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Regulating Tobacco Product Advertising and Promotions in the Retail Environment: A Roadmap for States and Localities

Tamara Lange, J.D.,
Formerly a consulting attorney for ChangeLab Solutions

Michael Hoefges, J.D., Ph.D., and
Associate Professor at the University of North Carolina School of Media and Journalism

Kurt M. Ribisl, Ph.D.
Professor of Health Behavior at the University of North Carolina Gillings School of Global Public Health

Introduction

The evidence linking tobacco product advertising to adolescent smoking initiation and resulting long-term addiction, premature death, and disability is well established. Each link in the causal chain has been substantiated: children and adolescents are especially vulnerable to advertising;[1] point-of-sale advertising comprises 92.1% of cigarette advertising and marketing expenditures by manufacturers and 71.3% of smokeless tobacco advertising;[2] tobacco companies have targeted youth through advertising;[3] advertising exposure causes adolescents to start and to continue smoking;[4] among adults who become daily smokers, nearly all first use of cigarettes occurs by 18 years of age;[5] adolescents who smoke are at high risk for long-term addiction because their brains are still developing;[6] and long-term addiction results in the tremendous personal, social and financial costs of tobacco-related illnesses.[7]

Over the past several decades, leading cities, counties, and states across the country have implemented a broad array of programs aimed at preventing youth[8] tobacco use.[9] Nevertheless, in 2014, 7.7% of middle school and 24.6% of high school students were current users of tobacco products, such as cigarettes, cigars, e-cigarettes, and smokeless tobacco.[10] The vast majority (88%) of smokers started smoking before they were 18 years of age. If current smoking rates continue unchanged, 5.6 million American youth under age 18 are projected to die prematurely of a smoking-related illness.[11] Recognizing that current prevention and cessation programs are insufficient to prevent initiation and addiction in youth, state and local governments and tobacco control advocates have long been interested in regulating point-of-sale advertising and promotion of tobacco products, which are particularly effective in recruiting minors to tobacco use.[12]

Contact Author: Kurt Ribisl, The University of North Carolina Gillings School of Global Public Health, 316 Rosenau Hall, CB # 7440, Chapel Hill, NC 27599-7440, 919 843 8042, kurt_ribisl@unc.edu.

Despite their critical importance, however, restrictions on youth exposure to point-of-sale advertising and promotion of tobacco products face two significant legal obstacles in the United States.[13] The first is the Supreme Court's stringent use of the First Amendment to protect commercial speech against government regulation. The current First Amendment test requires an increasingly substantial demonstration of proof of efficacy to justify a restriction of truthful and non-misleading advertising for lawful products, including dangerous but legal products like tobacco.[14] Moreover, recent Supreme Court decisions suggest, though they have not yet held, that "content-based" regulation of commercial speech may be subjected to some form of heightened scrutiny.[15] For First Amendment purposes, a regulation that focuses on tobacco advertising generally will be content-based because one must consider the topic of the speech at issue to determine whether the regulation applies.[16]

The second legal impediment is preemption. The Federal Cigarette Labeling and Advertising Act of 1965 (FCLAA) has long contained a general preemption provision that bars state and local regulation with respect to cigarette advertising and promotion based on smoking and health.[17] That provision still exists, but Congress amended FCLAA in the 2009 Family Smoking Prevention and Tobacco Control Act (FSPTCA) and exempted from the general rule of federal preemption all state and local restrictions on the time, place, and manner of cigarette advertising and promotion (but not content) based on smoking and health.[18] In addition, a preemption provision in the 1986 Comprehensive Smokeless Tobacco Health Education Act (CSTHEA) prohibits state and local laws that require statements in smokeless tobacco product advertisements (except for outdoor billboard advertisements) that are related to the use of smokeless tobacco products and health.[19] Conflict preemption, a general rule of federal law that restricts the application of state or local laws to the extent they conflict with federal law, also should be considered when regulating tobacco advertising.[20] When regulating both cigarettes and smokeless tobacco products, a jurisdiction must consider all three forms of federal preemption – FCLAA, CSTHEA, and conflict preemption.[21] In addition, local jurisdictions must steer clear of any state-level preemption.

Despite the serious challenge of overcoming a First Amendment challenge to point-of-sale regulation, the expansion of regulatory authority under the FCLAA preemption exemption and the ever-increasing body of evidence linking exposure to advertising and smoking initiation have led to renewed interest in state and local regulation of tobacco advertising. This article explains the current state of First Amendment commercial speech doctrine and federal preemption law and provides a roadmap for state and local advocates and officials who want to address problems in their communities that result from youth exposure to tobacco advertising and promotional activity.

The First Amendment and the Point-of-Sale

Upon entering a tobacco retail outlet, a shopper is immediately exposed to a barrage of products, advertising, and marketing strategies designed to influence tobacco purchase behaviors and use. Tobacco advertising is featured on gas pump toppers and sandwich board signs and on store exteriors. Behind the checkout counter, "powerwalls" – large tobacco industry shelving units – typically occupy the majority of the visible space on the back wall.

Countertops often feature tobacco product displays for e-cigarettes and other non-cigarette tobacco products such as grape- and strawberry-flavored little cigars.[22]

Exposure to such tobacco-saturated retail settings is associated with higher rates of tobacco initiation among youth.[23] Because the public health consequences of youth initiation are borne by entire communities, local and state governments have sought to influence the point-of-sale environment in a variety of ways, including restricting the locations where tobacco products may be stored, regulating the retail price of tobacco products, adding government health warnings to the information environment, compelling factual disclosures about the health risks of tobacco products, and imposing direct restrictions on the time, place, or manner of tobacco advertising.

Each one of these strategies is subject to a different legal test, but the tests share a common purpose: to ensure that regulation is consistent with the First Amendment commitment to freedom of speech. See Table 1.

Sales Practices with Expressive Value

Some sales practices involve expressive conduct and trigger First Amendment review. Others have no expressive component at all. In either case, however, a jurisdiction should consider the possibility that regulation of sales practices may be challenged under the First Amendment. One of the earliest approaches to tobacco regulation at the point-of-sale was a ban on self-service displays, which required that tobacco products be displayed in such a manner that youth cannot reach them. In 2001, the Supreme Court decided *Lorillard Tobacco Co. v. Reilly*, where it upheld a restriction on display location as a "sales practice" but recognized that how and where a product is displayed may have communicative value.[30] The *Lorillard* Court applied the *O'Brien* test, a form of "intermediate scrutiny" that permits regulation of some expressive conduct under the First Amendment.[31] The Court held the display restrictions complied with the First Amendment because they were narrowly tailored to serve a substantial government interest that was unrelated to regulating expression (preventing access to tobacco products by minors), still allowed retailers to convey product information, and permitted consumer inspection of the products prior to purchase.[32] Notably, the *Lorillard* Court analyzed a regulation that left open the possibility of using empty boxes in displays, a strategy the Court said would address "any cognizable speech interest" associated with product displays.[33] Consequently, when regulating display size or location, one of the policy strategies discussed below, a jurisdiction should evaluate the likely impact of empty-package displays and decide whether there is sufficient evidence to support a decision to prohibit them or to restrict displays to one package per product.

Sales Practices without Expressive Value

More recently, local governments have successfully defended regulation of tobacco sales practices concerning pricing. In 2012 and 2013, respectively, Providence, Rhode Island, and New York City enacted tobacco pricing ordinances prohibiting licensed tobacco retailers from using means such as coupon redemptions and multi-pack discounts to sell tobacco products for less than the non-discounted listed price of the products.[34] The federal First Circuit Court of Appeals and the District Court for the Southern District of New York both

rejected First Amendment challenges to these ordinances without finding any restriction of expressive conduct or speech.[35] Importantly, the challenged ordinances did not restrict advertising of lawful pricing.[36] Jurisdictions outside the First Circuit and the Southern District of New York may face litigation along the same lines when regulating tobacco pricing, but the Providence and New York City ordinances provide proven examples to follow to mitigate or avoid First Amendment issues.

Banning tobacco sales or creating a licensing program that limits the number of authorized tobacco retailers within a certain distance of schools and playgrounds is another example of regulation of a sales practice that involves neither expressive conduct nor speech.[37] This strategy requires a careful assessment of the impact of the restriction on tobacco sales in the region and of federal law that authorizes such restrictions.[38] It is a promising avenue, however, particularly as a means of addressing youth exposure. In fact, the federal District Court for the Northern District of Illinois recently upheld a Chicago ordinance that bans the sale of flavored tobacco products within 500 feet of a public, private, or parochial school, rejecting an argument that it was preempted.[39]

Government Speech

Government also can influence the point-of-sale environment by introducing its own messaging. When government speech is at issue, the First Amendment generally is not implicated because the government is speaking independently on behalf of itself.[40] When state or local governments require retailers to convey a government message about tobacco, however, they are likely to face a First Amendment challenge. Very few cases have addressed the viability of such a claim. For example, in 2009, New York City adopted a local law requiring tobacco retailers to post graphic tobacco health warnings with smoking cessation information at the point-of-sale.[41] Although the law required private retailers to post them, the mandatory signs bore the insignia of the City of New York as well as the Health Department logo. They were clearly messages that were both crafted by and attributable to the government. As such, the City argued they constituted government speech.[42] In a federal lawsuit challenging the New York City law, plaintiff tobacco retailers and manufacturers took a different view, characterizing the signage requirement as an example of compelled opinion speech, which is reviewed under the most stringent standard of First Amendment review – "strict scrutiny."[43] Without determining whether the signs violated the First Amendment, the federal court held that the ordinance, as drafted and implemented, was preempted by FCLAA, as discussed below.[44]

More recently, a federal district court in California held a Berkeley city ordinance that requires cell phone retailers to post or provide customers with a city-sponsored notice concerning potential health risks of radio frequency exposure from cell phones was likely constitutional both under an enhanced version of rational basis review that the court said ought to apply to government speech and under the *Zauderer* test for compelled commercial disclosures, discussed below.[45] While *Zauderer* clearly applies when the government requires a commercial disclosure that is both delivered by and attributed to a private speaker, if the message is plainly attributed to the government, the First Amendment interest is quite weak, so the even more lenient version rational basis review should be appropriate. It should

be noted, however, that the Supreme Court suggested in dicta earlier this year—in a case involving a state's refusal to issue specialty license plates bearing a confederate flag—that the First Amendment "may constrain the government's speech if, for example, the government seeks to compel private persons to convey the government's speech. But, as a general matter, when the government speaks it is entitled to promote a program, to espouse a policy, or to take a position."[46] In light of this statement, although either approach should be permissible, it may be that a law that requires public health warnings as a condition of participation in a retail licensing program is better positioned to survive a First Amendment challenge than one that imposes a direct warning requirement on private businesses. In either case, to pass muster required messages concerning tobacco products must be clearly attributed to the government rather than to the individual retailers, wholesalers, or manufacturers.

Required Disclosures

Another permissible way of influencing the information environment is for government to require private actors to communicate information that is relevant to a consumer in making a commercial transaction. As the prior discussion reflects, there may be significant overlap from a legal perspective between the doctrinal line allowing the government to require certain commercial disclosures and the line of authority exempting government speech from First Amendment review. For example, through the enactment of the FSPTCA, Congress has required tobacco companies to communicate information about the health risks of smoking by including graphic warning labels for cigarette packages and advertisements. Although this sort of warning requirement might also be analyzed as a form of government speech, the Supreme Court has typically has upheld government-mandated commercial speech disclosures under the First Amendment using the *Zauderer* test, which often is referred to as a form of "rational basis" review and which is less stringent than either strict or intermediate scrutiny.

Under *Zauderer*, government may constitutionally require a business to communicate commercial information that is "purely factual and uncontroversial" and "reasonably related" to the government interest of preventing consumer deception.[47] Otherwise, disclosures that are "unjustified or unduly burdensome" may violate the First Amendment.[48] Lower federal courts have extended the *Zauderer* test, applying it when other government interests are asserted, including goals related to public health. For example, the federal Sixth Circuit Court of Appeals in *Discount Tobacco City & Lottery, Inc. v. United States*, upheld the Congressional mandate in the FSPTCA requiring that cigarette packages contain color graphic warning labels that depict the health harms of smoking.[49] This deferential standard reflects the well-established First Amendment value in enhancing – as opposed to restricting – the stream of commercial information for consumers.[50] Although the Supreme Court has not addressed the issue, federal courts have said that commercial speech disclosure requirements that do not qualify for review under *Zauderer* are subject to more stringent review.[51]

Commercial Speech

While government speech and compelled factual commercial disclosures speech may not be viewed by courts as treading unduly on the rights of commercial advertisers, courts are far more wary of government efforts that directly restrict advertising. The current test used to ensure that such restrictions are consistent with the First Amendment is known as *Central Hudson*, after the case in which it was first articulated.[52] Under the *Central Hudson* test, a court reviewing a restriction on commercial speech must determine: (1) whether the expression is protected by the First Amendment, which is to say that the regulated speech concerns lawful activity and is not misleading; (2) whether the asserted governmental interest is substantial; (3) whether the regulation directly advances the governmental interest asserted; and (4) whether the regulation is "not more extensive than is necessary to serve that interest."[53]

The first prong reflects two important limits on the scope of First Amendment protection: commercial speech is not protected if it proposes an unlawful transaction or if it is false or misleading.[54] An example of commercial speech proposing an unlawful transaction is provided by the Providence and New York City minimum pricing cases discussed earlier. In both cases, federal courts agreed that, because it was illegal to *sell* discounted tobacco products in violation of the minimum price ordinances, *offers* to do so were not protected commercial speech under the First Amendment.[55] More generally, when a jurisdiction lawfully prohibits tobacco sales practices that lack expressive value, it typically will be free to restrict advertising and promotion of the activities outlawed without violating the First Amendment. Courts also have recognized that when tobacco product advertising does not disclose the associated health risks of using the product, it gives a false impression or is misleading.[56] Although a full exploration of the false or misleading nature of tobacco advertising is beyond the scope of this article, it is important to consider the extent to which any expressive conduct or advertising to be regulated may be false or misleading, as some jurisdictions may elect to treat this as a separate basis for defending against a First Amendment challenge.[57]

As to the second prong, there will rarely be any dispute that the public health concerns at stake in tobacco control work involve substantial, even compelling, governmental interests – especially protecting youth from the harms of tobacco.[58] Nevertheless, framing those interests precisely is important because they are the benchmark against which evidence of direct advancement and fit – the third and fourth prongs – are measured. In *R.J. Reynolds Tobacco Co. v. FDA*, decided in 2012, the federal D.C. Circuit Court of Appeals applied *Central Hudson* and struck down the FDA's rule requiring nine specifically designed and mandated color graphic warning labels for cigarette packaging and advertising.[59] In doing so, that court rejected the FDA's asserted interest in effectively conveying information about the negative health consequences of smoking as "too vague to stand on its own" under the *Central Hudson* test, perhaps reflecting a lack of confidence in the evidentiary showing.[60] However, the *R.J. Reynolds* court did recognize the FDA's interest in reducing smoking rates and assumed that interest was substantial.[61] Other courts may be willing to recognize both of these interests. They will be more likely to do so if the jurisdiction describes each interest it asserts as precisely as possible.

Central Hudson's third and fourth prongs require the most attention. The Supreme Court has applied them more rigorously over time, making it far more difficult to pass than other forms of intermediate scrutiny such as the *O'Brien* test for regulation of expressive conduct. The third prong – direct advancement – requires proof that "the harms [the government] recites are real and that its restriction will *in fact* alleviate them to a *material degree*."[62] This prong cannot be satisfied with "speculation or conjecture" and requires a sufficient evidentiary record.[63] Notably, the *R.J. Reynolds* court, applying *Central Hudson*, held that the FDA's graphic warnings rule did not directly advance the asserted regulatory goal of reducing smoking rates, in part because the FDA's own analysis estimated the new warnings would reduce U.S. smoking rates by a mere 0.088%.[64] *Central Hudson*, the court explained, "requires FDA to find and present data supporting its claims *prior to* imposing a burden on commercial speech."[65]

The lesson from *R.J. Reynolds* is that courts may require a fairly substantial evidentiary showing to support the causal link that is the *sine qua none* of direct advancement. Where there is little evidence regarding the anticipated impact of a restrictive measure because it has not yet been tried, a particularly careful exposition of the logic tying the restriction to the government's interests is essential. For example, in *Lorillard*, the Supreme Court applied *Central Hudson* and accepted the argument that evidence of a causal relationship between exposure to advertising and underage tobacco use logically supports a determination that reducing such exposure would reduce underage use of tobacco products.[66]

The fourth prong generally requires narrow tailoring, meaning a "fit" between the regulation and its objective that is "reasonable" but not the least restrictive means.[67] At the same time, the Supreme Court has said it is "clear that if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so" and that "[i]f the First Amendment means anything, it means that regulating speech must be a last–not first–resort."[68] A fit problem is serious because it suggests that the law could have an impermissible aim: suppression of a disfavored message.[69] Thus, while the government need not craft a perfect fit between the quantum and type of speech restricted and the law's purpose, the restriction must not be "more extensive than necessary to serve the interests that support it."[70]

Lorillard provides a paradigmatic example of how courts have applied *Central Hudson*. Within a defined zone—1,000 feet of such locations as schools, parks and playgrounds—the challenged state regulations at issue in that case generally banned outdoor cigarette, smokeless tobacco, and cigar advertising, including ads in retail outlets visible from outside or directed outside the establishment, and required retailers located in these zones to post point-of-sale cigarette advertisements at least five feet from the floor if minors were allowed inside.[71] As will be discussed, the Supreme Court found the cigarette regulations preempted under FCLAA but proceeded with a First Amendment analysis of the regulations for the non-preempted tobacco products using *Central Hudson*. Under the first prong, the state assumed for summary judgment purposes that the regulations applied to protected commercial speech, and, under the second prong, "the importance of the State's interest in preventing the use of tobacco by minors" was undisputed.[72] Under the third prong, the Court concluded that the state had provided a sufficient record, based in large part on studies cited

by the FDA in a 1995 rulemaking, along with more recent studies, that allowed the Court to conclude that the 1,000-foot rule for smokeless tobacco and cigar advertising to curb tobacco product use by minors was not "based on mere 'speculation [and] conjecture.'"[73] The Court found, however, the five-foot rule insufficiently effective under the third prong because children, whether under or over five feet tall, could look at signs placed higher than five feet.[74] Moreover, for a number of reasons, the Court held the 1,000-foot rule failed the fourth prong including because the state had failed to demonstrate how much speech would be restricted in major metropolitan areas and also how the rule might apply in rural and suburban areas.[75] In addition, the Court concluded the regulations seemed to restrict speech too broadly and, for example, could have targeted "highly visible billboards, as opposed to smaller signs," and "particular advertising and promotion practices that appeal to youth" if demonstrated by studies.[76] Similarly, the Court found the five-foot rule failed the tailoring requirement of the fourth prong and could have been more narrowly targeted, for example, by focusing on "tobacco advertisements and displays that entice children" for example.[77]

Recent court decisions and commentary affirm *Central Hudson*'s continuing vitality despite indications from the Supreme Court that more stringent review will be required in at least some circumstances.[78] In *Sorrell v. IMS Health, Inc.*, the Supreme Court applied *Central Hudson* to strike down a Vermont statute that restricted the sale and use of records that identified physicians, and the drugs they prescribed, for pharmaceutical marketing purposes.[79] The Court stated that "heightened scrutiny" – a standard more rigorous than *Central Hudson* – should apply because the statute restricted speech based on (1) its content (the restriction applied only to pharmaceutical marketing), (2) the identity of the speaker (the restriction applied specifically to pharmaceutical manufacturers), and (3) the viewpoint of the message (the restriction was designed to reduce the effectiveness of marketing for brand-name prescription drugs, thereby favoring generic alternatives).[80] However, the Court stopped short of applying or defining "heightened scrutiny" and held only that the statute could not satisfy even the "intermediate scrutiny" traditionally required under the *Central Hudson* test.[81] At least two federal district courts have upheld regulations based on application of *Central Hudson* after *Sorrell*.[82]

Other courts have struck down regulations under *Central Hudson* post-*Sorrell*. In one case, the Second Circuit stated that restrictions on off-label prescription drug promotion were subject to heightened scrutiny but held simply that they were unconstitutional even under the established *Central Hudson* analysis.[83] In another case, the D.C. Circuit applied *Central Hudson* when it ruled that the FDA's proposed graphic warnings rule was unconstitutional, citing *Sorrell* only for the proposition "'[t]hat the [government] finds expression too persuasive does not permit it to quiet the speech or to burden its messengers.'"[84] In a third case, the Sixth Circuit struck down provisions in the federal FSPTCA that restricted color and imagery in cigarette and smokeless tobacco advertising, including point-of-sale video advertising, concluding under *Central Hudson* that the restriction was an unconstitutional means of serving the asserted government interest in curbing underage tobacco use.[85] Notably, however, that court also applied *Central Hudson*—rather than heightened scrutiny—when it upheld other provisions in the FSPTCA, including bans on free tobacco samples, the use of tobacco-branded non-tobacco items, and tobacco-branded sponsorship of athletic,

music and similar events.[86] Like *Sorrell* itself, none of these decisions reflect application of heightened scrutiny.

In the same vein, although the Supreme Court's recent decision in *Reed v. Town of Gilbert, Arizona* highlights the importance of adequately justifying content-based restrictions, it did not directly alter the *Central Hudson* test or the fact that commercial speech regulation is subject to intermediate scrutiny.[87] In *Reed*, the Court struck down a sign ordinance that gave "[i]deological messages … more favorable treatment than messages concerning a political candidate."[88] The Court explained that "[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."[89] Lower courts have rejected the contention that *Reed* requires strict scrutiny in other contexts however, concluding, for example, that the recent decision "does not disturb the framework which holds that commercial speech is subject only to intermediate scrutiny as defined by the *Central Hudson* test."[90]

Nevertheless, in a pointed statement of particular relevance to tobacco control advocates, the Supreme Court explained in *Sorrell* that laws "may not seek to remove a popular but disfavored product from the marketplace by prohibiting truthful, nonmisleading advertisements … [and] [t]hat the State finds expression too persuasive does not permit it to quiet the speech or to burden its messengers."[91] This concern indicates the vital importance of considering the availability and relative efficacy of regulatory alternatives that either do not restrict speech or that are less restrictive than the measures under consideration. Failing to consider other approaches while focusing on restricting speech is a red flag indicating that the purpose is not to advance the government's asserted goal but to suppress lawful speech.

Because research literature supports the contention that a goal and effect of tobacco advertising and marketing practices is recruiting minors to smoking, restrictions that focus on reducing youth exposure may have a better chance of success when challenged in court.[92] If a jurisdiction has not implemented less restrictive or speech-neutral alternatives, however, it will be prudent either to try those alternatives first or to adopt a comprehensive tobacco control program. When assessing a comprehensive program that includes speech-restrictive measures, courts are likely to require evidence that non-speech or speech-neutral measures have been insufficient when used elsewhere and that there is a clear basis for extrapolating from the experience of other jurisdictions. Moreover, courts are likely to require a meticulous explanation of the evidence and reasoning that support the regulation, as content-, speaker-, and viewpoint-based regulations that would satisfy *Central Hudson* may be subject to more rigorous scrutiny in light of *Sorrell*.

Preemption of State and Local Laws Restricting Cigarette Advertising

Federal preemption is based on the constitutional principle that federal law is supreme over any conflicting state or local laws.[93] All state and local laws that encroach on territory carved out by Congress for exclusive federal control or that otherwise conflict with federal law are preempted.[94] Likewise, some state laws preempt local laws that conflict with them.

For example, several states preempt localities from adopting laws that go above and beyond state regulation of smoking, advertising, and access to tobacco products.[95]

As noted above, FCLAA has long contained a general preemption provision that prohibits any "requirement or prohibition based on smoking and health" under state law "with respect to the advertising or promotion of … cigarettes."[96] Similarly, CSTHEA preempts state and local laws requiring any "statement relating to the use of smokeless tobacco," except on outdoor billboards, "*in* any advertisement … of a smokeless tobacco product," other than the federally-mandated warnings for smokeless tobacco products.[97] To be very clear, when advertising is at issue, FCLAA preemption applies only with respect to *cigarette* advertising and promotion, and the CSTHEA preemption provision is limited to regulation of the statements in *smokeless tobacco product* advertisements themselves.

Congress has amended FCLAA several times since 1965, when it was first adopted. In *Lorillard*, the Supreme Court concluded that 1969 amendments to FCLAA reflected Congressional intent to reserve to the federal government the right to enact cigarette advertising regulations motivated by concerns about smoking and health.[98] As a result, state and local governments were precluded from doing so, whether or not the federal government took action. Massachusetts argued in *Lorillard* that its cigarette-related regulations were not preempted because they governed only the location of cigarette advertising – including within 1,000 feet of schools, parks, and playgrounds—and not its content. The Supreme Court rejected the state's argument, holding that FCLAA's preemptive scope encompassed both content- and location-based restrictions and left no room for a distinction between the two.[99] However, because FCLAA did not preempt similar regulations for smokeless tobacco, cigars and little cigars, the *Lorillard* Court applied *Central Hudson* and invalidated the regulations to the extent they applied to these non-cigarette products.[100]

The FCLAA preemption provision still exists, and the *Lorillard* Court's interpretation of it still governs. But in 2009, when Congress enacted the FSPTCA,[101] it carved out a new exception. FCLAA now expressly permits state and local governments to impose "specific bans or restrictions on the time, place, and manner, but not content, of the advertising or promotion of any cigarettes" that are "based on smoking and health."[102] In other words, Congress amended FCLAA to permit expansive local regulation of cigarette advertising, expressly adopting the very distinction between location and content regulation that the Supreme Court had rejected in *Lorillard*, as discussed.[103]

Since the enactment of the FSPTCA, a few courts have probed the contours of the revised preemption provision. For example, the Second Circuit held that a New York City law requiring retailers to post signs containing graphic cigarette health warnings and cessation information adjacent to cigarette product displays – a form of "promotion" – was preempted because the proximity requirement made the warnings supplementary to those required by Congress.[104] Notably, the court also said that cigarette health warnings might not be preempted under other circumstances.[105] And, in the Providence and New York City cases discussed above, the courts found that the cigarette price ordinances at issue were *not* preempted by the amended FCLAA because they did not regulate the *content* of cigarette

advertising or promotion based on smoking and health and fell within the category of permissible regulation of the "manner" of cigarette advertising or promotion.[106]

FCLAA's new preemption exception removes the barrier of federal preemption for those state and local laws that regulate the time, place and manner—the when, where and how—of cigarette advertising and promotion based on smoking and health. At the same time, it confirms that regulation of cigarette advertising and promotional *content* based on smoking and health remains off limits as stated in the FCLAA preemption provision. Reading FCLAA, *Lorillard*, and the FSPTCA together, state and local advertising regulations should not be federally preempted unless they impact cigarette advertising and promotional content, based on smoking and health, in a way that creates "diverse, nonuniform, and confusing" requirements for manufacturers designing their cigarette advertising and promotional content.[107] In other words, preemption should be limited to ensuring that state and local governments do not create the sort of laws that require tobacco companies to create new cigarette advertisements and promotions for each jurisdiction. The preemption exception is designed to advance that goal while ensuring the maximum latitude for protection of youth, one of the central purposes of the FSPTCA, which created the FCLAA preemption exception.[108] If there is any dispute about what Congress intended, the new exception should be read broadly because courts typically will select the reading that disfavors preemption.[109]

State Preemption of Local Laws

State preemption of local laws is another obstacle in many jurisdictions and may govern local attempts to curtail youth exposure to advertising. Examining potential preemption issues in the 50 states is beyond the scope of this article, but that analysis is essential for any municipality seeking to regulate tobacco advertising.[110]

The Roadmap

Significant regulatory opportunities remain despite these legal obstacles. Building upon the detailed analysis above, we offer here a roadmap for assessing the likely legality and efficacy of some of the leading approaches being considered to reduce tobacco initiation and use among youth by restricting their exposure to point-of-sale advertising and marketing practices.

Navigating the First Amendment

For interventions that directly limit point-of-sale advertising in order to reduce youth exposure, satisfying the First Amendment requires a thorough assessment of how well the proposed regulation advances the government's interest and how severely it curtails freedom of speech. Any regulation must be a "reasonable fit" with a substantial regulatory goal and not be "more extensive than necessary," particularly in light of the more stringent review threatened by recent commercial speech cases.[111] Applying the detailed step-by-step analysis required by *Central Hudson*, key considerations include whether there is evidence that the regulation will be effective in advancing the interests asserted, whether less- or non-speech-restrictive means of advancing the government's interests are insufficient, and

whether it appears the government has taken care to minimize the impact on protected commercial speech. In conducting that analysis, a jurisdiction should begin by recognizing that selling tobacco is a lawful transaction and should take steps to preserve the adult consumer's opportunity to "obtain information about products."[112] In practice, a regulation is more likely to survive a First Amendment challenge if the jurisdiction already has implemented other means of reducing youth smoking. It will be important to detail how and why other means, standing alone, have been insufficient to address the interest in eliminating underage tobacco use and why restricting advertising is an essential next step.

In the same vein, a jurisdiction must demonstrate that it has considered the availability of alternatives that would reduce youth tobacco use to a comparable degree without restricting lawful tobacco advertising to adults. This process of considering alternatives should be robust. The range of options considered should be broad, including such diverse approaches as implementing or increasing a tobacco tax, increasing funding for state or local tobacco control programs, banning tobacco *sales* near schools or in certain retail environments like pharmacies,[113] adopting or expanding smoke free air laws, and increasing the minimum legal sale-age for sale of tobacco products to 21 years old.[114]

Similarly, before considering interventions that *limit* tobacco advertising or marketing, jurisdictions should make a special effort to consider the likely efficacy and financial feasibility of approaches that inject *more* information into the information environment, such as government-sponsored health warnings that advise consumers about the adverse health impacts of tobacco products. Evidence that this sort of counter-speech program would not be prohibitively expensive and ultimately ineffective[115] should be collected.

It may well be that other interventions will not remediate the specific problem the jurisdiction seeks to address, or that they are infeasible as a matter of law or cost. Nevertheless, serious consideration of the anticipated impact of these bedrock tobacco control interventions should be a jurisdiction's first step. Thoughtful analysis, public health research, data on local needs, and information about the experiences of other jurisdictions all should be captured in the legislative record.

Avoiding Federal Preemption (Relevant Only to Regulation of Cigarette or Smokeless Tobacco Advertising)

Government regulations that restrict the advertising and promotion of non-cigarette products (also known as non-cigarette tobacco products or NCTPs) do not implicate FCLAA, which applies only to cigarette advertising and promotion. Likewise, regulations that restrict advertising of products other than smokeless tobacco do not trigger CSTHEA preemption. Consequently, jurisdictions should consider whether restrictions on the promotion of NCTPs might be an effective public health intervention in the absence of parallel restrictions on cigarette and smokeless tobacco advertising. For example, constitutionally drafted limits on the advertising and promotion of flavored cigars might be an effective strategy in locations where there are high rates of youth consumption of cigars, and limiting regulation to cigars would avoid federal preemption.

Jurisdictions that wish to limit cigarette advertising will need to avoid imposing a "ban or restriction" on the content of the advertising or promotion, based on smoking or health. The regulation of content is clearly reserved to the federal government under FCLAA. A state or local ban on cigarette advertising featuring images of young adults smoking, for example, would constitute a regulation of the content of that advertising, clearly implicating federal preemption.

Consistent with the relatively new exception to preemption under FCLAA, a regulation that restricts only the time, place, or manner of cigarette advertising and promotion avoids preemption. It need not do all three. But crafting a hybrid rule – one that limits the time and place, or the place and manner, or even the time, place, and manner of cigarette advertising – will always result in a more narrowly tailored regulation, making it more palatable for purposes of the First Amendment inquiry. Regulations that focus on overlapping areas (e.g. time and place, or time and manner) restrict less speech and therefore are more narrowly tailored, an important consideration under the First Amendment in light of increasingly stringent application of *Central Hudson*'s fourth prong.

Policies for Consideration

In light of the legal tests described above, we outline below a variety of interventions that localities and states may wish to consider when seeking tobacco regulations at the point of sale.

Restrictions on the redemption of coupons, and other price reduction strategies

Restrictions on the pricing of tobacco products, like minimum price laws and limiting redemption of coupons and multi-pack discounts to sell tobacco products below the legal minimum price, are likely to be more common now that the Providence and New York City ordinances discussed above have withstood First Amendment and preemption challenges in court. Localities will be wise to follow these cities' lead by clearly regulating pricing strategies directly rather than focusing on restricting dissemination of lawful and non-misleading price information about tobacco products that would implicate the First Amendment.

Jurisdictions seeking to introduce legislation regulating pricing strategies should prepare findings relating to the impact of price promotions on youth initiation and use of cigarettes, provide evidence of youth price sensitivity with respect to tobacco purchases, and focus regulations of price promotions on the retailer *redemption* of price discounts rather than the manufacturer distribution of coupons and other promotional materials.

Required point–of- sale warnings or cessation information

Health warnings and smoking cessation information at the point-of-sale can be powerful deterrents to impulse purchasing.[116] State and local government sponsored and disseminated tobacco health warnings should be free from First Amendment scrutiny because they are government speech rather than regulated commercial speech. However, as discussed previously, compelling private retailers to display even clearly identified government-sponsored public health warnings related to tobacco products may lead to a First

Amendment challenge. Any such requirement ought to be designed carefully to ensure that messages are controlled by and clearly attributed to the government and, at the same time, that they contain "purely factual and uncontroversial" messages about tobacco products that are reasonably related to such goals as preventing consumer deception regarding the harms of tobacco use, informing consumers about the negative health effects of tobacco use, and reducing the harms of tobacco use, especially among minors.[117]

As mentioned, FCLAA preemption applies only to requirements imposed "with respect to the advertising or promotion of any cigarettes" and CSTHEA preemption applies only to a statement in advertising "relating to the use of a smokeless tobacco product." Consequently, so long as warning requirements do not restrict or mandate statement in or with respect to advertising, there should be no preemption problem for warnings about cigarettes or smokeless tobacco products.

Moreover, state and local regulators should be able to avoid preemption arguments entirely by limiting tobacco health warning requirements to "non-cigarette-tobacco-products" (NCTPs), excluding cigarettes. Because warnings are not "in advertising," there should be no CSTHEA preemption with respect to smokeless tobacco products. For example, a jurisdiction could require retailers who sell NCTPs to post health warnings communicating information about the adverse health effects of the use of cigars, cigarillos, and smokeless tobacco products. Because FCLAA preemption applies only to requirements imposed "with respect to the advertising or promotion of any cigarettes," there would be no basis for arguing that the regulation was preempted under FCLAA. Of course, satisfying the First Amendment also would be required. In addition to excluding cigarettes from its coverage, such a regulation should explain that health warnings are required anywhere NCTPs are sold and should specify that they are not intended to interfere with or to counteract advertising but to ensure that full and accurate information is available to consumers at the point-of-sale. A jurisdiction undertaking this effort also should prepare findings showing the factual basis for requiring the specific warnings or information selected.

As mentioned above, the Second Circuit left open the possibility for state and local governments to use this strategy when it explained that warnings might not be preempted under FCLAA in other circumstances despite its holding that the New York City law requiring graphic supplemental cigarette warnings *adjacent* to retail cigarette displays was preempted.[118] It may be that a proximity requirement would pass muster before another court or that another jurisdiction might forego that requirement and simply require proximity to the cash register. In either case, whether to limit required point-of-sale tobacco health warnings to NCTPs or to include cigarettes (or to have separate ordinances for NCTP and cigarette warnings) is a complicated legal decision.[119]

No tobacco advertising or promotions near youth-concentrated places such as schools, playgrounds and youth centers

In light of research showing that youth tobacco use rates are higher in areas with more point-of-sale promotions in tobacco outlets near schools,[120] jurisdictions may consider adopting regulations that restrict tobacco advertising near youth-concentrated places, such as schools, parks and afterschool centers.

Jurisdictions that want to advance this strategy should show in findings that restricting retail advertising near schools and other such locations where children are "will in fact alleviate [youth smoking] to a material degree;"[121] collect empirical and anecdotal evidence that confirms the problem in the location to be regulated; if feasible, use mapping software to assign advertising boundaries; collect evidence about the types of stores frequented by youth and amount of marketing,[122] and consider exempting those that are patronized primarily by adults; consider sizing of banned advertising signage;[123] and create a clear record that the specific advertising practices targeted are particularly appealing to youth.[124] If such a restriction is imposed in a vacuum, however, it will be difficult to argue successfully that the restriction is essential. Given the burden of collecting findings and shaping a policy to ensure that it is sufficiently narrowly tailored, many jurisdictions may find it easier to pursue other approaches discussed here, or they may consider simply banning the *sales* of tobacco products near schools.

A jurisdiction that wants to proceed to reduce youth tobacco use by restricting both advertising and sales can link these strategies in at least two ways. First, it can restrict sale of tobacco products near schools and/or at specified times in outlets frequented by youth, such as convenience stores. To the extent sale of specified tobacco products in a particular time, place, or manner is banned, advertising about that product then concerns an activity that is not legal. The first prong of *Central Hudson* should permit regulation because the advertising concerns unlawful conduct (an offer for sale at a place and/or time where the sale is banned). Another potential approach to linking advertising and sales restrictions is to use severable provisions. An initial provision could restrict tobacco advertising near schools, supported by a strong evidentiary record in anticipation of a First Amendment challenge. The second provision would take effect only if the advertising restriction became unenforceable and would restrict tobacco sales instead of advertising. A court decision enjoining enforcement of the advertising restriction would automatically trigger the sales restriction.

No tobacco advertising or promotional activity visible before school, after school, or during school lunch and vacation periods

Because of the impact of tobacco advertising on youth, jurisdictions may wish to take steps to ensure that such advertising is not visible during times when youth are most likely to be in retail outlets. Jurisdictions contemplating this approach should consider the actual times of day when most youth are exposed to retail cigarette advertising; and consider applying time-based restrictions only in specified locations, such as near schools or other child-centered areas. This is a classic "time, place, or manner" restriction and therefore may apply to cigarettes without triggering FCLAA preemption. Nevertheless, for First Amendment purposes, a jurisdiction would need a detailed record of the scientific support for restricting youth exposure to advertising and should give serious thought to the feasibility of a time-based restriction for retailers. If it is impractical or unduly burdensome for retailers to adjust the visibility of tobacco advertising, time-based approaches may face a significant legal hurdle.

Tobacco product displays limited to stores with no youth access or portions of stores where access is limited to adults

Limiting tobacco product displays to stores that prohibit entry to youth or to those portions of stores that are accessible to adults only would permit uninterrupted commercial communication with lawful consumers, while protecting youth against dangerous exposure.[125] Jurisdictions considering this approach should: identify and address logistical challenges in consultation with experts in convenience store construction and safety; collaborate with store owners to identify and address design challenges, including consideration of low partitions or curtains and placement of wide-angle mirrors to allow staff to see the full store while preventing youth from seeing cigarette products; consider feasibility of installing a partition or curtain perpendicular to the counter to enable staff to serve customers from within the adult-only area and to keep cigarettes behind the counter without making them visible from the rest of the store; assess whether an access requirement is best adopted as part of an existing or new licensing scheme; analyze data on adolescent use of stores in the area and consider allowing the partition to be open during times when adolescents are unlikely to be present; prepare findings that show how segregation of product and/or advertising will reduce youth initiation of cigarette use; and specify that the regulation permits and encourages forms of communication that invite adults to enter the restricted area.

Restrict size of brand displays

In a 2011 study of retail tobacco advertising in New York state, researchers found that 82.2% of retailers dedicated 50% or more of the merchandising space behind the checkout counter to openly visible tobacco products, and the amount of space dedicated to the display of tobacco products averaged 32 square feet, equivalent to about 204 cigarette pack faces.[126] Restricting the size of brand displays means regulating expressive conduct, but the Supreme Court upheld the regulation of package displays in *Lorillard* under *O'Brien*, permitting a requirement that all packages be out of reach for customers. The same reasoning applicable to caps on brand display size applies to single pack display limits. Permitting the display of only one package of each tobacco product would dramatically reduce the total volume of tobacco product display yet would permit manufacturers to communicate information about their products to their adult customers. Comparative evidence regarding the impact of brand display size on adult consumers and youth would help to show that this sort of regulation directly advances the goal of reducing youth initiation of tobacco use and is narrowly tailored to minimize the impact on communication with lawful adult purchasers.

Cap total amount of display space

Many stores feature "power walls" of tobacco products, which are large and highly visible shelving units featuring cigarettes, cigars, e-cigarettes, smokeless tobacco and other tobacco products. Many displays are six or seven feet tall, and they feature not only the product, but "danglers" and "bursts" which are small signs designed to draw attention to product pricing and promotions. Jurisdictions may wish to reduce the size of tobacco displays, while at the same time ensuring that tobacco retailers can make clear to purchasers the variety of tobacco products that are for sale. Jurisdictions contemplating this approach should:

demonstrate how size of displays increase youth tobacco initiation and use and specify that manufacturers and retailers are free to put up posters equivalent to their display visual, thereby protecting the expressive interest, but must put most product out of sight, thereby regulating the use of product displays to recruit new youth to smoking.

Conclusion

New research and changes in the law warrant reconsideration of the feasibility of several types of restrictions on point-of-sale tobacco advertising and promotion. These point-of-sale interventions, if successful, are likely to result in significant reductions in youth initiation into the use of tobacco products and in the prevalence of tobacco use among youth. In light of the significant legal challenges discussed above, however, officials who are considering regulations that restrict tobacco advertising will be wise to adopt the following best practices:

1. Separately analyze the implications of potential First Amendment and preemption issues, including preemption under FCLAA or CSTHEA, conflict preemption under federal law, and state law preemption of local regulations.
2. In keeping with the proof required under *Central Hudson*, carefully document (a) evidence demonstrating the likely effectiveness of the proposed regulation, and (b) consideration of alternative regulatory interventions that do not restrict speech (or expressive conduct) or that are less restrictive of speech. Non-speech interventions may include tobacco retailer licensing schemes, reducing the number and density of tobacco outlets, raising the minimum legal sale-age for tobacco products to 21 years old, and banning tobacco sales at pharmacies or other retail outlets. The more robust the showing, the more likely it is that a regulation will both satisfy the current test and survive any heightened scrutiny.
3. Consider inserting *more* speech through carefully crafted government health warning campaigns or compelled commercial disclosures rather than restricting advertising or explain why such alternatives would be cost prohibitive and/or would be insufficiently effective.
4. Clearly identify the government interests that are at stake and outline in detail both evidence and logical inferences that show the proposed restriction will directly and materially advance those interests and is not more extensive than necessary to serve them. Consider whether there are ways to structure restrictions that avoid discriminating based on the content, speaker, and/or viewpoint of the speech without restricting even more speech.

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5. See U.S. Department of Health and Human Services, *supra* note [1], at 9 ("among adults who become daily smokers, nearly all first use of cigarettes occurs by 18 years of age (88%), with 99% of first use by 26 years of age"); see also *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 127–28 (2000) (citing FDA findings and conclusion).
6. See U.S. Department of Health and Human Services, *supra* note [1].
7. U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health. Health Consequences of Smoking. 2014
8. We use "youth" to refer to those below the legal age for smoking in a given jurisdiction.
9. U.S. Department of Health and Human Services, Public Health Service, Office of the Surgeon General. The Health Consequences of Smoking-50 Years of Progress: A Report of the Surgeon General. 2014 see U.S. Department of Health and Human Services, supra note [1].
10. Centers for Disease Control and Prevention. Tobacco Product Use among Middle and High School Students—United States, 2011 and 2012. Morbidity and Mortality Weekly Report. 2013; 62(45): 893–897. [PubMed: 24226625] see alsoTobacco Use Among Middle and High School Students — United States, 2011–2014. Apr 17; 2015 64(14):381–385. (available at http://www.cdc.gov/mmwr/

preview/mmwrhtml/mm6414a3.htm?s_cid=mm6414a3_e). At the time of this article, the Food and Drug Administration (FDA) had proposed a rule, still pending, to include electronic cigarettes, and also cigars, among others, as "tobacco products" regulated under federal law along with traditional cigarettes and smokeless tobacco, among others. *Deeming Tobacco Products To Be Subject to the Federal Food, Drug and Cosmetic Act, as Amended by the Family Smoking Prevention and Tobacco Control Act; Regulations on the Sale and Distribution of Tobacco Products and Required Warning Statements for Tobacco Products*, 79 Fed. Reg. 23142 (proposed April 25, 2014) (to be codified at 21 C.F.R. pts. 1100, 1140, and 1143).

11. See U.S. Department of Health and Human Services, *supra* note [1].
12. See *supra* note [4].
13. This article updates and provides in-depth analysis of the legal issues referenced in several recent guides to point-of-sale tobacco regulation. SeeLaird-Metke EP. Tobacco Control Legal Consortium, Regulating Tobacco Marketing: "Commercial Speech" Guidelines for State and Local Governments. 2010 (analyzing preemption and First Amendment hurdles to regulation of tobacco advertising); Laird-Metke EP. Tobacco Control Legal Consortium, Regulating Tobacco Marketing: A "Commercial Speech" Factsheet for State and Local Governments. 2010 (analyzing point-of-sale strategies and different First Amendment tests for various types of regulation); Center for Public Health Systems Science. Point-of-Sale Strategies: A Tobacco Control Guide. 2014 Center for Public Health Systems Science, George Warren Brown School of Social Work at Washington University in St. Louis and the Tobacco Control Legal Consortium (ranking point-of-sale interventions by risk of legal challenge).
14. See, e.g.Hoefges M, Rivera-Sanchez M. 'Vice' Advertising under the Supreme Court's Commercial Speech Doctrine: The Shifting *Central Hudson* Analysis. Hastings Communications and Entertainment Law Journal. 2000; 22(3/4):350–389.Hoefges M. Protecting Tobacco Advertising under the Commercial Speech Doctrine: The Constitutional Impact of Lorillard Tobacco Co. Communication Law and Policy. 2003; 8(3):267–311.
15. *Sorrell v. IMS Health, Inc.*, 131 S.Ct. 2653, 2663–64, 2667 (2011).
16. Although not in a commercial speech case, the Supreme Court recently cited *Sorrell* stating "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2227 (2015) (citing, *e.g.*, *Sorrell*, 131 S.Ct. at 2663–64; *Carey v. Brown*, 447 U.S. 455, 462 (1980); *Police Dep't of Chi. v. Mosley*, 408 U.S. 92 (1972)). The Court further said "[t]his commonsense meaning of the phrase 'content-based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Id.* (citing *Sorrell*, 131 S.Ct. at 2664).
17. 15 U.S.C. § 1334(b) (2012) ("No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.").
18. 15 U.S.C. § 1334(c) (2012) ("Notwithstanding subsection (b), a State or locality may enact statutes and promulgate regulations, based on smoking and health, that take effect after the effective date of the Family Smoking Prevention and Tobacco Control Act, imposing specific bans or restrictions on the time, place, and manner, but not content, of the advertising or promotion of any cigarettes.").
19. 15 U.S.C. § 4406(b) (2012) ("No statement relating to the use of smokeless tobacco products and health [other than federally-mandated statements] shall be required by any State or local statute or regulation to be included on any package or in any advertisement (unless the advertisement is an outdoor billboard advertisement) of a smokeless tobacco product."). This provision applies to smokeless tobacco packages in addition to advertisements. *Id.* The preemption provision in CSTHEA is narrower than the FCLAA preemption provision. *Philip Morris Inc. v. Harshbarger*, 122 F.3d 58, 77 (1997) (comparing the "with respect to" language in FCLAA to the clauses "*on* any package" and "*in* any advertisement" in CSTHEA).
20. See, e.g., *Graham v. R.J. Reynolds Tobacco Co.*, 782 F.3d 1261, 1282, 1284 (11th Cir. 2015) (holding scope of CSTHEA's express preemption provision was immaterial because "a saving clause …does *not* bar the ordinary working of conflict pre-emption principles" and plaintiff's tort claims were preempted by federal law in light of "Congress's clear purpose and objective of regulating—not banning—cigarettes"); *CTIA – The Wireless Ass'n v. City of Berkeley*, 2015 WL

5569072, *6–7 (N.D. Cal. 2015) (discussing standard and rejecting application of conflict preemption).

21. Courts try to avoid deciding constitutional questions, so if they determine that a state or local regulation of tobacco advertising is preempted, they may not address First Amendment issues. See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 540–53 (2001).
22. Although there is a great deal of contemporary debate about the appropriate regulatory classification of e-cigarettes, their classification is immaterial for purposes of the First Amendment analysis, and, to date, neither the Food, Drug, and Cosmetic Act (FDCA), as amended by the 2009 Family Smoking Prevention and Tobacco Control Act (FSPTCA), nor the Federal Cigarette Labeling and Advertising Act (FCLAA) applies to e-cigarettes. Generally, seeLindblom EN. Effectively Regulating E-Cigarettes and Their Advertising—and the First Amendment. Food and Drug Law Journal. 2015; 70(1)Lempert, LK.; Grana, R.; Glantz, SA. The Importance of Product Definitions in US E-cigarette Laws and Regulations. Tobacco Control. (epub 2014) (available at http://www.ncbi.nlm.nih.gov/pubmed/25512432. See also supra note [8] discussing pending FDA rulemaking).
23. See *supra* note [4].
24. *United States v. O'Brien*, 391 U.S. 367, 377 (1968).
25. *See Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence, R.I.*, 731 F.3d 71, 77–78 (1st Cir. 2013); *Nat'l Ass'n of Tobacco Outlets, Inc. v. City of N.Y.*, 27 F. Supp. 3d 415, 421–24 (S.D.N.Y. 2014).
26. See *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 553, 556–67 (2005) (plurality opinion); *U.S. Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2328 (2013) (holding government may restrict speech of its grantees within the scope of government-funded work but may not impose "conditions that seek to leverage funding to regulate speech outside the contours of the program itself"); *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015) (holding state denial of Confederate flag design for specialty license plate program was permissible because selection of designs was government speech).
27. Zauderer v. Office of Disciplinary Counsel of the Supreme Ct. of Ohio, 471 U.S. 626, 651 (1985) (upholding required disclosure because it was "purely factual and uncontroversial" and reasonably related to preventing consumer deception in attorney advertising); see also Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 249–50 (2010) (applying Zauderer and upholding required disclosure because it was an "accurate statement" of factual information reasonably related to preventing consumer deception in attorney advertising, but not addressing or mentioning whether the statement was "uncontroversial"). Lower courts and commentators have differed on the exact constitutional requirements under Zauderer, a full discussion of which is beyond the scope of this article, but until the Supreme Court decides another case, state and local regulations that require advertisers to include "factual and uncontroversial" information that is "reasonably related" to preventing consumers from being deceived by their ads are likely to be upheld under Zauderer's rational basis review. See Am. Meat Inst. v. U.S. Dept. of Agric., 760 F.3d. 18, 21, 22–23 (D.C. Cir. 2014) (stating as a "starting point" that "Zauderer applies to government mandates requiring disclosure of 'purely factual and uncontroversial information' appropriate to prevent deception in the regulated party's commercial speech," but also recognizing that Zauderer can apply to other asserted government interests);Keighly JM. Can You Handle the Truth? Compelled Commercial Speech and the First Amendment. University of Pennsylvania Journal of Constitutional Law. 2012; 15(2):539–616. at 568 ("Commercial disclosures must provide 'purely factual and uncontroversial information to be subject to Zauderer's rational basis test.").
28. Although the Supreme Court has not yet applied Zauderer to compelled commercial disclosures when the government interest is something other than preventing consumer deception, several federal circuit courts of appeals have done so including, recently, the federal D.C. Circuit Court of Appeals. See Am. Meat Inst., 760 F.3d at 22–23; N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health, 556 F.3d 114, 133 (2d Cir. 2009); Pharm. Care Mgmt. Ass'n v. Rowe, 429 F.3d 294, 309–310, 310 n.8 (1st Cir. 2005) (Torruella, J.), id., at 316 (Boudin, C.J. & Dyk, J., concurring), id., at 297–298 (per curiam) (noting concurring opinion controls on First Amendment disclosure issue); Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 113–15 (2d Cir. 2001). The Sixth Circuit applied Zauderer and upheld the FSPTCA's disclosure requirements for cigarette advertisements and packages, recognizing government interests in "preventing consumer deception" and promoting

better public understanding of the risks of smoking. Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 562, 565–66, 569, (6th Cir. 2012), cert. denied sub nom, Am. Snuff Co., LLC v. United States, 133 S.Ct. 1996 (2013); id., at 556 (Stranch, J., writing for the majority on the disclosure issue and stating "Zauderer's framework can apply even if the disclosure's purpose is something other than or in addition to preventing consumer deception"). Commentators have taken various positions on this issue, a full discussion of which is beyond the scope of this article, but there is support for this broader interpretation of Zauderer. See, e.g.,Post R. Compelled Commercial Speech. West Virginia Law Review. 2015; 117(3):867–919. at 882.

29. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980).
30. *Lorillard*, 533 U.S. at 567–571.
31. *O'Brien*, 391 U.S. at 376. To comport with the First Amendment, a regulation of expressive conduct must be within the government's constitutional power and supported by an important government interest unrelated to curbing free expression, and any incidental impact on expression must be "essential" to serve the asserted interest in regulating the conduct. *Id.*
32. *Lorillard*, 533 U.S. at 569–71.
33. *Id.*, at 569–570 ("Moreover, retailers have other means of exercising any cognizable speech interest in the presentation of their products. We presume that vendors may place empty tobacco packaging on open display, and display actual tobacco products so long as that display is only accessible to sales personnel.").
34. Providence, R.I., City Code of Ordinances § 14–303 (2012); N.Y.C., Admin. Code §§ 17–176.1(b), (c) (2013).
35. *Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence, R.I.*, 731 F.3d at 78 ("[T]he regulation of prices, without more, does not rise to the level of regulation of 'inherently expressive conduct' subject to *O'Brien* scrutiny."); *Nat'l Ass'n of Tobacco Outlets, Inc. v. City of N.Y.*, 27 F.Supp.3d at 422 ("The ordinance only regulates an economic transaction – the sale of tobacco products below the listed price. It does not restrict the dissemination of pricing information and thus, it does not violate the First Amendment."). In a recent case involving a challenge to a New York state statute that prohibits sellers from charging consumers a "swipe fee" for using credit cards for commercial transactions, the Second Circuit relied on *City of Providence* and cited *City of New York* approvingly in support of its holding that the limitation on pricing mechanisms did not regulate either speech or expressive conduct under the First Amendment. *Expressions Hair Design v. Schneiderman*, 803 F.3d 94, 106–11 (2d Cir. 2015) ("although the Supreme Court has now repeatedly held that the advertising of lawful prices is protected by the First Amendment [], it has reaffirmed in doing so that states may continue to make certain prices un lawful through 'direct regulation'") (citations omitted).
36. *Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence, R.I.*, 731 F.3d at 76–77 ("Nothing in the Price Ordinance restricts retailers or anyone else from communicating pricing information concerning the lawful sale price of cigarettes."); *Nat'l Tobacco Outlets, Inc. v. City of N.Y.*, 27 F.Supp.3d at 421–23 (stating "tobacco manufacturers and retailers have an undisputed First Amendment right to advertise the listed price of their products to their consumers," but concluding the city ordinance provisions "regulating the sale of cigarettes and tobacco products below the listed price" does not restrict speech).
37. See, e.g.,Luke D, Ribisl K, Smith C, Sorg A. Family Smoking Prevention and Tobacco Control Act: Banning Outdoor Tobacco Advertising Near Schools and Playgrounds. American Journal of Preventive Medicine. 2011; 40(3):295–302. [PubMed: 21335260]
38. See 21 U.S.C. § 387p; *U.S. Smokeless Tobacco Mfg. Co. LLC v. City of N.Y.*, 708 F.3d 428, 434 (2d Cir. 2013) (upholding ordinance prohibiting sale of flavored tobacco products other than in a tobacco bar because statutory scheme "reserves regulation at the manufacturing stage exclusively to the federal government, but allows states and localities to continue to regulate sales and other consumer-related aspects of the industry in the absence of conflicting federal regulation"). Notably, the Second Circuit declined to consider whether a complete ban would be permissible, rejecting the contention that the ordinance operated as a complete ban because it permitted sale of flavored tobacco products only in tobacco bars, the City had only eight tobacco bars, and none of the existing tobacco bars sold flavored tobacco products. *Id.*, at 435–36.

39. See *Indeps. Gas & Serv. Stations Ass'ns, Inc. v. City of Chi.*, 2015 WL 4038743, at *1–5 (N.D. Ill. June 29, 2015).
40. See Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 467 (2009); Johanns, 544 U.S. at 562; Walker, 135 S. Ct. at 2245–46. So long as it is clear that the message is controlled by and attributable to the government, even imposing a special tax to fund dissemination of the government's message is permissible. See Johanns, 544 U.S. at 563–64 (rejecting claim that imposition of a special assessment on beef producers to fund the advertising campaign, "Beef. It's What's for Dinner," violated the First Amendment by creating a perception that the advertisements spoke for all beef producers and holding statute and regulation at issue could not "be the cause of any possible First Amendment harm" because they did not "require attribution," and there is no First Amendment right not to fund government speech). For an extensive discussion of this strategy of using taxes to fund counterspeech, seeSilver, Derigan; Fenson-Hood, Kelly. More Speech, Not Enforced Silence: Tobacco Advertising Regulations, Counter-marketing Campaigns and the Government's Interest in Protecting Children's Health. Berkeley Journal of Entertainment and Sports Law. 2012; 1(1):1–36. at 31–36. Regardless of the funding mechanism, whether requiring retailers to post the government's messages is a permissible means of disseminating government speech or constitutes impermissible compulsion of private speech should turn on whether the ordinance or statute at issue affirmatively requires attribution of the message to the retailer. See Johanns, 544 U.S. at 564 (holding as-applied challenge would require evidence that individual advertisements were attributed to the plaintiffs).
41. N.Y.C. Health Code, § 181.19 (2009). As the code provisions required, the city health department produced three signs, each with a different warning statement and graphic image. The signs read: "Smoking Causes Lung Cancer," over a photograph of an x-ray of a lung with cancer; "Smoking Causes Tooth Decay," over a photograph of a decayed tooth; and "Smoking Causes Stroke" over a photograph of an MRI of a stroke-damaged brain. All three signs also included the statement "Quit Smoking Today – For Help, Call 311 or 1-866-NYQUITS." *23–34 94th St. Grocery Corp. v. N.Y.C. Bd. of Health*, 685 F.3d 174, 179 (2d Cir. 2012). The code provisions required a "small sign" under 144 square inches within three inches of cash registers where consumers pay for tobacco products and a "large sign" less than 576 square inches at tobacco product displays. *Id.*, at 179 n. 4 and n. 5 (citing and quoting the Health Code provisions). The signs had to be "unobstructed in their entirety and easily read" by consumers considering and making tobacco purchases. *Id.*, at 179. The product display signs had to be between four and seven feet from the floor. *Id*
42. Defendants' brief in opposition to plaintiffs' motion for a preliminary injunction and in support of defendants' cross-motion for summary judgment, *23–34 94th St. Grocery*, 685 F.3d 174.
43. Plaintiffs' joint memorandum of law in support of motion for a preliminary injunction, *23–34 94th St. Grocery*, 685 F.3d 174. Generally, in a First Amendment case, strict scrutiny requires the government to demonstrate that its regulation of speech is necessary to serve a compelling government interest and is narrowly tailored to do so. *See, e.g., Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991).
44. *23–34 94th St. Grocery*, 685 F.3d at 179–80, 185, 186 (stating despite preemption holding that "states and localities remain free to impose time, place, and manner restrictions on the advertising and promotion of cigarettes, and to engage in anti-smoking campaigns using their own resources" and the holding "should not be read to curtail in any way state and locally funded efforts to further educate consumers and counter cigarette advertising and promotion").
45. *CTIA – The Wireless Ass'n v. City of Berkeley*, 2015 WL 5569072, *16–19 (N.D. Cal. 2015). The court noted the lack of "any [cited] appellate authority addressing the proper standard of First Amendment review where the government requires mandatory disclosure of *government* speech by a private party in the context of commercial speech." *Id.* at *14. The court tested the ordinance under the "more rigorous rational basis review" than usually is applied to government regulations "[b]ecause there is an arguable First Amendment interest," which "requires an examination of actual state interests and whether the challenged law actually furthers that interest rather than the traditional rational basis review which permits a law to be upheld if rationally related to any conceivable interest." In addition, the court separately tested the ordinance under "the more specific *Zauderer* test" with its "predicate requirement … that compelled speech must be factual and uncontroversial." *Id.* at *16, 17; *compare CTIA – The Wireless Ass'n v. City and County of*

San Francisco, 494 Fed. Appx. 752, 753–754 (9th Cir. 2012) (not selected for publication) (holding fact sheet that cell phone retailers would be required to provide to customers could not be deemed "purely factual and uncontroversial" under *Zauderer* because "language [in the sheet] could prove to be interpreted by consumers as expressing San Francisco's opinion that using cell phones is dangerous" when "[t]he FCC, however, has established limits of radiofrequency energy exposure, within which it has concluded using cell phones is safe").

46. See *Walker*, 135 S. Ct. at 2246.
47. *Zauderer*, 471 U.S. at 651; see also *Milavetz*, 559 U.S. at 249–50. The *Zauderer* Court stated in dicta that "unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech" but explicitly held "that an advertiser's rights are adequately protected as long as the disclosure requirements are reasonably related to the [government's] interest in preventing deception of consumers." *Zauderer*, 471 U.S. at 651. See *supra* note [28].
48. *Zauderer*, 471 U.S. at 651; *Ibanez v. Fla. Dep't of Bus. and Prof'l Regulation, Bd. of Accountancy*, 512 U.S. 136, 146–47 (1994) (relying on *Zauderer*); *Milavetz*, 559 U.S. at 250 (relying on *Zauderer*).
49. See *supra* note [28] discussing that case and ruling.
50. See *Zauderer*, 471 U.S. at 651 ("Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of information such speech provides, [a commercial speaker's] constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal.") (internal citation omitted). *See also Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976) ("As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate.")
51. *Compare Disc. Tobacco City*, 674 F.3d at 521, 554 (Stranch, J., writing for majority in this section of the opinion, stating that commercial speech disclosures are subject either to rational basis review under *Zauderer* or, if not, strict scrutiny); *with R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 696 F.3d 1205, 1217 (D.C. Cir. 2012) (finding FDA's required graphic warning labels for cigarette packages and advertisements were subject to intermediate scrutiny under *Central Hudson* because rational basis review under *Zauderer* did not apply), *partly overruled on other grounds by Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 22–23 (D.C. Cir. 2014). In a subsequent case, the D.C. Circuit concluded that "relaxed review" under *Zauderer* applies only to "[voluntary commercial] advertising or product labeling at the point of sale." *Nat'l Ass'n of Mnfrs. v. SEC*, 800 F.3d 518, 520, 522–24, 524–30 (D.C. Cir. 2015).
52. *Cent. Hudson*, 447 U.S. 557.
53. *Id.*, at 566.
54. *Va. State Bd.*, 425 U.S. at 771–72.
55. *Nat'l Ass'n of Tobacco Outlets, Inc.v. City of Providence*, 731 F.3d at 78; *Nat'l Ass'n of Tobacco Outlets, Inc. v. City of N.Y.*, 27 F. Supp. 3d at 423–24 (relying on the rationale of the First Circuit in *City of Providence*).
56. See *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 527 (1992) ("'To avoid giving a false impression that smoking [is] innocuous, the cigarette manufacturer who represents the alleged pleasures or satisfaction of cigarette smoking in his advertising also must disclose the serious risks to life that smoking involves.'") (quoting with approval the Federal Trade Commission from a 1964 trade regulation rule promulgation) (citation omitted); *Disc. Tobacco City*, 674 F.3d at 562 ("[A]dvertising promoting smoking deceives consumers if it does not warn consumers about tobacco's serious health risks.").
57. Some academics have proposed new arguments based on the misleading effects of manipulative marketing, seeBerman ML. Manipulative Marketing and the First Amendment. Georgetown Law Journal. 2014; 103(3):497–546. at 515 (discussing "the wide gap between the Supreme Court's information-focused conception of advertising and the reality that most advertising employs noninformational methods of persuasion"). Given the developing evidence of the connection between youth exposure to advertising and initiation and use, it also may now be possible to show that tobacco advertising is misleading because it fails to disclose the substantial risks of tobacco use that are specific to youth and young adults. But see Brown & Williamson Tobacco Corp. v.

Food & Drug Admin., 153 F.3d 155, 166 (4th Cir. 1998) (holding FDA was constrained to find warnings mandated by other federal statutes were sufficient to address youth-specific risks because applicable statutes at the time did not permit federal agencies to add to or modify the congressionally-mandated warnings), aff'd sub nom., Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000). Under the Federal Food, Drug, and Cosmetic Act (FDCA), as amended by Congress in the 2009 FSPTCA, tobacco products are considered misbranded if their labeling or advertising is false or misleading. 21 U.S.C. § 387c(a)(1), (a)(7)(A) (2012).

58. See *Lorillard*, 533 U.S. at 555, 569 (noting there was no dispute regarding the "importance of the State's interest in preventing the use of tobacco products by minors" for purposes of the *Central Hudson* analysis of outdoor and point-of-sale advertising restrictions and that "the State has demonstrated a substantial interest in preventing access to tobacco products by minors" for purposes of the *O'Brien* analysis of restrictions on placement of tobacco products); *Brown & Williamson Tobacco Corp.* 529 U.S. at 161 ("tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States").
59. *R.J. Reynolds Tobacco*, 696 F.3d at 1221. According to the majority, this interest merely described the *means* by which the government sought to advance its underlying interest in reducing smoking and was not a separately asserted justification in its own right. Given the Supreme Court's focus in *Lorillard* on "the relationship between *the harm that underlies the State's interest* and the means identified by the State to advance that interest," *Lorillard*, 533 U.S. at 555 (emphasis added), the dissent in *R.J. Reynolds* seems more persuasive on this point.
60. *R.J. Reynolds Tobacco*, 696 F.3d at 1221.
61. *Id.*, at 1217–19. The *R.J. Reynolds* court refused to apply the more lenient *Zauderer* test because it concluded the FDA's required color graphic warnings were not "factual and uncontroversial" under *Zauderer* or "accurate statement[s]" under *Milavetz*, and that *Zauderer* only applied when the government goal was to prevent consumer deception, which the court found the FDA had not demonstrated. *Id.* at 1216 (internal citations omitted). In a more recent case, the D.C. Circuit, sitting *en banc*, overruled the *R.J. Reynolds* decision to the extent it held that *Zauderer* applies only when the goal is preventing consumer deception. *Am. Meat Inst.*, 760 F.3d at 22–23. Moreover, another federal appeals court, the U.S. Sixth Circuit, had found already that the provisions in the FSPTCA generally requiring color graphic warning labels depicting the health risks of smoking for cigarette advertising and packaging are constitutional on their face under *Zauderer* as a means of preventing consumer deception and fully informing consumers about the health risks of smoking. *Disc. Tobacco City*, 674 F.3d at 562–69. That court, however, did not address the constitutionality of the *specific* warnings enacted by the FDA, and the Supreme Court declined to review the decision. *Id.* Thus, the FDA still retains jurisdiction to draft new graphic warning labels under the FSPTCA.
62. *Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993) (emphasis added).
63. See *id.*
64. *R.J. Reynolds Tobacco*, 696 F.3d at 1220.
65. *Id.*, at 1221.
66. *See Lorillard*, 533 U.S. at 556, 558, 560, 561 (acknowledging that "product advertising stimulates demand for products, while suppressed advertising may have the opposite effect"; finding that "the record reveals that the [government] has provided ample documentation of the problem with underage use of smokeless tobacco and cigars"; refuting "that there is no evidence that preventing targeted campaigns and limiting youth exposure to advertising will decrease underage use of smokeless tobacco and cigars"; and concluding that "[o]n this record and in the posture of summary judgment, [the government's] decision to regulate advertising of smokeless tobacco and cigars in an effort to combat the use of tobacco products by minors was [not] based on mere 'speculation [and] conjecture.'").
67. *Bd. of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989).
68. *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 371, 373 (2002).
69. *Cf. Hill v. Colorado*, 530 U.S. 703, 776 (2000) (Kennedy, J., dissenting) (contending that fit cannot be satisfied by censoring more speech to make a statute aimed at suppressing anti-abortion speech appear to be content-neutral).

70. *Lorillard*, 533 U.S. at 556 (applying the *Central Hudson* test) (citation omitted); *see also Sorrell*, 131 S.Ct. at 2669 ("Rules that burden protected expression may not be sustained when the options provided by the [government] are too narrow to advance legitimate interests or too broad to protect speech.")
71. *Lorillard*, 533 U.S. at 534–536 (citation to regulations omitted).
72. *Id.*, at 555.
73. *Id.*, at 561 (quoting *Edenfield*, 507 U.S. at 770).
74. *Id.*
75. *Id.*, at 562–63 (concluding "The uniformly broad sweep of the geographical limitation demonstrates a lack of tailoring.").
76. *Id.*, at 563.
77. *Id.*, at 566, 567 ("Massachusetts may wish to target tobacco advertisements and displays that entice children, much like floor-level candy displays in convenience stores, but the blanket height restriction does not constitute a reasonable fit with [the state's regulatory] goal.")
78. See, e.g., Flying Dog Brewery, LLLP v. Mich. Liquor Control Comm'n, 597 F. App'x 342, 355 (6th Cir. 2015) (remanding to allow district court to resolve in the first instance all "disputes of fact impacting the Central Hudson analysis"); id., at 365 (Moore, J., dissenting) (concluding denial of registration label for "Raging Bitch" beer violated First Amendment based on undisputed facts and Central Hudson should apply because, "although Sorrell stated that 'heightened judicial scrutiny' applied, it reaffirmed the use of the Central Hudson test and simply acknowledged the reality that content-based speech regulation will rarely satisfy the test"); 1-800-411-Pain Referral Serv., LLC v. Otto, 744 F.3d 1045, 1055-57 (8th Cir. 2014) (concluding as a result of Supreme Court's failure to define "heightened scrutiny" in Sorrell that "[t]he upshot is that when a court determines commercial speech restrictions are content- or speaker-based, it should then assess their constitutionality under Central Hudson," but finding inherently misleading speech was subject to regulation in any event); King v. Gen. Info. Servs., Inc., 903 F. Supp. 2d 303, 308 (E.D. Pa. 2012) (concluding Sorrell "stopped far short of overhauling nearly three decades of precedent" and "typical commercial speech inquiry under intermediate scrutiny remains valid law"); cf. Beeman v. Anthem Prescription Mgmt., LLC, 353, 315 P.3d 71, 87 (2013) (stating "the high court has consistently applied intermediate scrutiny to prohibitions on such speech used for marketing or advertising" and explaining rationale for "heightened scrutiny of laws restricting commercial speech," as compared to rational basis review for compelled disclosures, include "free flow of commercial information", "the informational function of advertising" and "consumer choice") (citations omitted); see alsoShik O. The Central Hudson Zombie: For Better or Worse, Intermediate Tier Review Survives Sorrell v. IMS Health. Fordham Intellectual Property, Media and Entertainment Law Journal. 2015; 25(2):562–588. Note. (summarizing court decisions and commentary; Thompson HB. Whither Central Hudson? Commercial Speech in the Wake of Sorrell v. IMS Health. Columbia Journal of Law & Social Problems. 2013; 47(2):171–207. (summarizing cases and commentary).
79. *Sorrell*, 131 S.Ct. at 2670–72.
80. *Id.*, at 2663–2665.
81. *Id.*, at 2667–2672.
82. See *Retail Digital Network, LLC v. Appelsmith*, 945 F. Supp. 2d 1119, 1125 (C.D. Cal. 2013) (granting summary judgment for defendant and rejecting argument that *Sorrell* amended *Central Hudson* test in part because courts must continue to apply established law unless intervening authority from a higher court is "'clearly irreconcilable'") (citing *Actmedia Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003)), appeal filed (June 19, 2013); *Demarest v. City of Leavenworth*, 876 F. Supp. 2d 1186, 1194–96 (E.D. Wash. 2012) (granting summary judgment for defendant on challenge to sign ordinance and explaining that although "*Sorrell* is a significant opinion, it did not overturn the long line of Supreme Court precedent based upon *Central Hudson*," but also concluding ordinance was not a content-based restriction).
83. See *United States v. Caronia*, 703 F.3d 149 (2d Cir. 2012) (finding the provisions at issue were content- and speaker-based and therefore subject to heightened scrutiny under *Sorrell* but ultimately holding under *Central Hudson* that the government could not constitutionally criminalize truthful promotion of off-label uses of FDA-approved drugs by pharmaceutical

companies and their agents); see also *Educ. Media Co. at Va. Tech, Inc. v. Insley*, 731 F.3d 291, 297–302 (4th Cir. 2013) (striking down state restrictions on alcohol advertising in college publications aimed at combatting underage drinking without needing to decide if "heightened scrutiny" under *Sorrell* applied because the restrictions failed the less demanding *Central Hudson* test, but noting however, that to the extent the regulation prevented "dissemination of alcohol advertisements to readers age 21 or older does exactly what *Sorrell* prohibits: it attempts to keep would-be drinkers in the dark based on what the [state] perceives to be their own good"); *Valle Del Sol Inc., v. Whiting*, 709 F.3d 808, 828 (9th Cir. 2013) (striking down state efforts to promote traffic safety by restricting certain day labor soliciting activities under the pre-*Sorrell* version of *Central Hudson*, despite finding them to be "content-based restrictions designed to suppress the economic activity of undocumented immigrants," because the provisions did not pass muster under *Central Hudson* and finding it unnecessary to reach the issue of whether *Sorrell* made the fourth *Central Hudson* prong more demanding as was argued); See Shik, *supra* note [77], at 580–81; Thompson, *supra* note [77], at 193 (discussing the *Caronia* case).

84. *R.J. Reynolds Tobacco*, 696 F.3d at 1222; see also *id.*, at 1226 n. 4 (Rogers, J., dissenting) ("Notwithstanding any intimations it may have made in cases such as *Sorrell v. IMS Health Inc.*, … the Supreme Court has continued to apply the more deferential framework of *Central Hudson* to commercial speech restrictions.").
85. *Disc. Tobacco City*, 674 F.3d at 548. The court cited *Sorrell* for the propositions that "'the [government] may not seek to remove a popular but disfavored product from the marketplace by prohibiting truthful, nonmisleading advertisements" and "'[t]hat the [government] finds expression too persuasive does not permit it to quiet the speech or to burden its messengers.'" *Id.*, at 546 (citation omitted). At the time of this article, the FSPTCA provisions at issue in this case applied only to cigarettes and smokeless tobacco products.
86. *Id.*, at 539–543.
87. 135 S. Ct. 2218, 2226–27 (2015).
88. *Id.*.
89. *Id.* at 2226 (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115, 118 (1991)).
90. *Contest Promotions, LLC v. City and Cty. of S.F.*, No. 15-CV-00093-SI, 2015 WL 4571564, at *4 (N.D. Cal. July 28, 2015) (rejecting application of *Reed* to laws that distinguish between on-site and off-site commercial speech and holding regulation survived intermediate scrutiny), appeal filed (August 25, 2015); *see also Citizens for Free Speech, LLC v. Cty. of Alameda*, No. C14-02513 CRB, 2015 WL 4365439, at *13 (N.D. Cal. July 16, 2015) (upholding sign ordinance under intermediate scrutiny and concluding *Reed* was inapplicable because it concerned a sign code's application of different restrictions—including temporal and geographic restrictions—to permitted signs based on their content).
91. *Sorrell*, 131 S.Ct. at 2671.
92. See Lorillard, 533 U.S. at 561, 565; see also Disc. Tobacco City, 674 F.3d at 540 (reciting evidence and concluding that "the massive amount of money invested by the tobacco industry in advertising and marketing is largely devoted to (1) attracting new young adult and juvenile smokers, and (2) brand competition in the young adult and juvenile market"). Given that 88% of smokers began smoking as youth, see supra note [6], and that brand changes are rare among established tobacco users, seeDawes J. Cigarette Brand Loyalty and Purchase Patterns: An Examination Using US Consumer Panel Data. Journal of Business Research. 2014; 67(9):1933–1943., the contention that point-of-sale advertising is directed at young adults rather than at youth may not be terribly persuasive.
93. U.S. Const. art. VI, cl. 2.
94. *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76–77 (2008).
95. *See supra* note [67] Centers for Disease Control and Prevention (available at http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6033a2.htm).
96. 15 U.S.C. § 1334(b) (2012) (emphasis added).
97. 15 U.S.C. § 4406(b) (2012) (citing to the required warnings set out in 15 U.S.C. § 4402) (emphasis added). *See supra* note [20] (noting CSTHEA's preemption provision is narrower than FCLAA's).
98. *Lorillard*, 533 U.S. at 547–48; 15 U.S.C. §1334(b) (2012); *see also Cipollone*, 505 U.S. at 520–21.

99. *Lorillard*, 533 U.S. at 548–549.
100. *Id.*, at 535–36 (citation to regulations omitted), 553–567, 590 (Souter, J., concurring in part and dissenting in part), 591 (Stephens, J., concurring in part, concurring in the judgment in part, and dissenting in part).
101. Family Smoking Prevention and Tobacco Control Act (FSPTCA), Pub. L. No. 111-31, 123 Stat. 1776 (codified in various sections of the U.S.C.) (2009).
102. 15 U.S.C. § 1334(c) (2012).
103. There is a long-standing "time, place or manner" test under the First Amendment that is a form of intermediate scrutiny similar to the *O'Brien* test, but that test applies only to content-neutral restrictions on speech, i.e., restrictions that are imposed without regard to the content of the speech at issue. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Regulations of tobacco advertising usually are not considered content neutral because they single out one kind of message – about tobacco products – for regulation.
104. *23–34 94th St. Grocery*, 685 F.3d at 182–185. *See supra* note [39].
105. *23–34 94th St. Grocery*, 685 F.3d at 185 ("To be sure, we do not hold that supplementary warnings are, in and of themselves, preempted under by the Labeling Act. We hold only that requiring retailers to post graphic supplementary warnings adjacent to cigarette displays is preempted."). Thus, requiring supplemental point-of-sale cigarette health warnings remains an option where preemption under FCLAA can be avoided.
106. *Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence*, 731 F.3d at 81–82 (concluding that "[p]rice regulations, including regulations of price offers, are regulations concerning the 'manner' of promotion" of cigarettes); *Nat'l Ass'n of Tobacco Outlets, Inc. v. City of N.Y.*, 27 F. Supp. 3d at 426 (relying on reasoning of First Circuit in *National Association of Tobacco Outlets, Inc.*, and finding ordinance was a "lawful restriction on the manner in which tobacco manufacturers and retailers advertise and promote their products").
107. 15 U.S.C. § 1331(2)(B).
108. FSPTCA, 123 Stat. at 1777 (Congressional findings on tobacco advertising, youth targeting and addiction, including that "[b]ecause past efforts to restrict advertising and marketing of tobacco products have failed adequately to curb tobacco use by adolescents, *comprehensive restrictions on the sale, promotion, and distribution of such products are needed*" and that "[f]ederal and State governments have lacked the legal and regulatory authority and resources they need to address comprehensively the public health and societal problems caused by the use of tobacco products" (emphasis added)).
109. *Altria Grp.*, 555 U.S. at 77.
110. In a recent evaluation, eighteen states still preempted local restrictions on advertising, a number that remained constant over the decade ending in 2010. SeeCenters for Disease Control and Prevention. State Preemption of Local Tobacco Control Policies Restricting Smoking Advertising and Youth Access – United States, 2000–2010. Morbidity and Mortality Weekly Report. 2011; 60(33):1124–1127. [PubMed: 21866085]
111. See *Sorrell*, 131 S. Ct. at 2671; *Thompson*, 535 U.S. at 371; *Lorillard*, 533 U.S. at 554, 556, 561, 565, 567.
112. *Lorillard*, 533 U.S. at 565.
113. Laws curtailing tobacco sales near schools have passed in New Orleans, Chicago, Santa Clara County, and other jurisdictions. See, e.g., Chicago Ordinance No. 02013-9185 (2014), *available at* < http://www.cityofchicago.org/content/dam/city/depts/bacp/Rules%20and%20Regulations/regulationsflavoredtobaccofinal.pdf > (last visited December 11, 2015).
114. See, e.g.,State and Community Tobacco Control Research. Point-of-Sale Report to the Nation: The Tobacco Retail and Policy Landscape. 2014. available at <http://cphss.wustl.edu/Products/Documents/ASPiRE_2014_ReportToTheNation.pdf> (last visited November 30, 2015).
115. See, e.g., Berman, *supra* note [57].
116. SeeCoady MH, et al. Awareness and Impact of New York City's Graphic Point-of-Sale Tobacco Health Warning Signs. Tobacco Control. 2013; 22 available at <http://tobaccocontrol.bmj.com/content/early/2012/06/22/tobaccocontrol-2011-050261.full.pdf+html> (last visited November 30, 2015). Kim AE, Nonnemaker JM, Loomis BR, Shafer PR, Shaikh A, Hill E, Holloway JW,

Farrelly MC. Influence of Point-of-Sale Tobacco Displays and Graphic Health Warning Signs on Adults: Evidence from a Virtual Store Experimental Study. American Journal of Public Health. 2014; 104(5):888–895. [PubMed: 24625149]

117. See *Zauderer*, 471 U.S. 626; *Am. Meat Inst.*, 760 F.3d 18; *Disc. Tobacco City*, 674 F.3d 509.
118. See *23–34 94th St. Grocery*, 685 F.3d at 182–185.
119. See *Milavetz*, 559 U.S. at 249–50 (referring to *Zauderer* for the proposition that the "constitutionally protected interest in *not* providing the required factual information is 'minimal'") (citation omitted).
120. Sabiston CM, Nykiforuk CI, Hsu HC, Hadd V, Lovato CY. Tobacco Point-of-Purchase Marketing in School Neighbourhoods and School Smoking Prevalence: A Descriptive Study. Canadian Journal of Public Health. 2007; 98(4):265–270. [PubMed: 17896733] O'Malley PM, Chaloupka FJ, Wakefield M, Johnston LD, Slater SJ. The Impact of Retail Cigarette Marketing Practices on Youth Smoking Uptake. Archives of Pediatric & Adolescent Medicine. 2007; 161(5):440–445.
121. *Lorillard*, 533 U.S. at 555 (emphasis added) (internal quotations omitted). Preparation of legislative findings should include a detailed review of Chapters 5 and 6 of the Surgeon General's 2012 Report and the research it cites, as well as the helpful summary of key data from the report compiled in *Cause and Effect: Tobacco Marketing Increases Youth Tobacco Use* (Tobacco Control Legal Consortium).
122. Henriksen L, Feighery EC, Schleicher NC, Haladjian HH, Fortmann SP. Reaching Youth at the Point of Sale: Cigarette Marketing Is More Prevalent in Stores Where Adolescents Shop Frequently. Tobacco Control. 2004; 13(3):315–318. [PubMed: 15333890]
123. *Lorillard*, 533 U.S. at 563 ("a ban on all signs of any size seems ill suited to target the population of highly visible billboards, as opposed to smaller signs").
124. *Id.* ("To the extent that studies have identified particular advertising and promotion practices that appeal to youth, tailoring would involve targeting those practices while permitting others."). Perhaps most importantly, the regulation must be drafted so it does not "unduly impinge on the speaker's ability to propose a commercial transaction and the adult listener's opportunity to obtain information about products." *Id.*, at 565.
125. Several provinces in Canada have enacted legislation prohibiting the display of tobacco products in retail outlets if young persons are permitted access to the premises. See, e.g., Statutes of Saskatchewan, "The Tobacco Control Act," S.S., c. T-14.1, s. 6(3) (2001). Other guides on point-of-sale advertising restriction have expressed concern about the legality, in the U.S., of proposals to cover tobacco displays and advertising with a screen during times when youth are likely to be present. See, *supra* note [13].
126. New York State Department of Health. '"Power Wall" Display of Tobacco Products by New York State Licensed Retailers. Tobacco Control Program StatShot. 2012; 5(1) available at <http://www.health.ny.gov/prevention/tobacco_control/reports/statshots/volume5/n1_display_of_tobacco_products_by_retailers.pdf> (last visited November 30, 2015).

Table 1

Legal Standards Applicable to Varying Types of Government Regulation

Type of Government Regulation	Applicable First Amendment test	Standard
Content-neutral regulation of sales practices that constitute expressive conduct (e.g., banning 'self-service' tobacco products displays in retail outlets)	*O'Brien*	Regulation of expressive conduct under *O'Brien* must be supported by an important government interest unrelated to curbing free expression, and any incidental impact on expression must be no more than is "essential" to serve the asserted interest in regulating the conduct.[24]
Regulation of sales practices such as retail tobacco pricing (e.g., minimum price law or a restriction on redemption of coupons or using multi-pack discounts)	*N/A*	To date, courts have held that direct restrictions on tobacco product pricing strategies, such as the adoption of minimum retail price laws and bans on redemption of coupons and using multi-pack discounts to drop the retail sales price below the statutory minimum price, are not regulations of speech or expressive conduct and therefore do not trigger First Amendment scrutiny.[25]
Government health warning campaign	*Government Speech*	Government speech – where the message is promulgated by the government or is part of a government program in which the government is clearly the speaker – is generally exempt from First Amendment scrutiny.[26]
Compelled commercial speech (e.g., mandating the disclosure of factual information relating to tobacco products)	*Zauderer*	Compelled commercial speech is constitutional if the mandated disclosure is "purely factual and uncontroversial" and "reasonably related" to the government's interest in preventing consumer deception.[27] Lower federal courts have applied this test when disclosures were related to other government interests, including public health-related goals.[28]
Direct restriction on commercial speech (e.g., limits on where tobacco advertising may be placed or restricting its content such as color and imagery)	*Central Hudson*	Government restrictions on commercial speech (where the speech is not about illegal conduct and is not misleading) are constitutional where: (1) the asserted government interest for the regulation is "substantial;" (2) the regulation "directly advances the government interest," and (3) the regulation is "not more extensive than is necessary to serve that interest."[29] If regulations are based on the content and viewpoint of a speaker's message, as may be the case when restricting tobacco advertising, application of this test is likely to be stringent.