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Smoking Out a Compromise: Splitting the Difference Through a Public Policy Approach to Resolving the Graphic Cigarette Warning Label Circuit Split

Amelia B. Larsen

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SMOKING OUT A COMPROMISE: SPLITTING THE DIFFERENCE THROUGH A PUBLIC POLICY APPROACH TO RESOLVING THE GRAPHIC CIGARETTE WARNING LABEL CIRCUIT SPLIT

AMELIA B. LARSEN*

| | | |
|------|--|-----|
| I. | INTRODUCTION | 536 |
| II. | UNDERSTANDING COMPELLED COMMERCIAL SPEECH AND THE FDA’S GRAPHIC CIGARETTE WARNING LABEL REGULATIONS | 538 |
| | A. <i>Compelled Commercial Speech under the First Amendment</i> | 538 |
| | 1. <i>The Wooley Standard</i> | 538 |
| | 2. <i>The Central Hudson Standard</i> | 539 |
| | 3. <i>The Zauderer Standard</i> | 540 |
| | B. <i>FDA’s Proposed Graphic Cigarette Warning Labels</i> | 541 |
| | C. <i>Scope of Public Health Smoking Issue</i> | 542 |
| | D. <i>Impact of Cigarette Smoking on Low-Income and Less Educated Populations</i> | 545 |
| III. | COMMERCIAL SPEECH CONSTITUTIONALITY UNDER THE <i>WOOLEY</i> STANDARD | 545 |
| | A. <i>The Wooley Standard Does Not Apply</i> | 546 |
| IV. | COMMERCIAL SPEECH CONSTITUTIONALITY UNDER THE <i>ZAUDERER</i> STANDARD | 548 |
| | A. <i>An Alternative Approach: Applicability of the Zauderer Standard to Graphic Cigarette Warning Labels</i> | 548 |
| | B. <i>Cigarette Warning Labels are Constitutional Under Zauderer</i> | 551 |
| V. | COMMERCIAL SPEECH CONSTITUTIONALITY UNDER THE <i>CENTRAL HUDSON</i> STANDARD | 553 |
| | A. <i>The Central Hudson Standard is the Most Appropriate Level of Scrutiny to Apply to Graphic Cigarette Warning Labels</i> | 553 |
| | B. <i>Application of the Central Hudson Standard to Cigarette Warning Labels</i> | 555 |
| | 1. <i>The Graphic Cigarette Warning Labels are Legal and Not Misleading</i> | 555 |
| | 2. <i>The Smoking Warnings Bear a Substantial Government Interest in Ensuring Accurate Commercial Information</i> | 555 |
| | i. <i>There is a Substantial Public Health Interest</i> | 555 |
| | ii. <i>There is a Substantial Equality Interest</i> | 556 |
| | iii. <i>There is a Substantial Economic Interest</i> | 557 |
| | 3. <i>The Smoking Warnings Directly Advance the Government’s Interest</i> | 559 |

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| | |
|--|-----|
| 4. The Smoking Warnings are No More Extensive than Necessary | 561 |
| VI. CONCLUSION | 564 |

I. INTRODUCTION

Hairdryers: “WARNING: do not use while in the shower;” sleeping pills: “WARNING: may cause drowsiness;” matches: “WARNING: contents may catch fire;” and Hershey’s Almond Bar: “WARNING: may contain traces of nuts.” Many of the products consumers purchase contain these types of product warnings. Understandably, consumers become callous to these product warnings, and they lose their efficacy. This is the problem with the current cigarette warning labels. The current warning labels have not been edited since 1984, and studies have dubbed the labels “vague,” “stale,” and “worn-out.”¹ Since warnings were first placed on cigarette packages in 1966, the prevalence of smoking in the United States has steadily declined.² However, currently, tobacco smoking declines in the U.S. have halted and rates of tobacco use have even begun to increase.³

Nowhere is this problem more apparent than among low socioeconomic populations. Consider Lindell Harvey, 54, living in Philadelphia, the poorest of the 10 largest US cities. Philadelphia also has one of the highest rates of smoking of any large city. Harvey finds that he often makes the decision to smoke cigarettes over choosing to eat. Harvey explains that his cigarettes get him through his hard days, that “[i]n [his] mind, the smoking becomes a comfort as [he] tr[ies] to create ways to get food,” and that he smokes “out of anxiety because [he doesn’t] have the food [he] need[s].”⁴ Sadly, Harvey’s story is not uncommon; many poor individuals make this same choice every day. Researchers explain that “[n]icotine gets into the part of the brain stem that creates a sense of safety, comfort, warmth. If you have to decide between buying bread or cigarettes, not buying cigarettes creates a disease and agitation in the brain that says there’s only one way to fix this situation: Just smoke.”⁵

In response to cigarette warnings’ waning efficacy Congress enacted the Family Smoking Prevention and Tobacco Control Act that gives the Food and Drug Administration (“FDA”) the authority to issue updated warnings on cigarette packaging. On June 21, 2011, the FDA released its proposed warnings. The warnings include nine pictorial messages depicting the negative consequences of

¹ U.S. DEP’T OF HEALTH & HUMAN SERVS., CTRS. FOR DISEASE CONTROL & PREVENTION, NAT’L CTR. FOR CHRONIC DISEASE PREVENTION AND HEALTH PROMOTION, OFFICE ON SMOKING AND HEALTH, PREVENTING TOBACCO USE AMONG YOUTH AND YOUNG ADULTS: A REPORT OF THE SURGEON GENERAL 716 (2012) [hereinafter SURGEON GENERAL REPORT]; see also Ellen Peters et al., *The Impact and Acceptability of Canadian-Style Cigarette Warning Labels Among U.S. Smokers and Nonsmokers*, 9 NICOTINE & TOBACCO RESEARCH 473, 473 (2007).

² Goodarz Danaei et al., *The Preventable Causes of Death in the United States: Comparative Risk Assessment of Dietary, Lifestyle, and Metabolic Risk Factors*, 6 PLOS MED 6(4): e1000058. doi:10.1371/journal.pmed.1000058, at 20 (2009).

³ *Id.*

⁴ Alfred Lubrano, *Struggling with Hunger and Poverty, and Caught in Tobacco’s Grip*, PHILA. INQUIRER, October 14, 2013.

⁵ *Id.*

smoking, including a sore-covered smoker's mouth and a cadaver with staples running up the chest.⁶ Before the FDA's warnings could even go into effect, set for September 2012, the tobacco companies filed several lawsuits challenging the warnings' constitutionality. Two of these lawsuits have been heard before the United States Federal Circuit Courts of Appeals; the decisions are split. Tobacco companies argue that the proposed warnings infringe on their First Amendment commercial speech rights. The issue regarding the government's ability to compel commercial speech regulations has not yet been resolved by the Supreme Court. This issue presents an opportunity to provide a needed solution to an unsettled issue in the dramatic legal landscape of "Big Tobacco" versus the United States government, marking this issue likely for a "Supreme Court showdown."⁷ However, after the D.C. Circuit struck down the FDA's proposed warnings, the government chose not to appeal the decision to the Supreme Court.⁸ Instead, the FDA is re-working the warnings and looking to release edited warnings in the near future.

The public health crisis' severity, and the resulting economic impact of smoking related health care costs, create a substantial governmental interest, necessitating the FDA's use of the proposed graphic warning labels. In light of the immense nature of the smoking problem, and the projected effectiveness of mandating graphic warning labels (illustrated by overwhelming scientific evidence), the proposed warnings do not infringe on the tobacco companies' limited First Amendment corporate free speech rights. The Supreme Court's precedential reasoning that the true goal of the First Amendment is to promote the efficient exchange of information strongly supports governmental imposition of disclosures of truthful information. The imposition of graphic warning labels is necessary; the tobacco market exploits the lower class by capitalizing on their under-education regarding the negative health consequences of smoking. This injustice can be corrected by providing the most direct and clear communication imaginable to consumers to ensure they are completely informed of the peril they are placing themselves in when they choose to smoke—the graphic warning labels provide this kind of communication.

This Note discusses why the FDA's warning labels meet First Amendment constitutional scrutiny and serve a substantial governmental interest regarding the country's public health, socioeconomic equality, and economy. Part II of this Note provides a background of the Court's First Amendment jurisprudence. This background section discusses the three levels of constitutional scrutiny that courts have applied to cases of compelled commercial speech. Part III of this Note establishes that the strictest of these standards, the *Wooley* standard, is not the appropriate standard to apply to the FDA's cigarette warning label regulations. Part IV of this Note provides that the Supreme Court may decide to apply the *Zauderer* rational-basis standard of scrutiny for the cigarette warning labels; the FDA

⁶ *FDA Unveils Final Cigarette Warning Labels: New labels Will Help Prevent Children from Smoking and Help Adults Quit*, U.S. DEP'T OF HEALTH & HUMAN SERVS. (June 21, 2011), <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm260181.htm>.

⁷ Steven A. Delchin, *D.C. Circuit Splits with Sixth Circuit on Color Graphic Cigarette Warnings; Supreme Court Showdown Likely*, LEXOLOGY (Aug. 28, 2012), <http://www.lexology.com/library/detail.aspx?g=7863b79d-f9a1-44b5-8543-9a36530db138>.

⁸ U.S. Dep't of Health & Human Servs., *Cigarette Health Warnings*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/TobaccoProducts/Labeling/Labeling/CigaretteWarningLabels/default.htm> (last updated June 6, 2013).

regulations are constitutional under this standard. Part V of this Note provides that the *Central Hudson* standard is the most appropriate for reviewing the cigarette warning regulations, and further provides that the regulations are constitutional under that standard. Finally, Part VI of this Note provides a conclusion that explains that governmental impositions of commercial speech limitations are constitutional, because they are motivated by serious and imminent policy concerns.

II. UNDERSTANDING COMPELLED COMMERCIAL SPEECH AND THE FDA'S GRAPHIC CIGARETTE WARNING LABEL REGULATIONS

A. *Compelled Commercial Speech under the First Amendment*

The First Amendment, as part of the Bill of Rights, protects freedom of speech. The addition of the Bill of Rights to the Constitution contemplated protecting *individual* rights; individual speech receives greater protection than commercial speech.⁹ The Supreme Court has defined commercial speech as an “expression related solely to the economic interests of the speaker and its audience.”¹⁰ While the Supreme Court has waived somewhat in limiting commercial speech’s First Amendment protection, it has rigidly retained that commercial speech does not receive the same protection as other types of speech.¹¹ Compelled commercial speech occurs where a governmental regulation requires a commercial entity to disclose specific information in its commercial communications.¹² The compelled commercial speech area has not yet been clarified by the Supreme Court.¹³ Compelled commercial speech cases adjudicated today face one of three constitutional scrutiny standards: the strict scrutiny *Wooley* standard, the intermediate scrutiny *Central Hudson* standard, and the rational-basis *Zauderer* standard.¹⁴

1. The *Wooley* Standard

The Supreme Court established the strictest of these standards in *Wooley v. Maynard*. The Supreme Court, in *Wooley*, determined that a strict scrutiny analysis is proper where the regulation at issue is not sufficiently compelling to justify

⁹ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 561 (1980); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 363-64 (1977); *Friedman v. Rogers*, 440 U.S. 1, 11 (1979) (defining commercial speech as an “expression related solely to the economic interests of the speaker and its audience”).

¹⁰ *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 561.

¹¹ Dayna B. Royal, *Resolving the Compelled-Commercial-Speech Conundrum*, 19 VA. J. SOC. POL’Y & L. 205, 213-15 (2012). See generally Samantha Rauer, *When the First Amendment and Public Health Collide: The Court’s Increasingly Strict Constitutional Scrutiny of Health Regulations that Restrict Commercial Speech*, 38 AM. J.L. & MED. 690 (2012).

¹² Royal, *supra* note 11, at 206.

¹³ *Id.*

¹⁴ *Turner Broad. Sys., Inc. v. Fed. Commc’ns Comm’n*, 512 U.S. 622, 641 (1994); *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 696 F.3d 1205, 1221-22 (2012).

requiring the compelled speech.¹⁵ The Court stated that if the governmental purpose is considered legitimate and substantial, it must next determine if the means to achieving that purpose “broadly stifle fundamental personal liberties” and whether “the end can be more narrowly achieved.”¹⁶ In *Wooley*, Jehovah’s Witness citizens in New Hampshire challenged the constitutionality of regulations requiring them to display the state’s motto, “Live Free or Die,” on their vehicle license plates.¹⁷ The Supreme Court found that the government’s goal of communicating a proper appreciation of history, state pride, and individualism could be achieved in a number of other ways than to require the state motto on its citizens’ license plates.¹⁸ The court held that the state could not constitutionally require an individual to participate in the dissemination of the state’s ideological message by displaying that message on his private property with the express purpose of it being read by the public.¹⁹ The state’s interest to disseminate its ideologies could not outweigh an individual’s First Amendment rights.²⁰

In *Wooley*, the Supreme Court determined that compelled speech is unconstitutional if the government’s interest “can be more narrowly achieved.”²¹ The *Wooley* Court thus created a two-prong standard: (1) the government must demonstrate a compelling government interest; and (2) that the compelling government interest must be narrowly tailored.²² While *Wooley* does not directly address the issue of commercial speech, the Court has subsequently applied its ruling in several First Amendment commercial speech cases.²³ The Supreme Court has not yet settled the varied application of *Wooley* to commercial speech cases.

2. The *Central Hudson* Standard

The intermediate level of scrutiny, as applied to compelled commercial speech, uses the four part *Central Hudson* test. In *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, the Public Service Commission of the State of New York issued a regulation that banned electric utilities in the State of New York from participating in any advertising that promoted the use of electricity.²⁴ The Commission issued this regulation to promote energy conservation motivated by limited state energy resources.²⁵ The *Central Hudson Gas and Electric Corporation* challenged the Commission’s regulation, arguing that the

¹⁵ *Wooley v. Maynard*, 430 U.S. 705, 716 (1977).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 717.

¹⁹ *Id.* at 705.

²⁰ *Id.*

²¹ *Id.* at 716.

²² *Id.* at 714-16.

²³ *Id.* at 705.

²⁴ *Cent. Hudson Gas & Electric Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980).

²⁵ *Id.* at 568.

regulation restrained their commercial speech in violation of the First Amendment.²⁶ The Supreme Court established that in order to receive First Amendment protection, the commercial speech regulation at issue must: (1) at least “concern lawful activity and not be misleading;” and (2) “the asserted governmental interest [must be] substantial.”²⁷ Further, the court must then determine “whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.”²⁸ The Court subsequently held that this test does not mean that the government must use the least restrictive means possible to achieve its goals.²⁹

3. The *Zauderer* Standard

Zauderer v. Office of Disciplinary Counsel of Supreme Court is the least strict of the constitutional scrutiny standards applied to cases of compelled commercial speech. Philip Zauderer, an Ohio attorney, was reprimanded by the Office of Disciplinary Counsel of the Supreme Court of Ohio for issuing advertisements that violated the Disciplinary Rules of the Ohio Code of Professional Responsibility.³⁰ The Supreme Court, in *Zauderer*, chose to adopt a more lenient standard of review than *Central Hudson*.³¹ The Court justified this less strict standard by drawing a distinction between a factual-disclosure regulation, which warranted the more lenient standard, and restrictions on commercial speech, which called for the stricter *Central Hudson* standard.³² In *Zauderer*, the Supreme Court stated that a governmental compelled disclosure that is “purely factual and uncontroversial information” does not violate any First Amendment protection so long as the speech is “reasonably related to the state’s interest in preventing” consumer deception.³³ The Court

²⁶ *Id.* at 566.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 556 (2001).

³⁰ *Zauderer* issued advertisements which were found to be misleading to potential clients. One such promise concerned an advertisement that Zauderer would refund the full legal fee to clients if they were convicted of drunk driving. The disciplinary counsel determined that this was misleading because it failed to mention the possibility of plea bargaining where the offender may be found guilty of a lesser crime and thus even though they are convicted they would still owe attorney’s fees because the charge would not be drunk driving. Another such advertisement promised targeted women who had suffered injuries as a result of using the Dalkon Shield Intrauterine Device form of contraception that they would not be responsible for legal fees. The disciplinary counsel found this advertisement misleading because it failed to mention that clients would be responsible for paying legal costs (as opposed to fees) even if their claims were unsuccessful. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985).

³¹ *See id.*

³² *Id.* at 650-51.

³³ *Id.* at 651.

reasoned this type of compelled commercial speech is not “unjustified or unduly burdensome” under the First Amendment.³⁴

While the tests established in each of these cases are well founded, their application is still subject to much debate. The Supreme Court has not established any hard and fast rule determining which standard applies where.³⁵ Federal District and Circuit Courts have established various, often contradictory frameworks concerning the application of these standards.³⁶ Compelled commercial disclosure regulations “raise the questions of whether the government violates the First Amendment when it compels commercial speakers to espouse messages they otherwise would not . . . [t]he question is difficult to resolve because it implicates a relatively new doctrine of First Amendment law that the Supreme Court has not fully clarified.”³⁷

B. FDA’s Proposed Graphic Cigarette Warning Labels

The Family Smoking Prevention and Tobacco Control Act (“FSPTCA”) was signed by President Obama on June 22, 2009.³⁸ FSPTCA gave the FDA the ability to issue updated tobacco product warnings.³⁹ FSPTCA also established that it is illegal to manufacture, package, or import for sale or distribution within the United States unless the product has the required warning labels.⁴⁰ The FDA regulations require color pictures graphically depicting the harmful health effects of smoking cigarettes.⁴¹ The proposed regulations require the pictures to be accompanied by warnings similar to those currently on cigarette packages including: “WARNING: Cigarettes are addictive;” “WARNING: Smoking can kill you;” and “WARNING: Tobacco smoke can harm your children.”⁴² Furthermore, the recent FDA requirements specify that the top 50% of the front and rear panels of cigarette packages be covered with these warnings.⁴³

³⁴ Stephanie Jordan Bennett, *Paternalistic Manipulation Through Pictorial Warnings: The First Amendment, Commercial Speech, and the Family Smoking Prevention and Tobacco Control Act*, 81 Miss. L.J. 1909, 1922 (2012) (quoting *Zauderer*, 471 U.S. at 651).

³⁵ Royal, *supra* note 11, at 208.

³⁶ A Kentucky District Court applied *Central Hudson*, rejected strict scrutiny, and did not state why *Zauderer* was inapplicable. The Federal District Court for the District of Columbia applied strict scrutiny, rejected *Zauderer*, and did not explain why *Central Hudson* was considered inapplicable. Bennett, *supra* note 34, at 1918.

³⁷ Royal, *supra* note 11, at 206.

³⁸ Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 201, 123 Stat. 1776 (2009).

³⁹ *Id.* at 1842-43.

⁴⁰ *Id.*

⁴¹ U.S. Dep’t of Health & Human Servs., *Tobacco Products, Product Requirements, Marketing & Labeling*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/TobaccoProducts/Labeling/Labeling/default.htm> (last updated Apr. 26, 2013) [hereinafter USDHHS, *Marketing & Labeling*].

⁴² Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 201, 123 Stat. 1776, 1842-43 (2009).

⁴³ *Id.*

Circuit Courts are divided not only as to whether the FDA's graphic tobacco warning regulations are constitutional, but also over which constitutional standard of review applies. In March 2012, the Sixth Circuit Court of Appeals upheld the constitutionality of the warnings in *Discount Tobacco City & Lottery, Inc. v. United States*.⁴⁴ In *Discount Tobacco* the court justified the constitutionality of the warnings under both the *Zauderer* and *Central Hudson* standards, while explicitly rejecting the *Wooley* strict scrutiny standard.⁴⁵ In August 2012, the District of Columbia Circuit Court of Appeals struck down the tobacco warning labels in the *R.J. Reynolds Tobacco Co. v. FDA* case.⁴⁶ The court held that the graphic cigarette warning labels were unconstitutional, applying solely *Central Hudson's* intermediate level of scrutiny.⁴⁷ These regulations on cigarette packaging were initially intended to take effect by September 22, 2012.⁴⁸ However, the warnings are now indefinitely suspended due to an injunction issued after the *RJ Reynolds* decision.⁴⁹ In December 2012, the District of Columbia Circuit Court of Appeals denied the FDA's request to rehear the *RJ Reynolds* case.⁵⁰ The FDA had ninety days from the date the court denied the rehearing to petition for certiorari to the Supreme Court, and it chose not to appeal but rather to create different proposed warnings.⁵¹ The *RJ Reynolds* case created a circuit split which has pegged this issue as a target for review by the Supreme Court in the upcoming months: "a high profile case pitting a major public health initiative against corporate free speech rights."⁵²

C. Scope of Public Health Smoking Issue

This sizable impact on Americans' health led the Supreme Court to declare that "tobacco use...poses perhaps the single most significant threat to public health in the United States."⁵³ Smoking is the number one preventable cause of death in the

⁴⁴ *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509 (6th Cir. 2012).

⁴⁵ *Id.*

⁴⁶ *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 696 F.3d 1205 (D.C. Cir. 2012).

⁴⁷ *Id.*

⁴⁸ 76 C.F.R. § 36628 (2011).

⁴⁹ USDHHS, *Marketing & Labeling*, *supra* note 41; see also Robyn Hagan Cain, *FDA Gets Burned in Graphic Warning Label Appeal*, THE FINDLAW DC CIRCUIT COURT OF APPEALS NEWS & INFORMATION BLOG (Aug. 24, 2012), http://blogs.findlaw.com/dc_circuit/2012/08/fda-gets-burned-in-graphic-warning-label-appeal.html.

⁵⁰ Jessica M. Karmasek, *Federal Appeals Court Denies FDA's Request for Rehearing in Graphic Tobacco Label Case*, LEGAL NEWSLINE LEGAL JOURNAL (Mar. 26, 2014), <http://legalnewsline.com/tobacco/239032-federal-appeals-court-denies-fdas-request-for-rehearing-in-graphic-tobacco-label-case>.

⁵¹ Michael Felberbaum, *Court Denies Rehearing on Cigarette Warnings*, THE BIG STORY (Dec. 5, 2012, 2:59 PM), <http://bigstory.ap.org/article/court-denies-rehearing-cigarette-warnings>.

⁵² Delchin, *supra* note 7.

⁵³ *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000).

United States, claiming 467,000 lives every year.⁵⁴ In fact, smoking causes more deaths each year than AIDS, alcohol, car accidents, murders, suicides, drugs, and fires combined.⁵⁵ Additionally, smoking causes or contributes to over 16 types of cancer, heart disease, cerebrovascular disease, chronic bronchitis, and emphysema.⁵⁶ In particular, 30% of all cancer deaths and 87% of all lung cancer deaths can be attributed to smoking.⁵⁷ The impact of the smoking public health crisis on the American health care industry is overwhelming: smoking accounts for 75% of American health care spending.⁵⁸

While many assume that the prevalence of smoking is decreasing due to widespread awareness of the health consequences of smoking; in reality, for the first time in fifty years, tobacco consumption in the United States is increasing.⁵⁹ In the United States today, roughly 20% of the adult population are cigarette smokers.⁶⁰

⁵⁴ NAT'L CANCER INST., DIVISION OF EXTRAMURAL ACTIVITIES, PRESIDENT'S CANCER PANEL ANNUAL REPORT, PROMOTING HEALTHY LIFESTYLES (2007) [hereinafter PRESIDENT'S CANCER REPORT]; FACT SHEET, CAMPAIGN FOR TOBACCO-FREE KIDS, TOLL OF TOBACCO IN THE UNITED STATES OF AMERICA (Nov. 9, 2012), available at http://www.tobaccofreekids.org/research/factsheets/pdf/0072.pdf?utm_source=factsheets_finder&utm_medium=link&utm_campaign=analytics; U.S. DEP'T OF HEALTH & HUMAN SERVS., CNTRS. FOR DISEASE CONTROL & PREVENTION, MORBIDITY & MORTALITY WEEKLY REPORT, SMOKING-ATTRIBUTABLE MORTALITY, YEARS OF POTENTIAL LIFE LOST, AND PRODUCTIVITY LOSSES—UNITED STATES, 2000–2004 (2008); see also Danaei et al., *supra* note 2, at 9 (467,000 deaths each year, works out to be about 1 of every 5 deaths in America). Experts report that “smoking remains the largest preventable source of mortality in the United States. Peters et al., *supra* note 1, at 473. Specifically, among men smoking is the leading cause of death: 21% of all adult male deaths. Smoking kills approximately 248,000 men each year. PRESS RELEASE, HARVARD SCHOOL OF PUBLIC HEALTH, SMOKING, HIGH BLOOD PRESSURE & BEING OVERWEIGHT TOP THREE PREVENTABLE CAUSE OF DEATH IN THE U.S. (Apr. 27, 2009), available at <http://www.hsph.harvard.edu/news/press-releases/2009-releases/smoking-high-blood-pressure-overweight-preventable-causes-death-us.html> [hereinafter HARVARD PUBLIC HEALTH PRESS RELEASE]. Half of all adult smokers eventually die prematurely from tobacco-related ailments. SURGEON GENERAL REPORT, *supra* note 1, at 3.

⁵⁵ PRESIDENT'S CANCER REPORT, *supra* note 54.

⁵⁶ *Id.* Additionally, roughly 8.6 million Americans suffer from these smoking induced chronic illnesses. U.S. DEP'T OF HEALTH & HUMAN SERVS., CNTRS. FOR DISEASE CONTROL & PREVENTION, MORBIDITY AND MORTALITY WEEKLY REPORT, CIGARETTE SMOKING-ATTRIBUTABLE MORBIDITY—UNITED STATES, 2000, at 842 (2003).

⁵⁷ Lila J. Finney Rutten et al., *Smoking Knowledge and Behavior in the United States: Sociodemographic, Smoking Status, and Geographic Patterns*, 10 NICOTINE & TOBACCO RESEARCH 1559, 1559 (2008).

⁵⁸ SURGEON GENERAL REPORT, *supra* note 1, at 3. Considering the health maladies that come with smoking cigarettes, experts have estimated that tobacco-related illnesses contribute over \$193 billion per year in health care expenditures and lost productivity. Matt Shechtman, *Smoking Out Big Tobacco: Can the Family Smoking Prevention and Tobacco Control Act Equip the FDA to Regulate Tobacco Without Infringing on the First Amendment?*, 60 EMORY L.J., 705, 707 (2011).

⁵⁹ Shechtman, *supra* note 58, at 707. However, in 2007 congressional hearings revealed that the prevalence of smoking among adults has been cut in half from 42% to 21% since 1965.

⁶⁰ *Id.*

Additionally, the perils of smoking disproportionately burden Americans of lower socioeconomic statuses.⁶¹ Lower socioeconomic status has been associated with a higher prevalence of smoking in many countries, including the United States.⁶²

Children are another especially vulnerable consideration to be taken into account when discussing the smoking public health crisis. Children are especially susceptible to misunderstanding the health consequences of smoking.⁶³ In fact, most adult smokers today picked up the habit when they were younger; 88% of adult daily smokers began smoking by the time they were 18.⁶⁴ Experts attribute this phenomenon to adolescent vulnerability to the social influences created by the heavy marketing efforts of tobacco companies and the “modeling of smoking by attractive role models, as in movies, which have especially strong effects on the young.”⁶⁵ The effectiveness of tobacco companies’ marketing efforts is evident by the fact that 80% of youth smoke the most heavily marketed brands of cigarettes, while only 54% of adults 26 and older smoke those same brands.⁶⁶

The tobacco companies’ strong marketing efforts have understandably caused the current cigarette warning labels to become less effective. The warnings were edited in 1984, which was the only change to the warnings since their introduction in 1966.⁶⁷ Thus, for years experts have advocated for larger pictorial warnings that would be “easily understood by those with low literacy skills, including young children, youth with lower levels of education, and youth who may be literate but not in the language of the text warnings, such as young people in some immigrant families.”⁶⁸

⁶¹ Rutten et al., *supra* note 57, at 1563. (“[R]espondents were asked, ‘Can you think of anything people can do to reduce their chances of getting cancer?’ . . . Identification of ‘quit smoking’ increased significantly with reported income and education.”).

⁶² SURGEON GENERAL REPORT, *supra* note 1, at 433. This trend was also reported in France, Germany, and India. *Id.* See generally Sean P. Flanagan, *Up in Smoke? Commercial Free Speech in the United States and the European Union: Why Comprehensive Tobacco Advertising Bans Work in Europe, But Fail in the United States*, 44 SUFFOLK U. L. REV. 211 (2011).

⁶³ RICHARD J. BONNIE ET AL., ENDING THE TOBACCO PROBLEM: A BLUEPRINT FOR THE NATION, appendix E at 485, 490 (2007) (Adolescents tend “to underestimate or be uninformed about the difficulty of stopping smoking . . . they are less likely to believe that the risk of addiction and related health consequences apply to them.”).

⁶⁴ SURGEON GENERAL REPORT, *supra* note 1, at 3. Ninety-eight percent of adult smokers began smoking by the time they were 25. *Id.* at 852.

⁶⁵ *Id.* at 3. Tobacco companies spent \$9.94 billion on marketing cigarettes alone in 2008. *Id.* at 9-10.

⁶⁶ Discount Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 521 (6th Cir. 2012). See generally Clay Calvert, Wendy Allen-Brunner & Christina M. Locke, *Playing Politics or Protecting Children? Congressional Action & A First Amendment Analysis of the Family Smoking Prevention and Tobacco Control Act*, 36 J. LEGIS. 201 (2010).

⁶⁷ SURGEON GENERAL REPORT, *supra* note 1, at 715.

⁶⁸ *Id.* at 718-19. A study of current Canadian pictorial cigarette warnings reported that 80% of youth found the pictorial warnings more noticeable and 95% reported that the warning communicated the risks of smoking better than text-only warnings. *Id.* at 717.

D. Impact of Cigarette Smoking on Low-Income and Less Educated Populations

While the effect of cigarette smoking on American society is overwhelming, it is particularly poignant when put into perspective of its disproportionate impact on those from lower-income and less educated populations than on those from higher-income and more educated populations. This is particularly alarming considering the rate at which the price of cigarettes is increasing, meaning the cost is becoming more and more of a burden on those from poor populations. To put things into perspective, at current prices, a single, low-income household, with a parent who smokes two packs of cigarettes a day, will spend at least 25% of their income on cigarettes.⁶⁹ The tobacco companies have recognized this discrepancy, and “[t]hrough market research and aggressive promotions, the industry has successfully penetrated these communities and the industry’s ‘investment’ in these communities has had a destructive impact.”⁷⁰

Education is also a strong indicator of whether a person will be a smoker or not: 41.9% of adults with a GED, 23.1% of adults with a high school diploma, 9.1% of adults with an undergraduate degree, and 5.9% of adults with a postgraduate degree smoke cigarettes.⁷¹ Additionally, just 39.9% of those with a GED make attempts to quit compared to 80.7% of those with a graduate degree.⁷²

Even more devastating is the fact that those families who are most poor will often be faced with the decision between providing food for their families or supporting their cigarette addiction; that choice has unfortunately often been cigarettes over food. In fact, “[l]ow income families who [are] food insecure [are] more likely to have a head of household or spouse who smoke[s] cigarettes than low-income families who [are] food secure.”⁷³

III. COMMERCIAL SPEECH CONSTITUTIONALITY UNDER THE *WOOLEY* STANDARD

In content-based speech restriction cases, courts default to a strict scrutiny test.⁷⁴ Courts have established a few “narrow and well-understood exceptions” to the strict scrutiny default rule: the *Zauderer* and *Central Hudson* standards.⁷⁵ The *Wooley*

⁶⁹ Peter Franks et al., *Cigarette Prices, Smoking, and the Poor: Implications of Recent Trends*, 97 AM. J. OF PUB. HEALTH 1873, 1876 (2007).

⁷⁰ FACT SHEET, CAMPAIGN FOR TOBACCO-FREE KIDS, TOBACCO AND SOCIOECONOMIC STATUS (Jan. 31, 2013), available at <http://www.tobaccofreekids.org/research/factsheets/pdf/0260.pdf>.

⁷¹ CTRS. FOR DISEASE CONTROL & PREVENTION, ADULT CIGARETTE SMOKING IN THE UNITED STATES: CURRENT ESTIMATES (Feb. 14, 2014), available at http://www.cdc.gov/tobacco/data_statistics/fact_sheets/adult_data/cig_smoking.

⁷² Anita Fernader et al., *Cigarette Smoking Interventions Among Diverse Populations*, 25 AMERICAN J. OF HEALTH PROMOTION S1, S4 (2011).

⁷³ Brian S. Armour et al., *Cigarette Smoking and Food Insecurity among Low-Income Families in the United States, 2001*, FEDERAL RESERVE BANK OF ATLANTA WORKING PAPER SERIES, 4 (Aug. 2007).

⁷⁴ Bennett, *supra* note 34, at 1916.

⁷⁵ R.J. Reynolds Tobacco Co. v. Food & Drug Admin., 696 F.3d 1205, 1212 (D.C. Cir. 2012) (quoting *Turner Broad Sys. Inc. v. Fed. Comm’n’s Comm’n*, 512 U.S. 622 (1994)). Two primary exceptions exist within the commercial speech context: (1) the *Zauderer*

strict scrutiny standard was not initially intended to apply to commercial speech cases.⁷⁶ However, many courts have subsequently applied the *Wooley* standard to First Amendment challenges concerning commercial speech.⁷⁷

The Supreme Court has not yet chosen to settle the varied application amongst these different standards. Thus, different circuit courts apply the standards differently. Some courts draw the distinction that *Wooley* should be applied to disclosures of information that are “subjective and highly controversial,” while others believe that *Wooley* is applicable when the government “prescribe[s] what shall be orthodox in politics, nationalism, religion or other matters of opinion. . . .”⁷⁸ No matter what distinction is drawn regarding the applicability of the *Wooley* standard, it remains that it is not the appropriate standard to apply to the FDA’s cigarette warning labels. The labels do not threaten the First Amendment so strongly that a *Wooley* strict scrutiny review would be considered necessary.

A. The *Wooley* Standard Does Not Apply

The *Wooley* strict scrutiny standard is not necessary in the context of cigarette warning labels. While no circuit court has chosen to apply the *Wooley* strict scrutiny standard, the tobacco companies in *RJ Reynolds* and *Discount Tobacco* asserted that the *Wooley* standard should apply.⁷⁹ The D.C. Circuit Court of Appeals argued that strict scrutiny applied when the government seeks to compel individuals to express certain views or speech with which they do not agree.⁸⁰ This principle does not apply to cigarette warning labels, as the labels do not compel individuals to disseminate any message at all. The Court attempted to expand this notion, which was initially held in an individual context (individual New Hampshire residents), to corporate compelled speech by citing the *Pacific Gas and Electric Co. v. Public Utilities Commission* plurality opinion.⁸¹ But in contrast to individuals, the tobacco companies are the ones required to disclose government-mandated warnings. It is a well-established constitutional tenet that the First Amendment does not afford the same protections to commercial speech as to individual speech.

exception, applied in instances of “purely factual and uncontroversial” disclosures; and (2) the *Central Hudson* exception, simply that commercial speech is afforded less First Amendment speech protection than individual speech. *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 579 (1980).

⁷⁶ *Wooley v. Maynard*, 430 U.S. 705 (1977).

⁷⁷ *Bennett*, *supra* note 34, at 1917.

⁷⁸ *Ent. Software Ass’n v. Blagojevich*, 469 F.3d 641, 651 (7th Cir. 2006); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

⁷⁹ *R.J. Reynolds Tobacco Co.*, 696 F.3d 1205; *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509 (6th Cir. 2012).

⁸⁰ *R.J. Reynolds Tobacco Co.*, 696 F.3d at 1211. *See generally* Robert Post, *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Association in United Foods, Zauderer, and Abood*, 40 VAL. U. L. REV. 555 (2006).

⁸¹ *R.J. Reynolds Tobacco Co.*, 696 F.3d at 1211; *see also* *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 16 (1986).

The FDA's proposed cigarette warning labels are not threatening to the underlying goal of the First Amendment freedom of commercial speech, and thus, the *Wooley* strict scrutiny standard is inappropriate. The tobacco companies, in *RJ Reynolds*, urged that the government's ideological message is "that the risks from smoking outweigh the pleasure that smokers derive from it, and that smokers make bad personal decisions, and should stop smoking."⁸² This position is supported by the tobacco company's citation of the Seventh Circuit's decision in *Entertainment Software Association v. Blagojevich*.⁸³ The court in *Blagojevich* held that placing a four-inch square sticker with "18" onto video games that contained sexually explicit content, representing the game should only be used by eighteen year olds, was a violation of a strict scrutiny review—the stickers were unconstitutional.⁸⁴ Several courts have rejected similar attempts in applying *Blagojevich* in order to apply strict scrutiny to cases of compelled commercial speech.⁸⁵ Courts have distinguished video game warnings, stating that determining what is or is not sexually explicit is a subjective measure.⁸⁶ In contrast with graphic cigarette warning labels, the dangers of smoking are not subjective. Studies conclusively show that smoking is highly detrimental to one's health.⁸⁷ The cigarette warning labels do not present a strong enough challenge to the First Amendment commercial speech standard to warrant a strict scrutiny review. Considering that neither the Sixth nor the District of Columbia Circuit Courts applied the *Wooley* strict scrutiny standard of review in the cases challenging the graphic cigarette warning labels, it is clearly not the proper standard to apply. The warning labels do not cross the necessary threshold for strict scrutiny to apply.

The government interest at issue behind enacting the graphic cigarette warning labels is starkly different from the government interest in *Wooley*. The government interest in requiring the state motto on license plates in *Wooley* was to promote the state's history and distinguish passenger plates from license plates on other types of vehicles (i.e. commercial vehicles and trailers).⁸⁸ These governmental interests are not substantially compelling or important; they are no matter of life and death, whereas the governmental interest behind the graphic cigarette warning labels is a matter of life and death for American citizens; the interest is substantially compelling. The tobacco companies' attempts to equate the non-compelling governmental interest at issue in *Wooley* with the government's interest in regulating graphic cigarette warning labels is grossly inappropriate and unconvincing.

⁸² *R.J. Reynolds Tobacco Co.*, 696 F.3d at 1211.

⁸³ *Id.* at 1217.

⁸⁴ *Ent. Software Ass'n v. Blagojevich*, 469 F. 3d 641 (7th Cir. 2006).

⁸⁵ *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509 (6th Cir. 2012); *Commonwealth Brands, Inc. v. United States*, 678 F. Supp. 2d 512 (W.D. Ky. 2010); *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950 (9th Cir. 2009).

⁸⁶ *Discount Tobacco City & Lottery, Inc.*, 674 F.3d at 561.

⁸⁷ See SURGEON GENERAL'S REPORT, *supra* note 1.

⁸⁸ *Wooley v. Maynard*, 430 U.S. 705, 716 (1977).

IV. COMMERCIAL SPEECH CONSTITUTIONALITY UNDER THE *ZAUDERER* STANDARD

The underlying purpose of First Amendment protection of speech supports the argument that the *Zauderer* standard is the appropriate standard to apply to graphic cigarette warning labels. Compelled commercial disclosures of speech are treated with a more lenient standard of constitutional scrutiny for a reason:

Commercial disclosure requirements are treated differently from restrictions on commercial speech because mandated disclosure of accurate, factual, commercial information does not offend the core First Amendment values of promoting efficient exchange of information or protecting individual liberty interests. Such disclosure furthers, rather than hinders, the First Amendment goal of the discovery of truth and contributes to the efficiency of the “marketplace of ideas.” Protection of the robust and free flow of accurate information is the principal First Amendment justification for protecting commercial speech, and requiring disclosure of truthful information promotes that goal. In such a case, then, less exacting scrutiny is required than where truthful, nonmisleading commercial speech is restricted.⁸⁹

Courts have held that the First Amendment assumes disclosing some truthful information to consumers is preferable to no information being communicated whatsoever.⁹⁰ The cigarette warning labels informing consumers about smoking health hazards are preferable and advance “the First Amendment goal of the discovery of truth.”

A. An Alternative Approach: Applicability of the Zauderer Standard to Graphic Cigarette Warning Labels

While this Note contends that in light of the Supreme Court’s recent swing towards stronger corporate protections under the First Amendment the *Central Hudson* standard will be the more likely standard to be applied by the Supreme Court in its inevitable taking up of the graphic cigarette warning label issue, it is also foreseeable that the court will be persuaded that the *Zauderer* standard is most appropriate. Many scholars, and the Sixth Circuit, in its decision in *Discount Tobacco*, contend that the *Zauderer* standard is clearly most applicable.⁹¹ Courts

⁸⁹ Nat’l Elec. Mfrs. Ass’n v. Sorrell, 272 F.3d 104, 114-15 (2d Cir. 2001); see also *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985) (“Thus, in virtually all our commercial speech decisions to date, we have emphasized that because disclosure requirements trench much more narrowly on an advertiser’s interest than do flat prohibitions on speech, ‘warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception.”); *In re R.M.J.*, 455 U.S. 191, 201 (1982); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 (1976).

⁹⁰ *Bates v. State Bar of Ariz.*, 433 U.S. 350, 374-75 (1977); see also *Zauderer*, 471 U.S. at 646 (“[R]ecent decisions involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful.”).

⁹¹ *Discount Tobacco City & Lottery, Inc.*, 674 F.3d at 524; Richard F. Lee, *A Picture is Worth a Thousand Words: The Marketplace of Ideas and the Constitutionality of Graphic-*

have found *Zauderer* applicable in instances where the speech would be misleading to consumers without the disclosure imposed by the government.⁹² *Zauderer* has been applied in cases where the commercial speech is inherently misleading, potentially misleading, or where the “speech is not provably false, or even wholly false, but only deceptive or misleading.”⁹³ The Supreme Court explained the *Zauderer* standard, stating that when the challenged disclosure is (1) “directed at misleading commercial speech;” and (2) “imposes a disclosure requirement rather than an affirmative limitation on speech, the less exacting scrutiny set out in [*Zauderer*] governs.”⁹⁴ The deceptive history of tobacco companies could justify government mandated disclosures of health warnings to consumers, indicating that the lenient *Zauderer* standard would be the proper standard to apply to the graphic warning labels.

The D.C. Circuit Court, in *RJ Reynolds*, inappropriately rejected applying *Zauderer* by repeatedly relying on shaky precedent, using plurality, concurring, and dissenting opinions.⁹⁵ The Court is hasty in stating that consumers are not misled under the current cigarette warnings.⁹⁶ The D.C. Circuit Court argues that while the tobacco companies’ representations regarding “light” or “low tar” cigarettes in the past were misleading, these statements are now prohibited.⁹⁷ Thus, it is no longer an issue. In *Warner-Lambert Co. v. FTC*, the Supreme Court held that the discontinuation of misleading advertisements does not correct public perceptions that were created by those misleading contentions.⁹⁸ In *Warner-Lambert*, the Court required Listerine to publish disclosures on future advertisements after misleading advertisements claimed that using Listerine could cure a sore throat and prevent colds.⁹⁹ The Court held that the disclosure statements were necessary to “dissipate the effects of respondent’s deceptive representations.”¹⁰⁰ Some courts have found that “the government’s interest in preventing consumer fraud/confusion may well take on added importance in the context of a product . . . that can affect the public health.”¹⁰¹ The warning labels are even more justified than those in *Warner-Lambert*,

Image Cigarette Warning Labels and Other Commercial Disclosure Requirements, 84 U. COLO. L. REV. 1179 (2013); Timothy J. Straub, *Fair Warning?: The First Amendment, Compelled Commercial Disclosures, and Cigarette Warning Labels*, 40 FORDHAM URB. L.J. 1201 (2013); Michael S. Samsel, *Clearing the Air: The Constitutionality of the FDA’s Discarded Tobacco Warning Labels and the Resulting Implications on the FDA’s Future Warning Labels*, 13 CONN. PUB. INT. L.J. 111 (2013).

⁹² *Discount Tobacco City & Lottery, Inc.*, 674 F.3d at 524.

⁹³ *Id.*

⁹⁴ *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 230 (2010).

⁹⁵ *See generally* *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 696 F.3d 1205 (D.C. Cir. 2012).

⁹⁶ *Id.* at 1214-15.

⁹⁷ *Id.* at 1230-31.

⁹⁸ *See Warner-Lambert Co. v. Fed. Trade Comm’n*, 562 F.2d 749, 764 (D.C. Cir. 1977).

⁹⁹ *Id.* at 753.

¹⁰⁰ *Id.* at 769.

¹⁰¹ *Pearson v. Shalala*, 164 F.3d 650, 656 (D.C. Cir. 1999).

because the consequences of consumer misperceptions at stake here (cancer, death, addiction, etc.) are far more detrimental.

The tobacco companies' marketing has historically been misleading and thus subject to the *Zauderer* standard. The court could find that a company has a tendency to present misleading information to consumers if it believes that the company attempted to capitalize on prior deceptions by advertising in a way that relies on and builds off of consumers' existing misperceptions.¹⁰² In response to a RICO action against tobacco giant Phillip Morris, the District Court of the District of Columbia mandated that Phillip Morris publish corrective statements, like those issued in the *Warner-Lambert* case via newspapers, television advertisements, retail displays, and on their corporate websites.¹⁰³ The corrective statements addressed many topics of deception by the tobacco companies including the dangers of secondhand smoke, the addictive nature of cigarettes, and the fabrication that "light" or "low-tar" cigarettes are less harmful.¹⁰⁴ Each statement will include the following introduction: "A Federal Court has ruled that the Defendant tobacco companies deliberately deceived the American public about the health effects of smoking, and has ordered those companies to make this statement. Here is the truth."¹⁰⁵ Tobacco companies have a long history of consumer manipulation; tobacco company executives "publicly denied and distorted the truth about the addictive nature of [nicotine], . . . and denie[d] their efforts to control nicotine levels . . . [while] engineer[ing] their products around creating and sustaining . . . addiction."¹⁰⁶

¹⁰² *United States v. Phillip Morris USA, Inc.*, 566 F.3d 1095, 1144-45 (D.C. Cir. 2009).

¹⁰³ *United States v. Phillip Morris USA, Inc.*, 907 F. Supp. 2d 1 (D.D.C. 2012). These mandated corrective statements are to address five topics established by the court:

- (a) the adverse health effects of smoking; (b) the addictiveness of smoking and nicotine; (c) the lack of any significant health benefit from smoking 'low tar,' 'light,' 'ultra light,' 'mild,' and 'natural,' cigarettes; (d) [Phillip Morris'] manipulation of cigarette design and composition to ensure optimum nicotine delivery; and (e) the adverse health effects of exposure to secondhand smoke.

Id.

¹⁰⁴ *Id.* Here are a few examples of the statements:

"Smoking kills, on average, 1200 Americans. Every day."; "When you smoke, the nicotine actually changes the brain—that's why quitting is so hard."; "All cigarettes cause cancer, lung disease, heart attacks, and premature death—lights, low tar, ultra lights, and naturals. There is no safe cigarette."; "Defendant tobacco companies intentionally designed cigarettes to make them more addictive."; and "Secondhand smoke kills over 3,000 Americans each year."

Id. at 8-9.

¹⁰⁵ *Id.* at 8.

¹⁰⁶ *Phillip Morris USA, Inc.*, 566 F.3d at 1107; *id.* at 1124 (stating that the tobacco company executives "knew of their falsity [of their statements] at the time and made the statements with intent to deceive"); *see also* Bennett, *supra* note 34, at 1931 n.106 (citing Stuart Elliot, *When Doctors, and Even Santa, Endorsed Tobacco*, N.Y. TIMES, Oct. 7, 2008, at B3; *In Old Ads, Doctors and Babies Say "Smoke"*, N.Y. TIMES, http://www.nytimes.com/slideshow/2008/10/06/business/media/20081006_CigaretteAd_Slideshow_ready_index.html).

People with lower levels of education are less equipped to sort out these commonplace misperceptions, making them particularly vulnerable to the tobacco industry's history of deception. The second element governing the application of *Zauderer*, that the requirement be a "disclosure requirement rather than an affirmative limitation on speech," is also satisfied—the challenge is a disclosure of information on cigarette packages.¹⁰⁷ Considering the duration and extent of the tobacco companies' deception to consumers, many argue that the *Zauderer* standard is the correct standard to apply to graphic cigarette warnings.

B. Cigarette Warning Labels are Constitutional Under Zauderer

While the *Zauderer* court established a more lenient standard of review for factual commercial disclosures, it also recognized that disclosure requirements are not devoid of First Amendment protection.¹⁰⁸ The Supreme Court recognized that disclosures that are "unjustified or unduly burdensome . . . might offend the First Amendment . . ." ¹⁰⁹ The tobacco companies argue that the proposed warnings are unduly burdensome, because they shrink their ability to display product brands, constructively eliminating communication with consumers at the point of sale.¹¹⁰ The Sixth Circuit Court directly rejected this argument, pointing out that half of cigarette packaging remains available for brand identification.¹¹¹

The Supreme Court, in *Zauderer*, established that in order for the regulation to survive a constitutional challenge under the First Amendment, the disclosures must be "purely factual and uncontroversial."¹¹² The tobacco companies argue that the graphic warnings are subjective and go beyond being "purely factual."¹¹³ The dissent in *RJ Reynolds* suggests that "the emotive quality of the selected images does not necessarily undermine the warnings' factual accuracy."¹¹⁴ The majority in *RJ Reynolds* points out that the Supreme Court has only applied *Zauderer* when the challenged disclosures were not subject to misinterpretation by consumers.¹¹⁵ The court then argues that the FDA's proposed warning labels could be misinterpreted by consumers.¹¹⁶ The court focuses this argument around the proposed warning that has a picture of a smoker blowing cigarette smoke out of a tracheotomy hole.¹¹⁷ The

¹⁰⁷ *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 229 (2010).

¹⁰⁸ *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985).

¹⁰⁹ *Id.*

¹¹⁰ *Calvert, Allen-Brunner & Locke, supra* note 66, at 226; *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 524 (6th Cir. 2012).

¹¹¹ *Discount Tobacco City & Lottery, Inc.*, 674 F.3d at 525.

¹¹² *Zauderer*, 471 U.S. at 651.

¹¹³ *Discount Tobacco City & Lottery, Inc.*, 674 F.3d at 528.

¹¹⁴ *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 696 F.3d 1205, 1230 (D.C. Cir. 2012).

¹¹⁵ *Id.* at 1232-33.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 1233-34.

court asserts that this warning label requires “significant extrapolation” on the part of the consumer to understand the FDA’s contention that the picture symbolizes the addictive nature of cigarettes.¹¹⁸ Throughout its argument, the court conveniently ignores the fact that the picture is accompanied by the text “WARNING: Cigarettes are addictive.”¹¹⁹ Hence, the FDA’s intended message behind the picture does not require any “significant extrapolation” on the part of the consumer; its meaning is clear. In fact, the warning even provides a good example of how a picture can provide the consumer with better information about the health effects of smoking than a textual warning. The picture illustrates that cigarettes are so addictive that many struggle to quit even after experiencing major health consequences; 50 percent of those diagnosed with neck and head cancer continue to smoke.¹²⁰ A textual warning that “Cigarettes are addictive,” fails to adequately communicate the overpowering nature of cigarette addiction, while the addition of the picture makes for a much more informative warning.

The Supreme Court further clarified the *Zauderer* standard, stating that the commercial entity’s rights are “adequately protected as long as disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers.”¹²¹ The Sixth Circuit dissenting opinion in *Discount Tobacco* contended that the large scale pictorial warnings are simply unprecedented, and the government fails to establish that the warnings are reasonably tailored to the goal of preventing consumer deception.¹²² While, there are no other consumer products with comparably strong warnings, the strength of the warning labels should be unprecedented, because the public health tobacco crisis is unprecedented. The toll smoking cigarettes is taking on the United States’ public health and health care costs, warrants warnings that force consumers to pay attention and recognize the harms they are subjecting themselves to.

The scientific evidence relied upon by the FDA supports the salience of using graphic warnings, demonstrating that they are reasonably related to providing consumers with accurate information about the hazards of smoking.¹²³ The Court also suggests that the pictorial warnings “evoke a visceral response that subsumes rational decision making.”¹²⁴ While the current textual-only cigarette warnings are

¹¹⁸ *Id.* at 1216 (“[T]he image of a man smoking through a tracheotomy hole might be misinterpreted as suggesting that such a procedure is a common consequence of smoking.”).

¹¹⁹ 76 C.F.R. § 36628 (2011).

¹²⁰ *R.J. Reynolds Tobacco Co.*, 696 F.3d at 1232 (explaining some of the other graphic warning label images: the picture of the autopsy supports the warnings that “smoking can kill you,” the picture of a baby enveloped in smoke supports the warning that “tobacco smoke can harm your children” and “tobacco smoke causes fatal lung disease in nonsmokers,” and the picture of a healthy man wearing a T-shirt that says “I Quit” demonstrates the warning that “quitting smoking now greatly reduces serious risks to your health”).

¹²¹ *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 651 (1985).

¹²² *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 528 (6th Cir. 2012).

¹²³ *R.J. Reynolds Tobacco Co.*, 696 F.3d at 1284-85.

¹²⁴ *Discount Tobacco City & Lottery, Inc.*, 674 F.3d at 529.

unnoticed, the new graphic warning labels are doing just the opposite of the court's suggestion: the warnings inform consumers of tobacco health risks, so they are well equipped to make a rational decision before deciding to light up.¹²⁵ When the *Zauderer* standard is applied to the cigarette warning labels, it becomes overwhelmingly clear that the warnings are constitutional. The FDA's proposed warning labels are aimed at overcoming tobacco advertising's seedy past and bringing tobacco products into the current market where consumers can expect to be sufficiently warned when they purchase particularly harmful products.

V. COMMERCIAL SPEECH CONSTITUTIONALITY UNDER THE *CENTRAL HUDSON* STANDARD

An analysis of the four part *Central Hudson* test illustrates that the FDA's warning labels will pass constitutional muster, because they address a serious public health issue, one in which desperate measures are called for. Without the imposition of the FDA's pictorial warning labels, Americans will continue to choose to smoke without fully understanding the associated health consequences.

A. *The Central Hudson Standard is the Most Appropriate Level of Scrutiny to Apply to Graphic Cigarette Warning Labels*

When the day inevitably comes that the Supreme Court is faced with addressing the issue of whether graphic cigarette warning labels infringe on a corporation's First Amendment freedom of speech, the *Central Hudson* standard would be the most appropriate standard to apply. The two circuit court cases, which addressed the constitutionality of graphic cigarette warning labels, differed largely based on their findings on the applicability of *Central Hudson*. While many scholars have argued that, when the Supreme Court does address the constitutionality of graphic cigarette warning labels it will find that the *Zauderer* standard is most appropriate. However, these arguments fail to consider the current corporate friendly lean the court has taken. This corporate friendly lean has been illustrated by the court in recent decisions like *Citizens United v. Federal Election Commission* and *Sorrell v. IMS Health*.¹²⁶ In *Citizens United*, the Supreme Court found that corporations are entitled to freedom of political speech under the First Amendment in the form of campaign financial support.¹²⁷ In *Sorrell*, the Supreme Court found that a Vermont statute, which prohibited the sale of pharmacy records that reveal the prescribing practices of individual doctors, was a violation of the plaintiff corporation's First Amendment rights.¹²⁸ With this recent track record of corporate favoritism, it would be prudent for the FDA to be prepared to face a higher level of scrutiny with the Supreme Court. The Supreme Court could assert that the government is required to meet a higher burden to ensure that the graphic warning labels are completely necessary for addressing the government's substantial interest in reducing smoking prevalence.

¹²⁵ Peters et al., *supra* note 1, at 479; *see also* SURGEON GENERAL REPORT, *supra* note 1, at 716.

¹²⁶ *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011).

¹²⁷ *Citizens United*, 558 U.S. at 310.

¹²⁸ *Sorrell*, 131 S. Ct. 2653.

One of the main differences in the D.C. Circuit's holding in *R.J. Reynolds*, and the Sixth Circuit's decision in *Discount Tobacco*, was the very thing being challenged. In *Discount Tobacco*, the Sixth Circuit found the Family Smoking Prevention and Tobacco Control Act itself to be constitutional—prior to the FDA even unveiling any proposed warning labels.¹²⁹ Thus, it was easier for the Sixth Circuit to ignore any possibility that the FDA's proposed warnings would not be purely factual and uncontroversial, which is required for the *Zauderer* standard to apply. However, once the FDA unveiled its proposed warnings, the tobacco companies had specific evidence to point to that suggested the pictures went beyond the purely factual and uncontroversial *Zauderer* requirement. In fact, that is precisely what the tobacco companies did in *R.J. Reynolds*, and the D.C. Circuit Court was persuaded: it looked at the FDA's proposed warning labels, rather than the statute itself, and found them to be unconstitutional in applying the *Central Hudson*, not the *Zauderer*, standard. While the D.C. Circuit specifically pointed to the warnings containing a woman crying, and a small child and a man wearing a t-shirt saying "I QUIT" as examples of images that portray no factual information, it is likely that even toned down versions of the labels will raise similar arguments.¹³⁰ The government must predict, no matter what warning labels are eventually proposed by the FDA, that the tobacco companies will inevitably make this same argument. While the FDA should focus on making the labels as factual and uncontroversial as possible, it is almost unavoidable that the court may find the labels controversial based solely on their color, size, and striking nature.

The Supreme Court will predictably apply *Central Hudson* not only because it seems to be the only appropriate choice by way of default—in finding the other standards inapplicable; it will also predictably apply *Central Hudson* due to its appropriateness in its own right as established by Supreme Court precedent. While the Supreme Court has never explicitly ruled that the *Central Hudson* standard would be the appropriate standard to apply in compelled commercial speech cases, it has alluded to it on several occasions. For example, in *Glickman v. Wileman Bros. & Elliott, Inc.*, the Court stated that using the *Central Hudson* test was not proper where, *inter alia*, the statute does "not compel anyone to engage in any actual or symbolic speech."¹³¹ This insinuates that if the Supreme Court were to evaluate a statute that does compel someone to engage in speech, it would provide that *Central Hudson* would be the correct level of scrutiny to apply. More recently, in *Sorrell*, the Supreme Court justified its selection of scrutiny, stating that "Vermont's statute neither forbids nor requires anyone to say anything, to engage in any form of symbolic speech, or to endorse any particular point of view, whether ideological or related to the sale of a product (And here this assumes that *Central Hudson* might otherwise apply)."¹³² Again, it seems that the Supreme Court's language is suggesting that the *Central Hudson* standard would be appropriate in a compelled commercial speech challenge.

¹²⁹ Julie C. LaVille, *A Warning Worth a Thousand Words: First Amendment Challenges to the FDA's Graphic Warning Label Requirements*, 58 ST. LOUIS L.J. 243 (2013) (citing *Discount Tobacco City & Lottery, Inc.*, 674 F.3d at 558-59).

¹³⁰ *Id.* (citing *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 696 F.3d 1205, 1216 (D.C. Cir. 2012)).

¹³¹ *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 458 (1997).

¹³² *Sorrell*, 131 S. Ct. at 2675.

B. Application of the Central Hudson Standard to Cigarette Warning Labels

The Supreme Court, in *Central Hudson*, developed a four part test for determining constitutionality, specifically in commercial speech cases.¹³³ The four parts to this test are: (1) the commercial speech must concern a lawful activity and not be misleading; (2) the asserted governmental interest must be substantial; (3) if the answer to the first two questions is yes, then the court must determine whether the regulation directly advances that governmental interest; and (4) the court must determine whether the regulation is not more extensive than necessary to serve the governmental interest.¹³⁴ This section discusses each part of this test in turn.

1. The Graphic Cigarette Warning Labels are Legal and Not Misleading

The parties and the courts agree that the first part of the *Central Hudson* test, the commercial speech is a lawful activity and is not misleading, is satisfied as to the pictorial cigarette warnings.¹³⁵ The sale of cigarettes is a lawful activity and the warnings do not present any misleading information.

2. The Smoking Warnings Bear a Substantial Government Interest in Ensuring Accurate Commercial Information

i. There is a Substantial Public Health Interest

The cigarette warnings advance their constitutionality under the *Central Hudson* test, because they seek to advance a critical governmental interest in the public health of Americans by ensuring all consumers are aware of the health consequences associated with smoking. Supreme Court precedent has well-established the satisfaction of the next part of the *Central Hudson* test: whether the asserted governmental interest is substantial.¹³⁶ The Supreme Court has generally held that any regulation where the government's interest is rooted "in ensuring the accuracy of commercial information in the market-place is substantial."¹³⁷ Additionally, when it comes to public health, the Supreme Court holds that the government has a "significant interest in protecting the health, safety, and welfare of its citizens"¹³⁸ The government asserts that its established interest is to make the public more informed about the variety and severity of health consequences attributable to

¹³³ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980).

¹³⁴ *Id.*

¹³⁵ *Id.* The FDA has previously made the argument that the cigarette regulations would not pass this test because some regulations seek to restrict the sale of cigarettes to minors, which is an illegal transaction. However, the graphic warning label itself does not attempt to regulate the sale of cigarettes to minors. Calvert, Allen-Brunner & Locke, *supra* note 66, at 230.

¹³⁶ *Cent. Hudson*, 447 U.S. at 566.

¹³⁷ *Edenfield v. Fane*, 507 U.S. 761, 769 (1993).

¹³⁸ *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 485 (1995).

smoking.¹³⁹ The Supreme Court has declared that there is a substantial governmental interest in conveying truthful information about tobacco products.¹⁴⁰

The tobacco companies' argument that the warning labels are merely presenting information that is already a part of public awareness is not well founded.¹⁴¹ While the public may be generally aware that smoking is dangerous, many people still do not understand the complete scope of serious diseases associated with smoking, or the strong nature of nicotine addiction.¹⁴² Particularly, those who are less educated, and thus less able to understand the text only warnings, are more susceptible to the dangers of cigarette smoking. People of lower education levels are less able to read product warnings; the addition of pictures to the warning labels will effectively deliver the message to these people. It is clear that the government's interest in issuing the graphic warning requirement is substantial. The goal of the First Amendment is to ensure that consumers have adequate information about the products they purchase; the imposition of graphic warning labels merely executes this goal for a broader scope of the American public.

ii. There is a Substantial Equality Interest

The government is able to assert a substantial interest not only in the public health issue that cigarette smoking imposes on the American public, but also through the inequality that has emerged between those from high-income and those from lower-income populations. Since the Surgeon General released its first report uncovering the health consequences of smoking in 1964, a gap between those from high-income populations and those from low-income populations has been created and become increasingly prevalent.¹⁴³ In fact, 27.9% of adults who live below the poverty level smoke compared with just 17% of adults who live at or above the poverty level.¹⁴⁴ Even more alarming, studies show that as much as 68-80% of the United States' homeless adult population are current cigarette smokers.¹⁴⁵

¹³⁹ *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 696 F.3d 1205, 1298 (D.C. Cir. 2012).

¹⁴⁰ *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 564 (2001).

¹⁴¹ *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 528 (6th Cir. 2012) ("There is also agreement that Plaintiffs' argument that consumers are already adequately aware of the health risks associated with tobacco is not widely accepted . . . the government has presented abundant evidence to support Congress' findings that juveniles are not sufficiently aware of the actual risks of tobacco use.").

¹⁴² *R.J. Reynolds Tobacco Co.*, 696 F.3d at 1224 (Many adolescents, a particularly vulnerable consideration in the tobacco debate, tend "to underestimate or be uninformed about the difficulty of stopping smoking.").

¹⁴³ Lorna Schmidt, FACT SHEET, CAMPAIGN FOR TOBACCO-FREE KIDS, TOBACCO AND SOCIOECONOMIC STATUS (Jan. 31, 2013), available at <http://www.tobaccofreekids.org/research/factsheets/pdf/0260.pdf>.

¹⁴⁴ CTRS. FOR DISEASE CONTROL & PREVENTION, ADULT CIGARETTE SMOKING IN THE UNITED STATES: CURRENT ESTIMATES, 2014, available at http://www.cdc.gov/tobacco/data_statistics/fact_sheets/adult_data/cig_smoking.

¹⁴⁵ Travis P. Baggett, Lydie A. Lebrun-Harris and Nancy A. Rigotti, *Homelessness, Cigarette Smoking and Desire to Quit: Results From a US National Study*, 108 ADDICTION 2009 (2013).

Furthermore, secondhand smoke exposure is a greater issue for those from low-income populations; individuals who work in the blue-collar and service industries are more likely to be exposed to secondhand smoke in the workplace.¹⁴⁶ While exact causalities are often difficult to prove, numerous studies have found that the current climate addressing smoking in the United States have failed to take into account the disparity of smoking prevalence among socioeconomic status populations. On the other hand, this trend is no secret to the tobacco companies who choose to advertise and market more heavily in poorer neighborhoods.¹⁴⁷ Thus, there is a substantial governmental interest in addressing the disparity of the impact of cigarette smoking between lower and higher socioeconomic status populations.

iii. There is a Substantial Economic Interest

Finally, the government can assert a substantial economic interest in enacting a regulation requiring tobacco companies to display graphic cigarette warning labels on their packaging. The costs caused by smoking burdens Americans beyond the negative health effects and extends to US taxpayer pockets. Health care expenditures for smoking-induced ailments cost \$96 billion per year.¹⁴⁸ People of lower socioeconomic statuses are more often smokers than those of higher socioeconomic statuses.¹⁴⁹ Smoking related health care expenditures are disproportionately paid by Medicare and Medicaid, which expend \$58.3 billion per year on smoking related health care expenditures.¹⁵⁰ Medicaid beneficiaries have almost twice the smoking

¹⁴⁶ Fernader et al., *supra* note 72, at S1. “Only 83.2 percent of blue-collar workers (and just 67.8 percent of construction workers) work in an environment with a smoke-free workplace policy, compared with 90.7 percent of white-collar workers.” FACT SHEET, CAMPAIGN FOR TOBACCO-FREE KIDS, TOBACCO AND SOCIOECONOMIC STATUS (Jan. 31, 2013), *available at* <http://www.tobaccofreekids.org/research/factsheets/pdf/0260.pdf>.

¹⁴⁷ Robert H. Anderson et al., *Smoking Habits and Prevention Strategies in Low Socio-Economic Status Populations*, PREVENTION RESEARCH CENTER: NATIONAL NETWORK ON TOBACCO PREVENTION AND POVERTY, at 1 (2004).

¹⁴⁸ FACT SHEET, CAMPAIGN FOR TOBACCO-FREE KIDS, TOLL OF TOBACCO IN THE UNITED STATES OF AMERICA (Nov. 9, 2012), *available at* http://www.tobaccofreekids.org/research/factsheets/pdf/0072.pdf?utm_source=factsheets_finder&utm_medium=link&utm_campaign=analytics; There is an additional cost of \$97 billion in lost productivity costs due to smoking related disease. CTRS. FOR DISEASE CONTROL & PREVENTION, MORBIDITY AND MORTALITY WEEKLY REPORT, SMOKING-ATTRIBUTABLE MORTALITY, YEARS OF POTENTIAL LIFE LOST, AND PRODUCTIVITY LOSSES—UNITED STATES, 2000–2004 (2008).

¹⁴⁹ *See* Rutten et al., *supra* note 57, at 1559; *see also* SURGEON GENERAL REPORT, *supra* note 1, at 3.

¹⁵⁰ Medicare and Medicaid pay \$58.3 billion of a total \$96 billion (i.e., 60.7%) in costs associated with smoking related health care expenditures. On the other hand, Medicare and Medicaid pay \$876 billion out of a total \$2.5 trillion (i.e., 35%) of all U.S. health care expenditures. Therefore, the percentage of money paid by Medicare and Medicaid for smoking related health care expenditures is much higher than its percentage of costs paid in total. (Expenditure amounts gathered from FACT SHEET, CAMPAIGN FOR TOBACCO-FREE KIDS, TOLL OF TOBACCO IN THE UNITED STATES OF AMERICA (Nov. 9, 2012), *available at* http://www.tobaccofreekids.org/research/factsheets/pdf/0072.pdf?utm_source=factsheets_finder&utm_medium=link&utm_campaign=analytics and CTRS. FOR MEDICARE & MEDICAID SERVICES, NAT’L HEALTH EXPENDITURE PROJECTIONS 2010-2020, (2009)).

rates, at 37%, compared with the general United States adult population.¹⁵¹ Studies have estimated that America's Medicaid system could spend close to \$10 billion less within five years if all Medicaid beneficiaries who smoke, quit.¹⁵²

The Supreme Court directly confronted the issue of health care costs of all U.S. citizens in its decision upholding the constitutionality of the individual health care coverage mandate within the Patient Protection and Affordable Care Act ("PPACA"). In the PPACA decision, the Court explained the current problem being targeted by the individual health care coverage mandate:

Collectively, Americans spent \$2.5 trillion on health care in 2009, accounting for 17.6% of our Nation's economy. Within the next decade, it is anticipated, spending on health care will nearly double. . . . In 2009, approximately 50 million people were uninsured, either by choice or, more likely, because they could not afford private insurance and did not qualify for government aid. . . . Health-care providers do not absorb these bad debts. Instead, they raise their prices, passing along the cost of uncompensated care to those who do pay reliably: the government and private insurance companies. In response, private insurers increase their premiums, shifting the cost of the elevated bills from providers onto those who carry insurance. The net result: Those with health insurance subsidize the medical care of those without it. As economists would describe what happens, the uninsured 'free ride' on those who pay for health insurance. The size of this subsidy is considerable. Congress found that the cost-shifting just described "increases family [insurance] premiums by on average over \$1,000 a year."¹⁵³

While the PPACA individual mandate is aimed at addressing the United States health care coverage discrepancy, the economic issues caused by smokers covered by government health care may be exacerbated during the PPACA's transitional period. The PPACA will increase Medicaid coverage to millions more low-income adults, meaning more potential smokers will be on taxpayers' health care dime.¹⁵⁴ The PPACA also requires that Medicaid cover smoking cessation services for pregnant women, costing U.S. taxpayers even more.¹⁵⁵

Curbing health care expenditures is not the only form of state economic interest. The government also has a substantial economic interest in maximizing workplace productivity. Data has shown that "nonsmokers are more productive, take fewer sick

¹⁵¹ CTRS. FOR DISEASE CONTROL & PREVENTION, *State Medicaid Coverage for Tobacco-Dependence Treatments—United States, 2009*, 59 MMWR 1340, 1340 (Oct. 22, 2010).

¹⁵² *Smokers Cost Medicaid System Nearly \$10 Billion: New Report from the American Legacy Foundation Finds Tobacco-Free States Spend Less on Medicaid*, PRNEWswire, <http://www.prnewswire.com/news-releases/smokers-cost-medicare-system-nearly-10-billion-59896577.html> (last visited Mar. 30, 2014).

¹⁵³ Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2609-11 (2012).

¹⁵⁴ Patrick Richard, Kristina West & Leighton Ku, *The Return on Investment of a Medicaid Tobacco Cessation Program in Massachusetts*, 7 PLOS ONE e29965 (2012).

¹⁵⁵ *Id.*

days per year, and use fewer healthcare resources than smokers.”¹⁵⁶ After quitting, former smokers show a significant decline in their absenteeism from work, and their productivity levels rise to that of those who have never smoked.¹⁵⁷

3. The Smoking Warnings Directly Advance the Government’s Interest

Pictorial cigarette warning labels have been proven to be drastically more effective at getting consumers to reconsider smoking; thus, the third prong of the *Central Hudson* test is satisfied. The debate over the constitutionality of the cigarette warnings revolves around the court’s determination of the third part of the *Central Hudson* test: whether the government interest is directly advanced by the regulation.¹⁵⁸ The D.C. Circuit Court in *RJ Reynolds* mischaracterizes the asserted governmental interest and consequently relies on that misrepresentation in holding the graphic warning labels unconstitutional.¹⁵⁹ The Court claims the interest asserted by the government is to reduce the prevalence of smoking.¹⁶⁰ However, the dissenting opinion points out that while legislative history indicates a desire to decrease the prevalence of smoking in the United States, the official asserted governmental interest is actually clearly stated: to “effectively communicate information about the negative health consequences of smoking.”¹⁶¹ While reducing the number of smokers is a potential benefit in making consumers more aware of the negative health effects of smoking, it is simply not the explicitly identified goal.

People of lower socioeconomic statuses are generally less educated than those of higher socioeconomic statuses; thus, the need to provide reliable, available information to those people is especially important.¹⁶² The existing text-only warning labels on cigarette packaging require a college reading level, whereas pictorial warnings could be easily understood by those with lower literacy skills.¹⁶³ Research indicates that those with higher levels of education have more accurate knowledge about smoking and cancer, and individuals of a lower socioeconomic status are less likely to try to quit smoking.¹⁶⁴ By providing accurate health information about the consequences of smoking directly on the cigarette packaging, via easily understood pictorial warnings, the FDA ensures that consumers purchasing cigarettes are fully aware of those consequences.

The graphic cigarette warnings directly advance this governmental interest. The Supreme Court interpreted the *Central Hudson* holding, clarifying that the

¹⁵⁶ LEIF ASSOCIATES, INC., REPORT: THE BUSINESS CASE FOR COVERAGE OF TOBACCO CESSATION 2012 UPDATE, at 6 (2012).

¹⁵⁷ *Id.*

¹⁵⁸ *See Cent. Hudson Gas & Elect. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 564 (1980).

¹⁵⁹ *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 696 F.3d 1205, 1238 (D.C. Cir. 2012).

¹⁶⁰ *Id.* at 1233.

¹⁶¹ *Id.* at 1230.

¹⁶² *See Rutten et al.*, *supra* note 57, at 1563.

¹⁶³ *See also* SURGEON GENERAL REPORT, *supra* note 1, at 719.

¹⁶⁴ *See Rutten et al.*, *supra* note 57, at 1567.

government must be able to prove that the challenged regulation advances the government's stated interest in a direct or material way.¹⁶⁵ The government's burden must go beyond "mere speculation or conjecture" that the regulation will advance the governmental interest.¹⁶⁶ The studies presented by the government in support of the warning labels illustrate the ineffectiveness of the current warning labels.¹⁶⁷ These studies conclude that the current warnings are "unnoticed and stale, and that they fail to convey relevant information in an effective way."¹⁶⁸ In issuing the pictorial warnings, the FDA relied on an internet-based consumer study that revealed that the graphic warnings were more effective in providing the lasting and salient message that tobacco use has many serious negative health effects and encouraged viewers to quit or refrain from smoking.¹⁶⁹ In response to this evidence, the D.C. Circuit Court stated that "it is mere speculation to suggest that respondents who report increased thoughts about quitting smoking will actually follow through on their intentions."¹⁷⁰

Admittedly, these studies do not establish that the new warnings will have a material effect on the number of smokers. Scientific evidence proving that the

¹⁶⁵ See *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 479 (1995).

¹⁶⁶ *Id.* at 487; *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) ("[T]he government[] . . . must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.").

¹⁶⁷ *Id.* at 13-17.

¹⁶⁸ INST. OF MED. OF THE NAT'L ACADEMIES, *ENDING THE TOBACCO PROBLEM: A BLUEPRINT FOR THE NATION* 291 (Richard J. Bonnie et al. eds., 2007).

¹⁶⁹ *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 696 F.3d 1205, 1209 (D.C. Cir. 2012) ("[The] FDA based its selection of the final images on an 18,000—person internet-based consumer study it commissioned. The study divided respondents into two groups: a control group that was shown the new text format of the current warnings (located on the side of cigarette packages), and a separate treatment group that was shown the proposed graphic warnings, which included the new text, the accompanying graphic image, and the 1-800-QUIT-NOW number. Each group then answered questions designed to assess, among other things, whether the graphic warnings, relative to the text-only control, (1) increased viewer's intention to quit or refrain from smoking; (2) increased viewers' knowledge of the health risks of smoking or second-hand smoke; and (3) were 'salient' which [the] FDA defined in part as causing viewers to feel 'depressed,' 'discouraged,' or 'afraid.'"); see also, SURGEON GENERAL REPORT, *supra* note 1, at 717 ("Ninety-five percent of Canadian youth reported that pictorial health warnings communicated the risks of smoking better than text-only warnings . . . [t]he most recent survey, in 2006, found that 86% of youth smokers reported the messages as effective in informing them about the health effects of smoking; 70% said that the messages had been effective in getting them to try to quit smoking; 66% reported that the messages had increased their desire to quit; and 56% said they smoked less around others as a results of the messages."); *Family Smoking Prevention and Tobacco Control Act: Hearing Before the H. Subcomm. on Health of the Comm. on Energy and Commerce*, 110th Cong. 42 (2007) ("[M]ore than 40 percent of subjects did not even view the warning," and "an additional 20 percent looked at the warning but failed to actually read it.").

¹⁷⁰ *R.J. Reynolds Tobacco Co.*, 696 F.3d at 1219. In order for the government to establish that the graphic warnings directly advance a misidentified goal of decreasing the number of smokers, the government would have to present evidence that the warnings will actually cause some people to quit smoking and/or others to never start smoking. *Id.* at 1242.

warnings actually lead consumers to quit smoking would require extended longitudinal studies.¹⁷¹ In the meantime, millions of Americans would continue to smoke and consequently die; thus, such studies cannot be timely conducted in order to address the imminent smoking public health concerns. Furthermore, the D.C. Circuit Court, in *RJ Reynolds*, mischaracterizes the governmental interest—to reduce the prevalence of smoking. The scientific evidence resoundingly advances the governmental interest expressly stated by the FDA in its proposal of these warnings: to create a greater awareness of the scope of the health risks associated with tobacco use.¹⁷² By using graphic warning labels, consumers will become more educated about the consequences of their purchases. Whether those consumers use that additional information to their benefit is up to them, but either way, the government's stated goal will have been accomplished. The governmental limitation on the tobacco companies' freedom of speech is justified. Thus, the implementation of the graphic warning labels directly and materially advances the declared governmental interest, and the third part of the *Central Hudson* test is satisfied.

4. The Smoking Warnings are No More Extensive than Necessary

While the graphic warning labels may limit the commercial speech of tobacco companies, the limitation by imposing graphic warning labels has been thoroughly researched and is a necessary measure. Numerous other avenues have attempted to achieve this governmental goal and have failed. The tobacco companies challenge the constitutionality of the graphic warnings under the fourth part of the *Central Hudson* test: the regulation cannot be more extensive than is necessary to achieve the governmental interest.¹⁷³ The tobacco companies argue that the scale and intrusiveness of pictorial warnings strongly outweigh the need to convey information to consumers, since the information is already effectively conveyed, and consumers already overestimate tobacco use health risks.¹⁷⁴ The previously discussed scientific evidence overwhelmingly disproves this contention. Amongst American consumers, there is still widespread ignorance of the health risks associated with tobacco use.¹⁷⁵ It was no mistake that the graphic warning labels created by the FDA elicit strong emotional responses.¹⁷⁶ Warning labels that create unfavorable emotional associations with smoking tobacco help consumers appreciate the risks of

¹⁷¹ *Id.* at 1210.

¹⁷² *See id.*; *see also* Peters et al., *supra* note 1, at 479 (“The results showed that the Canadian labels were examined voluntarily for longer durations than were the U.S. labels among both smokers and nonsmokers.”).

¹⁷³ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 565 (1980) (“[t]he regulatory technique may extend only as far as the interest it serves. The State cannot regulate speech that poses no danger to the asserted state interest . . . nor can it completely suppress information when narrower restrictions on expression would serve its interest as well.”); *Nat’l Cable & Telecomms. Ass’n v. Fed. Commc’ns Comm’n*, 555 F.3d 996, 1002 (“[t]he government] does not have to demonstrate a perfect means-ends fit. . . . The only condition is that the regulation be proportionate to the interests sought to be advanced.”).

¹⁷⁴ *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 524 (6th Cir. 2012).

¹⁷⁵ *See* Rutten et al., *supra* note 57, at 1569-70.

¹⁷⁶ *See* Peters et al., *supra* note 1, at 474.

smoking.¹⁷⁷ The warning labels aim to create a negative association between cigarettes and consumers to overcome the long-standing ‘attractive, cool smoker’ image.¹⁷⁸ The deep rooted affinity for smoking in American culture is one that will not be easily overcome and necessitates serious, in-your-face interventions to effectively inform Americans.¹⁷⁹ The stronger the negative association is, the more effective the warning will become, ameliorating the current dilemma. The smoking problem is massive; cigarettes are the only legal consumer products in the world that cause one-half of their long-term users to die prematurely; thus, the solution must be proportionately impactful.¹⁸⁰

The Supreme Court has also provided, under the fourth part of the *Central Hudson* test, that there must be a “reasonable fit between the legislature’s ends and the means chosen to accomplish those ends.”¹⁸¹ Scholars have argued that the warning labels are not a reasonable fit, because there are other options the government could use to achieve its goal of informing consumers, including: publishing charts and graphs illustrating the health effects of tobacco use; taxation of tobacco products; or banning tobacco use in public places.¹⁸² Each of these avenues have been exhausted by the government, and yet the smoking public health crisis resiliently remains.

Cigarettes are already heavily taxed.¹⁸³ Since 2002, forty-seven states have increased their tax rates on cigarettes more than 105 times.¹⁸⁴ Early studies suggested that increasing taxes on cigarettes would directly target lower-income populations, suggesting that those who would less be able to afford cigarettes would simply quit.¹⁸⁵ Yet, later studies have found that the recent increase in taxes on cigarettes has actually widened the gap in smoking participation between lower and higher-

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*; see also *Family Smoking Prevention and Tobacco Control Act: Hearing Before the H. Subcomm. on Health of the Comm. on Energy and Commerce*, 110th Cong. 42 (2007) (“The tobacco problem is fundamentally a man-made problem. Cigarettes became one of the most successful consumer products in history in only a few decades and became an ever-present icon of American life—embedded in the culture and promoted by a powerful industry.”).

¹⁷⁹ See Peters et al., *supra* note 1, at 479 (“[T]he mere presentation of hazard information is not sufficient to motivate perceptions of risk. Risk is most readily communicated by information that arouses emotional associations with the activity.”).

¹⁸⁰ See SURGEON GENERAL REPORT, *supra* note 1, at 3.

¹⁸¹ *Lorillard Tobacco Co. v. Reilly*, 533 US 525, 556 (2001).

¹⁸² See Bennett, *supra* note 34, at 1933-34.

¹⁸³ The cities with the highest combined state-local tax rate are New York City, with a tax of \$5.85 per pack, and Chicago, with a rate of \$4.66 per pack. Anne Boonn, *State Cigarette Excise Tax Rates & Rankings*, CAMPAIGN FOR TOBACCO-FREE KIDS (2013), available at <http://www.tobaccofreekids.org/research/factsheets/pdf/0097.pdf>.

¹⁸⁴ *Id.*; see also SURGEON GENERAL REPORT, *supra* note 1, at 851 (“[M]arketing and promotional expenditures of the tobacco industry have become increasingly concentrated on efforts to reduce the prices of tobacco products.”).

¹⁸⁵ Franks et al., *supra* note 69, at 1873.

income populations.¹⁸⁶ Other studies have found that low-income smokers are relatively insensitive to cigarette pack prices.¹⁸⁷ Thus, as the government is working to decrease the number of smokers, the tobacco companies are passing their decrease in sales on to the remaining consumers they do have, causing prices of cigarettes to be even higher.¹⁸⁸ While it goes against common sense to many, increased prices will not lead to poorer smokers choosing to quit. In fact, when the State of New York chose to increase its tax on cigarettes from \$1.50 per pack in 2004 to \$4.35 per pack in 2010, low-income smokers went from spending 11.6% of their income on cigarettes to 23.6% of their income.¹⁸⁹ In the poorest of families, it is not uncommon for the parents to choose to buy cigarettes before buying food.¹⁹⁰ Increasing prices will not decrease the prevalence of smoking among the poor, and it will only make their plight more difficult. Therefore, it will be more effective to provide persuasive information at the point of purchase. If these low-income populations are faced with warnings, which are understandable to them, they will finally make the choice to quit.

The government has produced charts, graphs, reports, and brochures in its efforts to disseminate information regarding the negative health effects of smoking.¹⁹¹ The issue remains that these types of resources are least accessible to poorer, less educated people who are most susceptible to the health maladies imposed by smoking. The government has also attempted its own advertising campaigns and community outreach programs to curb smoking.¹⁹² The D.C. Circuit Court analogized the government's efforts against the tobacco companies' giant marketing campaigns as being "like [the government] bringing a butter knife to a gun fight."¹⁹³ In 2008 alone, tobacco companies spent \$9.94 billion on marketing.¹⁹⁴

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ Lorna Schmidt, FACT SHEET, CAMPAIGN FOR TOBACCO-FREE KIDS, TOBACCO AND SOCIOECONOMIC STATUS (Jan. 31, 2013), available at <http://www.tobaccofreekids.org/research/factsheets/pdf/0260.pdf>.

¹⁸⁹ Jeannine Stein, *The Poorest New York Smokers Spend a Quarter of their Income on Cigarettes*, TAKEPART (Sept. 20, 2012), <http://www.takepart.com/article/2012/09/20/poorest-new-york-smokers-spend-quarter-their-income-cigarettes>.

¹⁹⁰ Armour et al., *supra* note 73, at 4.

¹⁹¹ Generally, government organizations that publish and distribute tables, charts, pamphlets, and website information include: the Center for Disease Control and Prevention, the Surgeon General, the Food and Drug Administration, the National Cancer Institute, Smokefree.gov, the National Institute on Drug Abuse, and the Department of Health and Human Services. These organizations demonstrate just some of the government's efforts at the federal level.

¹⁹² See SURGEON GENERAL REPORT, *supra* note 1; see also *Family Smoking Prevention and Tobacco Control Act: Hearing Before the H. Subcomm. on Health of the Comm. on Energy and Commerce*, 110th Cong. 42 (2007) ("Despite the numerous Federal and state initiatives, tobacco still claims hundreds of thousands of lives every year.").

¹⁹³ *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 696 F.3d 1205, 1221 (D.C. Cir. 2012).

¹⁹⁴ SURGEON GENERAL REPORT, *supra* note 1, at 10.

All of the government's methods have failed to achieve the level of effectiveness that is anticipated from providing factual information to consumers directly via graphic warnings. With these pictorial warnings, smokers who smoke a pack of cigarettes per day will be exposed to the health warnings 7,000 times per year each time they reach for a cigarette from their pack.¹⁹⁵ The use of pictures in harmony with the textual warnings ensures that the most vulnerable—children and the poor—are exposed to and understand the health consequences associated with smoking. The fourth part of the *Central Hudson* test is satisfied; the FDA extensively researched the effectiveness of these particular warnings. Predictably, these warnings will have a strong effect on consumers' increased knowledge of the health hazards associated with smoking.

Under the *Central Hudson* intermediate scrutiny standard, it is apparent that the FDA's graphic cigarette warning labels are constitutional. The Supreme Court, in *Central Hudson*, established this test to accomplish a goal of balancing between necessary governmental limits to commercial speech and allowing corporations to have artistic license in presenting their products to consumers.¹⁹⁶ The *Central Hudson* test is aimed at the essence of the First Amendment's goal to provide consumers with a safe marketplace—a marketplace that also allows consumers to hold the power to choose which products they purchase without meddlesome government regulation. Since the FDA's proposed cigarette warnings pass each part of this test, the warnings satisfy that balance. The warnings are a necessary and appropriate governmental limitation on the tobacco companies' packaging in light of the serious consequences caused by smoking cigarettes.

VI. CONCLUSION

“To have hundreds of thousands of premature deaths caused by these modifiable risk factors is shocking and should motivate a serious look at whether our public health system has sufficient capacity to implement interventions and whether it is currently focusing on the right set of interventions.”¹⁹⁷ The litigious American society has created a market where many of the products consumers purchase contain some sort of warning label. Consumers become accustomed to product warnings, and they fail to consider the message warnings convey. When certain products become particularly harmful to the American public health, it becomes necessary for the government to intervene and protect the spirit of the First Amendment: “the robust and free flow of accurate information . . .”¹⁹⁸ The public health crisis created by smoking is one of the most serious issues facing American society today. This should be particularly alarming, because this epidemic is not caused by disease beyond human control, but rather it is self-inflicted. When such self-infliction becomes so widespread, it is apparent that sweeping government action is necessary.

¹⁹⁵ *Id.* at 715.

¹⁹⁶ *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

¹⁹⁷ HARVARD PUBLIC HEALTH PRESS RELEASE, *supra* note 54 (quoting associate professor of international health at the Harvard School of Public Health and the study's senior author, Majid Exxati).

¹⁹⁸ *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 114 (2d Cir. 2001).

Each constitutional standard used to evaluate commercial speech under the First Amendment reflects an underlying theme: if the governmental interest motivating the limitation on commercial speech is considered to be very important, and the limitation is comparably reasonable, it will not be considered unconstitutional. The government interest at stake with cigarette warning laws aims to save millions of American lives and billions of dollars in health care costs; what interest could be considered more important than that? The vulnerability of particularly susceptible people, children and the undereducated poor, bolster the importance of the government's interest in establishing pictorial cigarette warning legislation. These vulnerable classes are particularly affected by the health consequences of smoking; they are at a disadvantage of being less able to make informed decisions about their purchases due to a lack of an educated understanding. To correct this injustice, the government must step in and provide easy-to-comprehend, direct information about these particularly dangerous purchases.

The warning methods chosen by the FDA are carefully researched and designed to effectively provide only the most pertinent information to consumers. The graphic cigarette warnings proposed by the FDA are strongly proven to provide consumers with accurate information about the hazards of smoking. The FDA regulations imposing graphic cigarette warning labels are forgivable, minor impositions on commercial speech when cast in light of the imminent health care threat the United States is up against.