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## A Picture is Worth a Thousand Words: The Marketplace of Ideas and the Constitutionality of Graphic-Image Cigarette Warning Labels and Other Commercial Disclosure Requirements

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# A PICTURE IS WORTH A THOUSAND WORDS: THE MARKETPLACE OF IDEAS AND THE CONSTITUTIONALITY OF GRAPHIC-IMAGE CIGARETTE WARNING LABELS AND OTHER COMMERCIAL DISCLOSURE REQUIREMENTS

RICHARD F. LEE\*

*American cigarette warning labels are lackluster compared to others around the world. To address this inadequacy, the FDA created nine graphic-image cigarette warning labels that were scheduled to appear on all cigarette packages sold in the US beginning in 2012. However, before they debuted, the D.C. Circuit Court of Appeals struck the labels down in R.J. Reynolds Tobacco Co. v. FDA, holding that they constituted compelled commercial speech in violation of the First Amendment. This Note argues that the R.J. Reynolds decision conflicts with the Supreme Court's commercial speech jurisprudence. Historically, the Supreme Court has applied limited First Amendment protection to commercial speech under a "marketplace of ideas" rationale. Accordingly, the Court has applied a rational basis standard to regulations compelling commercial speech since such regulations increase the amount of commercial information available to consumers and the public. Despite this precedent, the D.C. Circuit in R.J. Reynolds applied heightened scrutiny to the FDA's graphic-image cigarette warning labels, protecting industry interests at the public's expense. This Note argues that courts should apply a rational basis standard to all commercial disclosure requirements so long as they do not compel disclosure of misleading content. In turn, this note argues that the D.C. Circuit should have upheld the FDA's cigarette warning labels under rationality review. Even if offensive to some, the labels would have enhanced the marketplace of ideas that*

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*the Supreme Court's commercial speech doctrine was designed to protect.*

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INTRODUCTION

Tobacco use kills more Americans than HIV, illegal drug use, alcohol use, motor vehicle injuries, suicides, and murders combined.<sup>1</sup> Cigarette smoking kills 443,000 people in the U.S. each year, accounting for roughly 20 percent of total domestic deaths.<sup>2</sup> Nonetheless, over 3,000 Americans start smoking each day, 850 of whom are eighteen years old or younger.<sup>3</sup>

As this epidemic persists, cigarette warning labels in the U.S. have stayed the same since 1984. American cigarette warning labels are far less forceful than those used in many other Western countries such as Canada, Australia, France, and the United Kingdom.<sup>4</sup> These countries and thirty-nine others have created image-based cigarette warning labels.<sup>5</sup> Most of these warning labels occupy a substantial portion of the front panel of cigarette packages and graphically depict the health hazards of smoking.<sup>6</sup> Meanwhile, American warning labels are composed of black and white text that appears on one side of cigarette packages. Studies show that American warning labels go largely unnoticed and that even when they

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1. *Tobacco-Related Mortality*, CENTER FOR DISEASE CONTROL, [http://www.cdc.gov/tobacco/data\\_statistics/fact\\_sheets/health\\_effects/tobacco\\_relat ed\\_mortality](http://www.cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/tobacco_relat ed_mortality) (last updated Mar. 21, 2011).

2. *Id.*

3. See U.S. DEPT OF HEALTH & HUMAN SERVS., RESULTS FROM THE 2009 NATIONAL SURVEY ON DRUG USE AND HEALTH: DETAILED TABLES at tbls. 4.5–.8 (2010), <http://www.oas.samhsa.gov/NSDUH/2k9NSDUH/tabs/Sect4peTabs5to8 .pdf> (reporting that 1,125,000 Americans, including 310,000 aged 12–17, began smoking in 2009; 1,125,000 persons/year ÷ 365 days/year = 3082.2 persons/day; 310,000 persons aged 12–17/year ÷ 365 days/year = 849.3 persons aged 12–17/day).

4. See generally *Cigarette Warning Labels Around the World*, HUFFINGTON POST (Nov. 10, 2010, 3:45 PM), [http://www.huffingtonpost.com/2010/11/10/ cigarette-warning-labels-\\_n\\_781779.html#s179311&title=US\\_Proposed](http://www.huffingtonpost.com/2010/11/10/ cigarette-warning-labels-_n_781779.html#s179311&title=US_Proposed) (providing slideshow of cigarette warning labels from around the world, including labels from the UK and Canada).

5. MEG RIORDAN, CAMPAIGN FOR TOBACCO FREE KIDS, TOBACCO WARNING LABELS: EVIDENCE OF EFFECTIVENESS 4 (2011), [www.tobaccofreekids.org/research/factsheets/pdf/0325.pdf](http://www.tobaccofreekids.org/research/factsheets/pdf/0325.pdf).

6. See Lea Winerman, *A Look at Cigarette Warnings Around the World*, PBS (Nov. 10, 2010), <http://www.pbs.org/newshour/rundown/2010/11/fda-unveils-new-graphic-cigarette-warning-labels.html> (displaying image-based warning labels used in several different countries).

are noticed, they fail to effectively warn consumers of the dangers of smoking.<sup>7</sup>

To address the inadequacies of existing text-based warning labels, Congress passed the Family Smoking Prevention and Tobacco Control Act (the "FSPTCA" or the "Act") in June 2009.<sup>8</sup> Among other things, the Act requires the FDA to create graphic-image warning labels to appear on the top half of the front and back panels of cigarette packages.<sup>9</sup> After the FSPTCA was passed but before the FDA had settled on specific images or language, five tobacco companies challenged the constitutionality of the FSPTCA's warning label requirement in *Discount Tobacco City & Lottery, Inc. v. United States*.<sup>10</sup> The tobacco companies claimed that the Act's warning label requirement constituted compelled speech in violation of the First Amendment.<sup>11</sup> The district court applied intermediate scrutiny and upheld the warning label requirement, holding that it was sufficiently tailored to the government's substantial interest in informing consumers of the health risks of smoking.<sup>12</sup>

The tobacco companies appealed, but the Sixth Circuit Court of Appeals affirmed the district court's decision under a more deferential rational basis standard.<sup>13</sup> Specifically, the Sixth Circuit rejected the tobacco companies' argument that the FSPTCA's warning label requirement should be subject to strict scrutiny because image-based warning labels are inherently subjective, as opposed to purely factual.<sup>14</sup> The tobacco companies did not dispute that the government may,

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7. See, e.g., David Hammond, *Health Warning Messages on Tobacco Products: A Review*, 20 TOBACCO CONTROL 327, 329–30 (2011) ("[S]tudies suggest that health warnings with pictures are significantly more likely to draw attention, result in greater information processing and improve memory for the health message.").

8. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009) (codified in scattered sections of 15 U.S.C. and 21 U.S.C.).

9. *Id.* at § 201 (codified at 15 U.S.C. § 1333(4) (2012)).

10. See *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509 (6th Cir. 2012); see also *infra* Part I.B (discussing *Discount Tobacco* in greater depth).

11. *Discount Tobacco*, 674 F.3d at 525–26.

12. *Commonwealth Brands, Inc. v. United States*, 678 F. Supp. 2d 512, 531–32 (W.D. Ky. 2010), *aff'd in part, rev'd in part sub nom. Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509 (6th Cir. 2012).

13. *Discount Tobacco*, 674 F.3d at 531, 559. Rational basis review requires only that a statute or regulation be reasonably related to a legitimate government interest. *U.S. R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 178 (1980).

14. *Discount Tobacco*, 674 F.3d at 558–61.

under certain circumstances, compel commercial actors to disclose factual information about their products.<sup>15</sup> However, the companies argued that image-based labels necessarily contain subjective, opinion-based content.<sup>16</sup> In turn, the companies argued that the court should apply strict scrutiny because the warning label requirement constituted an attempt to turn the tobacco companies into the government's "mouthpiece for a subjective and highly controversial marketing campaign expressing its disapproval of their lawful products."<sup>17</sup> Though the court did not question the tobacco companies' premise that strict scrutiny should apply to regulations requiring disclosure of opinion-based content, the court rejected the tobacco companies' other premise that image-based warning labels are inherently subjective.<sup>18</sup> The court explained that the tobacco companies' position was "tantamount to concluding that pictures can never be factually accurate," which the court found to "stand[] at odds with reason."<sup>19</sup>

In June 2011, while *Discount Tobacco* was pending on appeal, the FDA promulgated nine image-based cigarette warning labels to be implemented in September 2012.<sup>20</sup> In *R.J. Reynolds Tobacco Co. v. FDA*, the tobacco companies challenged the selected labels, claiming that they violated the First Amendment.<sup>21</sup> The district court applied strict scrutiny after finding that the labels "communicate a subjective and highly controversial message" that is meant to persuade consumers not to smoke.<sup>22</sup> In turn, the district court struck down the labels, holding that they were not narrowly tailored to a compelling government interest.<sup>23</sup>

On appeal, the D.C. Circuit Court of Appeals also found

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15. See *id.* at 558.

16. *Id.* at 526.

17. *Id.* at 525 (internal quotation marks omitted).

18. *Id.* at 559.

19. *Id.*

20. 21 C.F.R. §§ 1141.10, 1141.12 (2013) (incorporating labels by reference to <http://www.fda.gov/cigarettewarningfiles>), *invalidated by* R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1222 (D.C. Cir. 2012) [hereinafter R.J. Reynolds I].

21. See R.J. Reynolds I, 696 F.3d at 1208.

22. R.J. Reynolds Tobacco Co. v. FDA, 845 F. Supp. 2d 266, 274 (D.D.C. 2012), *aff'd*, 696 F.3d 1205 (D.C. Cir. 2012) (quoting Entm't Software Ass'n v. Blagojevich, 469 F.3d 641, 652 (7th Cir. 2006) (internal quotation marks omitted) [hereinafter R.J. Reynolds II]).

23. R.J. Reynolds II, 845 F. Supp. 2d at 274.

that the warning labels communicated a subjective message,<sup>24</sup> but it rejected the tobacco companies' argument that strict scrutiny should apply and instead applied intermediate scrutiny.<sup>25</sup> Nonetheless, the D.C. Circuit affirmed, finding that the government failed to show that the labels would "directly advance" its interest in either reducing smoking rates or ensuring that consumers are informed of the health risks of smoking.<sup>26</sup> Notably, in finding the warning labels non-factual, the court implied that all provocative image-based warning labels are inherently subjective, not just the FDA's labels.<sup>27</sup>

*R.J. Reynolds* does not technically conflict with *Discount Tobacco* since *R.J. Reynolds* involved a challenge of the specific warning labels created pursuant to the FSPTCA, whereas *Discount Tobacco* involved a challenge to the statute's warning label requirement on its face. However, the decisions conflict insofar as *R.J. Reynolds* implies that provocative image-based warning labels should always be subjected to at least intermediate scrutiny because they are inherently subjective.<sup>28</sup> In contrast, *Discount Tobacco* rejected the notion that graphic-image warning labels are inherently subjective and, in turn, applied a more deferential rational basis standard to the FSPTCA's warning label requirement.<sup>29</sup> Because of the tension between *R.J. Reynolds* and *Discount Tobacco*, many believed the Supreme Court would review either or both cases to resolve the apparent conflict.<sup>30</sup> But the FDA declined to appeal the D.C. Circuit's decision in *R.J. Reynolds* and instead will

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24. *R.J. Reynolds I*, 696 F.3d at 1216–17.

25. *Id.* at 1217.

26. *Id.* at 1222.

27. *Id.* at 1216–17.

28. *Id.*

29. *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 559–61 (6th Cir. 2012) ("We can envision many graphic warnings that would constitute factual disclosures . . . . A nonexhaustive list of some that [sic] would 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.").

30. See Cheryl Wetzstein, *Cigarette Warning Issue May Go to Supreme Court*, WASH. TIMES, Dec. 5, 2012, at A07, available at <http://www.washingtontimes.com/news/2012/dec/5/cigarette-warning-issue-may-go-to-high-court/?page=all>; Bill Mears, *Federal Appeals Court Strikes Down FDA Tobacco Warning Label Law*, CNN (Aug. 25, 2012), <http://www.cnn.com/2012/08/24/justice/tobacco-warning-label-law/index.html>.

attempt to create less objectionable warning labels over the coming months.<sup>31</sup> Nonetheless, since the tobacco companies argued in *Discount Tobacco* that any type of image-based labels are unconstitutional, the tobacco companies will likely challenge the FDA's next round of labels irrespective of their appearance. In that case, given the salience of the issue, it appears likely that the Supreme Court will assess the constitutionality of graphic-image cigarette warning labels over the coming years.

*Discount Tobacco* and *R.J. Reynolds* present important questions that go well beyond the warning label requirements at issue. To what extent does the First Amendment protect commercial speech? In particular, can the government compel commercial actors to publish facts or opinions that cast their products or services in a negative light? There is no dispute that the government can advertise against using tobacco or other products, provided that doing so serves a legitimate government purpose.<sup>32</sup> But can the government compel tobacco companies or other commercial speakers to publish bad facts or opinions on their own product labeling or advertising? If so, under what circumstances?

Since the mid-1970s, the Supreme Court has consistently held that the First Amendment provides limited protection to commercial speech.<sup>33</sup> The Court has based this protection on the value of commercial speech to consumers rather than on the interests of commercial speakers.<sup>34</sup> As a result, the Court

31. Michael Felberbaum, *US Won't Appeal Ruling Blocking Graphic Cigarette Warnings, FDA to Revise Labels*, WASH. POST, Mar. 19, 2013, [http://articles.washingtonpost.com/2013-03-19/business/37837113\\_1\\_images-of-diseased-lungs-cigarette-packs-tracheotomy-hole](http://articles.washingtonpost.com/2013-03-19/business/37837113_1_images-of-diseased-lungs-cigarette-packs-tracheotomy-hole).

32. For examples of federal and state funded advertisements against cigarette smoking, see, e.g., *CDC: Tips from Former Smokers*, YOUTUBE (Mar. 15, 2012), <https://www.youtube.com/watch?v=GEWky9PEroU>; *Heart Stopper: How Tobacco Smoke Can Lead to a Hearth Attack—Even Death*, YOUTUBE (Dec. 8, 2010), <https://www.youtube.com/watch?v=3EbYaJc4J2A>; *Montana Tobacco Use Prevention Program PSA—Imitation*, YOUTUBE (Feb. 13, 2013), <https://www.youtube.com/watch?v=HWqgCUph4JM>.

33. See, e.g., *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).

34. See, e.g., *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 563 (1980) ("The First Amendment's concern for commercial speech is based on the informational function of advertising."); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 114 (2d. Cir. 2001) (holding that the First Amendment does not protect commercial speakers' privacy interests). While courts have consistently justified commercial speech protection as a means of serving consumers' interests, some argue that the independent interests of commercial speakers should be of concern as well. See *infra* note 196. While this issue is



has refused to extend First Amendment protection to misleading commercial speech, which serves only to harm consumers.<sup>35</sup> Likewise, the Court has applied a lenient level of scrutiny akin to rational basis review to regulations that compel commercial speakers to disclose certain information where their speech might otherwise mislead consumers.<sup>36</sup>

The Court has not yet clarified what level of scrutiny should apply to disclosure requirements that are not aimed at preventing consumer deception, but instead serve some other government interest, such as promoting public health. In addition, the Court has not addressed whether and under what circumstances the government may compel commercial speakers to disclose non-factual, opinion-based content about their products or services. If the Court ultimately reviews *Discount Tobacco* or any future cases challenging graphic-image cigarette warning labels, it will likely need to answer one or both of these questions in order to resolve whether image-based warning labels are constitutional.

This Note argues that courts should apply a lenient level of scrutiny akin to rational basis review to disclosure requirements regardless of whether those requirements target consumer deception.<sup>37</sup> In addition, this Note argues that the same lenient standard should apply to disclosure requirements regardless of whether they compel disclosure of factual or non-factual, opinion-based content. It asserts that all non-misleading disclosure requirements increase the amount of information available to consumers and, thus, serve the same interests that the Supreme Court's commercial speech doctrine is meant to protect.

Part I details the history of the Supreme Court's commercial speech doctrine and describes in particular the Court's focus on the interests of consumers, who act as

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worthy of debate, it is beyond the scope of this Note. Instead, this Note assumes that commercial speech protection is justified insofar as it advances consumers' interests in the free flow of commercial information, which is consistent with the Supreme Court's commercial speech jurisprudence. See *infra* Part I.A.

35. See, e.g., *Friedman v. Rogers*, 440 U.S. 1, 9-10, 14-15 (1979) (upholding a Texas statute prohibiting optometrists from advertising their membership in a trade organization where advertising such memberships was likely to mislead consumers as to the credentials of a given optometrist).

36. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) ("[W]e 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.") (emphasis added).

37. *Infra* Part II.D.

“listeners” in the commercial speech context. Part I then analyzes the current litigation involving the new cigarette warning label requirements. Part II suggests a lenient test for disclosure requirements by examining their effect on listeners’ interests in the free flow of information and ideas. Part II.A describes the “marketplace of ideas” theory, which has provided the theoretical foundation for the Supreme Court’s listener-focused analysis in its commercial speech jurisprudence. Part II.B assesses the value of factual and non-factual disclosure requirements under a marketplace of ideas analysis and concludes that both should be subject to a lenient level of scrutiny, regardless of the purposes they are meant to serve. Part II.C criticizes the D.C. Circuit’s decision in *R.J. Reynolds* to apply a stricter standard to the FDA’s cigarette warning label requirement. Part II.D then proposes a specific test under which all disclosure requirements are constitutional so long as they are reasonably related to a legitimate government interest and are not unjustified or unduly burdensome. Finally, Part III applies this deferential standard to the warning labels chosen by the FDA and concludes that they should be upheld.

## I. BACKGROUND ON THE COMMERCIAL SPEECH DOCTRINE AND THE CIGARETTE WARNING LABEL CASES

To understand the commercial speech doctrine and its relationship to cigarette warning labels and other disclosure requirements, this Note must first distinguish commercial speech from other forms of speech. The Supreme Court has set forth three non-dispositive factors to be considered when making this distinction: (1) whether the speech constitutes an advertisement; (2) whether it concerns commercial products; and (3) whether it is motivated by economic interests.<sup>38</sup> Under this guidance, courts have consistently classified commercial advertising and product labeling as commercial speech.<sup>39</sup>

Over the last half century, the Supreme Court has held that the First Amendment protects commercial speech, but to a lesser extent than other forms of speech, such as political or

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38. See *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66–67 (1983).

39. See, e.g., *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (classifying advertisements for pharmaceutical drugs as commercial speech); See *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 113 (2d Cir. 2001) (classifying labeling of light bulb product packaging as commercial speech).

artistic expression.<sup>40</sup> Before the current era of limited protection, the Court flatly dismissed claims to constitutional protection for commercial speech, which it treated like any other business activity.<sup>41</sup> However, the Court reversed itself in 1976 in the landmark decision of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council* and held that commercial speech is entitled to limited First Amendment protection.<sup>42</sup> Since then, the Court has struck down several restraints on commercial speech,<sup>43</sup> as well as some regulations compelling commercial speech.<sup>44</sup> Nonetheless, compared to other forms of speech, the Court has consistently applied lesser protection to commercial speech, which intertwines with commercial transactions that are traditionally subject to government regulation.<sup>45</sup>

The Court changed its position on commercial speech because it began to recognize that listeners hold a significant interest in the free flow of commercial information,<sup>46</sup> whereas before it accounted only for the economic interests of commercial speakers.<sup>47</sup> Part I.A describes the evolution of the Court's commercial speech jurisprudence and examines the current state of the law with respect to both restraints on commercial speech and compelled commercial speech.

### A. *The Commercial Speech Doctrine*

#### 1. Restraints on Commercial Speech

##### a. *The Early Cases: Treating Advertising as Ordinary Business Activity Subject to Commercial Regulation*

The first Supreme Court case to decide whether the First Amendment protects commercial speech was *Valentine v.*

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40. See *Valentine v. Christensen*, 316 U.S. 52, 54 (1942).

41. *Id.*

42. *Va. State Bd. of Pharmacy*, 425 U.S. at 770.

43. See, e.g., *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 570-71 (1980).

44. See *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 146-49 (1994).

45. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978).

46. See *Va. State Bd. of Pharmacy*, 425 U.S. at 763-65.

47. See *Valentine v. Christensen*, 316 U.S. 52, 54-55 (1942); *Breard v. City of Alexandria, La.*, 341 U.S. 622, 641-42, 645 (1951).

*Christensen*.<sup>48</sup> In *Valentine*, New York City police officers prevented a man from distributing handbills containing commercial advertisements on public streets, which was prohibited by a local ordinance.<sup>49</sup> The man argued that the city violated the First Amendment by interfering with the distribution.<sup>50</sup> But the Supreme Court denied the challenge, holding that the Constitution does not bar government restraints on “purely commercial advertising.”<sup>51</sup>

Nine years later, the Court reaffirmed *Valentine*’s holding in *Breard v. City of Alexandria*.<sup>52</sup> In *Breard*, a man was arrested for soliciting magazine subscriptions door-to-door without prior consent of the homeowners solicited, a violation of a local ordinance.<sup>53</sup> The Court upheld the ordinance against the man’s First Amendment challenge, holding that the First Amendment does not protect the act of door-to-door solicitation, even if the magazines being sold were entitled to such protection.<sup>54</sup>

In both *Valentine* and *Breard*, the Court gave very little explanation for why commercial speech should be distinguished from the forms of speech that the Court recognized as protected at the time. The Court seemed to treat advertising as it would any other business activity, rather than as speech raising unique First Amendment concerns.<sup>55</sup> In *Valentine*, the Court explained, “Whether, and to what extent, one may promote or pursue a gainful occupation in the streets . . . are matters for legislative judgment.”<sup>56</sup> Likewise, in *Breard*, the Court limited its holding to the prohibition of a specific method of selling periodicals—door-to-door solicitation—while at the same time recognizing that the periodicals being sold were protected by the First Amendment.<sup>57</sup> Thus, it appears that in the Court’s

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48. 316 U.S. 52.

49. *Id.* at 53.

50. *Id.* at 54.

51. *Id.* at 54–55.

52. *Breard*, 341 U.S. at 645.

53. *Breard v. City of Alexandria, La.*, 341 U.S. 622, 624 (1951).

54. *Id.* at 645.

55. See Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 TEX. L. REV. 747, 758 (1993) (“The Court’s reasoning [in *Valentine*] is worth a close look, because it suggests quite strongly . . . that the Court conceptualized advertising as a *business*, not as a means of expression.”) (emphasis in original).

56. *Valentine v. Christensen*, 316 U.S. 52, 54 (1942).

57. See *Breard*, 341 U.S. at 641 (“We agree that the fact that periodicals are sold does not put them beyond the protection of the First Amendment. The selling, however, brings into the transaction a commercial feature.”).

view, these cases raised questions not about the constitutionality of regulations on speech, but about regulation of business activity, which the Court had held generally constitutional in prior cases.<sup>58</sup> As a result, the government was free to regulate commercial speech—or even prohibit it altogether.

*b. The Transition to Protection of Commercial Speech: Considering the Interests of Listeners*

From the late 1960s to the mid-1970s, the Court began to change its position on commercial speech as its focus shifted from the rights of commercial speakers to the rights of listeners to receive commercial information.<sup>59</sup> By the end of 1975, several decisions had shown signs that the Court was beginning to question its holdings in *Valentine* and *Breard*.<sup>60</sup> During that year, the Court decided *Bigelow v. Virginia*, in which it noted great skepticism of *Valentine* and *Breard*.<sup>61</sup> In *Bigelow*, a managing editor of a newspaper had been convicted for publishing an advertisement for abortion services in violation of a Virginia advertising law.<sup>62</sup> The Court overturned the conviction and struck down the law, holding that the advertisement was protected under the First Amendment despite its commercial aspects.<sup>63</sup> The Court reasoned that information contained in the advertisement could be of great

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58. See, e.g., *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392 (1937).

59. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (holding that the First Amendment protected a newspaper advertisement criticizing police action against members of the civil rights movement and soliciting contributions for the movement where the newspaper and advertiser were sued for libel; "That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold."); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973) (holding that help-wanted advertisements appearing in gender-designated columns were not protected; holding that an advertisement's commercial proposal constituted employment discrimination; implying that advertisements would have been protected if that proposal would have been legal); *Cammarano v. United States*, 358 U.S. 498, 514 (1959) (Douglas, J., concurring) ("The [*Valentine*] ruling was casual, almost offhand. And it has not survived reflection.").

60. See *supra* note 59.

61. *Bigelow v. Virginia*, 421 U.S. 809, 817–19 (1975).

62. *Id.* at 811–13.

63. *Id.* at 818 ("The fact that the particular advertisement in appellant's newspaper had commercial aspects or reflected the advertiser's commercial interests did not negate all First Amendment guarantees.").

value to its audience.<sup>64</sup>

Though the Court was obviously skeptical of *Valentine* and *Breard*, it did not overturn them. Instead, it limited their application to ordinances regulating methods of distributing literature, as opposed to laws regulating the content of the literature itself.<sup>65</sup> In turn, the Court distinguished the abortion advertisements at issue in *Bigelow*, explaining that they “contain[ed] factual material of clear public interest,” and, thus, “involve[ed] the exercise of the freedom of communicating information and disseminating opinion.”<sup>66</sup> More generally, the Court rejected the notion “that all statutes regulating commercial advertising are immune from constitutional challenge.”<sup>67</sup> Thus, though the Court did not expressly overturn *Valentine* or *Breard*, it narrowed their application to the point that they were all but nullified.

*c. The Creation of the Commercial Speech  
Doctrine for the Benefit of Listeners*

One year after *Bigelow*, the Court took the next step and expressly overturned *Valentine* and *Breard* in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*.<sup>68</sup> There, the Court struck down a Virginia statute that prohibited pharmacists from advertising prices for prescription drugs.<sup>69</sup> The Court held more generally that the First Amendment protects commercial speech even when it is motivated entirely by economic interests.<sup>70</sup>

As in *Bigelow*, the Court’s reasoning in *Virginia State Board of Pharmacy* focused on consumers’ interests in the free flow of commercial information.<sup>71</sup> First, the Court explained that a consumer’s interest in the free flow of commercial information “may be as keen, if not keener by far, than his or her interest in the day’s most urgent political debate.”<sup>72</sup> Second, the Court found that the free flow of commercial

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64. *Id.* at 822.

65. *Id.* at 819–20, 828.

66. *Id.* at 822 (internal quotation marks omitted).

67. *Id.* at 820.

68. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).

69. *Id.* at 773.

70. *Id.* at 762.

71. *Id.* at 763–65.

72. *Id.* at 763.

information was "indispensable to the formation of intelligent opinions as to how [the market economy] ought to be regulated or altered."<sup>73</sup> Thus, the Court reasoned, "even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal."<sup>74</sup> Although the Court emphasized the interests of consumers and society at large in the availability of commercial information, it did not base its holding in any way on the interests of the commercial speaker.

In its analysis, the Court did not clarify what level of scrutiny should apply to restraints on commercial speech, but it clearly viewed the advertising ban with great skepticism.<sup>75</sup> The state claimed that the ban was necessary to maintain professionalism among pharmacists; if price advertising were allowed, the state argued, pharmacists would likely be forced to reduce the quality of their services to remain competitive.<sup>76</sup> The Court, however, called the advertising ban a "highly paternalistic approach" to serving the state's interests.<sup>77</sup> The Court explained that, although the state can maintain professionalism by regulating the conduct of pharmacists, "it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering."<sup>78</sup>

Despite the Court's impassioned rhetoric, it ultimately distinguished commercial speech as deserving less protection than other forms of speech in light of two of its characteristics.<sup>79</sup> First, the Court stated that compared to other speakers, commercial speakers are more able to verify the truthfulness of their speech because they are usually very familiar with the products or services they sell.<sup>80</sup> Second, the Court stated that commercial speech is less likely to be chilled by proper regulation than other forms of speech because

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73. *Id.* at 765.

74. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976).

75. *See id.* at 765-70; RICHARD T. KAPLAR, ADVERTISING RIGHTS, THE NEGLECTED FREEDOM: TOWARD A NEW DOCTRINE OF COMMERCIAL SPEECH 22 (1991) ("*Virginia Pharmacy Board* was, and still is, the Supreme Court's high-water mark in its consideration of commercial speech.").

76. *Va. State Bd. of Pharmacy*, 425 U.S. at 766.

77. *Id.* at 770.

78. *Id.*

79. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976).

80. *Id.*

commercial speech is often an essential condition to commercial profits.<sup>81</sup> Overall, the Court concluded that “the greater objectivity and hardness of commercial speech may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker.”<sup>82</sup>

Still, the Court did not clarify what level of scrutiny should apply to restraints on commercial speech. Instead, the Court simply held that the consumers’ interests in the pharmaceutical advertisements at issue outweighed the state’s interests that the advertising ban was meant to serve.<sup>83</sup> Later, in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, the Court developed the modern test for the constitutionality of restraints on commercial speech,<sup>84</sup> which is discussed in the next section.

#### *d. The Four-Part Test for Restraints on Commercial Speech*

In *Central Hudson*, the Court reviewed a New York statute banning promotional advertising by an electrical utility.<sup>85</sup> The Court delineated a specific test for restraints on commercial speech based on three principles distilled from its prior commercial speech jurisprudence.<sup>86</sup> First, the Court recognized that “[t]he First Amendment’s concern for commercial speech is based on the informational function of advertising.”<sup>87</sup> In turn, the Court reasoned that “there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity.”<sup>88</sup> Finally, the Court recognized that non-misleading commercial speech is entitled to First Amendment protection, though only in limited form.<sup>89</sup>

Based on these premises, the Court specified the four-part, intermediate scrutiny test for restraints on commercial speech that still applies today:

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81. *Id.*

82. *Id.*

83. *Id.* at 770.

84. *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980).

85. *Id.* at 558.

86. *Id.* at 562–66.

87. *Id.* at 563.

88. *Id.*

89. *Id.* at 564.



[1] 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. [2] Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine [3] whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.<sup>90</sup>

Applying the test, the Court struck down the advertising ban, finding that it was more extensive than necessary to serve the asserted state interest, which was to conserve energy.<sup>91</sup>

Over time, the Court has applied the *Central Hudson* test more strictly, particularly with regard to the fourth prong.<sup>92</sup> For the first fifteen years after *Central Hudson*, the Court largely deferred to legislatures on this prong and required only that there be a "reasonable fit" between restraints on commercial speech and the substantial state interests they are meant to serve.<sup>93</sup> However, beginning with *44 Liquormart, Inc. v. Rhode Island*, the Court has applied a stricter test that requires restraints on commercial speech to advance the government's substantial interests "to a material degree."<sup>94</sup>

This change is representative of the Court's recent trend of examining commercial speech regulations more closely and viewing them with greater skepticism.<sup>95</sup> This trend has appeared not only in cases involving restraints on commercial

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90. *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980).

91. *Id.* at 571.

92. *Compare Bd. of Trs. v. Fox*, 492 U.S. 469, 480 (1989), with *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996).

93. *Fox*, 492 U.S. at 480; *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 341 (1986); *In re R.M.J.*, 455 U.S. 191, 203 (1982).

94. *44 Liquormart, Inc.*, 517 U.S. at 505 (quoting *Edenfield v. Fane*, 507 U.S. 761, 771 (1993)); see also *id.* at 521-22 (Thomas, J., concurring) (criticizing *Fox* and several other cases).

95. See, e.g., *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2663-64 (2011) (striking down Vermont statute that restricted pharmaceutical companies' ability to access information regarding doctors' prescribing patterns; emphasizing that "heightened judicial scrutiny is warranted" whenever a "content-based burden" is imposed on commercial speech); see also Richard Samp, *Sorrell v. IMS Health: Protecting Free Speech or Resurrecting Lochner?*, 2011 CATO SUP. CT. REV. 129, 133-35 (2011) (arguing that the Court in *IMS Health Inc.* applied a stricter standard than past decisions that applied the *Central Hudson* test).

speech, but also in those involving challenges to regulations that compel commercial speech.<sup>96</sup> Thus, if the Court ultimately considers the constitutionality of image-based cigarette warning labels, it may be more exacting than it has been in the past with other disclosure requirements. The next Section analyzes the evolution of federal case law addressing the constitutionality of commercial disclosure requirements.

## 2. Compelled Commercial Speech

Courts have recognized a government interest in informing consumers by compelling commercial entities to disclose information about their products or services.<sup>97</sup> In at least some circumstances, courts have applied a more lenient standard than the *Central Hudson* test to commercial disclosure requirements.<sup>98</sup> In *Zauderer v. Office of Disciplinary Counsel*, the Supreme Court applied a variation of rational basis review to a regulation requiring attorneys who advertise contingent-fee rates to disclose that clients will be liable for litigation costs even if their claims are unsuccessful.<sup>99</sup> The Court found that the regulation was meant to prevent potential consumer deception and that it required disclosure of “purely factual and uncontroversial information.”<sup>100</sup>

Though *Zauderer* undoubtedly governs factual disclosure requirements aimed at preventing consumer deception, the Court has not yet addressed whether a rational basis standard should be applied even in the absence of potential consumer deception. Prior to the D.C. Circuit’s decision in *R.J. Reynolds*, the federal circuit court decisions that expressly considered this issue unanimously held that rational basis review applies to factual disclosure requirements aimed at legitimate government interests even if there is no threat of deception by omission.<sup>101</sup> Nonetheless, the D.C. Circuit in *R.J. Reynolds* refused to apply *Zauderer* to the FDA’s new image-based

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96. See *United States v. United Foods, Inc.*, 533 U.S. 405, 415 (2001); see also *infra* notes 128–138 and accompanying text (discussing *United Foods* at length).

97. See, e.g., *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 650–51 (1985).

98. See *id.* at 651 (applying a more lenient standard than the *Central Hudson* test); see also *infra* note 115 (listing federal circuit court decisions applying *Zauderer*’s lenient standard to cases involving disclosure requirements).

99. *Zauderer*, 471 U.S. at 650–51.

100. *Id.* at 651.

101. See *infra* note 115 and accompanying text.

cigarette warning labels because it found both that there was an absence of potential consumer deception and that the selected warning labels compelled disclosure of content that was not purely factual and uncontroversial.<sup>102</sup> Instead, the D.C. Circuit chose to apply *Central Hudson's* heightened standard,<sup>103</sup> and one federal circuit court has applied an even stricter standard where it found that the disclosure requirement at issue compelled disclosure of non-factual, opinion-based content.<sup>104</sup>

The following Sub-Sections discuss the pertinent case law addressing factual and non-factual disclosure requirements, which provides necessary background for the analysis of *Discount Tobacco* and *R.J. Reynolds* contained in Part I.B.

### *a. Factual Disclosure Requirements*

As noted above, the Supreme Court held in *Zauderer* that, at least in certain circumstances, commercial disclosure requirements should be subject to rational basis review.<sup>105</sup> There, the Court found that the disclosure requirement at issue was meant to prevent consumer deception regarding the financial risk that clients face when represented by an attorney under a contingent-fee agreement.<sup>106</sup> The Court held 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."<sup>107</sup>

In *Zauderer*, the Court emphasized that "material differences [exist] between disclosure requirements and outright prohibitions on speech" in the context of commercial speech.<sup>108</sup> Citing *Virginia State Board of Pharmacy*, the Court explained that "[b]ecause the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, . . .

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102. *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1213–17 (D.C. Cir. 2012).

103. *Id.* at 1217.

104. *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006) (applying strict scrutiny to Illinois statute establishing a content suitability rating system for video games); *see also infra* Part I.A.2.b (discussing *Entm't Software* and one other case involving disclosure requirements found to compel non-factual, opinion-based content).

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

106. *Id.* at 650–51.

107. *Id.* at 651.

108. *Id.* at 650.

[a commercial speaker's] constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal."<sup>109</sup> Thus, a lenient level of scrutiny was appropriate.<sup>110</sup>

However, the Court also recognized that disclosure requirements triggered by voluntary speech could inadvertently chill such speech and, in turn, threaten consumers' interests in having access to commercial information.<sup>111</sup> For this reason, the Court added an additional requirement that disclosure requirements not be "unjustified or unduly burdensome" so as to chill commercial speech.<sup>112</sup> Thus, for example, the Court has struck down as unduly burdensome a regulation that would require accountants to include disclaimers in their advertisements that were so lengthy that they would have effectively ruled out yellow page listings and other forms of print advertisements.<sup>113</sup>

The Court has not decided whether *Zauderer's* framework of analysis should apply in the absence of potential consumer deception. As explained more fully in Part I.B, the D.C. Circuit in *R.J. Reynolds* refused to apply *Zauderer* to the FDA's graphic-image cigarette warning labels after finding that they neither corrected nor prevented consumer deception.<sup>114</sup> In contrast, the other circuits that have considered the issue—the First, Second, and Sixth Circuits—have come out the other way.<sup>115</sup>

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109. *Id.* at 651 (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)).

110. *Id.*

111. *Id.*

112. *Id.*

113. *See Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 146–49 (1994).

114. *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1213–15 (D.C. Cir. 2012).

115. *See Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 114–15 (2d Cir. 2001) (upholding Vermont statute requiring manufacturers of mercury-containing products to label their products to inform consumers that their products contain mercury and instruct them to dispose of the products as hazardous waste; "*Zauderer*, not *Central Hudson*, describes the relationship between means and ends demanded by the First Amendment in compelled commercial disclosure cases." (citation omitted)); *N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health*, 556 F.3d 114, 132–35 (2d Cir. 2009) (upholding a New York City ordinance requiring restaurants to post calorie content on their menus and reaffirming *Sorrell's* holding that *Zauderer* applies to disclosure requirements even in the absence of potential consumer deception); *Pharmacy Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 310 n.8 (1st Cir. 2005) (upholding a Maine statute compelling disclosures of conflicts of interests and other information from "pharmacy benefit managers"

The first time a circuit court addressed this issue was in *National Electrical Manufacturers Association v. Sorrell*, where the Second Circuit upheld a Vermont labeling requirement for commercial products that contain mercury.<sup>116</sup> In *Sorrell*, the Second Circuit chose to apply *Zauderer* even after finding that the labeling requirement did not target consumer deception, but instead served to protect public health and welfare by preventing mercury poisoning and pollution from improper disposal of mercury-containing products.<sup>117</sup> Consistent with the Supreme Court's reasoning in its commercial speech jurisprudence, the court in *Sorrell* chose to apply *Zauderer*'s lenient standard because it recognized that consumers had a significant interest in the information contained in the labels at issue.<sup>118</sup>

In *New York State Restaurant Association v. New York City Board of Health* (NYSRA), the Second Circuit reaffirmed *Sorrell*'s holding that *Zauderer* applies to disclosure requirements even in the absence of potential consumer deception.<sup>119</sup> In *NYSRA*, the court applied *Zauderer*'s deferential standard to a New York City regulation that

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that act as intermediaries between pharmaceutical manufacturers and pharmacies, on the one hand, and health care providers on the other; applying *Zauderer*; rejecting plaintiffs' argument that *Zauderer* should be limited to potentially deceptive advertising, stating "we have found no cases limiting *Zauderer* in such a way"; see also *Env'tl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 848–51 (9th Cir. 2003) (upholding federal regulation requiring providers of storm sewers to "distribute educational materials to the community . . . about the impacts of stormwater discharges on water bodies and the steps the public can take to reduce pollutants in stormwater runoff"; citing *Zauderer* and *Sorrell* but not specifying what level of scrutiny it applied to the regulation at issue); but see *Mason v. Fla. Bar*, 208 F.3d 952, 955–58 (11th Cir. 2000) (striking down the Florida Bar's action requiring attorney to include disclaimers in advertisement; applying *Central Hudson* without considering whether to apply *Zauderer* instead); *Borgner v. Brooks*, 284 F.3d 1204, 1210–13 (11th Cir. 2002) (upholding a Florida statute requiring dentists to include disclaimers in advertisements listing specialty areas that were not recognized by the American Dental Association; applying *Central Hudson* without considering whether to apply *Zauderer* instead); see generally *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 640–42 (6th Cir. 2010) (discussing the Supreme Court and circuit court case law through 2010 regarding disclosure requirements; describing *Mason* and *Borgner* as "unpersuasive in determining the proper standard of review" because "in neither case did the Eleventh Circuit explain its decision to employ the *Central Hudson* test instead of *Zauderer*").

116. *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 113–15 (2d Cir. 2001).

117. *Id.* at 115.

118. *Id.* at 113–14.

119. *N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health*, 556 F.3d 114, 133 (2d Cir. 2009).

required restaurants to post nutritional information on their menus.<sup>120</sup> Though there was no threat of deception by omission, the court upheld the menu labeling requirement under *Zauderer* after finding that it was reasonably related to the city's legitimate interest in combating obesity.<sup>121</sup>

Like the Second Circuit in *Sorrell* and *NYSRA*, the First Circuit in *Pharmaceutical Care Management Ass'n v. Rowe* also held that *Zauderer's* deferential standard applies to disclosure requirements even in the absence of consumer deception.<sup>122</sup> *Rowe* addressed the constitutionality of a Maine statute that required pharmaceutical salespersons (intermediaries that broker deals between pharmaceutical manufacturers and pharmacies on the one hand and health care providers on the other) to disclose conflicts of interests to the health care providers with which they deal.<sup>123</sup> The court upheld the disclosure requirement under *Zauderer*, finding that it was reasonably related to the government's legitimate interest in increasing public access to drugs by keeping prices down.<sup>124</sup>

Overall, apart from the D.C. Circuit's decision in *R.J. Reynolds*, the circuit court decisions that have expressly considered the issue have unanimously held that *Zauderer's* deferential standard applies to disclosure requirements even absent potential consumer deception.<sup>125</sup> The circuit courts authoring these decisions have recognized that disclosure requirements can effectively serve many legitimate government interests apart from preventing consumer deception.<sup>126</sup> Moreover, these courts have adhered to the Supreme Court's listener-centered jurisprudence by applying a lenient test to disclosure requirements, which increase the

120. *Id.* at 131–34.

121. *Id.* at 136.

122. *See Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 310 n.8 (1st Cir. 2005).

123. *Id.* at 298–99, 310.

124. *Id.* at 310. The court also found that the disclosure requirement could serve to prevent consumer deception. *Id.* Nonetheless, its opinion directly rejected the notion that *Zauderer* applies only to disclosure requirements aimed at preventing consumer deception. *Id.* at 310 n.8.

125. *See supra* note 115.

126. *See Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001) (preventing pollution by compelling disclosure to consumers of mercury content in commercial products); *NYSRA*, 556 F.3d at 134–36 (reducing obesity by compelling restaurants to post nutritional information on their menus); *Rowe*, 429 F.3d at 310 (preventing corrupt pharmaceutical sales practices and, in turn, preventing unnecessary price increases by requiring pharmaceutical salespersons to disclose conflicts of interest to healthcare providers).

amount of commercial information available to consumers.

Nonetheless, the Supreme Court has recently indicated that it might interpret *Zauderer* narrowly if asked to examine its scope.<sup>127</sup> First, in *United States v. United Foods*, the Court struck down a statute requiring mushroom producers to pay assessments that would fund public advertisements meant to promote mushroom sales generically.<sup>128</sup> The Court emphasized that the statute was not part of a broader economic regulatory scheme but instead was meant only to produce advertisements.<sup>129</sup> The Court refused to allow the government to circularly justify a subsidized advertising program based on the advertisements themselves without identifying any independent regulatory interest that they serve.<sup>130</sup> In turn, the Court struck down the statute because it was not a part of any legitimate regulatory scheme.<sup>131</sup>

In *United Foods*, the Court distinguished *Zauderer*, explaining that “[t]here is no suggestion in the case now before us that the mandatory assessments imposed . . . are somehow necessary to make voluntary advertisements nonmisleading for consumers.”<sup>132</sup> However, this distinction appeared as dicta at the end of the *United Foods* opinion, after the Court had already reached its holding.<sup>133</sup> As such, it served only to explain that the outcome of the case was consistent with *Zauderer*.<sup>134</sup> The Court did not use the distinction to justify the type of legal analysis that it chose to apply.<sup>135</sup> In fact, the Court did not apply a discrete test, but instead it simply struck down the statute as *per se* unconstitutional because it was not part of a legitimate regulatory scheme.<sup>136</sup> The regulation at issue in

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127. See *Milavetz, Gallop & Milavetz, P.A. v. United States*, 599 U.S. 299, 1339–40 (2010); see also *United States v. United Foods, Inc.*, 533 U.S. 405, 416 (2001); see *infra* notes 128–143 (discussing these decisions at length).

128. *United Foods*, 533 U.S. at 415–16.

129. *Id.* at 411–12.

130. *Id.* at 415–16.

131. *Id.* (explaining that the Court has never “upheld compelled subsidies for speech in the context of a program where the principal object is speech itself”).

132. *Id.* at 416.

133. See *id.* at 415–16.

134. See *id.* (“Our conclusions are not inconsistent with the Court’s decision in *Zauderer*.”) (emphasis added).

135. See *N.Y. State Rest. Ass’n v. N.Y.C. Bd. of Health*, 556 F.3d 114, 133 (2d Cir. 2009) (explaining that *United Foods* “simply distinguish[ed] *Zauderer* on the basis that the compelled speech in *Zauderer* was necessary to prevent deception of consumers; it does not provide that all other disclosure requirements are subject to heightened scrutiny”).

136. See *United Foods*, 533 U.S. at 415–16.

*United Foods* was unique because it did not serve a broader regulatory goal that did not concern speech, but rather its “principal object [was] speech itself.”<sup>137</sup> Accordingly, the Court applied a unique analysis tailored to the specific facts of the case.

Because of its narrow applicability, *United Foods* does not conflict with the circuit court decisions that applied *Zauderer* in the absence of potential consumer deception. In fact, *Rowe* and *NYSRA* were both decided after *United Foods*, and in each case, the First and Second Circuits, respectively, rejected the notion that *United Foods* limited *Zauderer* to cases involving potential consumer deception.<sup>138</sup>

Nonetheless, since *Rowe* and *NYSRA*, the Supreme Court in *Milavetz, Gallop & Milavetz, P.A. v. United States* again indicated that it might interpret *Zauderer* narrowly if asked to determine its scope.<sup>139</sup> In *Milavetz*, the Court applied *Zauderer*’s deferential standard to a federal statute requiring law firms offering bankruptcy assistance to identify themselves as “debt-relief agencies” in their advertisements and to make certain disclosures about the services that they provide.<sup>140</sup> The Court analogized the disclosure requirement at issue to the one in *Zauderer* by noting that it was intended to prevent consumer deception and that the required disclosures constituted purely factual statements about the advertiser’s legal status and identity.<sup>141</sup> Specifically, the Court referred to the underlying purpose of preventing consumer deception as one of the “essential features” of the disclosure requirements at issue in *Zauderer*.<sup>142</sup> Additionally, Justice Thomas expressly argued in his concurring opinion that *Zauderer* should be read as applying only to disclosure requirements that are aimed at preventing consumer deception.<sup>143</sup>

However, the Court has never explicitly held that *Zauderer* applies only where there is a threat of consumer deception. Further, neither *United Foods* nor *Milavetz*, provide any rationale for why a different standard should apply to

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137. *Id.* at 415.

138. See *Pharm. Care Mgmt. Ass’n v. Rowe*, 429 F.3d 294, 310 n.8 (1st Cir. 2005); *NYSRA*, 556 F.3d at 133.

139. See *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1339–40 (2010).

140. *Id.* at 1339. The Court ultimately upheld the requirement. *Id.* at 1341.

141. *Id.* at 1339–40.

142. *Id.* at 1340.

143. *Id.* at 1343.



disclosure requirements that do not prevent consumer deception, but rather serve some other legitimate government interest. For now, *Zauderer* remains good law, and, as noted above, the First and Second Circuits have held that it should apply to factual disclosure requirements regardless of whether they serve to prevent consumer deception.<sup>144</sup>

Some courts have applied yet another test for regulations that compel commercial entities to disclose subjective views regarding their products or services, as opposed to purely factual information.<sup>145</sup> Notably, the D.C. Circuit in *R.J. Reynolds* applied *Central Hudson's* intermediate scrutiny standard to the graphic-image cigarette warning labels promulgated by the FDA after finding that the labels were not purely factual.<sup>146</sup> Part I.B discusses *R.J. Reynolds* and *Discount Tobacco*, the other decision addressing the constitutionality of image-based cigarette warning labels. But first, the next Section discusses tests that federal circuit courts have applied to regulations that compel commercial entities to disclose non-factual, opinion-based content, as the D.C. Circuit found was true of the labels at issue in *R.J. Reynolds*. This Note will refer to such regulations as “non-factual disclosure requirements.”

### b. *Non-Factual Disclosure Requirements*

The two circuits that have considered the constitutionality of non-factual disclosure requirements have disagreed on what level of scrutiny should apply.<sup>147</sup> In *Entertainment Software Ass'n v. Blagojevich*, the Seventh Circuit applied strict scrutiny to an Illinois statute that required an “18” sticker to appear on video games that met the statute’s definition of “sexually explicit.”<sup>148</sup> The court chose not to apply *Zauderer's* deferential

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144. See *supra* notes 115–126 and accompanying text.

145. See, e.g., *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006) (applying strict scrutiny to Illinois statute establishing a content suitability rating system for video games).

146. *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1217 (D.C. Cir. 2012).

147. Compare *Entm't Software*, 469 F.3d at 652 (applying strict scrutiny to Illinois statute establishing a content suitability rating system for video games), with *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 966 (9th Cir. 2008) (applying *Zauderer's* deferential standard to a similar labeling requirement for video games).

148. *Entm't Software*, 469 F.3d at 652. Strict scrutiny requires statutes or regulations to be narrowly tailored to a compelling state interest. Ultimately, the court struck down the statute under that standard. *Id.*

standard because it found that the statute's definition of "sexually explicit" was "opinion-based," unlike the purely factual disclosures required in *Zauderer*.<sup>149</sup> Yet, in distinguishing *Zauderer*, the court did not provide any authority or rationale for limiting *Zauderer* to purely factual disclosure requirements.<sup>150</sup>

In contrast, the Ninth Circuit chose to apply *Zauderer* to a similar video game labeling requirement in *Video Software Dealers Ass'n v. Schwarzenegger*.<sup>151</sup> The court in *Video Software Dealers* criticized the *Entertainment Software* decision for applying strict scrutiny without supporting authority or rationale.<sup>152</sup> Ultimately, however, the court in *Video Software Dealers* struck down the video game labeling requirement at issue.<sup>153</sup> Oddly, while the court refused to limit *Zauderer*'s scope to factual disclosure requirements, it applied *Zauderer* narrowly to the facts of the case and inquired only as to whether the labeling requirement at issue was reasonably related to the government's interest in preventing consumer deception.<sup>154</sup> However, the court did not expressly hold that *Zauderer* is limited to cases involving potential consumer deception.<sup>155</sup> Such a narrow reading would conflict with the Ninth Circuit's prior decision in *Environmental Defense Center, Inc. v. EPA*,<sup>156</sup> in which the court cited both *Zauderer* and *Sorrell*<sup>157</sup> and held that the disclosure requirement at issue did not violate the First Amendment because it served "legitimate" government interests.<sup>158</sup>

In 2011, the Supreme Court affirmed the Ninth Circuit's decision in *Video Software Dealers*,<sup>159</sup> but it did so with the understanding that video games are expressive speech entitled to the full panoply of protection afforded by the First

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149. *Id.*

150. *See id.*

151. *See* *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 966 (9th Cir. 2008).

152. *Id.* at 966 n.20 ("We do not adopt the [*Entertainment Software*] court's approach here because it is not clear what authority supported its application of strict scrutiny.").

153. *Id.* at 966.

154. *See id.*

155. *See id.*

156. *See* *Env'tl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 848–51 (9th Cir. 2003).

157. *Id.*

158. *Id.* at 849 (upholding a regulation requiring storm sewer producers to distribute educational materials to community members regarding the environmental impacts of stormwater discharge).

159. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2742 (2011).

Amendment, as opposed to commercial speech, which is entitled to only limited protection.<sup>160</sup> Accordingly, the Court applied strict scrutiny and struck down the video game labeling requirement at issue without addressing the level of scrutiny that should be applied to non-factual disclosure requirements directed at commercial speech.<sup>161</sup>

Without a Supreme Court decision on point and only cursory analysis from the Seventh and Ninth Circuits, it is not clear what test courts will apply to non-factual disclosure requirements in the future. As noted above, the D.C. Circuit applied intermediate scrutiny to the graphic-image cigarette warning labels at issue in *R.J. Reynolds*, in part because it found that the warning labels were not factual and uncontroversial.<sup>162</sup> The next Section analyzes this decision and other litigation surrounding the warning labels.

### *B. The Cigarette Warning Label Cases: Discount Tobacco and R.J. Reynolds*

As previously discussed, tobacco companies have filed two lawsuits challenging the new cigarette warning label requirements. The first, *Discount Tobacco & Lottery v. United States*, facially challenged the FSPTCA's warning label requirement,<sup>163</sup> whereas the second, *R.J. Reynolds*, attacked the FSPTCA as applied by challenging the image-based warning labels promulgated by the FDA pursuant to the FSPTCA.<sup>164</sup>

In *Discount Tobacco*, the Sixth Circuit upheld the FSPTCA's warning label requirement against a facial challenge brought by five tobacco companies.<sup>165</sup> The court applied

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160. *Id.* at 2733 ("Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world) . . . . Under our Constitution, 'esthetic and moral judgments about art and literature . . . are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority.'" (quoting *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 818 (2000)).

161. *Brown*, 131 S. Ct. at 2738.

162. *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1217 (D.C. Cir. 2012) [hereinafter *R.J. Reynolds II*].

163. *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509 (6th Cir. 2012).

164. 696 F.3d 1205 (D.C. Cir. 2012).

165. *Discount Tobacco*, 674 F.3d at 531.

*Zauderer*'s rational basis standard and held that the warning labels were reasonably related to the government's interest in preventing consumer deception regarding the health risks of using tobacco.<sup>166</sup> Notably, although the court found a threat of consumer deception, in dicta it rejected the notion that *Zauderer* applies only where such a threat exists.<sup>167</sup>

The court assumed that *Zauderer* applies only to factual disclosure requirements but held that the tobacco companies failed to show that the FSPTCA could not be implemented using factually accurate warning labels.<sup>168</sup> The court explained that since the tobacco companies challenged the statute on its face, they had the burden "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."<sup>169</sup> But, the court envisioned several warning labels that would constitute factual disclosures under *Zauderer*, including "a picture or drawing of a nonsmoker's and smoker's lungs displayed side by side."<sup>170</sup>

While *Discount Tobacco* was pending on appeal, the FDA selected nine graphic-image warning labels (shown below) to appear on cigarette packages starting in September of 2012.<sup>171</sup> Notably, one of the labels selected included a side-by-side display of a nonsmoker's and a smoker's lungs,<sup>172</sup> just as the

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166. *Id.* at 562.

167. *Id.* at 556–57 (citing Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104 (2d Cir. 2001)).

168. *Id.* at 558–59.

169. *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 559 (6th Cir. 2012).

170. *Id.* Indeed, the court went on to note that "*Zauderer* itself eviscerates the argument that a picture or drawing cannot be accurate and factual." *Id.* at 560. The court was referring to a portion of *Zauderer*, which is not discussed in this Note, that addressed the constitutionality of a professional-conduct rule prohibiting the use of illustrations in attorney advertisements. *See id.* (citing *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 647 (1985)). As the D.C. Circuit explained in *R.J. Reynolds*, the Supreme Court in *Zauderer* struck down that rule, reasoning that "the use of illustrations or pictures in advertisements serves important communicative functions: it attracts attention of the audience to the advertiser's message, and it may also serve to impart information directly." *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1230 (D.C. Cir. 2012) (quoting *Zauderer*, 471 U.S. at 647); *see also infra* notes 218–224 and accompanying text.

171. *See* 21 C.F.R. §§ 1141.10, 1141.12 (2013) (incorporating labels by reference to <http://www.fda.gov/cigarettewarningfiles>), *invalidated by* *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1222 (D.C. Cir. 2012).

172. *Id.*

Sixth Circuit described in *Discount Tobacco*:<sup>173</sup>

Figure 1



However, before the FDA's labels could be implemented, the D.C. Circuit in *R.J. Reynolds* struck down each label under *Central Hudson's* intermediate scrutiny standard after holding that *Zauderer* did not apply.<sup>174</sup> The D.C. Circuit even struck down the label displaying healthy and diseased lungs,<sup>175</sup> which the Sixth Circuit in *Discount Tobacco* had previously approved, at least in theory.<sup>176</sup> The D.C. Circuit in *R.J. Reynolds* held that *Zauderer* did not apply for two reasons. First, the court interpreted *Zauderer* as applying only to disclosure requirements meant to prevent consumer deception and held that the FDA's warning label requirement was not meant to prevent consumer deception, but rather was meant to discourage smoking.<sup>177</sup> Second, the court interpreted *Zauderer* as applying only to factual and uncontroversial disclosure requirements and held that the FDA's images did not meet this requirement.<sup>178</sup> The court reasoned that the labels were not "purely" factual because "they are primarily intended to evoke

173. *Discount Tobacco*, 674 F.3d at 559.

174. *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1221–22 (D.C. Cir. 2012) [hereinafter *R.J. Reynolds II*].

175. *Id.*

176. *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 559 (6th Cir. 2012).

177. *R.J. Reynolds II*, 696 F.3d at 1214–15.

178. *Id.* at 1216–17.

an emotional response or, at most, shock the viewer into retaining the information in the text warning.”<sup>179</sup> In addition, the court found that several of the images could be misinterpreted by consumers.<sup>180</sup> For example, the court noted that “the image of a man smoking through a tracheotomy hole might be misinterpreted as suggesting that such a procedure is a common consequence of smoking.”<sup>181</sup>

Having ruled out the *Zauderer* standard, the court applied *Central Hudson*’s intermediate scrutiny based on an earlier decision of the same court which held that *Central Hudson* governed commercial disclosure requirements not otherwise governed by *Zauderer*.<sup>182</sup> First, the court found that the FDA’s warning labels were meant to serve the government’s substantial interest in reducing smoking rates.<sup>183</sup> However, the court found that the government failed to show that the labels directly advance this interest and, thus, held that the labels failed to satisfy intermediate scrutiny under *Central Hudson*.<sup>184</sup> The court explained that the FDA’s Regulatory Impact Analysis was based primarily on international studies conducted in countries where image-based warning labels were implemented at roughly the same time as other anti-smoking measures, such as increased cigarette taxes and new restrictions on public smoking.<sup>185</sup> In addition, the court found that despite the FDA’s failure to take account of these variables, the FDA’s own analysis predicted that the warning labels would reduce U.S. smoking rates by only 0.088 percent.<sup>186</sup> On these grounds, the court held that the labels were not sufficiently tailored to the government’s interest in reducing smoking rates and thus were unconstitutional.<sup>187</sup>

179. *Id.* at 1216.

180. *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1216 (D.C. Cir. 2012) [hereinafter *R.J. Reynolds II*].

181. *Id.*

182. *Id.* at 1217.

183. *Id.* at 1218. The FDA also stated an interest in “effectively communicating health information regarding the negative effects of cigarettes.” *Id.* at 1221 (internal quotation marks omitted). However, the court found this interest illusory because achieving it was valuable only insofar as doing so would serve the government’s interest in reducing smoking rates: “[t]he goal of effectively communicating the risks of cigarette smoking is, of course, related to the viewer’s decision to quit, or never to start, smoking.” *Id.*

184. *Id.* at 1219.

185. *Id.* at 1219–20.

186. *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1220 (D.C. Cir. 2012) [hereinafter *R.J. Reynolds II*].

187. *Id.* at 1221–22.

The dissent neither accepted nor disputed the majority's interpretation of the scope of *Zauderer*—that *Zauderer* applies only to factual and uncontroversial disclosure requirements aimed at preventing consumer deception. Rather, the dissent found that the FDA's labels were factual and effectively served to prevent consumer deception regarding the health effects of smoking.<sup>188</sup> First, the dissent echoed the reasoning of the majority in *Discount Tobacco* that the use of graphic images does not necessarily render the FDA's warnings nonfactual.<sup>189</sup> Second, the dissent argued that the labels were meant to combat a long history of deception by tobacco companies and, further, that cigarette packages "that fail to display the final costs of smoking in a prominent manner" are deceptive "[e]ven absent any affirmatively misleading statements."<sup>190</sup> Having determined that the FDA's warning labels were both factually accurate and rationally related to the government's interest in preventing consumer deception, the dissent argued that they should have been upheld.<sup>191</sup>

*Discount Tobacco* and *R.J. Reynolds* raise two important questions regarding compelled commercial speech. First, what level of scrutiny should courts apply to factual disclosure requirements in the absence of potential consumer deception? Second, should non-factual disclosure requirements be subject to a different standard of review than factual disclosure requirements? Part II answers both of these questions in light of the listener-focused rationale underlying the Supreme Court's commercial speech doctrine and proposes that *Zauderer*'s deferential standard should apply to all non-misleading disclosure requirements. Following that discussion, Part III applies the *Zauderer* standard to the labels promulgated by the FDA and struck down in *R.J. Reynolds*.

## II. FIRST AMENDMENT ANALYSIS OF COMMERCIAL DISCLOSURE REQUIREMENTS IN LIGHT OF THE RATIONALES FOR THE COMMERCIAL SPEECH DOCTRINE

First Amendment controversies are especially difficult for courts to resolve in large part because the Constitution does not define "speech," and there is no historical evidence that the

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188. *Id.* at 1222–23.

189. *Id.* at 1230.

190. *Id.* at 1228–29.

191. *Id.* at 1237–38.

framers agreed on a coherent theory of freedom of speech that should govern a court's interpretation of the First Amendment.<sup>192</sup> Without authoritative constitutional text or historical evidence to guide them, courts have adopted several different theories about the values and interests that the First Amendment's freedom of speech clause is meant to serve.<sup>193</sup> These courts seek to resolve First Amendment controversies in a way that advances those values and interests.

Some First Amendment theories define protected speech in a way that promotes the interests of speakers in their own autonomy or self-fulfillment.<sup>194</sup> Other theories define protected speech in a way that promotes listeners' interests in accessing a wide variety of information and ideas with which to educate themselves.<sup>195</sup> The former theories hold that disclosure requirements interfere with speakers' constitutionally protected interests regardless of whether they ultimately increase the amount of information available to listeners. In contrast, the latter theories, often called the "marketplace of ideas" theories, approve of disclosure requirements and other speech regulations so long as they ultimately increase the amount of information available to listeners in the aggregate.

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192. See Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 8 (1979) ("Nothing in the Constitutional text or history yields any very precise notion of what the 'freedom of speech' means."); Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 307–08 (1978) ("The only firm conclusion solidly based on historical scholarship is that the framers 'had no coherent theory of freedom of speech.'" (quoting Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 22 (1971))).

193. See, e.g., *Edenfield v. Fane*, 507 U.S. 761, 766–67 (1993) (explaining the need for protection of commercial speech by reference to the "marketplace of ideas" theory; "The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish."); *New York Times Co. v. Sullivan*, 376 U.S. 254, 274–75 (1964) (reflecting the "political speech" theory; emphasizing that protection of political speech is of utmost importance under the First Amendment); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (reasoning in accordance the "self-fulfillment" theory, "[t]hose who won our independence believed that the final end of the state was to make men free to develop their faculties . . .").

194. See, e.g., C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 1007 (1978) (arguing that freedom of speech is meant only to protect the right of individuals to choose to speak: "[T]he purpose of the first amendment is not to guarantee adequate information.").

195. See, e.g., ALEXANDER MEICKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 25 (1948) ("[T]he point of ultimate interest is not the works of the speakers, but the minds of the hearers"; arguing that the First Amendment's freedom of speech clause exclusively protects political speech).



In the commercial speech context, it is well established that commercial speakers do not hold interests in autonomy or self-fulfillment that are uniquely linked to their speech.<sup>196</sup> Instead, the Supreme Court's rationale for protecting commercial speech finds a theoretical basis in the marketplace of ideas theory, which emphasizes the interests of listeners and society as a whole in the free flow of information and ideas, including commercial information.<sup>197</sup> Thus, to remain consistent with the Court's commercial speech jurisprudence, a marketplace of ideas analysis should apply in determining the constitutionality of commercial disclosure requirements, including the FSPTCA's cigarette warning label requirement.

Part II.A describes the marketplace of ideas theory and its

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196. See, e.g., *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 650–51 (1986) (“Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides . . . [a commercial speaker’s] constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal.”); *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 113 (2d. Cir. 2001) (holding that the First Amendment does not protect commercial speakers’ privacy interests); see also *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 804–05 (1977) (White, J., dissenting) (“[W]hat some have considered to be the principal function of the First Amendment, the use of communication as a means of self-expression, self-realization, and self-fulfillment, is not at all furthered by corporate speech.”); THOMAS EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 311 (1970) (arguing that commercial advertising, soliciting, canvassing, and other similar conduct “fall within the system of commercial enterprise” and do not constitute self-expression); C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 25–33 (1989) (arguing that commercial speech does not serve individuals’ interests in autonomy because it does not represent the choice of the speaker but rather is driven by profit motive, which in turn is dictated by “externally imposed” market demands). Notably, some of the Court’s opinions have suggested that the autonomy or privacy interests of commercial speakers are also relevant to a First Amendment analysis of commercial speech regulations. See *United States v. United Foods, Inc.*, 533 U.S. 405, 415–16 (2001) (discussed *supra* Part I.A.2.a); striking down assessments imposed on mushroom producers that funded advertising for mushrooms generically; reasoning without regard to whether the advertisements were valuable to consumers); *Glickman v. Wileman Bros.*, 521 U.S. 457, 490 (1997) (Souter, J., concurring) (“Truth is indeed a justifiable objective of commercial speech protection, but so is nonmisleading persuasion directed to the advertiser’s own choice of what to promote.”). In addition, several scholars have also urged that apart from listeners’ interests, the interests of commercial speakers should also be considered by courts reviewing commercial speech regulations. See, e.g., MARTIN REDISH, *FREEDOM OF EXPRESSION* 67–68 (1984). It is worth debating whether commercial speakers actually do hold autonomy interests in their speech. However, such debate is beyond the scope of this Note.

197. See, e.g., *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm. of New York*, 447 U.S. 557, 563 (“The First Amendment’s concern for commercial speech is based on the informational function of advertising.”).

view on the value of government speech regulations. Part II.B argues that regulations requiring disclosure of non-misleading content enhance the marketplace of ideas regardless of whether they prevent consumer deception or whether they compel disclosure of factual or non-factual, opinion-based content. Part II.B then concludes that all non-misleading disclosure requirements should be subject to a lenient level of scrutiny. Part II.C criticizes the district court's decision in *R.J. Reynolds* to apply intermediate scrutiny to the cigarette warning labels promulgated by the FDA. Finally, Part II.D proposes a particular deferential standard for all regulations requiring disclosure of non-misleading content.

A. *The Marketplace of Ideas Theory and the Role of Government*

The marketplace of ideas theory assumes that the First Amendment should facilitate the attainment of truth.<sup>198</sup> The theory holds that the most effective way to discover the truth is by allowing opposing viewpoints to compete with each other.<sup>199</sup> Marketplace theorists argue that through such competition, opposing ideas will expose the falsities ingrained in one another, and in turn, rational actors will believe the idea that is closest to the truth.<sup>200</sup> Under this model, suppression of communication interferes with the attainment of truth by limiting the ability of rational actors to test existing beliefs.<sup>201</sup> Thus, the marketplace of ideas theory proposes that the freedom of speech clause of the First Amendment is meant to

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198. See, e.g., *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . . That at any rate is the theory of our Constitution."); see also THOMAS EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 7–8 (1963) (claiming that the attainment of truth is one of the chief aims of the First Amendment).

199. See, e.g., JOHN MILTON, *Areopagitica*, reprinted in *GREAT BOOKS OF THE WESTERN WORLD* 381, 409 (Robert Maynard Hutchins, ed., Univ. Chi. Press 1952) (1643); J.S. MILL, *On Liberty*, reprinted in *GREAT BOOKS OF THE WESTERN WORLD* 267, 276 (Robert Maynard Hutchins, ed., Univ. Chi. Press 1952) (1859).

200. See, e.g., *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting); MILTON, *supra* note 199, at 409 ("Let [truth] and falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?"); Christopher T. Wonell, *Truth and the Marketplace of Ideas*, 19 U.C. DAVIS L. REV. 669 (1986) (arguing that the marketplace analogy accurately depicts the positive contribution of speech to the natural and social sciences).

201. See, e.g., *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting); MILL, *supra* note 199, at 276.

ensure that the maximum amount of information and ideas are able to compete in the marketplace.<sup>202</sup>

The marketplace theory does not condemn all government regulation of speech. Rather, certain government actions bolster or even enhance the marketplace of ideas.<sup>203</sup> For example, in *Red Lion Broadcasting Co. v. FCC*, the Supreme Court relied on a marketplace analysis in upholding a government regulation requiring radio and television broadcasters to discuss public issues in their programming and, additionally, to grant fair coverage to different views on those issues.<sup>204</sup> The Court found that the regulation served the purposes of the First Amendment by ensuring that listeners can hear different views.<sup>205</sup>

In addition to ensuring fair competition in the marketplace of ideas, the government can also affirmatively contribute to the marketplace by producing its own speech.<sup>206</sup> For example, the government frequently issues press releases containing factual findings, policy objectives, or even the political or philosophical views of certain government officials. Professor Steven Shiffrin, a leading First Amendment scholar, argues that “speech financed or controlled by government plays an enormous role in the marketplace of ideas.”<sup>207</sup> Another leader in the field, Professor Abner S. Greene, explains further that government speech “can help foster debate, fleshing out views, and leading toward a more educated citizenry and a better chance of reaching the right answer.”<sup>208</sup> As with the speech of

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202. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

203. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 394 (1969) (upholding government regulation requiring radio and television broadcasters to grant fair coverage to opposing views on matters of public interest: “To condition the granting or renewal of licenses on a willingness to present representative community views on controversial issues is consistent with the ends and purposes of those constitutional provisions forbidding the abridgment of freedom of speech and freedom of the press. Congress need not stand idly by and permit those with licenses to ignore the problems which beset the people or to exclude from the airways anything but their own views of fundamental questions.”); Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 569 (1980) (arguing that the government’s own speech “plays an enormous role in the marketplace of ideas”).

204. *Red Lion Broad. Co.*, 395 U.S. at 390 (“It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.”).

205. *Id.*

206. See Helen Norton, *Government Workers and Government Speech*, 7 FIRST AMEND. L. REV. 75, 77 (2008).

207. Shiffrin, *supra* note 203, at 569.

208. Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1, 11 (2000).

any powerful actor, there is the risk that government speech could mislead its audience or chill other speech.<sup>209</sup> However, absent such circumstances, government speech discloses valuable information to the public.<sup>210</sup>

The next section analyzes factual and non-factual disclosure requirements under the marketplace theory and concludes that they should both be subject to *Zauderer*'s deferential standard regardless of the purposes they are meant to serve.

## *B. Commercial Disclosure Requirements Under the Marketplace of Ideas Theory*

### 1. A Marketplace Analysis of Factual Disclosure Requirements

Like the government's own speech, compelled commercial speech contributes to the marketplace of ideas. In *Zauderer*, the Supreme Court recognized that factual disclosure requirements serve listeners' interests in the free flow of commercial information.<sup>211</sup> While the disclosure requirement at issue in *Zauderer* was meant to prevent consumer deception,<sup>212</sup> factual disclosure requirements increase the amount of information available to listeners regardless of the specific purpose such disclosure requirements are meant to serve. This is the reason why the Second Circuit chose to apply rational basis review in *National Electrical Manufacturers Ass'n v. Sorrell* absent any showing of potential consumer deception.<sup>213</sup> There, the court explained that "mandated disclosure of accurate, factual, commercial information . . . furthers, rather than hinders, the First Amendment goal of the discovery of truth and contributes to the efficiency of the 'marketplace of

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209. See David Fagundes, *State Actors as First Amendment Speakers*, 100 NW. U. L. REV. 1637, 1640 (2006) (observing that government speech has the capacity to contribute to the marketplace of ideas as well as to detract from it by chilling or crowding out private speech, and arguing in turn that courts should take a unique approach when examining government speech under the First Amendment).

210. See Norton, *supra* note 206, at 77 (arguing that government speech helps to inform voters of the government's priorities and, in turn, enhances citizen participation in self-governance).

211. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 650–51 (1985).

212. *Id.* at 651–52.

213. *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 114 (2d Cir. 2001); see also *supra* notes 115–118 and accompanying text (discussing *Sorrell*).

ideas.”<sup>214</sup>

Courts should follow the Second Circuit’s lead and apply a lenient level of scrutiny to disclosure requirements even in the absence of potential consumer deception. Factual disclosure requirements increase the amount of information available to listeners regardless of whether such requirements prevent consumer deception. To be sure, listeners may often have a stronger interest in disclosures that prevent deception than in those that simply serve to inform. However, even assuming this distinction is accurate, it does not justify application of a stricter legal standard to disclosure requirements that are not meant to prevent consumer deception. Instead, all factual disclosure requirements should be subject to *Zauderer*’s deferential standard because they enhance the marketplace of ideas and, thus, do not frustrate the purposes of the commercial speech doctrine in any way. The next section applies a marketplace analysis to non-factual disclosure requirements and concludes that such requirements should be subject to a lenient level of scrutiny as well.

## 2. A Marketplace Analysis of Non-Factual Disclosure Requirements

Non-factual disclosure requirements contribute to the marketplace of ideas, albeit in a different way than purely factual disclosure requirements. In *Gertz v. Robert Welch, Inc.*, the Supreme Court emphasized the importance of non-factual statements of opinion in the marketplace of ideas, explaining that “[u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.”<sup>215</sup> In the commercial speech context, the Court has employed similar reasoning in protecting both factual and non-factual commercial speech.<sup>216</sup> Since extending First Amendment protection to objectively verifiable price advertisements in

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214. *Sorrell*, 272 F.3d at 114 (emphasis added).

215. 418 U.S. 323, 339–40 (1974).

216. See, e.g., *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763–65, 770 (1976) (striking down ban on purely factual pharmaceutical price advertisements); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 565–66 (2001) (striking down ban on persuasive, value-laden cigarette advertisements).

*Virginia State Board of Pharmacy*,<sup>217</sup> the Court has extended protection to colorful, subjective, and persuasive non-factual commercial advertisements.<sup>218</sup> In doing so, the Court has specifically recognized the unique communicative value of visual images contained in commercial advertising and product labeling.<sup>219</sup>

The most relevant example of the Court's protection of non-factual commercial advertisements is *Lorillard Tobacco Co. v. Reilly*.<sup>220</sup> There, the Court struck down a Massachusetts regulation that banned outdoor cigarette advertisements within one thousand feet of schools and playgrounds.<sup>221</sup> The Court held that the advertising ban failed the fourth prong of *Central Hudson's* intermediate scrutiny test, finding that the ban was not sufficiently tailored to the government's interests in preventing youth smoking.<sup>222</sup> The Court explained that while the government had a substantial, or perhaps even compelling, interest in preventing youth smoking, adult consumers still had a protected interest in accessing the information and ideas contained in the banned tobacco advertisements.<sup>223</sup>

The Court's decision in *Lorillard* confirmed that the First Amendment protects iconic non-factual tobacco advertisements such as the ones below because of their contribution to the marketplace of ideas:<sup>224</sup>

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217. See *Virginia State Bd. of Pharmacy*, 425 U.S. at 770.

218. See *Lorillard*, 533 U.S. at 565–66.

219. See, e.g., *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 647 (1985) (striking down a regulation prohibiting the use of color and illustrations in attorney advertising in a part of the opinion separate from its ruling upholding the disclosure requirements also at issue, which is discussed throughout this note: “The use of illustrations or pictures in advertisements serves important communicative functions: it attracts the attention of the audience to the advertiser’s message and it may also serve to impart information directly.”).

220. 533 U.S. 525 (2001).

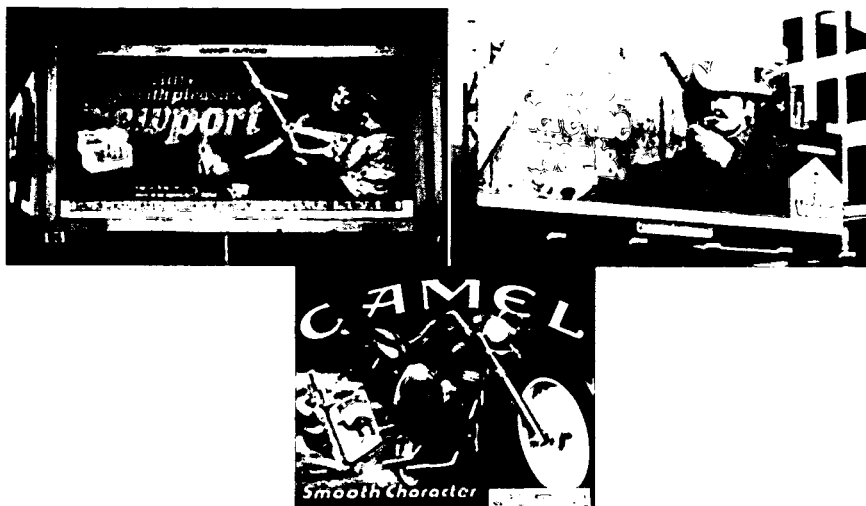
221. *Id.* at 565–66.

222. *Id.*; see also *supra* Part I.A.1.d (discussing the *Central Hudson* four-part test).

223. *Lorillard*, 533 U.S. at 564.

224. The advertisements shown were obtained from the following sources: *Alive with Pleasure!*, TOBACCODOCUMENTS.ORG, [http://tobaccodocuments.org/pollay\\_ads/Newp01.01.html](http://tobaccodocuments.org/pollay_ads/Newp01.01.html) (last visited Feb. 23, 2013); *Come to Where the Flavor Is*, TOBACCODOCUMENTS.ORG, [http://tobaccodocuments.org/pollay\\_ads/Mar106.11.html](http://tobaccodocuments.org/pollay_ads/Mar106.11.html) (last visited Feb. 23, 2013); *CAMEL Smooth Character*, TOBACCODOCUMENTS.ORG, [http://tobaccodocuments.org/pollay\\_ads/Came35.15.html](http://tobaccodocuments.org/pollay_ads/Came35.15.html) (last visited Feb. 23, 2013).

Figure 2



If these highly contrived non-factual advertisements contribute to the marketplace of ideas, surely the FDA's new graphic-image cigarette warning labels do as well.

At first glance, it may seem that courts should nonetheless view the warning labels skeptically because courts often see compelled speech as just as, if not more, violative of the First Amendment as prohibitions on speech.<sup>225</sup> However, this principle does not apply in the context of commercial speech, which lacks intrinsic value to speakers but is nonetheless protected because of its practical value to listeners.<sup>226</sup> Non-misleading disclosure requirements serve the same instrumental function as non-misleading commercial speech by increasing the amount of information available to listeners. Moreover, this same reasoning applies to all non-misleading disclosure requirements, regardless of whether such

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225. See, e.g., *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (striking down a New Hampshire statute making it a crime to cover up the words "Live Free or Die" which appeared on state license plates; "[W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message.").

226. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 650-51 (1985) (distinguishing *Wooley* and several other compelled speech cases involving non-commercial speech); see also *supra* note 196 and accompanying text (addressing counterarguments that commercial speakers possess autonomy interests in their speech and that courts should therefore recognize commercial speech as worthy of protection, irrespective of its value to listeners).

requirements serve to prevent potential consumer deception or whether they compel disclosure of factual or non-factual content. For these reasons, courts should apply a lenient level of scrutiny to non-misleading disclosure requirements regardless of the government purpose underlying the requirements or the nature of the required disclosure as either factual or non-factual, opinion-based content.

Specifically then, even if the FDA's cigarette warning labels constitute non-factual disclosure requirements, the warning labels should still be subject to a lenient level of scrutiny so long as they are not misleading.<sup>227</sup> The next section criticizes the court's decision in *R.J. Reynolds* to apply strict scrutiny to the labels.

### C. *The R.J. Reynolds Opinion*

In *R.J. Reynolds*, the D.C. Circuit struck down the FDA's new cigarette warning label requirement under intermediate scrutiny analysis.<sup>228</sup> The court refused to apply a lenient level of scrutiny under *Zauderer* after finding that the warning labels were neither aimed at preventing consumer deception nor purely factual and uncontroversial like the disclosure requirements at issue in *Zauderer*.<sup>229</sup> In so doing, the court failed to provide meaningful rationale for its refusal to apply *Zauderer* under those circumstances.<sup>230</sup>

The court in *R.J. Reynolds* failed to honor the long history of commercial speech precedent by neglecting to account for the contribution that image-based warning labels make to the marketplace of ideas. Instead, the court placed undue emphasis on the warning labels' provocative and subjective qualities, describing them as "inflammatory images . . . [meant to] browbeat consumers into quitting."<sup>231</sup> In particular, the court emphasized its finding that the warning labels "are primarily intended to evoke an emotional response, or, at most, shock the viewer into retaining the information in the text warning."<sup>232</sup> In addition, the court noted that each of the warning labels directly advocates against smoking by displaying "1-800-

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227. See *supra* Part I.B (discussing *R.J. Reynolds*).

228. *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1221–22 (D.C. Cir. 2012).

229. *Id.* at 1213–17.

230. See *id.*

231. *Id.* at 1216–17.

232. *Id.* at 1216.



QUITNOW.”<sup>233</sup> For these reasons, the court refused to apply *Zauderer*’s deferential standard to the warning labels, implying that the labels’ provocative content offends the First Amendment’s freedom of speech clause, whereas factual disclosure requirements do not.<sup>234</sup>

The *R.J. Reynolds* court’s reasoning is directly contrary to one of the tenets of the marketplace of ideas theory: statements of opinion should not be suppressed simply because they are offensive.<sup>235</sup> In essence, assuming the labels are not purely factual, they are precisely the type of subjective, value-laden, and provocative expression that the marketplace theory seeks to promote. Moreover, it is inconsequential to a marketplace analysis whether the government compels a commercial speaker to disseminate information or the speaker instead chooses to do so on its own.<sup>236</sup> The marketplace theory focuses only on the aggregate effect of regulations compelling speech and disapproves of them only if the required disclosures mislead listeners or chill other speech to the extent that they cause a net-decrease in the amount of information and ideas available to listeners.<sup>237</sup>

By refusing to analyze the cigarette warning labels under this rubric, the *R.J. Reynolds* court ironically neglected the interests of listeners that provided the Supreme Court’s theoretical justification for protecting tobacco companies’ commercial speech in the first place. Moreover, the court provided no rationale for why *Zauderer*’s standard should not apply to non-factual commercial disclosure requirements.<sup>238</sup>

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233. *Id.* at 1216–17.

234. *Id.* at 1217.

235. *See, e.g.,* *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.”).

236. *See supra* Part II.B.

237. *See supra* Part II.B.

238. Instead, the district court cited the Seventh Circuit’s opinion in *Entm’t Software* and an inapposite Supreme Court case, *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, as its sole authority for limiting *Zauderer* to purely factual and uncontroversial disclosure requirements. *R.J. Reynolds Tobacco Co. v. FDA*, 845 F. Supp. 2d 266, 274 (D.D.C. 2012) (citing *Pac. Gas & Elec. Co.*, 475 U.S. 1 (1986); *Entm’t Software Ass’n v. Blagojevich*, 469 F.3d 641 (7th Cir. 2006)). *Entertainment Software*, a Seventh Circuit opinion, was not binding authority for the *R.J. Reynolds* court, which sits in the District of Columbia. In addition, *Entertainment Software* did not provide any rationale for limiting *Zauderer* in this way. *See supra* Part I.A.2.b (discussing *Entertainment*

Instead, the court simply assumed that *Zauderer* should not apply outside of the context of purely factual and uncontroversial disclosure requirements and, in turn, chose to apply *Central Hudson's* four-part test.<sup>239</sup> The next section lays out, in detail, the standard that the *R.J. Reynolds* court should have applied.

*D. The Appropriate Test for Commercial Disclosure Requirements: Zauderer's Deferential Standard*

On their face, non-misleading commercial disclosure requirements always serve listeners' interests by increasing the amount of commercial information available in the marketplace of ideas. However, disclosure requirements have the potential to contravene listeners' interests by inadvertently chilling speech. For example, if the government compels a commercial entity to include disclosures in print advertisements, that entity will likely choose to forgo print advertising altogether if the required disclosures would occupy half a page in a newspaper.<sup>240</sup>

In light of these risks and benefits, the standard applied by the Supreme Court in *Zauderer* provides the best framework of analysis to apply to non-misleading disclosure requirements.<sup>241</sup> In *Zauderer*, the Court recognized the benefits that listeners accrue from disclosure requirements.<sup>242</sup> For this reason, the Court required only a rational relationship between the disclosure requirement at issue and the government interest it

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*Software* at length). Thus, by citing *Entertainment Software*, the *R.J. Reynolds* court did not incorporate any rationale for its refusal to apply *Zauderer* to the cigarette warning labels at issue. Finally, *Pacific Gas & Electric Co.* involved political speech, and the Court in that case specifically distinguished the value of such speech from that of commercial speech. 475 U.S. at 9 (1986); *see also* *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 797 (1988) (explaining that "[p]urely commercial speech is more susceptible to compelled disclosure requirements" than is personal or political speech). For these reasons, *Pacific Gas & Electric Co.* does not provide support for applying any stricter of a standard to commercial disclosure requirements than *Zauderer's* lenient standard.

239. *R.J. Reynolds*, 696 F.3d at 1216.

240. *See Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 139–40 (1994) (striking down as unduly burdensome regulation requiring disclosure in print advertising for accounting services because the required disclosure was so lengthy that it would have "effectively rule[d] out" notation on business cards or yellow page listings).

241. *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 650–51 (1985).

242. *See id.*

was meant to serve, which in that case was prevention of consumer deception.<sup>243</sup> However, *Zauderer* also required that disclosure requirements not be unjustified or unduly burdensome in such a way that would inhibit the functioning of the marketplace of ideas.<sup>244</sup> *Zauderer* thus combined rational basis review with the additional condition that disclosure requirements must not be unjustified or unduly burdensome.

Rational basis review requires only that a regulation be rationally related to a legitimate government interest.<sup>245</sup> The Supreme Court has held several times that rational basis review does not require the government to show specific evidence linking its actions to the purposes it seeks to achieve.<sup>246</sup> Rather, rational basis review requires only that there be "plausible reasons" for government action.<sup>247</sup> Likewise, the Court in *Zauderer* held that disclosure requirements do not need to be the least restrictive means of achieving the government's purposes.<sup>248</sup>

*Zauderer*'s "unjustified or unduly burdensome" requirement is primarily meant to prevent disclosure requirements from chilling voluntary speech to the extent of causing a net decrease in the amount of information available to consumers.<sup>249</sup> In addition, courts should equitably assess whether disclosure requirements are justified given the nature of the products or services sold by the affected commercial speakers. For instance, in the context of warning label requirements, a court should consider not only the size of the label, but also the severity and likelihood of the harm that the product or service could cause. While vivid warning labels may be appropriate for extremely dangerous products such as weapons, power tools, and certain prescription drugs, it would

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243. *Id.*

244. *Id.*

245. U.S. R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 178 (1980).

246. *See, e.g., id.* at 177-79.

247. *Id.* at 179.

248. *Zauderer*, 471 U.S. at 651 n.14.

249. *Id.* at 651 ("We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech."); *see also* *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 139-40 (1994) (striking down as unduly burdensome regulation on advertisements for accountants requiring a lengthy disclaimer to accompany specialist designations that were not recognized by the state or federal government; reasoning that the disclaimer requirement "effectively rule[d] out" notation on business cards or yellow page listings of specialist designations that were not recognized by the government).

be unjust for the government to require packages of sugary children's cereals to include large pictorial warning labels that gruesomely depict tooth decay. Likewise, it would certainly be unjust to require one company's product packaging to carry a warning label pertaining to a different company's product. Thus, it would be unjust to require the children's cereal boxes mentioned above to display the FDA's new cigarette warning labels even if doing so might deter youth smoking. Such an arbitrary imposition on private speech would undermine the free exchange of information and ideas and should not be permitted under the First Amendment.

Overall, *Zauderer* provides the best standard to apply to non-misleading disclosure requirements regardless of whether they are meant to prevent consumer deception or whether they are factual or non-factual. It readily allows disclosure requirements that promote the marketplace of ideas while, at the same time, prohibiting disclosure requirements that inadvertently threaten the vitality of the marketplace of ideas by chilling commercial speech.

Nonetheless, misleading disclosure requirements should be flatly prohibited under the First Amendment or, at the very least, should be subject to strict scrutiny analysis. There is no justification under any First Amendment theory for allowing the government to use disclosure requirements to mislead individuals and other private entities. Thus, as a threshold matter, courts examining disclosure requirements should first determine whether they compel misleading speech. If so, they should be struck down or at least be subject to strict scrutiny. On the other hand, non-misleading disclosure requirements should be subject to *Zauderer's* deferential standard. The next section applies this analytical framework to the warning labels that the D.C. Circuit struck down in *R.J. Reynolds*.

### III. ANALYSIS OF THE FDA'S INVALIDATED GRAPHIC-IMAGE CIGARETTE WARNING LABELS UNDER *ZAUDERER'S* DEFERENTIAL STANDARD

Though they could have upset some consumers, the cigarette warning labels that were struck down in *R.J. Reynolds* generally convey a valid, non-misleading depiction of the grave health risks of cigarette smoking. Further, the labels easily satisfy *Zauderer's* rational basis standard and unjustified or unduly burdensome requirement. Thus, the

labels did not violate the First Amendment.

*A. The Invalidated Warning Labels Are Not Misleading*

As a group, the FDA's invalidated cigarette warning labels dramatically depict the hardships that millions of Americans suffer on a daily basis as a result of cigarette smoking. The labels touch on a range of concerns, from the harmful physical effects of smoking to the health benefits enjoyed by those who quit.<sup>250</sup> In addition, they include the phone number "1-800-QUITNOW," which at least implicitly encourages consumers to quit smoking or to never start in the first place.

The district court in *R.J. Reynolds* suggested that some of the images contained in the labels may be misleading.<sup>251</sup> Specifically, the district court found that the image containing a corpse lying on an autopsy table suggested that smoking leads to autopsies, though that is generally untrue.<sup>252</sup> In addition, the district court pointed out that the image of the man exhaling cigarette smoke through a tracheotomy hole in his throat does not represent a common consequence of smoking.<sup>253</sup> The D.C. Circuit echoed the district court's concern regarding the second image, but did not address the accuracy of the first.<sup>254</sup>

These two images may in fact mislead consumers into believing that the specific circumstances they depict are a usual consequence of smoking. If after closer examination the court had found that these images were misleading, the individual labels containing these images should have been severed from the FDA's warning label requirement and then struck down or at least been subject to a separate strict scrutiny analysis.

The remaining labels either validly depict the physical effects of smoking or symbolize the human devastation caused by smoking in a way that is not likely to mislead consumers. Thus, the D.C. Circuit in *R.J. Reynolds* should have analyzed most, if not all, of the FDA's invalidated labels under *Zauderer's* deferential standard. The next section conducts that

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250. See *supra* notes 171–173 and accompanying text (displaying and discussing the nine warning labels).

251. See *R.J. Reynolds Tobacco Co. v. FDA*, 845 F. Supp. 2d 266, 273 (D.D.C. 2012), *aff'd*, 696 F.3d 1205 (D.C. Cir. 2012).

252. *Id.*

253. *Id.*

254. *R.J. Reynolds*, 696 F.3d at 1216.

analysis.

*B. The Invalidated Labels Satisfy Zauderer's Deferential Standard*

Most, if not all, of the FDA's warning labels are non-misleading and easily satisfy both prongs of *Zauderer's* deferential standard: rational basis review and the unjustified or unduly burdensome requirement. With regard to the rational basis prong, the FDA has stated that the labeling requirement is meant to serve two closely related, yet conceptually distinct government interests.<sup>255</sup> First, as the FDA stated in the final rule, "[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."<sup>256</sup> Second, the government has a legitimate interest in ensuring that people choosing whether to use tobacco products are informed of the associated health risks.<sup>257</sup>

The FDA's final rule demonstrated that the selected warning labels were reasonably related to serving these interests. Based on reductions in the smoking populations in other countries attributed to the implementation of graphic-image warning labels, the rule estimated that the graphic warning labels would cause a reduction in the U.S. smoking population of 213,000 people in 2013, with smaller reductions continuing through 2031.<sup>258</sup> In financial terms, benefits estimates range from \$5.21 billion to \$13.55 billion over the same eighteen-year timespan from life-year extensions and several other expected effects of the warning labels.<sup>259</sup> In addition to the benefits from reduced smoking rates, several international studies show that, compared to text-based warnings, image-based warnings are significantly more effective at getting consumers' attention and informing them of the health risks of smoking, even if they still choose to

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255. See Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628, 26,629–36 (June 22, 2011) (codified at 21 C.F.R. § 1141 (2013)), *invalidated by* R.J. Reynolds, 696 F.3d at 1222.

256. 76 Fed. Reg. at 36,629 (June 22, 2011).

257. *Id.* at 36,632.

258. *Id.* at 36,721.

259. *Id.* at 36,727.

smoke.<sup>260</sup> For example, one study shows that since the implementation of image-based cigarette warning labels in Taiwan, consumers are now 25 percent more likely to have noticed warning labels and roughly 40 percent more likely to think about the health hazards of smoking.<sup>261</sup> Finally, studies show that image-based warning labels are significantly less likely than text-based warning labels to lose their effectiveness over time.<sup>262</sup> Overall, the amount of evidence linking the invalidated warning labels to reduced cigarette usage and greater awareness of the health risks of smoking greatly exceeds the requirements of rational basis review.

Moreover, the invalidated labels were neither unjustified nor unduly burdensome. First, had the labels been implemented, they would not have chilled tobacco companies' speech. Obviously, tobacco companies would not have forgone selling cigarettes in order to avoid publishing the labels. Additionally, the warning labels would not have covered the entire surface area of cigarette packages; instead tobacco companies would have been free to print their own speech on the bottom half of the front and back panels and 100 percent of the top, bottom, and side panels, which would have been more than sufficient for notation of brand markings and accompanying motifs.<sup>263</sup> Finally, while the labels were relatively large and delivered a powerful message, they were not unjustified given the frequency with which smoking causes premature death and debilitating disease. For the foregoing reasons, the FDA's former warning labels satisfy *Zauderer's* deferential standard and should not have been invalidated in *R.J. Reynolds*.

## CONCLUSION

Courts should apply *Zauderer's* deferential standard to non-misleading disclosure requirements regardless of whether they are meant to prevent consumer deception or whether they are factual or non-factual. Protection of commercial speech is justified by listeners' interests in the free flow of commercial

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260. *Id.* at 36,633.

261. See Fong-ching Chang, et al., *The Impact of Graphic Cigarette Warning Labels and Smoke-free Law on Health Awareness and Thoughts of Quitting in Taiwan*, 26 HEALTH EDUC. RES. 179, 183 (2011).

262. See Hammond, *supra* note 7, at 333.

263. See 21 C.F.R. § 1141.10 (2013), *invalidated by R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1222 (D.C. Cir. 2012).

information and the marketplace of ideas theory more generally. While the *Central Hudson* test applies intermediate scrutiny to restraints on commercial speech, non-misleading disclosure requirements should be subject to *Zauderer's* deferential standard because they increase the amount of commercial information available to listeners.

More specifically, the court in *R.J. Reynolds* erred in refusing to apply *Zauderer's* deferential standard to the FDA's invalidated graphic-image cigarette warning label requirement. Above all else, the marketplace of ideas theory holds that speech should not be suppressed simply because it is provocative and opinionated. Moreover, it is inconsequential to a marketplace analysis that tobacco companies are compelled to publish cigarette warning labels, as opposed to doing so voluntarily. The marketplace theory condemns government speech regulations only if they diminish the amount of information and ideas available to listeners. Under this approach, *Zauderer's* deferential standard provides the best framework for analyzing compelled commercial speech, including the FDA's warning label requirement.

Finally, the FDA's invalidated warning labels clearly satisfy *Zauderer's* deferential standard. These labels would have enhanced the marketplace of ideas by conveying a valuable perspective of the dangers of tobacco use for consumers making the life-altering decision of whether to smoke cigarettes.



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