GUIDANCE FROM AN UNLIKELY SOURCE: WHY A HOLLYWOOD SATIRE CAN HELP RESOLVE THE CIRCUIT SPLIT OVER WHETHER MANDATORY GRAPHIC CIGARETTE PACKAGE WARNING LABELS VIOLATE THE FIRST AMENDMENT

ABSTRACT

In 2009, Congress directed the FDA to promulgate rules mandating that cigarette warning labels contain pictures in addition to the existing text. In 2011, the FDA selected the graphic images to be used and promulgated a final rule. Graphic *truly is the correct term for these images; several of them are emotionally shocking and perhaps even gruesome. Tobacco companies have challenged the picture requirement on the grounds that it violates their freedom of speech and forces them to put forth a viewpoint they would prefer not to sponsor. Two similar cases reached the circuit courts of appeals in 2012, with the Sixth Circuit upholding the label requirement and the D.C. Circuit striking it down.*

The subject has received extensive academic treatment, but this Note approaches the graphic-label requirement from a direction not seen in the literature thus far. It compares the real-life label requirement to the strikingly similar plot of the film Thank You For Smoking, *which predated both the legislation and the FDA rule but now appears to be a prime example of life imitating art. While tobacco companies are certainly not the most sympathetic of plaintiffs, this Note uses the freedom-of-choice theme from* Thank You For Smoking, *along with commercial speech, compelled speech, and compelled-subsidy jurisprudence, to assert that, when the circuit split is resolved, strict scrutiny should apply and the tobacco companies should ultimately prevail.*

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I. INTRODUCTION

A seemingly small event from 2006 may have predicted the future. That year, the film *Thank You for Smoking* was released.[1] Although it received plenty of critical acclaim,[2] the film only grossed about $25 million in the United States during its theatrical run—a very successful return

1. THANK YOU FOR SMOKING (Fox Searchlight Pictures & Room 9 Entertainment 2005).

2. *See* Thank You for Smoking: *Awards*, IMDB, http://www.imdb.com/title/tt0427944/awards?ref_=tt_awd (last visited Nov. 30, 2013).

compared to the film's budget,[3] but not even enough to rank it among that year's top 100 films.[4] Yet, this film may now have renewed and even lasting importance, which is more than a lot of that year's higher grossing movies can say.[5]

Why, you might ask? *Thank You for Smoking* is a brilliantly satirical film[6] in which Congress attempts to mandate pictorial cigarette warning labels at the behest of a crusading anti-tobacco senator.[7] The skull and crossbones is the symbol chosen for the labels because the image almost universally conveys that any substance bearing it is poisonous or otherwise harmful.[8] In the film, this legislative effort is offset against the tobacco lobby's renewed attempt to make smoking seem glamorous through product placement in movies.[9] Of course, the tobacco lobby resists the movement toward pictorial warnings, and although the film does not expressly state its reasons for doing so, an implicit undertone is that the requirement might violate the tobacco companies' First Amendment freedom of speech by forcing these companies to convey a government

3. *See Box Office / Business for* Thank You for Smoking, IMDB, http://www.imdb.com/title/tt0427944/business?ref_=tt_dt_bus (last visited Nov. 30, 2013) (estimating the budget at $6.5 million).

4. *See 2006 Domestic Grosses: # 101–200*, BOX OFFICE MOJO, http://boxofficemojo.com/yearly/chart/?page=2&view=releasedate&view2=domestic&yr=2006&p=.htm (last visited Nov. 30, 2013) (ranking *Thank You for Smoking* as the 103rd highest grossing film).

5. For a list of the top 100, some of which are decidedly unspectacular (especially in retrospect), see *2006 Domestic Grosses: # 1–100*, BOX OFFICE MOJO http://boxofficemojo.com/yearly/chart/?yr=2006&p=.htm (last visited Nov. 30, 2013).

6. *See* Roger Ebert, *Thank You for Smoking*, ROGEREBERT.COM (Mar. 23, 2006), http://www.rogerebert.com/reviews/thank-you-for-smoking-2006 (calling the film "both savage and elegant, a dagger instead of a shotgun").

7. THANK YOU FOR SMOKING, *supra* note 1, at 14:33.

8. *See id.* at 14:45 (unveiling the skull and crossbones symbol and reflecting the Senator's "hope that, within the year, every cigarette package . . . will finally be labeled appropriately as poison").

9. *Id.* at 16:11. Lobbyist Nick Naylor tells a group of tobacco executives: "The message Hollywood needs to send out is [that] smoking is cool!" *Id.* at 17:13. He goes on to propose to a Hollywood executive how this would be accomplished:

> Naylor: Now, what we need is a smoking role model—a real winner.
>
> [Hollywood executive]: Indiana Jones meets Jerry Maguire.
>
> Naylor: Right, on two packs a day.

Id. at 36:07.

message through their packaging.[10] Both sides and their respective priorities are portrayed in the film as patently ridiculous, but the eccentric and easily flustered anti-tobacco senator's unique wardrobe, impatient tics, and affinity for Vermont cheddar cheese lend extra weight to the film's implied assertion that graphic cigarette labels would be a legislative absurdity.[11] After seeing the film, viewers might understandably dismiss it as nothing more than mere entertainment because the entire plot seems so absurd that it could only happen plausibly in the movies, never in real life.

Yet, in 2009, Congress did precisely what *Thank You for Smoking* deemed ridiculous when it enacted the Family Smoking Prevention and Tobacco Control Act (FSPTCA).[12] Perhaps proving the maxim that life often imitates art, the law delegated to the Food and Drug Administration (FDA) the authority to promulgate new rules mandating certain graphic images be placed on every cigarette package.[13] In June 2011, the FDA issued the new rules, which require that images selected to convey the health risks of smoking occupy half of each cigarette pack or carton.[14] While these images are not specifically the skull and crossbones from *Thank You for Smoking*, they are emotionally striking nonetheless.[15] Tobacco companies believe the requirement that the images be included on every package force them both to convey and subsidize a government message through their packaging, in violation of their First Amendment freedom of speech.[16] Two similar lawsuits challenging the FSPTCA and FDA Rules have reached the federal circuit courts of appeals, with

10. *See generally id.* at 15:53, 1:21:45; *see also* U.S. CONST. amend. I.

11. *See* THANK YOU FOR SMOKING, *supra* note 1, at 21:35.

12. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, §§ 201–203, 123 Stat. 1776, 1842–46 (2009) (codified as amended at 15 U.S.C. §§ 1333–1334 (2012)).

13. *Id.* § 201(a).

14. Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628, 36,754 (June 22, 2011) (codified at 21 C.F.R. § 1141.10(a)(4) (2012)). For the sake of brevity and convenience, the text of this Note refers to these specific rules from this point forward as the FDA Rules.

15. *Compare id.* at 36,648–57 (listing and discussing the selected images), *with* THANK YOU FOR SMOKING, *supra* note 1, at 14:50 (presenting the skull and crossbones symbol). For a slideshow of the images, see *FDA's New Warning Labels for Cigarettes*, L.A. TIMES: BOOSTER SHOTS, http://www.latimes.com/health/boostershots/la-he-smoking-cigarette-warning-labels-pictures,0,6757388.photogallery?index=la-he-smoking-cigarette-warning-labels-picture-009 (last visited Nov. 30, 2013).

16. *Accord* R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1221 (D.C. Cir. 2012) (noting the FDA Rules "forc[e] the [tobacco c]ompanies to bear the cost of disseminating an anti-smoking message"); *see* U.S. CONST. amend. I.

contrasting results.[17] Because this circuit split between the Sixth and D.C. Circuits has emerged, it is now more likely that the U.S. Supreme Court will eventually need to examine the issue,[18] whether it concerns these specific labels or another set in the future.[19]

While perhaps not intended to be primarily political commentary, *Thank You for Smoking* nonetheless offers some lessons about the First Amendment's aspirations. Namely, it illuminates the beneficial First Amendment principle of personal autonomy because it encourages people to make their own investigations, reach their own conclusions, and create their own personal beliefs.[20] This is impossible without a bustling marketplace of ideas from which to choose.[21] Because the film's plot so closely resembles the current legislative landscape, these lessons are, perhaps strangely, applicable to the current circuit split.

This Note argues that whenever the Supreme Court finally resolves the split, it should keep *Thank You for Smoking*'s lessons in mind—admittedly not as controlling authority,[22] but certainly as more than mere

17. *Compare R.J. Reynolds Tobacco Co.*, 696 F.3d at 1222 (holding the FDA Rules impermissibly restrict speech), *with* Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 531 (6th Cir. 2012) (holding the FSPTCA's labeling requirements withstand First Amendment analysis), *cert. denied sub nom.* Am. Snuff Co. v. United States, 133 S. Ct. 1996 (2013).

18. *Appeals Court Blocks Graphic Warnings on Cigarettes*, N.Y. TIMES, Aug. 24, 2012, http://www.nytimes.com/2012/08/25/business/tobacco-groups-win-ruling-on-graphic-cigarette-warnings.html.

19. *See* Brady Dennis, *Government Quits Legal Battle Over Graphic Cigarette Warnings*, WASH. POST (Mar. 19, 2013), http://www.washingtonpost.com/national/health-science/government-quits-legal-battle-over-graphic-cigarette-warnings/2013/03/19/23053ccc-90d7-11e2-bdea-e32ad90da239_story.html ("The federal government, facing a court-imposed deadline and fierce opposition from the tobacco industry, has decided to abandon its legal fight to require cigarette makers to place large, graphic labels on their products warning of the dangers of smoking. . . . The FDA said in a statement Tuesday that it will go back to the drawing board . . . .").

20. *See, e.g.*, THANK YOU FOR SMOKING, *supra* note 1, at 8:42 ("[T]here will always be people trying to tell you what to do and what to think. . . . My point is that you have to think for yourself.").

21. Justice Holmes is often credited with forming the "marketplace of ideas" concept. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good . . . is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .").

22. When the Court does mention films in opinions, it typically does so to make an illustrative point rather than as any type of persuasive authority. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 371 (2010) (recalling critics derided *Mr. Smith*

coincidence—and should rule in the tobacco companies' favor. Part II surveys the current state of cigarette-labeling legislation and regulations and asks whether expanded labeling requirements might create a slippery slope toward more intrusive regulation in other industries. In other words, if the government can mandate graphic cigarette labels, what else can it mandate in the name of public health? Cigarettes may be the proverbial camel's nose under the tent. Part III examines the cases creating the circuit split. Part IV collects existing Supreme Court doctrines and precedent applicable to the FDA Rules while fine-tuning the precise type of analysis the required labels implicate. After Part V applies that analysis and concludes the FDA Rules violate tobacco companies' First Amendment rights by forcing them to subsidize and put forth speech they would otherwise not espouse, Part VI revisits *Thank You for Smoking*'s viewpoints for a simple alternative solution.

II. CURRENT CIGARETTE LABEL REGULATION

A. *Family Smoking Prevention and Tobacco Control Act*

Congress passed the first cigarette-label regulations in 1965.[23] That act has seen repeated amendments,[24] with the most recent in 2009.[25] As Congress expressly stated, one purpose of cigarette-label regulations is to ensure the public is "adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes."[26] Another is to ensure uniformity and prevent confusing advertising.[27]

Goes to Washington as "fiction and caricature," and noting "fiction and caricature can be a powerful force"); Ashcroft v. Free Speech Coal., 535 U.S. 234, 247–48 (2002) (referencing the films *Traffic* and *American Beauty* to demonstrate that teenage sexual activity may have artistic value).

23. Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282 (1965) (codified as amended at 15 U.S.C. §§ 1331–1338 (2012)).

24. *See, e.g.*, Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, § 6, 84 Stat. 87, 89 (1970) (codified as amended at 15 U.S.C. §§ 1331–1338) (banning tobacco companies from advertising products through certain media); Comprehensive Smoking Education Act, Pub. L. No. 98-474, § 4, 98 Stat. 2200, 2201-2203 (1984) (codified as amended at 15 U.S.C. § 1333) (establishing the original Surgeon General's Warnings required to be placed on cigarette packaging).

25. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009) (codified as amended at 15 U.S.C. §§ 1333–1334).

26. 15 U.S.C. § 1331(1).

27. *Id.* § 1331(2).

The currently required cigarette warnings are text-only, and packaging must bear one of several designated warnings.[28] The warnings must appear in a particular place on each package.[29] Unlike previous requirements, attribution to the Surgeon General is no longer included because, while "[a]ttribution to a government resource may increase believability of the information . . . , if the government is generally disliked or mistrusted, a government source attribution may result in rejection of the health warning."[30]

The word *warning* must be in all capitals, all text must "be in conspicuous and legible 17-point type," and the rest of the language must contrast "by typography, layout, or color, with all other printed material on the package."[31] No other labels are required "[e]xcept to the extent the Secretary requires additional or different statements."[32] Accordingly, this limitation is artificial because the law gives the FDA authority to do precisely that—require additional or different images accompanying the text label statements.[33]

28. *Id.* § 1333(a)(1). Under the FSPTCA, the required warnings are:

> WARNING: Cigarettes are addictive.
>
> WARNING: Tobacco smoke can harm your children.
>
> WARNING: Cigarettes cause fatal lung disease.
>
> WARNING: Cigarettes cause cancer.
>
> WARNING: Cigarettes cause strokes and heart disease.
>
> WARNING: Smoking during pregnancy can harm your baby.
>
> WARNING: Smoking can kill you.
>
> WARNING: Tobacco smoke causes fatal lung disease in nonsmokers.
>
> WARNING: Quitting smoking now greatly reduces serious risks to your health.

Id. These warnings are more direct and succinct than the required warnings under the prior version of the law. *See* Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628, 36,670 (June 22, 2011) ("The new textual statements represent a significant improvement . . . .").

29. The warnings must "be located in the upper portion of the front and rear panels of the package, directly on the package underneath the cellophane or other clear wrapping." 15 U.S.C. § 1333(a)(2).

30. Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. at 36,673.

31. 15 U.S.C. § 1333(a)(2).

32. *Id.* § 1334(a).

33. *See id.* § 1333(d); *supra* notes 12–14 and accompanying text.

The statute is at least cognizant of potential First Amendment quandaries because, in the preemption context, "a [s]tate or locality may . . . impos[e] specific bans or restrictions on the time, place, and manner, *but not content*, of the advertising or promotion of any cigarettes."[34] Typically, "reasonable time, place or manner restrictions . . . are valid provided that they are justified without reference to the content of the regulated speech."[35] Nonetheless, even before the FDA issued the new rules, commentators derided the law and prospective regulations under it as ineffective, misguided, and potentially problematic.[36] It seems Congress simply forgot that it, too, must abide by the First Amendment; states and localities are not the only policymaking bodies that cannot permissibly make content-based distinctions about speech.[37] In fact, some tobacco companies did not even wait for the FDA to issue regulations before challenging the FSPTCA on its face.[38] Nonetheless, the FDA promulgated the new rules despite these preemptive challenges.[39]

B. *New FDA Rules*

Before the new FDA Rules, only the specter of compelled speech threatened tobacco companies. Once the FDA fulfilled its legislative directive, however, that specter became quite real. Requiring the warnings paradoxically compels tobacco companies to counsel their potential customers against smoking; this viewpoint is clearly not one the tobacco companies would choose to display.[40] Moreover, tobacco companies will

34. 15 U.S.C. § 1334(c) (emphasis added).

35. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

36. *See, e.g.*, Robert J. Baehr, Note, *A New Wave of Paternalistic Tobacco Regulation*, 95 IOWA L. REV. 1663, 1679 (2010) ("It is . . . difficult to avoid frustration at the [FSPTCA's] internal contradictions."); Laura M. Farley, Comment, *With the Passage of the Family Smoking Prevention and Tobacco Control Act, Will Commercial Speech Rights Be up in Smoke?*, 7 J.L. ECON. & POL'Y 513, 542 (2011) (proposing a plan to "achieve the desired results without the First Amendment issues created by the [FSPTCA's] current provisions").

37. *See, e.g.*, United States v. Alvarez, 132 S. Ct. 2537, 2547–48 (2012) (holding the federal Stolen Valor Act to be an unconstitutional content-based restriction on free speech).

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

39. *See* Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628 (June 22, 2011).

40. *See* R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1212 (D.C. Cir. 2012) (describing the labels as "forc[ing] the manufacturer of a product to . . .

have to incur significant expense to implement the graphic warnings, and "[i]f the government wants to impose its viewpoint . . . , then arguably [it] should be forced to compensate the companies to carry its messages."[41]

The FDA issued the new rules in June 2011, and they require that each cigarette package reserve "at least 50 percent of the area of the front and rear panels" for a graphic image intended to convey the health risks of smoking.[42] The FDA selected a specific image to accompany each text warning.[43] The nine chosen images include "hole in throat," "smoke approaching baby," and "healthy/diseased lungs."[44]

Citing comments and studies received in response to the proposed rules issued months earlier, the FDA's final rules express concern about unchanging youth smoking rates and a lack of awareness as to "cigarettes' impact on life expectancy, heart disease, and pregnancy."[45] Accordingly, the FDA Rules express optimism that new graphic warnings would eliminate disproportionately high smoking rates among minorities and military personnel.[46] With public health in mind, the FDA also disagrees with several comments it received because it concludes they were not credible.[47] In particular, the agency disagrees with comments suggesting nicotine addiction is primarily psychological and "is the only medical condition that is irrefutably caused by cigarettes."[48] It also dismisses the idea that "consumers already know the health risks associated with smoking" and concludes that even if the risks are known, they "are not

undermine its own economic interest").

41. Clay Calvert et al., *Playing Politics or Protecting Children? Congressional Action & a First Amendment Analysis of the Family Smoking Prevention and Tobacco Control Act*, 36 J. LEGIS. 201, 239 (2010).

42. Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. at 36,674.

43. *Id.* at 36,648; *see supra* note 28 (listing the required text warnings). To view each of the images as it would appear alongside its respective text warning, see *FDA's New Warning Labels for Cigarettes*, *supra* note 15.

44. Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. at 36,649–57 (internal quotation marks omitted); *see also* Hilary G. Buttrick, *"You've Come a Long Way, Baby": Cigarettes, Graphic Warning Labels, and Balancing Consumer Protection and Commercial Free Speech*, 42 STETSON L. REV. 71, 71 (2012) ("Babies are great pitchmen. But can babies now convince consumers to give up cigarettes? The FDA hopes so.").

45. Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. at 36,629–30.

46. *Id.* at 36,630.

47. *Id.* at 36,630–31.

48. *Id.*

considered at the time of purchase."[49]

After identifying the public-health rationale, the FDA Rules proceed to explain the need for graphic warnings by asserting that existing warnings are inadequate.[50] Three alleged deficiencies cause the ineffectiveness: the warnings have not changed in 25 years, they often go unnoticed, and they fail to convey relevant information effectively.[51] According to the FDA, the existing warnings are inadequate precisely because they are familiar.[52] Because consumers have grown accustomed to seeing the warnings, the messages are no longer surprising and are more easily dismissed.[53] In contrast, large graphic warnings would "(1) get consumers' attention, (2) influence consumers' awareness of cigarette-related health risks, and (3) affect smoking intentions and behaviors."[54] While acknowledging the graphic labels would cause an emotional reaction, the FDA nonetheless concludes they are "appropriate and . . . consistent with well-established principles in the scientific literature" because "eliciting strong emotional and cognitive reactions . . . enhances recall and information processing, which helps to ensure that the warning is better processed, understood, and remembered."[55] Essentially, the FDA asserts that the labels change only the medium, not the message.[56]

C. *Cigarette Labels May Create a Slippery Slope*

The First Amendment extends its most vigorous protections to speech advocating political change.[57] This type of speech often springs from grassroots mobilization. Social change, while less about self-government, must still be organic to succeed. Yet, a dominating government viewpoint instead forecloses organic change by drowning out competing speech.[58] The

49. *Id.* at 36,632.
50. *Id.* at 36,631.
51. *Id.*
52. *Id.* at 36,632.
53. *Id.* at 36,635–36.
54. *Id.* at 36,633.
55. *Id.* at 36,641.
56. *But see* Nat Stern & Mark Joseph Stern, *Advancing an Adaptive Standard of Strict Scrutiny for Content-Based Commercial Speech Regulation*, 47 U. RICH. L. REV. 1171, 1198–99 (2013) ("A disclosure designed to repel customers from a product by provoking their disgust through a dramatic image is one different in kind, not degree, from a disclosure of fact. As is so often the case in speech, changing the mode of expression does indeed change the message.").
57. Morse v. Frederick, 551 U.S. 393, 403 (2007).
58. *Cf.* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)

FDA recognizes that mistrust of the government may arouse suspicion about the validity of any government speech.[59] Therefore, as government-mandated speech, graphic cigarette labels might not actually bring about social change in smoking rates because people consciously resist being told what to think.[60] Individual autonomy is desirable, and that principle dictates that people think for themselves.[61]

Law professors often quip that former clients' cringe-worthy conduct is simply an example of them exercising their right to be stupid. Although anecdotal, this description also supports the assertion that for the First Amendment to help advance individual autonomy, it must necessarily leave room for poor and even potentially harmful choices.[62] And if mandatory visual warning labels become commonplace on cigarettes, soon the government might be able to override, reduce, or even preclude those autonomous choices by mandating graphic warning labels on anything potentially harmful—even things as seemingly benign as high-calorie foods.[63] Because carcinogens and cholesterol are not one and the same, cigarettes are assuredly somewhat different from high-calorie foods. However, they are not so different as to merit wholly separate analysis; the slippery slope is still a danger. To illustrate, consider the assertion that cigarettes are different because unlike fatty foods, whose harm is no more than a side effect, cigarettes are designed to kill their users.[64] Although

("[F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.").

59. *See supra* note 30 and accompanying text.

60. *See* THANK YOU FOR SMOKING, *supra* note 1, at 9:08 (depicting a child's vehement denial when asked, "If your parents told you that chocolate was dangerous, would you just take their word for it?").

61. *See id.* at 9:13 ("So perhaps instead of acting like sheep . . . , you should find out for yourself.").

62. *See* Stern & Stern, *supra* note 56, at 1204 ("The Court . . . has affirmed that in commercial speech, as with other expression, freedom of speech may not be infringed because the choices it inspires are sometimes unwise.").

63. *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 589–90 (2001) (Thomas, J., concurring in part and concurring in the judgment); Stern & Stern, *supra* note 56, at 1203; Danielle Weatherby & Terri R. Day, *The Butt Stops Here: The Tobacco Control Act's Anti-Smoking Regulations Run Afoul of the First Amendment*, 76 ALB. L. REV. 121, 164–65 (2012); *infra* note 303–04 and accompanying text; *cf.* United States v. Alvarez, 132 S. Ct. 2537, 2547 (2012) ("Were [the Stolen Valor Act] to be sustained, there could be an endless list of subjects the National Government or the States could single out.").

64. *See* Darren S. Rimer, Note, *Secondhand Smoke Damages: Extending a*

framed callously, *Thank You for Smoking* illustrates why this argument fails: cigarettes are designed to get their users addicted, which is potentially debilitating—and certainly unfortunate—but is less insidious than literally hoping to kill.[65] The path of widespread paternalistic warnings, whether on cigarette packages, high-calorie foods, or some other product entirely, is not one the country would likely want to go down, because "[n]othing could be more damaging to the First Amendment than to equate it with a specific . . . perspective."[66]

If the Supreme Court holds the First Amendment precludes enforcement of any graphic warning label requirements, this problem could be avoided. While soliciting input on the new rules, the FDA received comments asserting potential First Amendment concerns.[67] However, the FDA Rules predictably "disagree that the warning requirements violate the First Amendment" because they supposedly compel disclosure only of factual information and do not otherwise change the messages' fundamental content.[68] Because the FDA Rules predate either of the circuit-split cases, they rely heavily on the predecessor district court case *Commonwealth Brands, Inc. v. United States*[69] for legal support.[70]

Nonetheless, several constitutional concerns have surfaced despite the FDA's attempt to assuage them preemptively.[71] This Note focuses on

Cause of Action for Battery Against a Tobacco Manufacturer, 24 SW. U. L. REV. 1237, 1265 n.196 (1995).

65. When confronted with an actual teenage smoker and accused of essentially plotting the teenager's demise, lobbyist Nick Naylor asks: "[H]ow on earth would Big Tobacco profit off of the loss of this young man? Now, I hate to think in such callous terms, but if anything, we'd be losing a customer. It's not only our hope, it's in our best interest to keep [him] alive and smoking." THANK YOU FOR SMOKING, *supra* note 1, at 5:26; *see also* United States v. Philip Morris USA, Inc., 907 F. Supp. 2d 1, 8 (D.D.C. 2012) (mandating tobacco companies publish a corrective statement admitting that cigarettes are "intentionally designed . . . with enough nicotine to create and sustain *addiction*" (emphasis added)).

66. Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 10 (2000).

67. Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628, 36,694–95 (June 22, 2011).

68. *Id.* at 36,695–96.

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

70. *See* Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. at 36,695–99.

71. *See, e.g.*, Stephanie Jordan Bennett, Comment, *Paternalistic Manipulation*

those involving the First Amendment, leaving other constitutional issues—for example, a Fifth Amendment takings claim asserting that the required labels infringe upon trademarked packaging[72]—for another day. Many commentators who evaluated the label requirement's free speech implications conclude, contrary to the FDA's own findings, that the FDA Rules do not satisfy First Amendment standards.[73] Of course, the issue will be decided based upon the Constitution, not solely upon what scholars think. However, the circuit split and the recent passing of the date by which the FDA Rules were to be effective[74] provides an opportunity for further analysis.

III. THE CIRCUIT-SPLIT CASES

A. Discount Tobacco City & Lottery*: The Sixth Circuit*

The current circuit split's roots took hold in 2010.[75] In *Commonwealth Brands*, the participating tobacco companies believed the potential[76] graphic warnings effectively forced them "to become the mouthpieces for a [g]overnment marketing campaign designed . . . to promote the [g]overnment's subjective desire that consumers stop using tobacco products altogether."[77] However, the court disagreed, holding "the government's goal is not to stigmatize the use of tobacco products on the industry's dime; it is to ensure that the health risk is actually *seen* by

Through Pictorial Warnings: The First Amendment, Commercial Speech, and the Family Smoking Prevention and Tobacco Control Act, 81 MISS. L.J. 1909, 1913–14 (2012).

72. Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. at 36,701; *see also* Benjamin A. Hackman, Comment, *On the Mark? Big Tobacco Asserts Property Rights on Cigarette Packaging*, 29 PENN ST. INT'L L. REV. 809, 809–10 (2011).

73. *See, e.g.*, Weatherby & Day, *supra* note 63, at 124 ("The . . . graphic images mandate tramples on the First Amendment."); B. Ashby Hardesty, Jr., Note, *Joe Camel Versus Uncle Sam: The Constitutionality of Graphic Cigarette Warning Labels*, 81 FORDHAM L. REV. 2811, 2815 (2013).

74. That date was September 22, 2012, "15 months after the date of publication in the Federal Register of [the] final rule" on June 22, 2011. Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. at 36,702.

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

76. The case was decided in January 2010, more than 15 months before the new FDA Rules were promulgated. *Id.*

77. *Id.* at 530 (second alteration in original) (quoting an appellate brief) (internal quotation mark omitted).

customers in the first instance."[78] Although less restrictive means were available, the court held they were predominantly variations on proposals already proven to be ineffective.[79]

Naturally, the case was appealed, and using a deferential standard of review, the Sixth Circuit affirmed the district court's holding that the color graphic warning labels satisfy First Amendment standards.[80] Relying on prior Supreme Court holdings, the Sixth Circuit recognized that preventing underage smoking underage smoking is a compelling government interest.[81] The court also incorporated Congress's findings that most new tobacco users are underage and past efforts to restrict advertising failed to achieve the goal of reduced adolescent tobacco use.[82] Thus, although First Amendment questions often require a higher standard of review, the deference the *Discount Tobacco City* court afforded Congress mimics rational basis review much more closely.[83] Indeed, the court recognized that, despite a duty to arrive at its own conclusions, some room was necessarily left "for the exercise of legislative judgment."[84] Accordingly, tobacco companies' ability to advertise on the remaining half of their packaging meant the required labels were not unduly burdensome.[85]

The dissent noted, however, that while the ends are compelling, the means are not appropriately tailored.[86] The color labels are too large in scale and are intended primarily "to create a visceral reaction in the consumer."[87] Strictly truthful information, even if frightening, can certainly be provided to cultivate a population of well-informed citizens, but it is not

78. *Id.*

79. *Id.* at 538.

80. *Disc. Tobacco City & Lottery*, 674 F.3d at 531, *cert. denied sub nom.* Am. Snuff Co. v. United States, 133 S. Ct. 1996 (2013).

81. *Id.* at 519.

82. *Id.* at 520.

83. *See id.* at 521–22 ("In reviewing the constitutionality of a statute, courts must accord substantial deference to the predictive judgments of Congress. . . . Even in the realm of First Amendment questions where Congress must base its conclusions upon substantial evidence, deference must be accorded . . . , lest [a court] infringe on traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy." (third alteration in original) (quoting Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 195–96 (1997)) (internal quotation marks omitted)).

84. *Id.* at 523 (quoting 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 508 (1996)) (internal quotation mark omitted).

85. *Id.* at 525; *id.* at 567 (Stranch, J., separate majority opinion).

86. *Id.* at 528 (Clay, J., dissenting in Section III).

87. *Id.*

"permissible for the government to simply frighten consumers or . . . to flagrantly manipulate the emotions of consumers as it seeks to do here."[88] Until the District of Columbia Circuit ruled in the tobacco companies' favor,[89] it appeared this dissent was the only legal authority in their corner.

B. R.J. Reynolds*: The D.C. Circuit*

While *Discount Tobacco City* was proceeding through "our endless appeals system,"[90] the tobacco companies initiated another lawsuit directly challenging the FDA Rules instead of only the law authorizing them.[91] In granting the tobacco companies' motion for summary judgment, the federal district court highlighted the "images' 'salience' . . . as a primary selection criterion" over whether they conveyed accurate, truthful, and factual information.[92] The images' purpose, the court held, is not to convey educational warnings, but to advocate the government's antismoking policy.[93] Indeed, the court noted even the term *warning* is inaccurate and unfairly benign because the images were intentionally designed to be more shocking and repulsive than informational.[94]

Accordingly, the court applied strict scrutiny because, in its view, the graphic images merely symbolize the consequences of smoking and do not exclusively contain truthful or factual information.[95] For example, while the text statements accompanying the warnings may be purely factual, the court held the image depicting a man exhaling smoke through a hole in his

88. *Id.* at 529; *see also* Jennifer M. Keighley, *Can You Handle the Truth? Compelled Commercial Speech and the First Amendment*, 15 U. PA. J. CONST. L. 539, 579 (2012) ("[T]he key goal in implementing fear appeals is *not to inform* the audience, but to appeal to the audience's emotions." (emphasis added)).

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

90. In *Thank You for Smoking*, one character sarcastically tells his son the "endless appeals system" makes the American government the best government. THANK YOU FOR SMOKING, *supra* note 1, at 11:16.

91. R.J. Reynolds Tobacco Co. v. FDA, 845 F. Supp. 2d 266, 268 (D.D.C. 2012), *aff'd*, 696 F.3d 1205 (D.C. Cir. 2012). The case was decided less than a month before the Sixth Circuit filed its *Discount Tobacco City* opinion, and accordingly, could not have been briefed before that court or considered during arguments. *See Disc. Tobacco City*, 674 F.3d at 509; *R.J. Reynolds Tobacco Co.*, 845 F. Supp. 2d at 266.

92. *R.J. Reynolds Tobacco Co.*, 845 F. Supp. 2d at 270 (citing Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628, 36,639 (June 22, 2011)).

93. *Id.* at 275.

94. *Id.* at 268 n.1.

95. *Id.* at 272–74.

throat is "not being used to show a usual consequence of smoking."[96] Rather, it is used only to symbolize cigarettes' addictive nature.[97] Because the required labels reach beyond bare facts "to evoke a strong emotional response," the images do not fit the deferential standard of review afforded to mandatory factual disclosures.[98] Therefore, strict scrutiny analysis was required because the interest in promoting truth that allows the government to mandate certain disclosures is nullified when those disclosures are not completely factual.[99] After applying strict scrutiny, the district court concluded the graphic labels are not primarily factual, and even if they are, they require so much space on each package that they become a substantial and unjustified burden on speech.[100] This indicates that the FDA Rules are not narrowly tailored and therefore violate the First Amendment.[101]

The appeal was not a rubber stamp affirmation.[102] Although it did affirm the result, the District of Columbia Circuit held a different level of review was appropriate, displacing the district court's strict review in favor of intermediate scrutiny.[103] The court was skeptical that dissuading adults from purchasing a lawful product is an important government interest,[104] but even assuming it is, the court nonetheless held that no shred of evidence suggested the regulations would advance that interest.[105] Accordingly, it vacated the FDA Rules.[106]

Thus, "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter."[107] The Supreme Court has already stated cigarette

96. *Id.* at 273.
97. *Id.*
98. *Id.* at 272, 274.
99. *Id.* at 274; *see also* Jennifer L. Pomeranz, *No Need to Break New Ground: A Response to the Supreme Court's Threat to Overhaul the Commercial Speech Doctrine*, 45 LOY. L.A. L. REV. 389, 403–07 (2012) (identifying the benefit of enabling citizens to make informed choices by providing them with and mandating disclosure of pertinent and *factual* information).
100. *R.J. Reynolds Tobacco Co.*, 845 F. Supp. 2d at 275–76.
101. *Id.* at 277.
102. *See* R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1217 (D.C. Cir. 2012).
103. *Id.*
104. *Id.* at 1218 n.13.
105. *Id.* at 1219.
106. *Id.* at 1222.
107. SUP. CT. R. 10(a).

advertising within the First Amendment context presents an important issue meriting consideration.[108] Therefore, disagreement between circuit courts of appeals on this issue is a scenario ripe for the Supreme Court to review.[109] Indeed, the last time the Court granted certiorari to a cigarette case, it did so to resolve a circuit split between only two circuits—the First and Fifth—over preemption.[110] Both the language of the Court's rule and the gravity of the First Amendment issues at stake mean the Court need not wait for more circuits to join the debate before resolving the split.[111] A petition for certiorari to the Sixth Circuit was filed in 2012,[112] along with an amicus brief that November[113] and a resistance from the government in March 2013,[114] but the Court denied certiorari.[115] Further, the government has decided not to pursue an appeal from the District of Columbia Circuit.[116] However, this certainly does not mean cigarette labels are forever a moot issue; the FDA stated it would return to the drawing board to create a new set of labels,[117] and those will likely be challenged just as vigorously.[118] The question then becomes: Once the Court eventually reviews the split, how should they resolve it?

108. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 540 (2001).

109. *See* SUP. CT. R. 10(a); *see also* Brian E. Mason, Comment, *Tobacco Manufacturers and the United States Government: Ready for Battle*, 15 SMU SCI. & TECH. L. REV. 555, 581 (2012) (predicting that if the circuit courts of appeals disagreed about the standard of review—which they did—"the Supreme Court will have a very interesting and important issue to address in the coming years").

110. Altria Grp., Inc. v. Good, 555 U.S. 70, 75–76 (2008).

111. *See, e.g.*, *id.*; *Lorillard Tobacco Co.*, 533 U.S. at 540.

112. Petition for a Writ of Certiorari, Am. Snuff Co. v. United States, 133 S. Ct. 1996 (2013) (No. 12-521), 2012 WL 5353900.

113. Brief of Washington Legal Foundation as Amicus Curiae in Support of Petitioners, *Am. Snuff Co.*, 133 S. Ct. 1996 (No. 12-521), 2012 WL 5928326.

114. Brief for the Respondents in Opposition, *Am. Snuff Co.*, 133 S. Ct. 1996 (No. 12-521), 2013 WL 1209163.

115. *Am. Snuff Co.*, 133 S. Ct. at 1996.

116. *See* Dennis, *supra* note 19.

117. *See id.*

118. *See* David L. Hudson, Jr., *A Smokin' Body: Cancer Images Are Lighting Up a First Amendment Blaze*, A.B.A. J., Apr. 2012, at 20, *available at* http://www.abajournal.com/magazine/article/a_smokin_body_cancer_images_are_lighting_up_a_first_amendment_blaze/ ("It's a burning controversy that continues to smolder—and use any other smoking puns you prefer—as the dispute over . . . images on cigarette packs lights up a First Amendment fire.").

IV. APPLICABLE DOCTRINES AND PRECEDENT

A. *Cases Concerning Identical or Closely Related Products*

The type of precedent to be applied depends on how cigarette packages and the FDA Rules are classified.[119] Commercial speech provides one set of cases, compelled speech provides another, and compelled subsidies another still. However, before approaching those, a threshold examination of prior cigarette and other "vice" cases reinforces the idea that even unpopular or unsavory speech merits First Amendment protection.[120] Further, these cases show that the Court understands tobacco companies' protected speech interests notwithstanding whatever health risks cigarettes pose.[121]

1. Cipollone v. Liggett Group, Inc.

Although primarily a preemption case, *Cipollone v. Liggett Group, Inc.*[122] nonetheless contains two findings which may inform the current circuit split. First, it incorporates the lower courts' fact-finding that the decedent whose estate maintained the action bore 80 percent of the comparative fault because cigarettes were a known danger.[123] Again this implicates the fact that cigarettes are a legal product; if the decedent knew the risks but chose to smoke cigarettes nonetheless, the label clearly did not impact her choice enough to change it, and so a picture might not do so either.[124]

119. At one point, the Court held the FDA had no power to regulate cigarettes beyond the limits of express congressional authority delegated to it. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 161 (2000). Because the FSPTCA expressly delegated power to the FDA, *Brown & Williamson* is rendered moot here. *See* Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 201(a), 123 Stat. 1776, 1842 (2009) (codified as amended at 15 U.S.C. § 1333 (2012)).

120. *See* Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 LOY. L.A. L. REV. 67, 102 (2007). For an example from a recent case, see Snyder v. Phelps, 131 S. Ct. 1207, 1220 (2011) (finding that the First Amendment shields Westboro Baptist Church from tort liability for virulent picketing when undertaken in compliance with local police regulations).

121. The Southern District of New York recently reaffirmed this statement. *See* Clinton v. Brown & Williamson Holdings, Inc., No. 05-CV-9907(CS), 2013 WL 3111122, at *10 (S.D.N.Y. June 20, 2013) ("It is undisputed that cigarette manufacturers have constitutionally protected First Amendment rights . . . .").

122. Cipollone v. Liggett Grp., Inc, 505 U.S. 504 (1992).

123. *Id.* at 512.

124. *See* R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1219 (D.C. Cir.

Second, *Cipollone* held that claims against tobacco companies for fraudulent advertising and conspiracy to conceal data showing cigarettes are hazardous are not preempted.[125] In contrast to the case's other lesson, this favors greater regulation of labeling because it protects consumers.[126] However, *Cipollone* was decided more than 20 years ago,[127] and given the extensive data the FDA considered in making the new rules, whatever was concealed then is likely no longer hidden.[128] Further, tobacco companies already have a federally mandated obligation to publish separate corrective statements about past lies.[129] Therefore, the graphic labels need not pursue this goal because it has already been addressed and remedied.

2. Lorillard Tobacco Co. v. Reilly

Although *Cipollone* did not consider any First Amendment questions,[130] the Court tackled that subject just nine years later and recognized tobacco companies' protected interest in communicating with customers.[131] The advertising restrictions at issue in *Lorillard Tobacco Co. v. Reilly* were state-imposed time, place, and manner restrictions,[132] which are typically valid because they are not content based.[133] These restrictions applied across the board, affecting cigars and smokeless tobacco in addition to cigarettes.[134] Although the restrictions were the same, the Court separated its analysis of the products because it again considered whether federal law preempted any further state regulation of cigarettes.[135] After

2012).

125. *Cipollone*, 505 U.S. at 530.

126. *See* Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 561 (6th Cir. 2012) (Stranch, J., separate majority opinion), *cert. denied sub nom.* Am. Snuff Co. v. United States, 133 S. Ct. 1996 (2013).

127. *Cipollone*, 505 U.S. at 504.

128. *See generally* Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628, 36,629–31 (June 22, 2011) (listing results from numerous studies showing negative health effects of smoking).

129. United States v. Philip Morris USA, Inc., 907 F. Supp. 2d 1, 8–9 (D.D.C. 2012).

130. *See Cipollone*, 505 U.S. at 530–31.

131. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 571 (2001).

132. The Massachusetts statute forbade outdoor advertising of cigarettes within 1,000 feet of schools and playgrounds, and mandated any in-store, point-of-sale advertising within the same thousand-foot radius be more than five feet from the floor. *Id.* at 534–35.

133. *See* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

134. *Lorillard Tobacco Co.*, 533 U.S. at 534–36.

135. *Id.* at 540.

concluding the regulations were preempted with regard to cigarettes,[136] the Court then invalidated the cigar and smokeless tobacco restrictions on First Amendment grounds.[137]

Citing potentially "onerous burdens on speech," the Court both recognized that adult tobacco use is a legal activity and noted that "tobacco retailers and manufacturers have an interest in conveying truthful information about their product to adults."[138] Even this restriction as to time, place, and manner was not appropriately tailored and could not satisfy First Amendment intermediate scrutiny under *Central Hudson Gas & Electric Corp. v. Public Service Commission.*[139]

While the *Lorillard* Court did not consider the First Amendment implications with respect to cigarettes,[140] its holding may nonetheless be instructive in resolving the current circuit split. In particular, no preemption issue exists here because the graphic warning label requirement is already federally mandated.[141] Without the preemption threshold, the Court's holding with regard to cigars and smokeless tobacco could conceivably be applied to cigarettes as well, especially because the graphic warning requirements do not fit nearly as neatly into the category of a time, place, or manner restriction.[142]

3. Altria Group, Inc. v. Good

In granting certiorari on yet another cigarette-labeling-preemption case just seven years after *Lorillard Tobacco Co.*, perhaps the Court hoped the third time was the charm and all issues would be clearly resolved.[143] Alas, as the current circuit split makes clear, another major issue has arisen just five years later.[144] *Altria Group, Inc. v. Good* stands as a foil to the circuit-split cases because it discusses specific instances of deceptive cigarette advertising rather than focusing on the industry as a whole.[145]

136. *Id.* at 551.
137. *Id.* at 564–66.
138. *Id.* at 564.
139. *Id.* at 565–66; *see infra* notes 181, 183 and accompanying text.
140. *Lorillard Tobacco Co.*, 533 U.S. at 553.
141. *See* 15 U.S.C. § 1333(d) (2012); Required Warnings for Cigarette Packages and Advertisements, 21 C.F.R. § 1141.10(a) (2013).
142. *See* 21 C.F.R. § 1141.10(a).
143. *See* Altria Grp., Inc. v. Good, 555 U.S. 70, 80 (2008) ("We have construed the operative phrases of [the cigarette-preemption statute] in two prior cases . . . .").
144. *See supra* Part III.
145. *See Altria Grp.*, 555 U.S. at 82–83.

Specific fraudulent statements about "light" cigarettes are a far cry from allegations that current cigarette labels are equally deceptive.[146] In fact, Congress specifically took the holding from *Altria* into account when it passed the FSPTCA, finding "there [is] no reduction in risk . . . from 'low tar' and 'light' cigarettes, and such products may actually increase the risk of tobacco use."[147] Further, it defined misbranded tobacco products to include those with "labeling [that] is false or misleading in any particular."[148] Thus, this case is distinguishable from the current dispute because light cigarettes are not at issue, and in any event, the harms *Altria* identified have since been addressed.[149]

4. *Other "Vice" Cases*

Smoking, gambling, and alcohol do not merit different legal treatment or less rigorous protection simply because they are adult vices.[150] Each product or activity is often regulated and restricted for a similar purpose: to reduce potential harmful effects by reducing consumer demand through curtailed advertising or packaging.[151] Alongside *Cipollone*, *Lorillard*, and *Altria*, cases dealing with vices other than cigarettes illustrate that these products and the speech rights of those who sell them are not discounted merely because some may find them objectionable. Indeed, the autonomy principle stands for the very idea that individuals can and should be able to define themselves by their vices if they so choose.

Take gambling as an example. While the effects on individuals are perhaps not as directly attributable as the health effects of smoking, gambling still produces social costs.[152] This is why lotteries and casinos, as

146. *Compare id.* at 82 ("[R]espondents' claim that the deceptive statements 'light' and 'lowered tar and nicotine' induced them to purchase petitioners' product alleges a breach of the duty not to deceive."), *with* R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1214–15 (D.C. Cir. 2012) ("[I]n the absence of any congressional findings on the misleading nature of cigarette packaging itself, there is no justification . . . for the graphic warnings.").

147. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 2(39), 123 Stat. 1776, 1780 (2009).

148. *Id.* § 101(b)(3), 123 Stat. at 1788 (codified at 21 U.S.C. § 387C(a)(1) (2012)).

149. *See supra* notes 128–29 and accompanying text.

150. *See* Michael Hoefges & Milagros Rivera-Sanchez, *"Vice" Advertising Under the Supreme Court's Commercial Speech Doctrine: The Shifting* Central Hudson *Analysis*, 22 HASTINGS COMM. & ENT. L.J. 345, 387–88 (2000).

151. *Id.* at 347.

152. *See generally* Keith C. Miller, *Public Policy and the Inevitability of*

well as "the dissemination of information concerning such enterprises," were historically discouraged.[153] Yet, in *Greater New Orleans Broadcasting Association v. United States*, the Court held that while the "[g]overnment may assert a legitimate and substantial interest in alleviating [various] societal ills," countervailing policy considerations must sometimes override.[154] Most notably, the Court's review of the restrictions forbidding broadcast advertisements for privately owned casinos was fatal both because the ban did not directly advance any asserted interest, and because it was chosen instead of reasonable alternatives that did not concern speech and were therefore less restrictive.[155] Thus, while gambling is potentially harmful, the Court deferred to "the presumption that the speaker and the audience, not the [g]overnment, should be left to assess the value of accurate and nonmisleading information about lawful conduct."[156]

Similarly, in *Rubin v. Coors Brewing Co.*, the Court found a regulation prohibiting brewers from displaying certain information on their labels, and the law prohibiting commerce in beer unless the labels adhered to this ban, were also unconstitutional.[157] While acknowledging an interest in preventing societal alcoholism through labeling "strength wars," the restriction again lacked a material connection to that interest.[158] The next year, the Court followed this reasoning further in *44 Liquormart, Inc. v. Rhode Island* and invalidated a Rhode Island ban on liquor-price advertising despite the State's asserted interest in reducing alcohol consumption.[159]

Of course, alcohol and gambling are not cigarettes, and restrictions on speech are not the same as affirmative disclosure requirements.[160] Thus, distinctions between other vice cases and the current circuit split are easy to make. Nonetheless, *Greater New Orleans*, *Rubin*, and *44 Liquormart* as a

Internet Gambling, 61 DRAKE L. REV. DISCOURSE 1, 14–16 (2012), *available at* http://students.law.drake.edu/lawReview/docs/lrDiscourse201210-miller.pdf (discussing the social costs of Internet gambling in particular).

153. Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 176–78 (1999).

154. *Id.* at 186.

155. *Id.* at 188–92.

156. *Id.* at 195 (citing Edenfield v. Fane, 507 U.S. 761, 767 (1993)).

157. Rubin v. Coors Brewing Co., 514 U.S. 476, 478–80 (1995).

158. *Id.* at 489.

159. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 507–08 (1996).

160. *See* Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 552 (6th Cir. 2012) (Stranch, J., separate majority opinion), *cert. denied sub nom.* Am. Snuff Co. v. United States, 133 S. Ct. 1996 (2013).

group supplement *Cipollone*, *Lorillard*, and *Altria* to provide one major takeaway: even vices are entitled to some First Amendment protection despite valid interests in preventing social harm.[161]

The Court's attitude toward cigarettes and other vices should inform, even if it does not dictate, its resolution of the circuit split. The current issue can be categorized in a number of ways: as commercial speech, compelled speech, a compelled subsidy, or a combination of the three. The principles of each doctrine merit brief discussion.

B. *Defining Commercial Speech*

The Court has given commercial speech several definitions; one is "expression related solely to the economic interests of the speaker and its audience."[162] However, this definition from *Central Hudson* is nebulous,[163] and the Court has also put forth a factor test to determine when speech is commercial.[164] The three factors, outlined in *Bolger v. Youngs Drug Products Corp.*, are whether the speech (1) proposes a transaction or advocates a sale; (2) references a specific product; and (3) is economically motivated.[165] Under this second definition, no factor alone makes speech commercial, but a combination of all three does.[166] A third definition also took hold in a recent commercial speech case, *Thompson v. Western States Medical Center*,[167] in which "the Court . . . unambiguously adopted the view that commercial speech is confined to expression advocating purchase."[168] While similar to the *Central Hudson* definition, the *Thompson* definition[169]

161. *See* Keighley, *supra* note 88, at 583 (providing a reminder that agreement with an initiative to reduce smoking rates does not mean the First Amendment can be ignored); Weatherby & Day, *supra* note 63, at 126 ("Tobacco companies are no less deserving of protection from compelled speech . . . than other persons or entities. The fact that the government's compelled speech targets commercial products and supports a worthy goal does not override the important and fundamental free speech rights . . . at stake.").

162. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 561 (1980) (citations omitted).

163. *See id.*

164. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66–67 (1983); *see also* Redish, *supra* note 120, at 74–75 (explaining the cryptic and often inconsistent definitions used by the Court).

165. *Bolger*, 463 U.S. at 66–67.

166. *Id.*

167. Thompson v. W. States Med. Ctr., 535 U.S. 357 (2002).

168. Redish, *supra* note 120, at 75; *see Thompson*, 535 U.S. at 366–67.

169. *Thompson*, 535 U.S. at 367 ("[A] communication that does no more than

is slightly narrower because economic interests can stretch beyond sale and purchase to include donation and even reputation.[170] Therefore, defining commercial speech broadly casts a wide net and is potentially overinclusive, even covering charities' requests for donations. *Central Hudson*'s limitation to economic interests does little to solve this quandary.[171] But although the Court's definitions of commercial speech lack clarity, cigarette packages ultimately qualify as commercial speech no matter which definition is used.[172]

C. *Protecting and Regulating Commercial Speech*

1. *Protecting Commercial Speech*

"The First Amendment . . . protects commercial speech from unwarranted governmental regulation."[173] The proffered justification for such protection is often that "the best way to ensure truth in commerce is to preclude government regulation of it."[174] However, "the Court will never provide . . . cigarette advertising the level of protection customarily granted political speech" and other core First Amendment categories.[175] Commercial speech only receives limited protection because full protection might frustrate consumer protection efforts and "dilute the First Amendment when it comes to political or other speech."[176] Limited protection also advances the idea that citizens should be suspicious of self-interested speech and reflects the distinction between the functional value of commercial and other types of speech.[177] Nonetheless, although "it

propose a commercial transaction is entitled to the coverage of the First Amendment.'" (quoting Edenfield v. Fane, 507 U.S. 761, 767 (1993)).

170. *Compare id.*, *with* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 561 (1980). Indeed, almost all speech is self-interested to some extent. *See* Redish, *supra* note 120, at 92–93.

171. *See Cent. Hudson*, 447 U.S. at 561.

172. *See infra* Part V.A.1.

173. *Cent. Hudson*, 447 U.S. at 561 (citing Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 761–62 (1976)).

174. Tamara R. Piety, *Market Failure in the Marketplace of Ideas: Commercial Speech and the Problem That Won't Go Away*, 41 LOY. L.A. L. REV. 181, 183 (2007). Professor Piety disagrees with that justification for commercial speech protection, using it only to frame her counterargument. *See id.*

175. R.A.V. v. City of St. Paul, 505 U.S. 377, 415 (1992) (Blackmun, J., concurring).

176. Samuel A. Terilli, Nike v. Kasky *and the Running-But-Going-Nowhere Commercial Speech Debate*, 10 COMM. L. & POL'Y 383, 388–89 (2005).

177. *Id.* at 389.

would be incorrect to suggest that commercial speech is today deemed fungible with fully protected speech in all contexts, it is at least true that the gap between the two is far narrower" now than it formerly was.[178] Most recent commercial speech cases have been decided in favor of fewer restrictions on speech,[179] but even so, some argue greater protection is still necessary.[180]

2. *Regulating Commercial Speech*

Although commercial speech does receive some protection, "[t]he First Amendment . . . does not prohibit the [government] from insuring that the stream of commercial information flow[s] cleanly as well as freely."[181] Regulations may be necessary to ensure that the metaphorical marketplace of ideas actually encourages truth in the literal marketplace and allows citizens to be better informed.[182] Because deceptive speech undermines the marketplace of ideas' supposed truth-finding function, preventing deception is a primary goal of commercial speech regulation.[183] The government seeks to eliminate deception either by restricting commercial speech or by mandating certain commercial disclosures.[184] Each is reviewed under its own test.[185]

The *Central Hudson* test, akin to intermediate scrutiny, governs

178. Redish, *supra* note 120, at 68 (footnote omitted).

179. *See, e.g.*, Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2659 (2011); Thompson v. W. States Med. Ctr., 535 U.S. 357, 377 (2002); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 566 (2001).

180. *See, e.g.*, Redish, *supra* note 120, at 122–23 (suggesting either greater protection of commercial speech or less expansive protection for counter-commercial speech and other self-interested speech, such as political advertising); Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 TEX. L. REV. 777, 781–82 (1993) ("[P]rofit motive alone is not enough, either in First Amendment doctrine or theory, to disqualify speech from full constitutional protection."); Stern & Stern, *supra* note 56, at 1202 ("The First Amendment simply does not support the 'commonsense' distinction made between personal and commercial speech. Such a distinction is 'commonsense' only if our sense leads to the abridgment of expression we find worthless." (footnote omitted)).

181. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771–72 (1976) (citations omitted).

182. *See* Piety, *supra* note 174, at 188–89.

183. Victor Brudney, *The First Amendment and Commercial Speech*, 53 B.C. L. REV. 1153, 1164–65 (2012).

184. *See* Dayna B. Royal, *Resolving the Compelled-Commercial-Speech Conundrum*, 19 VA. J. SOC. POL'Y & L. 205, 217–19 (2011).

185. *See id.*

commercial speech restrictions.[186] The FDA Rules could conceivably be termed a restriction because they limit the amount of available space for other labels.[187] Under *Central Hudson*, lawful and nonmisleading speech may be restricted if "the regulation directly advances the [substantial] governmental interest asserted, and . . . is not more extensive than necessary."[188] Of course, cigarettes are a legal product, and "so long as the sale and use of tobacco is lawful for adults, the tobacco industry has a protected interest in communicating information about its products."[189] The "lawful" aspect of the *Central Hudson* test works in favor of the tobacco companies.

On the other hand, the "misleading" aspect of the test is a more difficult hurdle to overcome. Tobacco companies have historically hidden the truth about cigarettes' health consequences,[190] and even influenced the law to create an exemption from tort liability.[191] Yet, although it is abhorrent, there are three reasons why this past conduct should not encourage a finding that current cigarette packaging is misleading. First, both sides of the tobacco debate employ manipulative tactics.[192] One side should not be unilaterally condemned when neither side plays fairly. Second, while an interest in rectifying past wrongs exists, unconstitutional requirements must be struck down notwithstanding any asserted reparatory purpose.[193] Third, and most importantly, the government has

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

187. *See supra* note 42 and accompanying text.

188. *See Cent. Hudson*, 447 U.S. at 566.

189. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 571 (2001).

190. *See* United States v. Phillip Morris USA, Inc., 907 F. Supp. 2d 1, 5 (D.D.C. 2012).

191. *See generally* Elizabeth Laposata et al., *Tobacco Industry Influence on the American Law Institute's Restatements of Torts and Implications for Its Conflict of Interest Policies*, 98 IOWA L. REV. 1 (2012).

192. *See, e.g.*, THANK YOU FOR SMOKING, *supra* note 1, at 22:50 (depicting an anti-tobacco legislator discussing with his aide the proper—meaning most sympathetic—characteristics for which to look when seeking a "cancer kid" for a publicity opportunity); *see also South Park: Butt Out* at 13:40 (Comedy Central television broadcast Dec. 3, 2003), *available at* http://www.southparkstudios.com/full-episodes/s07e13-butt-out (satirizing manipulative anti-tobacco groups by depicting an anti-tobacco advocate who maintains that "[s]ometimes lying is okay, like when you know what's good for people more than they do").

193. *Cf.* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 506 (1986) (invalidating a quota requirement for minority construction contractors because it was not narrowly tailored to remedy past racial discrimination).

already mandated that tobacco companies publish corrective statements about past deception.[194] That harm has specifically been addressed, so if the FDA Rules' purpose is remedial, punishment for past deception would be duplicative.

Additionally, cigarette packaging does not state there are health *benefits* to smoking, so "the communication is neither misleading nor related to unlawful activity."[195] Thus, because the package contains no positive implications, the assertion that a cigarette package "is deceptive because it highlights [the] product's pleasurable use while obscuring its serious health risks" is misguided.[196] *Thank You for Smoking* reinforces the idea that cigarette labels are not misleading because the health risks of smoking are already well known.[197] Accordingly, if cigarette packages are commercial speech, are not misleading, and concern only a lawful product, they cannot be restricted under *Central Hudson*.[198] Of course, even if cigarette packages *are* deemed misleading, the FDA Rules could still fail the *Central Hudson* test if they do not directly advance the asserted interest or are more extensive than necessary.[199] Indeed, the District of Columbia Circuit found the primary governmental interest of the FDA Rules is simply to reduce smoking rates, not prevent deception, and concluded not even a scintilla of evidence shows the graphic warnings will directly advance that interest, as *Central Hudson* requires.[200]

Zauderer v. Office of Disciplinary Counsel governs mandatory

194. *Philip Morris USA*, 907 F. Supp. 2d at 8–9.

195. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 (1980).

196. *Recent Case*, R.J. Reynolds Tobacco Co. v. Food & Drug Administration*, 693 F.3d 1205 (D.C. Cir. 2012)*, 126 HARV. L. REV. 818, 822 (2013). The FDA Rules' First Amendment implications for other cigarette advertisements displayed or published separately, including those that "extol the pleasures of [tobacco] use" more directly, are conceivably different but are beyond the scope of this Note. *Id.* at 825.

197. Testifying in front of a Senate committee, lobbyist Nick Naylor asks for a show of hands on the subject and then states: "I just don't see the point in a warning label for something people already know." THANK YOU FOR SMOKING, *supra* note 1, at 1:20:39; *see also* R. George Wright, *Are There First Amendment "Vacuums?": The Case of the Free Speech Challenge to Tobacco Package Labeling Requirements*, 76 ALB. L. REV. 613, 621 (2012) ("[M]ost people at this point have some basic awareness of the most common or severe general health risks [of smoking].").

198. *See Cent. Hudson*, 447 U.S. at 566.

199. *See id.*

200. R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1218–19 (D.C. Cir. 2012).

commercial disclosures.[201] Under this standard, required disclosures need only be "reasonably related to the . . . interest in preventing deception" as long as they are purely factual, uncontroversial, and not unduly burdensome.[202] The standard of review is lower because, unlike speech restrictions, mandatory disclosures uphold "our tradition that more speech, not less, is the governing rule."[203] Instead of preventing speech, mandatory disclosures merely require speakers to provide more information.[204] Because the FDA Rules require tobacco companies to add specific images to their packaging, the regulation fits more neatly as a *Zauderer* disclosure than as a *Central Hudson* restriction.[205]

While evaluating the FDA Rules, the Sixth Circuit concluded commercial speech can be supplemented with mandatory disclosures even if it is only potentially misleading and does not actually deceive.[206] Because some adolescents fail to appreciate the potential health risk of smoking, existing advertising and cigarette packaging may be misleading to them.[207] Because the text-only warnings are familiar and in some instances go unnoticed, even adult consumers may in fact believe no health risks loom. This, in turn, means the packaging is potentially misleading.[208] The court also found persuasive those studies which state "that an information deficit still exists . . . regarding the dangers of tobacco use,"[209] and it held that given all these factors, the *Zauderer* test was applicable because the FDA Rules were meant to prevent potential deception.[210]

Further, information that consumers are ill-equipped to evaluate because they lack knowledge about the subject is often deemed likely to mislead.[211] In other cases involving exposure to drugs or toxins, whether or

201. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985).

202. *Id.* at 651.

203. Citizens United v. FEC, 558 U.S. 310, 361 (2010).

204. Royal, *supra* note 184, at 220; *see Zauderer*, 471 U.S. at 651.

205. *Compare Zauderer*, 471 U.S. at 651, *with Cent. Hudson*, 447 U.S. at 566.

206. Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 524 (6th Cir. 2012) (citing Int'l Dairy Foods Ass'n v. Boggs, 622 F.3d 628, 641 (6th Cir. 2010)), *cert. denied sub nom.* Am. Snuff Co. v. United States, 133 S. Ct. 1996 (2013).

207. *Id.* at 525.

208. *See id.* at 563–64 (Stranch, J., separate majority opinion) (accepting the government's argument that the purpose of graphic warning labels is merely to ensure the health risk message is actually seen).

209. *Id.* at 525 (majority opinion).

210. *Id.* at 558 (Stranch, J., separate majority opinion); *see also Zauderer*, 471 U.S. at 651.

211. Linda J. Demaine, *Seeing is Deceiving: The Tacit Deregulation of*

not the First Amendment is implicated, "questions of medical causation [are] beyond the understanding of a lay person."[212] Under this standard, consumers are ill-equipped to evaluate almost any statement about health risks contained on cigarette packaging, and such statements could be deemed likely to mislead.[213]

Accordingly, the Supreme Court could find that to prevent the "false impression that smoking [is] innocuous, the cigarette manufacturer . . . must also disclose the serious risks to life that smoking involves."[214] Preventing dissemination of misleading information may necessitate "additional information, warnings, and disclaimers."[215] However, *Zauderer* analysis could still become inapplicable to the FDA Rules if the graphic warning labels are controversial, unduly burdensome, or not purely factual.[216]

D. *Compelled Speech in a Commercial Context*

1. *Developing the Compelled Speech Doctrine*

Compelled-speech jurisprudence utilizes strict scrutiny to evaluate challenges arising when the government effectively tells speakers what they must say.[217] The seminal case in this area is *West Virginia State Board of Education v. Barnette*, which challenged West Virginia's requirement that all schoolchildren salute the American flag and recite the Pledge of Allegiance.[218] The *Barnette* Court invalidated this requirement, stating "no official . . . can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."[219]

With this foothold established, the Court continued to use strict scrutiny for compelled-speech issues and later struck down two state laws: a Florida right-of-reply statute which forced a newspaper to provide a forum

Deceptive Advertising, 54 ARIZ. L. REV. 719, 745 (2012).

212. *In re* Baycol Prods. Litig., 321 F. Supp. 2d 1118, 1126 (D. Minn. 2004).

213. *See id.*; Demaine, *supra* note 211, at 745.

214. Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 527 (1992) (alteration in original) (quoting 29 Fed. Reg. 8356 (1964)) (internal quotation mark omitted).

215. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 772 n.24 (1976).

216. *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985).

217. *See* Royal, *supra* note 184, at 208–12.

218. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 626–27 (1943).

219. *Id.* at 642.

for views it would otherwise choose not to print,[220] and a New Hampshire statute which effectively forced motorists to "use their private property as a 'mobile billboard' for the [s]tate's ideological message."[221] Essentially, compelled speech deserves exacting scrutiny because it "forces speakers to alter their speech to conform with an agenda they do not set."[222] In the current case, the graphic labels certainly further an agenda: "to stigmatize the use of tobacco products on the industry's dime."[223]

However, the trouble in applying these cases to the FDA Rules comes because the compelled-speech doctrine was developed to protect core political speech, which is due the greatest amount of First Amendment protection.[224] Political speech and an open press contribute to the marketplace of ideas in ways commercial speech does not.[225] Indeed, mandatory commercial disclosures are typically exempt from compelled-speech analysis because they aid in preventing deception and uncovering truth.[226] Yet, it should not be necessary to "transplant principles governing compelled disclosure in other settings to commercial speech in order to recognize potential danger to First Amendment values when government dictates messages whose content is not unquestionably a provably true assertion."[227]

Further, the Supreme Court itself has extended compelled-speech reasoning to commercial speech cases, because the figurative levee holding back First Amendment concerns for purely factual disclosures "disappears if the compelled speech conveys the government's normative message."[228] The compelled-speech doctrine may have only protected political speech originally, but "[c]ompelled normative speech, even if based on factual information about a [commercial] product's risks, raises similar concerns as *Wooley* and *Barnette* by forcing the speaker to express the government's

220. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256, 258 (1974).

221. Wooley v. Maynard, 430 U.S. 705, 715 (1977).

222. Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 9 (1986).

223. Commonwealth Brands, Inc. v. United States, 678 F. Supp. 2d 512, 530 (W.D. Ky. 2010), *aff'd in part, rev'd in part sub nom.* Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509 (6th Cir. 2012).

224. *See Barnette*, 319 U.S. at 642; *see also Wooley*, 430 U.S. at 715.

225. *See generally* Pomeranz, *supra* note 99, at 394–402 (outlining the difference between core political speech and commercial speech).

226. Post, *supra* note 66, at 26; *see supra* notes 202–04 and accompanying text.

227. Stern & Stern, *supra* note 56, at 1190 (footnote omitted).

228. Keighley, *supra* note 88, at 570; *see also* Buttrick, *supra* note 44, at 109–10.

opinions and beliefs."[229] Thus, the doctrine now encompasses multiple categories of compelled-speech cases, the most important of which are those concerning compelled subsidies.[230]

2. *Compelled Subsidies*

The compelled-subsidy doctrine is a relatively recent construct. Before 2001, "[c]ompelled speech fit one paradigm in which *Barnette* . . . applied and commercial speech fit another, in which either *Central Hudson* or *Zauderer* applied."[231] But in 2001, *United States v. United Foods, Inc.,* unleashed this new category,[232] and the concept of compelled subsidies progresses logically from the previous paradigms. "If the compelled-speech doctrine prevents the government from compelling a person to espouse a message, it follows that the compelled-subsidy doctrine prevents the government from compelling that person to *fund* that same message expressed by another."[233]

The compelled-subsidy doctrine's seeds come from two cases about compelled association, *Abood v. Detroit Board of Education* and *Keller v. State Bar*.[234] In both cases, members of an associated group challenged their organization's use of individual dues to fund speech with which not all members agreed. In *Abood*, the group was a teachers' union,[235] and in *Keller*, the group was the State Bar of California.[236] In both instances, the Court found that compelled financial support infringes constitutional rights[237] and even went so far as to call it "sinful and tyrannical."[238]

229. Keighley, *supra* note 88, at 570. "The term 'normative speech' . . . describes speech that expresses the government's beliefs about how an individual should behave." *Id.* at 569.

230. *See* Larry Alexander, *Compelled Speech*, 23 CONST. COMMENT. 147, 148–50 (2006). *Barnette* and *Wooley* remain in the "compelled political speech" category. *Id.* at 148. *Miami Herald Publishing Company v. Tornillo* headlines its own category, in which the Court is concerned that compulsion might paradoxically become a prior restraint by preemptively chilling speech. *Id.* at 149–50. The third category, compelled association, is inapplicable here. *See id.* at 150. The fourth category, compelled subsidies, is most pertinent to this Note. *See id.* at 148.

231. Royal, *supra* note 184, at 222.

232. *See* United States v. United Foods, Inc., 533 U.S. 405, 415–16 (2001).

233. Royal, *supra* note 184, at 223 (emphasis added).

234. Keller v. State Bar, 496 U.S. 1 (1990); Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).

235. *See Abood*, 431 U.S. at 212–13.

236. *See Keller*, 496 U.S. at 5.

237. *Id.* at 13–14; *Abood*, 431 U.S. at 235.

However, as with *Barnette* and *Wooley*, the challenge revolved around political speech; neither group was permitted to use dues to fund ideological messages not germane to the purpose of the association itself.[239] Thus, while strict scrutiny applied here, it was again necessary because the compelled speech was political. Accordingly, for this precedent to indicate strict scrutiny should be used to evaluate the FDA Rules, the Court would need to reach one of two conclusions: that political speech and cigarette packaging should be deemed equivalent, or that *Abood* and *Keller* should be expanded beyond their associational underpinnings to include all forced subsidies. The former is highly unlikely because packaging is simply not identical to political speech.[240]

However, in evaluating mushroom advertising, *United Foods* made precisely the latter expansion.[241] United Foods produced mushrooms and refused to comply with a federal statute mandating that all mushroom producers subsidize generic advertising promoting the mushroom industry as a whole.[242] Rather than promoting all mushrooms equally, United Foods wanted instead to portray its own mushrooms as superior.[243] The Court invalidated the statute, holding "mandated support is contrary to the First Amendment principles . . . involving expression by groups which include persons who object to the speech."[244]

Mushrooms may seem like a laughably miniscule issue, but the First Amendment does not distinguish minor debates from major ones.[245] Cigarettes may be a matter of greater public concern than mushrooms, but *United Foods*'s principles are applicable no matter how weighty the subject.[246] Most importantly, *United Foods* shows that the heightened scrutiny of compelled speech applies equally in compelled-subsidy

238. *Abood*, 431 U.S. at 235 n.31 (quoting I. BRANT, JAMES MADISON: THE NATIONALIST 354 (1948)) (internal quotation mark omitted); *see also Keller*, 496 U.S. at 9–10 (comparing the "First Amendment concerns" implicated by compelled contributions to those implicated by prohibitions against contribution).

239. *Keller*, 496 U.S. at 13–14; *Abood*, 431 U.S. at 235.

240. *See generally* Pomeranz, *supra* note 99, at 394–402.

241. *See* United States v. United Foods, Inc., 533 U.S. 405, 413 (2001) ("We take further instruction . . . from *Abood*'s statement that speech need not be characterized as political before it receives First Amendment protection." (citing *Abood*, 431 U.S. at 232)).

242. *Id.* at 408–09.

243. *Id.* at 411.

244. *Id.* at 413.

245. *Id.* at 411.

246. *See, e.g.*, *id.*

situations.[247] Moreover, the FDA Rules also eviscerate the distinction between compelling speech and compelling payment, and thereby set the circuit split apart from *United Foods*.[248] Rather than falling into one category or the other, the FDA Rules both compel speech and force tobacco companies to subsidize it, providing an even stronger argument for strict scrutiny.[249]

3. *The FDA Rules Are More than Just Counter-Speech*

Counter-speech is almost always a valid and protected remedy for potentially misleading speech, and in many instances is a preferred one.[250] Yet, some assert the use of counter-speech against commercial speech is far less prevalent than against other forms of speech.[251] This assertion is incorrect. Attacks on the safety of a product or the conditions under which it is made receive robust First Amendment protection and are fairly commonplace.[252] The volume of counter-speech against commercial speech may not be enormous, but in a capitalist economy, more ads are to be expected.[253] Counter-speech against them is certainly not entirely absent.

Thus, the government may hold and distribute an antismoking viewpoint as counter-speech, just as Ralph Nader may publish a book about how unsafe certain cars are.[254] However, the FDA Rules go beyond mere counter-speech and instead convert cigarette packages into a

247. *See id.* The Court merely states "compelled funding . . . must pass *First Amendment* scrutiny," without designating a particular level. *Id.* (emphasis added). However, because the Court applied compelled-speech and compelled-association cases, it is logical to impute strict scrutiny. *See id.* at 410.

248. Justice Breyer highlighted this speech-versus-payment distinction in his *United Foods* dissent. *Id.* at 425 (Breyer, J., dissenting).

249. *See* R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1221 (D.C. Cir. 2012); *cf.* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 559 (2005) ("We have generally assumed . . . that compelled funding of government speech does not *alone* raise First Amendment concerns." (emphasis added)).

250. *See* United States v. Alvarez, 132 S. Ct. 2537, 2549 (2012) (stating "the dynamics of free speech, of counterspeech, of refutation, can" and should correct misstatements more effectively than wholesale speech restrictions).

251. *See, e.g.*, Brudney, *supra* note 183, at 1154. This assertion is used to justify reduced First Amendment protection for commercial speech. *Id.*

252. *See* Redish, *supra* note 120, at 123–24.

253. *See* Smolla, *supra* note 180, at 785–86 ("This is a market filled with hucksters, hustlers, hype, and hyperbole.").

254. *See* Redish, *supra* note 120, at 123–24.

mandatory mouthpiece for the government's message.[255] Rather than allowing consumers to evaluate both messages equally, the FDA Rules make the government's message predominant and burden tobacco companies with the cost of making it predominant.[256] This is impermissible counter-speech because a government desire to save money is not a valid basis for intruding upon the First Amendment.[257]

V. RESOLVING THE SPLIT

The cornerstone issue is whether the required labels convey purely factual information. The government has mandated textual warnings since the 1980s, and implementing them was surely costly for tobacco companies, just as implementing the graphic labels will be.[258] However, as both of the circuit-split courts have noted, text-only warnings are much more "purely factual" than pictures.[259] For this reason, among others, the Court should adopt the reasoning of the district court in *R.J. Reynolds* and apply strict scrutiny to the graphic label requirements.[260] Of course, strict scrutiny is often deemed "'strict' in theory and fatal in fact," meaning this type of review is merely a euphemism for automatic invalidation of whatever law or regulation is before the Court.[261] However, the Court has often distanced itself from this moniker,[262] and commentators also conclude strict

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

256. *See id.*

257. *Cf.* Palmer v. Thompson, 403 U.S. 217, 226 (1971) ("Citizens may not be compelled to forgo their constitutional rights [under the Fourteenth Amendment] because officials fear public hostility [to integration] or desire to save money." (citations omitted)).

258. *See* Comprehensive Smoking Education Act, Pub. L. No. 98-474, § 4, 98 Stat. 2200, 2201–03 (1984) (codified as amended at 15 U.S.C. § 1333 (2012)) (establishing the original Surgeon General's Warnings required to be placed on cigarette packaging).

259. *R.J. Reynolds Tobacco Co.*, 696 F.3d at 1216; Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 528 (6th Cir. 2012) (Clay, J., dissenting in Section III), *cert. denied sub nom.* Am. Snuff Co. v. United States, 133 S. Ct. 1996 (2013).

260. *See* R.J. Reynolds Tobacco Co. v. FDA, 845 F. Supp. 2d 266, 274–76 (D.D.C. 2012), *aff'd*, 696 F.3d 1205 (D.C. Cir. 2012).

261. Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

262. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) ("[W]e wish to dispel the notion that strict scrutiny is strict in theory, but fatal in fact."

scrutiny is no longer an automatic death knell, even if it should be.[263]

Unfortunately for the government, in this case strict scrutiny should operate to strike down the FDA Rules. The labels are not purely factual, and accordingly, strict scrutiny analysis reveals a tailoring issue; less restrictive means are available.[264] Further, even if the labels are purely factual, they operate as a forced subsidy and require so much space that they become an undue burden on tobacco companies' right not to support the government's message.[265] While *Thank You for Smoking* is not itself authoritative, it successfully illustrates the autonomy policy rationale underpinning this finding.[266] Ultimately, the graphic labels should be struck down.

A. *No Matter the Category, Strict Scrutiny Should Be the Test*

The circuit split presents a distinguishable factual situation and does not fit neatly into any existing doctrine. However, elements of commercial speech, compelled speech, and compelled subsidy cases indicate that no matter which is used, strict scrutiny should apply. This is because "the Court has made clear that a speaker does have an autonomy interest in not being required to spread the government's normative message, even when engaging in commercial speech."[267]

1. *Cigarette Packages Fit the Definition of Commercial Speech*

There are two subcategories beneath the umbrella label of commercial speech: narrow commercial speech and enriched commercial speech.[268] Enriched commercial speech "contains *additional* expression . . . that might be, or would be, covered by the First Amendment if it were freestanding."[269] Cigarette packages clearly do not fit this category.

(quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring)) (internal quotation mark omitted)).

263. *See, e.g.*, Matthew D. Bunker et al., *Strict in Theory, But Feeble in Fact? First Amendment Strict Scrutiny and the Protection of Speech*, 16 COMM. L. & POL'Y 349, 377–78 (2011).

264. *See infra* Part V.B.2.

265. Money is equivalent to speech. Buckley v. Valeo, 424 U.S. 1, 16–17 (1976). The government may not force a speaker to subsidize speech it would not otherwise support. United States v. United Foods, Inc., 533 U.S. 405, 410–11 (2001).

266. *See generally* THANK YOU FOR SMOKING, *supra* note 1.

267. Keighley, *supra* note 88, at 570.

268. Brudney, *supra* note 184, at 1155–57.

269. *Id.* at 1157.

Although the Marlboro Man might convey such a message, he does not inhabit every label. Thus, if cigarette packages are truly commercial speech at all, they must be narrow commercial speech, which proposes a sale or transaction and either describes the proposed terms of sale or identifies the product to be sold.[270]

Cigarette packages fit this definition. Although packages lack additional expression, do not necessarily have the eye-catching characteristics ad agencies crave, and may not contain price terms, they do identify the product to be sold. Further, even the mere use of a trade name may constitute implicit commercial solicitation.[271]

Using the Court's varying definitions, the result is the same.[272] Under the broad *Central Hudson* definition, cigarette packages are "related solely to the economic interests of the speaker and its audience."[273] The packages' content is chosen so that consumers can identify the product. Similarly, cigarette packages meet the *Bolger* factor test because they are related to economic interests and propose a transaction involving a specific product.[274] Packages also fit the narrow *Thompson* definition of commercial speech because if they are not enriched—meaning they contain no additional expression—they do no more than enable or advocate purchase.[275]

2. *Although Packages Are Commercial Speech, Compelled Subsidies Require Strict Scrutiny*

Yet, even though packages are commercial speech, it does not automatically follow that *Central Hudson* intermediate scrutiny should be applied. First, the government requires tobacco companies to both state a certain message and incur the cost of doing so.[276] The FDA Rules implicate both speech itself and the method of financing it, and therefore fall in line with *Abood*, *Keller*, and *United Foods*.[277] Strict scrutiny applies when the

270. *Id.* at 1155–56.
271. Friedman v. Rogers, 440 U.S. 1, 11 n.10 (1979).
272. The various definitions the Court has employed are discussed *supra* Part IV.B.
273. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 561 (1980) (citations omitted).
274. *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66–67 (1983).
275. *See* Thompson v. W. States Med. Ctr., 535 U.S. 357, 366–67 (2002).
276. Weatherby & Day, *supra* note 63, at 157.
277. *See supra* Part IV.D.2.

government forces speakers to subsidize speech they would otherwise not espouse, and this review is even more appropriate when the speakers themselves must utter the adverse, subsidized message.[278] If the government absorbed the cost of implementation, then intermediate scrutiny might be appropriate.[279] Without that concession, strict scrutiny is required.[280] Second, intermediate scrutiny typically applies only when speech is being restricted; one example is *Lorillard*.[281] In this case, no restrictions are made except to the extent there is less space available on each package. Finally, the *Central Hudson* test may be an artifact rather than a mandate. Although *Central Hudson* has not been expressly overruled, the Court has used more "robust scrutiny" in several of its commercial speech decisions over the past decade or so.[282]

3. *The Required Labels Are Not Purely Factual and Are an Undue Burden*

If the FDA Rules are not a restriction, then they mandate disclosure, and typically those fall under a standard of review more closely resembling rational basis.[283] Under *Zauderer*, mandatory commercial disclosures serve a truth-finding function and can be required, notwithstanding their cost, if

278. This stands in contrast to *Abood* and *Keller*, in which the forced subsidies funded someone *else's* adverse message. *See supra* notes 234–39 and accompanying text. It also stands in contrast to *Johanns v. Livestock Marketing Association*, in which the Court upheld part of the Beef Promotion and Research Act of 1985 despite the fact that, much like the program in *United Foods*, the Act assessed individual producers' cattle sales and importation to fund generic beef advertising. Johanns v. Livestock Mkt. Ass'n, 544 U.S. 550, 553–56, 564–65 (2005). The *Johanns* Court noted that "'[c]ompelled support of government' [speech] . . . is of course perfectly constitutional, as every taxpayer must attest," and emphasized that because the message funded by compelled subsidies came from the federal Beef Board, not the individual producers, there were no First Amendment concerns as to them. *Id.* at 559, 560–61 (quoting Abood v. Detroit Bd. of Educ., 431 U.S. 209, 259 n.13 (1977). By contrast, the tobacco companies *are* the speakers here because the image must be placed directly on cigarette packages. Moreover, the antismoking message is directly adverse, unlike the generic *Johanns* advertising that hampered individual producers' ability to "promote the superiority of . . . American beef, grain-fed beef, or certified Angus or Hereford beef," but still concluded that beef consumption would generally be a good thing. *Id.* at 555–56.

279. *See supra* Part IV.C.2.

280. *See supra* Part IV.D.2.

281. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001); *see supra* Part IV.A.2.

282. *See* Stern & Stern, *supra* note 56, at 1182–86.

283. *See supra* Part IV.C.2.

they are purely factual, uncontroversial, and do not create an undue burden.[284] These contingent requirements are crucial and should not be glossed over.[285] The FDA Rules fail all three.

First, the simple fact that litigation over the graphic labels is ongoing shows they are in fact controversial; there is a literal controversy about them. Beyond that, however, the labels are controversial because their content is so visceral.[286] These images are grisly and are intended to provoke strong emotional reaction.[287] Pictures of a hole in a man's throat, a stitched-up body, and cancerous lesions are intended to be shocking.[288] Intentionally inflammatory imagery or rhetoric can hardly be deemed uncontroversial.[289] Indeed, "speech that is rational, analytic, and contemplative will usually receive higher marks than speech that appeals to passion."[290] Graphic warning labels primarily appeal to passion. Because the labels "capitalize on the audience's emotional reactions, the state's goal is altered choice, instead of informed choice."[291] This frustrates the very purpose—cultivating well-informed citizens—of mandating commercial disclosures in the first place.[292]

Second, the labels are not purely factual.[293] This sets them apart from the previously mandated textual warnings. In principle, those too were compelled messages, and the government imposed the implementation costs on the tobacco companies. However, the images add another implicit layer of statements beyond those in the text.[294] This implicit layer is a

284. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985).

285. *See id.*

286. *See* Weatherby & Day, *supra* note 63, at 121–22 (describing the labels vividly and then asking, "Did the written descriptions alone incite feelings of unease, anxiety, and trepidation? If so, imagine the intensity of the response one might experience at the sight of the actual graphic images themselves").

287. *See supra* note 55 and accompanying text.

288. *See* Weatherby & Day, *supra* note 63, at 121–22.

289. For example, picture abortion protestors picketing with signs depicting grotesque post-abortion fetuses. Lefemine v. Wideman, 133 S. Ct. 9, 10 (2012). Another example is the Westboro Baptist Church thanking God for dead soldiers. Snyder v. Phelps, 131 S. Ct. 1207, 1213 (2011). Few would argue these activities and rhetorical tactics are not controversial.

290. Smolla, *supra* note 180, at 783.

291. Keighley, *supra* note 88, at 579.

292. *See supra* notes 181–84 and accompanying text.

293. *See* R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1216 (D.C. Cir. 2012).

294. *See* Stern & Stern, *supra* note 56, at 1195 ("[T]he picture itself vaults

normative statement dictating what the government believes the viewer should *do* rather than displaying what the viewer should *know*, and is just as invalid as requiring abortion clinics to display pictures of aborted fetuses.[295] Accordingly, the statements here cannot plausibly be purely factual.

Although cigarette packages themselves are not enriched commercial speech, the graphic labels *are* enriched commercial speech because they contain additional expression.[296] Using a stereo system to illustrate the difference, text-only statements reveal the decibel potential, or the voltage, or other measurable factual characteristics.[297] However, images go further and imply certain consequences for lifestyle or atmosphere, perhaps something like "[t]his stereo will make your nights at home more romantic."[298] The graphic cigarette labels cross this threshold and go beyond implication to become normative recommendations for consumer behavior.[299] Therefore, they are not purely factual. The recently imposed mandatory corrective statements illustrate the difference as well; they are non-pictorial, purely factual statements about cigarettes' health risks.[300] It is one thing to state plainly that cigarettes can cause lung cancer, but wholly another to imply it happens in every instance—or supersede the facts with emotional appeal—by putting pictures of cancerous lungs on every package.[301]

It is perhaps true that "the emotive quality of the selected images does not necessarily undermine the warnings' factual accuracy."[302] However, that is not the point. This Note does not argue that emotive

beyond fact to affect the consumer's emotions rather than her intellect.").

295. *See* Keighley, *supra* note 88, at 584.

296. *See supra* note 268 and accompanying text.

297. Smolla, *supra* note 180, at 800.

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

299. *See* Keighley, *supra* note 88, at 569–70 (distinguishing between a purely factual statement about a burger's caloric content and an additional admonishment, even if not made using imagery, that one should not eat the burger if they are overweight. The latter is normative speech and is therefore additional expression).

300. *See* United States v. Philip Morris USA, Inc., 907 F. Supp. 2d 1, 8–9 (D.D.C. 2012).

301. *See* Stern & Stern, *supra* note 56, at 1195; Weatherby & Day, *supra* note 63, at 149; *cf.* Buttrick, *supra* note 44, at 108 (suggesting that the cigarette label image showing a woman crying is not connected to displaying the risk or effect of smoking; instead, it "more effectively convey[s] the factual consequences of chopping onions").

302. R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1230 (D.C. Cir. 2012) (Rogers, J., dissenting).

characteristics remove factual accuracy entirely. Rather, the troubling aspect is that the images' emotive quality is so strong as to eclipse the simple facts and render the statements not *purely* factual.[303] "Purely factual" is a key requirement for valid mandatory commercial disclosures, and without that purity, any mandatory disclosures must be evaluated under a strict standard of review rather than a deferential one.[304]

Lastly, even if the labels *are* purely factual and merely convey health risks in a visual way, the amount of space they occupy and the cost they would impose constitutes an undue burden. There is no indication that requiring a lower percentage of space would be any less effective in "ensur[ing] that the health risk message is actually *seen* by consumers in the first instance."[305] Further, the cost of compliance would approach almost $20 million.[306] "[F]ailure to persuade does not allow [the government] to hamstring the opposition . . . . [and] burden the speech of others in order to tilt public debate in a preferred direction."[307] Yet, reserving half of each cigarette package for the graphic labels does precisely that.

Because the FDA Rules fail all the *Zauderer* criteria for mandatory disclosures, they are outside the gambit of *Zauderer* entirely. At a more basic level, *Zauderer* is also inappropriate here because it permits less stringent review only for compelled disclosure of unbiased information—which the graphic labels certainly are not.[308] Because the labels compel both speech and subsidies that are not purely factual, they must be evaluated under strict scrutiny.[309] The government must show that the FDA Rules are narrowly tailored to meet a compelling state interest.

B. *Applying Strict Scrutiny*

Other commentators have frequently concluded the FDA Rules

303. *See id.* at 1216 (majority opinion); *see also* Keighley, *supra* note 88, at 578 ("[T]he evidence . . . suggests that these images are designed to shock and disgust viewers, not *just* to inform them about the dangers of tobacco use." (emphasis added)).

304. *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985).

305. Commonwealth Brands, Inc. v. United States, 678 F. Supp. 2d 512, 530 (W.D. Ky. 2010), *aff'd in part, rev'd in part sub nom.* Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509 (6th Cir. 2012).

306. *See* Weatherby & Day, *supra* note 63, at 151.

307. Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2671 (2011).

308. *See* Weatherby & Day, *supra* note 63, at 155.

309. *See* Stern & Stern, *supra* note 56, at 1194 (describing the labels as a "wholly different species of disclosure").

cannot withstand any searching review, no matter how stringent.[310] Yet, strict scrutiny is not an automatic death knell. Perhaps the ends truly are compelling and the means appropriately tailored; strict does not necessarily mean fatal.[311] Unfortunately for the FDA, while the ends may be compelling, the graphic labels ultimately should be invalidated because they are not narrowly tailored.

1. *Compelling Government Interest*

The graphic labels are intended to promote several ends, and each has validity. For example, one purpose is to deter illegal youth smoking because children are most gullible, and youth smoking rates did not decrease between 2006 and 2009.[312] "The Court has long recognized that the [g]overnment has a compelling interest in protecting our [n]ation's children."[313] While Justice Sandra Day O'Connor made this statement to support the suppression of virtual child pornography,[314] the principle is also applicable to preventing youth smoking. Indeed, as long as tobacco remains a product only available *legally* to adults, Congress' goal remains clear, and it is virtually uncontested that children deserve protection.[315]

Previous deceptive tactics tobacco companies employed have been largely eliminated, severely reduced, or even corrected.[316] Nonetheless, all

310. *See, e.g.*, Buttrick, *supra* note 44, at 110 ("The question . . . becomes whether strict scrutiny or *Central Hudson*'s intermediate scrutiny should apply to the graphic warnings. As a practical matter, it may not make a difference."); *see also* Bennett, *supra* note 71, at 1922–34; Weatherby & Day, *supra* note 63, at 154–63. *But see* Ronald R. Sylvester, Note, R.J. Reynolds Tobacco Co. v. FDA*: The D.C. Circuit Tells the FDA to Butt Out of the Tobacco Companies' Business, Causing the Graphic Image Requirement of the Family Smoking Prevention and Tobacco Control Act to Go Up in Smoke*, 46 CREIGHTON L. REV. 777, 805 (2013) ("[B]ecause the [graphic image] regulations will more effectively provide for the government's interest in effectively communicati[ng] health information than the current textual warnings, the regulations are sufficiently tailored to satisfy . . . the intermediate scrutiny test.").

311. *See supra* notes 261–64 and accompanying text.

312. Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628, 36,629 (June 22, 2011).

313. Ashcroft v. Free Speech Coal., 535 U.S. 234, 263 (2002) (O'Connor, J., concurring in part and dissenting in part).

314. *See id.*

315. *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 555 (2001).

316. *E.g.*, United States v. Philip Morris USA, Inc., 907 F. Supp. 2d 1, 8–9 (D.D.C. 2012) (mandating cigarette companies publish corrective statements about cigarettes' health risks); *see* Lori Ann Luka, Note, *The Tobacco Industry and the First Amendment: An Analysis of the 1998 Master Settlement Agreement*, 14 J.L. & HEALTH

commercial speech can be regulated to prevent deception, even prospectively.[317] This, too, is a compelling interest, especially given that the potential health consequences of smoking are so severe.

Another goal is simply to curb smoking altogether.[318] While public health is "within the traditional scope of a [s]tate's police powers,"[319] the federal government may legislate for health if its action also houses another permissible exercise of federal power.[320] In this case, the enabling statute aims to prevent confusing labels and promote uniformity in the national economy.[321] Thus, the regulation is based on commerce, and so the additional purpose of promoting public health is permissible.

Ultimately, almost any purpose the FDA asserts could be compelling. Cigarettes have dangerous effects, and reducing those effects is a compelling interest whether framed as protecting children or preventing deception. However, a compelling interest alone cannot pass strict scrutiny; the FDA Rules must also be narrowly tailored.

2. *Narrow Tailoring*

The FDA Rules meet their end at this part of the test no matter which interest they are designed to assist. There is little indication the graphic labels would actually advance an interest in reducing smoking rates at all, much less be narrowly tailored to do so.[322] For example, although labels may cause smokers to *think* about quitting or cause prospective customers to think twice, there is no demonstrable correlation between thoughts and action.[323] Moreover, any reduction might be less than one

297, 314 (2000) (discussing the ban on tobacco companies' further use of cartoon characters).

317. 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, 562 (2006).

318. Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628, 36,630 (June 22, 2011); *see* Stern & Stern, *supra* note 56, at 1204 ("There is no question that the government's goal of curbing smoking rates is a worthy one.").

319. Sorrell v. IMS Health, Inc., 131 S. Ct. 2653, 2681 (2011) (Breyer, J., dissenting) (citing Hillsborough Cnty. v. Automated Med. Labs., Inc., 471 U.S. 707, 719 (1985)).

320. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2600 (2012) (upholding the Affordable Care Act's individual mandate as a valid exercise of Congress' taxing power).

321. 15 U.S.C. § 1331(2) (2012).

322. R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1219 (D.C. Cir. 2012).

323. *Id.*

percent—so miniscule as to be hardly noticeable.[324]

Additionally, there is a legitimate danger of reverse effects; that is, although the labels may intended to protect children, some will instead "be attracted to what they perceive as the forbidden fruit."[325] Further, the FDA itself acknowledges that labels generating "an immediate emotional response from viewers can confer negative feelings" but will enhance recall and ensure the message the labels convey is retained and understood.[326] Because the FDA acknowledges the visceral effect, yet mandates the labels anyway, they invite interpretation primarily on an emotional basis—and this is improper in the American legal system.[327]

Most importantly, there are less restrictive alternatives available.[328] For example, the government could continue to tax cigarettes heavily or engage in counter-speech against the product.[329] In fact, counter-speech is already a recognized option because the Center for Disease Control (CDC) has begun its own graphic antismoking ad campaign.[330] Indeed, the government could place its own antismoking ads using these very same images—or those from the CDC campaign—on checkout counters or adjacent to cigarette displays without a valid First Amendment objection.[331]

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324. *Id.* at 1220; *see also* Wright, *supra* note 197, at 622–23.

325. Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628, 36,634–35 (June 22, 2011) (internal quotation marks omitted).

326. *Id.* at 36,635; *see id.* at 36,641.

327. *Cf.* FED. R. EVID. 403 advisory committee's note (explaining that unfairly prejudicial evidence has an "undue tendency to suggest decision on an improper basis, commonly . . . *an emotional one*" (emphasis added)).

328. *See* Weatherby & Day, *supra* note 63, at 164 (distinguishing all the permissible options in the government's large arsenal from the one thing it cannot do—"conscript private entities to subsidize and express its highly subjective and controversial message").

329. Stern & Stern, *supra* note 56, at 1204; *see also* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2596 (2012) ("Today, federal and state taxes can compose more than half the retail price of cigarettes, not just to raise more money, but to encourage people to quit smoking.").

330. *CDC to Launch New, Graphic Anti-Smoking Campaign*, N.Y. DAILY NEWS (Mar. 15, 2012), http://www.nydailynews.com/life-style/health/cdc-launch-new-graphic-anti-smoking-campaign-article-1.1039470. For an illustrative video ad from this campaign, see Ctrs. for Disease Control & Prevention (CDC), *CDC: Tips From Former Smokers—Anthem Ad*, YOUTUBE (Mar. 15, 2012), http://www.youtube.com/watch?v=GEWky9PEroU.

331. *See* Keighley, *supra* note 88, at 584 ("[T]he [government's] use of shocking imagery in *its own* public health advertisements does not raise any First Amendment concerns." (emphasis added)).

A First Amendment violation occurs only because the graphic labels must be placed *on cigarette packages*. It is undisputed that the government may disseminate its own antismoking message on its own dime however it wishes, so long as it does not conscript others into adopting the message.[332] Social media is another potential venue for anti-tobacco counter-speech.[333] This would likely reach youth just as effectively as in-store or on-package images. With these less restrictive means available, the FDA Rules are not narrowly tailored and must be struck down.

VI. CONCLUSION

> *"[I]f we want to remind people of danger, why don't we slap a skull and crossbones on all Boeing airplanes . . . . And all Fords?"*[334]

We are always searching for "because." Applying strict scrutiny to the FDA Rules tells us they should be invalidated because they are not narrowly tailored. But *Thank You for Smoking* illustrates a broader and even more basic reason: the FDA Rules that mandate the labels should not stand because they offend the notion that the First Amendment should promote autonomy and choice rather than telling anyone what to say or think.[335]

Of course, the government may certainly regulate conduct to prevent harm.[336] Many states have done just that, attacking the smoking problem by attacking the act of smoking.[337] Laws like this find support because public

332. *See* Stern & Stern, *supra* note 56, at 1200; Weatherby & Day, *supra* note 63, at 158.

333. *See, e.g.*, Tony Leys, *Graphic Smoking Billboards to Be Cut*, DES MOINES REG., Aug. 6, 2011, at A1, *available at* 2011 WLNR 15587623 (stating that the antismoking group Just Eliminate Lies intended to "get its message out on Facebook [and] YouTube . . . .").

334. THANK YOU FOR SMOKING, *supra* note 1, at 1:20:54.

335. *See id.* at 1:23:16 ("If he really wants a cigarette, I'll buy him his first pack."); *see also* Keighley, *supra* note 88, at 570 ("[W]hen the speaker is being forced to repeat the government's normative judgments, her autonomy is being compromised . . . ."); Kristin M. Sempeles, Comment, *The FDA's Attempt to Scare the Smoke Out of You: Has the FDA Gone Too Far with the Nine New Cigarette Warning Labels?*, 117 PENN ST. L. REV. 223, 251 (2012) ("In the future, some adults . . . will choose to smoke and accept the risk. Whatever their choices may be, what matters is that it remains just that: a choice . . . .").

336. Brudney, *supra* note 183, at 1163.

337. *See, e.g.*, IOWA CODE § 142D.3 (2013) (prohibiting smoking in certain public places and places of employment under the Iowa Smokefree Air Act).

sentiment disfavors tobacco companies more than it did in the past.[338] Further, they are permissible because they only regulate "the conduct that the speech discusses or urges," not the speech itself.[339] Yet even when only conduct is regulated, autonomy concerns are still prevalent.[340] So, knowing autonomy matters, what course of action is correct? "[I]t's called education. It doesn't come off the side of a cigarette carton. It comes from our teachers, and more importantly, our parents."[341] Protecting children may be a valid goal, but the impetus for protecting them from cigarettes should lie with those closest to the children, as *Thank You for Smoking* asserts, not with the government.[342]

It is perhaps strange how prescient *Thank You for Smoking* turned out to be. Few would have thought a film that groups gun, alcohol, and tobacco lobbyists together as "merchants of death;"[343] uses flavors of ice cream to frame a lesson in debate strategy;[344] and contains villains who use nicotine patches to poison their target audience[345] could provide any useful legal commentary. However, *Thank You for Smoking* acknowledges its own absurdity, and by meeting it head-on, illustrates a valid point about freedom of choice.[346] In the film, that point resonates loudly with legislators, who, the film suggests, vote down the bill requiring the skull and crossbones on cigarette labels to the tobacco lobbyists' delight.[347] So,

338. *See, e.g.*, Philip Morris USA v. Williams, 549 U.S. 346, 349–51 (2007) (stating that the jury awarded punitive damages against a tobacco company to punish it based on general perception rather than for any individualized harm caused).

339. Brudney, *supra* note 183, at 1163.

340. *See, e.g.*, James Enters., Inc. v. City of Ames, 661 N.W.2d 150, 153 (Iowa 2003) (holding cities cannot enact stricter smoking bans than those established under state law). Although the Iowa Supreme Court decided this case based on principles of interpreting statutory conflict, underlying their decision is the implicit proposition that autonomy and choice have value. *See id.* at 153–54.

341. THANK YOU FOR SMOKING, *supra* note 1, at 1:21:57.

342. *See id.*; *see also* Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2741 (2011) (holding a state law that purported to aid parental authority in keeping violent video games from their children was overinclusive and noting "[e]ven where the protection of children is the object, the constitutional limits on governmental action apply").

343. THANK YOU FOR SMOKING, *supra* note 1, at 9:31.

344. *Id.* at 38:52.

345. *Id.* at 58:11.

346. *See id.* at 1:22:05 ("It is the job of every parent to warn their children of all the dangers of the world, including cigarettes, so that one day when they get older, *they can choose for themselves.*" (emphasis added)).

347. *See id.* at 1:23:53 ("The whole personal choice thing? They ate that shit

too, should it resonate in the real world—alongside the more detailed analysis an examination of First Amendment case law requires—when the Supreme Court considers the similar issue the current circuit split presents.

Neither *Thank You for Smoking*'s producers, nor the author of the book on which it is based,[348] likely anticipated their legislative scenario would one day mirror reality, but now that it does, the personal autonomy the film espouses is certainly appropriate. The graphic warning labels should be struck down after strict scrutiny review, following much of the D.C. district court's reasoning and repudiating the Sixth Circuit's analysis.[349] Perhaps in this instance, life imitating art would not be so surreal after all.

*David M. Ranscht**

up—just check the whip count. That bill is going down in flames.").

348. CHRISTOPHER BUCKLEY, THANK YOU FOR SMOKING (1994).

349. Interestingly, the Sixth Circuit is the other circuit involved in the current split, and judicial metrics show the Sixth Circuit has a recent track record of "getting the law wrong," or issuing decisions resulting in Supreme Court reversal, more frequently than any other circuit. Mark Walsh, *A Sixth Sense: 6th Circuit Has Surpassed the 9th as the Most Reversed Appeals Court*, A.B.A. J., Dec. 2012, at 15, 15 (internal quotation marks omitted), *available at* http://www.abajournal.com/magazine/article/a_sixth_sense_6th_circuit_has_surpassed_the_9th_as_the_most_reversed_appeal/. Of course, this does not mean the Sixth Circuit applied the law incorrectly in this instance, but it does show that in the Supreme Court's eyes, the Sixth Circuit has been wrong in recent cases more often than not. *See id.* at 15–16.

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