers from deception. *Id.*

245. *Discount Tobacco*, 674 F.3d at 557, 566.

246. 272 F.3d at 115. The *National Electric* court found that the statute's purpose was "protecting human health and the environment." *Id.*

247. 556 F.3d at 134.

248. 674 F.3d at 566–567.

249. *Id.* at 564.

250. *Id.* at 569; but see Aurora Paulsen, Student Author, *Catching Sight of Credence Attributes: Compelling Production Method Disclosures on Eggs*, 24 Loy. Consumer L. Rev. 280, 311–312 (2011) (arguing that based on the Supreme Court's application of *Zauderer* in other cases such as *Milavetz*, *Zauderer* applies to cases involving compelled commercial speech).

District of Columbia Circuit and the Sixth Circuit. The District of Columbia Circuit found that *Zauderer* applies to only “factual and uncontroversial” disclosures.²⁵¹ In the District of Columbia Circuit’s view, an “inflammatory” label designed to “evoke emotion . . . and browbeat consumers into quitting” cannot be reviewed under *Zauderer*.²⁵²

The Sixth Circuit, however, refused to equate warnings that provoke an “emotional” response with unconstitutional compelled speech:

[W]e vigorously disagree with the underlying premise that a disclosure that provokes a visceral response must fall outside *Zauderer*[’s] ambit. Facts can disconcert, displease, provoke an emotional response, spark controversy, and even overwhelm reason, but that does not magically turn such facts into opinions. . . . [W]hether a disclosure is scrutinized under *Zauderer* turns on whether the disclosure conveys factual information or an opinion, not on whether the disclosure emotionally affects its audience or incites controversy.²⁵³

A third area of disagreement between the District of Columbia Circuit and the Sixth Circuit was the nature of the *Zauderer* test itself. The District of Columbia Circuit’s formulation of *Zauderer* suggested that even “purely factual and uncontroversial disclosures” could violate the First Amendment if the disclosures were “unjustified or unduly burdensome.”²⁵⁴ The Sixth Circuit, however, concluded that to satisfy *Zauderer*, the disclosure requirement need only be reasonably related to the government’s goal—*Zauderer* does not require the government to independently demonstrate that the statute is not unduly burdensome or unjustified.²⁵⁵ This position is interesting in light of the fact that less

251. *R.J. Reynolds Tobacco Co.*, 696 F.3d at 1214 (quoting *Zauderer*, 471 U.S. at 651) (internal quotations omitted).

252. *Id.* at 1217. For a discussion of how this emotional response may be effective in smoking cessation, see David Hammond et al., Ltr. to the Ed., *Showing Leads to Doing: Graphic Cigarette Warning Labels Are an Effective Public Health Policy*, 16 *European J. of Pub. Health* 223, 223–224 (Apr. 2006) (available at <http://eurpub.oxfordjournals.org/content/16/2/223.full.pdf+html>).

253. *Discount Tobacco*, 674 F.3d at 569.

254. *R. J. Reynolds Tobacco Co.*, 696 F.3d at 1212 (quoting 471 U.S. at 651) (internal quotations omitted).

255. *Discount Tobacco*, 674 F.3d at 566–567.

than two years before the *Discount Tobacco* decision, the Sixth Circuit articulated the *Zauderer* test as including an unduly burdensome analysis in *Boggs*:²⁵⁶ “Under *Zauderer*, the Rule’s disclosure requirement . . . must be ‘reasonably related to the State’s interest in preventing deception of consumers’ and cannot be ‘unjustified or unduly burdensome.’”²⁵⁷

Not only did the Sixth Circuit and the District of Columbia Circuit have differing opinions on *Zauderer*’s scope, but they also differed greatly on their opinion regarding *Central Hudson*’s role in commercial-disclosure cases. The District of Columbia Circuit found that *Central Hudson*’s intermediate scrutiny was the appropriate test to apply to commercial disclosures that do not fall within *Zauderer*’s ambit.²⁵⁸ In reaching this conclusion, the District of Columbia Circuit relied on precedent from *Philip Morris*, which involved a First Amendment challenge to a district court order that required tobacco companies to publish “corrective statements” in newspapers and on their websites.²⁵⁹ Because the corrective statements involved commercial speech, the *Philip Morris* court concluded that they should be viewed under a lower level of scrutiny.²⁶⁰ In light of the *Philip Morris* decision, the District of Columbia Circuit in *R.J. Reynolds Tobacco Co.* concluded that strict scrutiny was not appropriate.²⁶¹ The District of Columbia Circuit had already determined that *Zauderer* was inapplicable to the graphic warnings, so it was left with one option: intermediate scrutiny under *Central Hudson*.²⁶²

A few other decisions have applied *Central Hudson* to commercial-disclosure requirements, but these decisions offered little explanation as to why they were applying *Central Hudson*, other than that the case simply involved commercial speech.²⁶³ Deci-

256. 622 F.3d at 642.

257. *Id.* (quoting *Zauderer*, 471 U.S. at 652).

258. *R.J. Reynolds Tobacco Co.*, 696 F.3d at 1217.

259. 566 F.3d at 1142–1143.

260. *Id.* “Because commercial speech receives a lower level of protection under the First Amendment, burdens imposed on it receive a lower level of scrutiny from the courts.” *Id.* (emphasis omitted).

261. 696 F.3d at 1217.

262. *Id.* at 1216–1217.

263. *Borgner v. Brooks*, 284 F.3d 1204, 1210–1213 (11th Cir. 2002) (applying *Central Hudson* to a disclosure statute regarding dentist specialties); *Mason v. Fla. Bar*, 208 F.3d 952, 954–955 (11th Cir. 2000) (applying *Central Hudson* to a disclosure requirement for attorneys relating to “self laudatory” statements).

sions that have extensively discussed the nature of commercial disclosures, such as *National Electric*,²⁶⁴ *Blagojevich*,²⁶⁵ and *Discount Tobacco*,²⁶⁶ suggested a bright-line rule: compelled commercial disclosures should be evaluated under either *Zauderer* or strict scrutiny; *Central Hudson*’s intermediate scrutiny does not belong in the mix. The District of Columbia Circuit’s opinion in *R.J. Reynolds Tobacco Co.*, however, puts *Central Hudson* back in play.²⁶⁷

In contrast, the Sixth Circuit relied on *National Electric* and concluded that *Central Hudson* sets forth the test for only *restrictions* on commercial speech.²⁶⁸ Where commercial *disclosures* are at issue, however, the test should be either *Zauderer*’s rational basis review or strict scrutiny under *Wooley*.²⁶⁹ Under the Sixth Circuit’s view, *Central Hudson*’s intermediate scrutiny is not even an option in commercial-disclosure cases. Likewise, Judge Leon of the District Court for the District of Columbia did not seriously consider the possibility that *Central Hudson* could apply in the commercial-disclosure context; he chose to apply strict scrutiny after determining that the graphic warnings did not fit the *Zauderer* paradigm.²⁷⁰

B. Waiting for the Supreme Court to Exhale

The Supreme Court may be asked to weigh in on whether the graphic warning labels are subject to *Zauderer* (as suggested by the majority in *Discount Tobacco*),²⁷¹ *Wooley*’s strict scrutiny (as urged by the tobacco companies and as Judge Leon found),²⁷² or

264. 272 F.3d at 107, 115 (involving a labeling requirement for products that contain mercury).

265. 469 F.3d at 643, 646, 651 (discussing a labeling requirement for sexually explicit video games).

266. 674 F.3d at 524.

267. 696 F.3d at 1217.

268. *Discount Tobacco*, 674 F.3d at 556–557.

269. *Id.* at 554.

270. *R.J. Reynolds Tobacco Co.*, 845 F. Supp. 2d at 45–46.

271. 674 F.3d at 558–559.

272. *R.J. Reynolds Tobacco Co.*, 845 F. Supp. 2d at 272–274 (granting summary judgment to the plaintiff after applying *Wooley*’s strict scrutiny standard); Br. for Appellees, *R.J. Reynolds Tobacco Co. v. FDA*, 2012 WL 204198 at 35–37 (D.C. Cir. Jan. 23, 2012) (No. 11-5332).

Central Hudson (as the FDA suggested as an alternative to strict scrutiny and found by the District of Columbia Circuit).²⁷³

To answer this question, the Supreme Court could follow the Sixth Circuit in *Discount Tobacco* and begin with an analysis of whether the images present “facts” or “opinions” about the health consequences of smoking.²⁷⁴ Although this test sounds straightforward, an examination of the images shows that the line between “fact” and “opinion” is less than clear. Some of the images, such as the “smoker’s lung,” show smoking’s factual health consequences and could fall under *Zauderer* as the Sixth Circuit surmised in dicta, stating that “[a] nonexhaustive list of some [images] that would [be factually accurate] include a picture or drawing of a nonsmoker’s and smoker’s lungs displayed side by side.”²⁷⁵

But many of the images do not convey smoking-specific facts. For instance, as noted by the District of Columbia Circuit, the “woman crying” image does not show factual information about smoking’s health consequences.²⁷⁶ The image is certainly unsettling, but what does it tell the viewer about the risks of smoking? That smoking might make you cry? The same image would more effectively convey the factual consequences of chopping onions. Likewise, it is difficult to understand what “facts” about smoking’s health consequences are conveyed by the man wearing the “I QUIT” t-shirt.²⁷⁷ The image might encourage consumers to stop smoking, but it does not show what smoking does to the body.

If the test for applying *Zauderer* is solely whether the disclosures contain factual information, then the Supreme Court could end up applying different levels of scrutiny throughout its analysis. For instance, it would have to apply the rational basis

273. *R.J. Reynolds Tobacco Co.*, 696 F.3d at 1217; Br. for Appellants, *R.J. Reynolds Tobacco Co. v. FDA*, 2011 WL 6179451 at 25 (D.C. Cir. Dec. 12, 2011) (No. 11-5332).

274. See 674 F.3d at 558–560 (concluding that *Zauderer*’s rational basis standard applied to the graphic warning labels because they “require[d] disclosing factual information rather than opinions”).

275. *Id.* at 559; see also Jonathan Mincer, RegBlog, *Court Misapplies First Amendment to Strike Down FDA Cigarette Warning Labels*, <https://www.law.upenn.edu/blogs/regblog/2012/03/court-misapplies-first-amendment-to-strike-down-fda-cigarette-warning-labels.html> (Mar. 3, 2012) (asserting that Judge Leon’s reasoning in *R.J. Reynolds Tobacco Co.* would incorrectly require “believing that facts cannot evoke emotions”).

276. *R.J. Reynolds Tobacco Co.*, 696 F.3d at 1216.

277. See *id.* (stating that the “I QUIT” t-shirt fails to convey any information about smoking’s health consequences).

test to the “factual” images (such as the “diseased lung”) and some form of heightened scrutiny to the more subjective images (such as the “crying woman”). Thus, relying solely on the “fact”-versus-“opinion” test to select the level of scrutiny could lead to an unwieldy analysis.

A better approach would be to examine, as Judge Leon and the District of Columbia Circuit did,²⁷⁸ the extent to which the government’s purpose is relevant to the level of scrutiny. That is, should *Zauderer* be read narrowly to apply only when the government’s purpose is preventing consumer deception, or should *Zauderer* be read broadly to apply to disclosures that serve other government purposes?

The Court should read *Zauderer* narrowly to allow mandated disclosures of purely factual information only when the statute’s purpose is to prevent consumer deception. Commercial speech is protected by the First Amendment to encourage the free flow of accurate information, which benefits consumers.²⁷⁹ The Supreme Court has long recognized that there is no First Amendment protection for deceptive, untruthful, or misleading commercial speech²⁸⁰ and has thus held that the government is “free to prevent the dissemination of commercial speech that is false, deceptive, or misleading.”²⁸¹ In *Zauderer*, the Supreme Court justified applying a low level of scrutiny to commercial-disclosure requirements because such mandates do not *restrict* speech—they simply require advertisers “to provide somewhat more information than they might otherwise be inclined to present”²⁸² in order to ensure that consumers are not misled by half-truths in advertisements.²⁸³ Preventing consumers from being misled is thus a critical underpinning of the *Zauderer* holding.²⁸⁴ When the

278. *Id.* at 1217–1218; *R.J. Reynolds Tobacco Co.*, 845 F. Supp. 2d at 272–273.

279. *Va. St. Bd. Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771, 771 n. 24 (1976).

280. *Id.*; *Central Hudson*, 447 U.S. at 563–564. For an overview discussing why misleading speech is not protected, see Jennifer L. Pomeranz, *Television Food Marketing to Children Revisited: The Federal Trade Commission Has the Constitutional and Statutory Authority to Regulate*, 38 J. L. Med. & Ethics 98, 101–103 (2010).

281. *Zauderer*, 471 U.S. at 638.

282. *Id.* at 650.

283. *Id.* at 651.

284. *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457, 490–491 (1997) (Souter, J., dissenting).

government compels disclosures for some *other* purpose, the justification for the lower level of scrutiny evaporates.

Here, the purpose of the graphic-warning-label requirement is something other than preventing consumer deception. The facts about smoking—that it causes cancer; that nicotine is addictive; and that second-hand smoke is dangerous—have been on cigarette packages for decades.²⁸⁵ There is no new information in the graphic warning labels; there is simply the government's desire to make the warnings more *effective* through the use of graphic images.²⁸⁶ The purpose of making the warnings more effective is, as the FDA says, "related to the viewer's decision to quit, or never to start, smoking."²⁸⁷ As the District of Columbia Circuit found, the endgame is encouraging smoking cessation—not preventing consumers from being misled.²⁸⁸ Accordingly, the justification for applying the *Zauderer* test is not present in this case, and a higher level of scrutiny must be applied.

The question then becomes whether strict scrutiny or *Central Hudson's* intermediate scrutiny should apply to the graphic warnings. As a practical matter, it may not make a difference in this case. The District of Columbia Circuit concluded that the graphic warnings did not pass muster under intermediate scrutiny;²⁸⁹ the court would have reached the same conclusion had it applied strict scrutiny. Regardless of which level of heightened scrutiny applies, Judge Leon and the District of Columbia Circuit reached the right decision in finding that the graphic warning labels do not fall under *Zauderer*. Some form of heightened scrutiny—be it strict scrutiny or *Central Hudson*—should apply to the graphic

Zauderer thereby reaffirmed a longstanding preference for disclosure requirements over outright bans, as more narrowly tailored cures for the potential of commercial messages to mislead by saying too little. . . . But however long the pedigree of such mandates may be, and however broad the government's authority to impose them, *Zauderer* carries no authority for a mandate unrelated to the interest in avoiding misleading or incomplete commercial messages.

Id. (citations omitted).

285. The Cigarette Labeling and Advertising Act, which mandates warning labels on cigarette packages, was passed over forty-five years ago. 15 U.S.C. § 1331.

286. See 76 Fed. Reg. at 36630–36632 (stating that the current non-graphic warnings are ineffective, go unnoticed, and have not been changed in over twenty-five years).

287. Br. for Appellants, *R.J. Reynolds Tobacco Co. v. FDA*, 2011 WL 6179451 at 47 (D.C. Cir. Dec. 12, 2011) (No. 11-5332).

288. *R.J. Reynolds Tobacco Co.*, 696 F.3d at 1218, 1221.

289. *Id.* at 1222.

warnings because the disclosure requirements do not fit the *Zauderer* mold.²⁹⁰

VI. CONCLUSION

In *Sorrell*, the Supreme Court found that “[t]he State may not burden the speech of others in order to tilt public debate in a preferred direction,”²⁹¹ but if these graphic warning labels are upheld, that will be the result. The type of graphic warning labels mandated by the Act and selected by the FDA are unprecedented in the United States. On no other product has the government compelled similar speech. A finding of constitutionality will mark a huge expansion in the government’s ability to not only compel product manufactures to display messages that convey the risks of product use but also affirmatively encourage consumers not to purchase certain products. Because the purpose of the graphic-warning requirement is not to prevent consumer deception, the Court should apply heightened scrutiny.

290. The graphic-warning-label litigation may provide the Supreme Court with the opportunity to answer several open questions about commercial free speech and the continued viability of *Central Hudson*. Should *Central Hudson*’s intermediate scrutiny continue to apply to commercial speech, or, as Justice Thomas has suggested, should *Central Hudson* be overturned because there is no justification for treating commercial speech differently from other protected speech? If *Central Hudson* remains viable, should it be applied to compelled commercial disclosures as well as commercial restrictions? The answers to these questions are beyond the scope of this Article, but see Jennifer L. Pomeranz, *No Need to Break New Ground: A Response to the Supreme Court’s Threat to Overhaul the Commercial Speech Doctrine*, 45 Loy. L.A. L. Rev. 389 (2012) (thoroughly discussing recent Supreme Court treatment of *Central Hudson* and arguing that intermediate scrutiny should remain the test for commercial-speech restrictions) and Lora E. Barnhart Driscoll, *Citizens United v. Central Hudson: A Rationale for Simplifying and Clarifying the First Amendment’s Protections for Nonpolitical Advertisements*, 19 Geo. Mason L. Rev. 213 (2011) (discussing recent Supreme Court treatment of political commercial speech and arguing that strict scrutiny should replace the *Central Hudson* test for commercial nonpolitical speech).

291. 131 S. Ct. at 2671.