









# REGULATING TOBACCO MARKETING AND THE FIRST AMENDMENT: CONSTITUTIONAL BASICS YOU SHOULD KNOW



# THE PUBLIC HEALTH LAW CENTER



# LEGAL TECHNICAL ASSISTANCE

-  Legal Research
-  Policy Development, Implementation, Defense
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**EQUALITY:**

Everyone gets the same – regardless if it's needed or right for them.



**EQUITY:**

Everyone gets what they need – understanding the barriers, circumstances, and conditions.



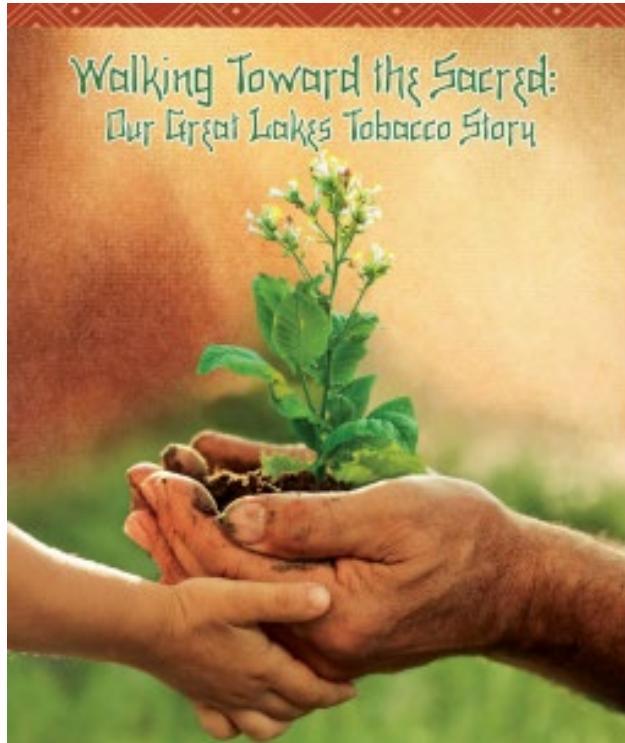
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based on work for First Nations Health Authority at Gathering Wisdom VI *Drawing Change*

Image credit: Sam Bradd <https://drawingchange.com/gathering-wisdom-visuals-for-a-healthy-future/>

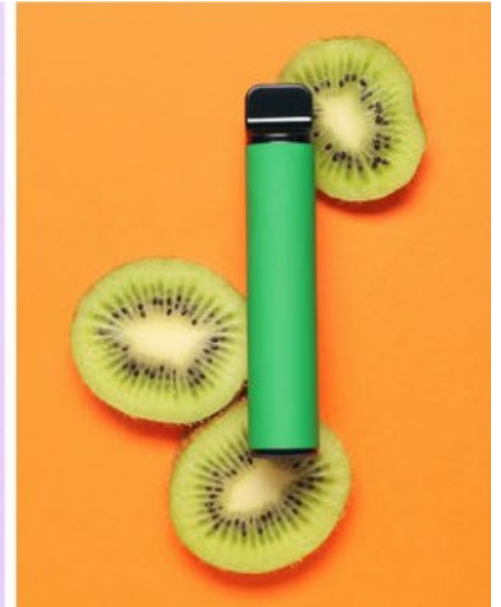
# COMMERCIAL TOBACCO IS NOT TRADITIONAL TOBACCO



Credit: GLITEC - Compiled and Edited by  
Isaiah Brokenleg and Elizabeth Tornes



*Nicotiana rustica*, Solanaceae, Mapacho, flower. Botanical Garden KIT,  
Karlsruhe, Germany. Wikimedia Commons.



# TYPES OF SPEECH AND EXPRESSIVE CONDUCT

The First Amendment protects:

- Speech
- Expressive conduct





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**State Constitutions often mirror federal protections.\***

**\* PHLC can help.**

# INTRODUCTION TO DOCTRINES AND RULES

- Judges make decisions based on facts and the law



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- They also adhere to “precedent” – resolving the case similarly to how courts have done in the past

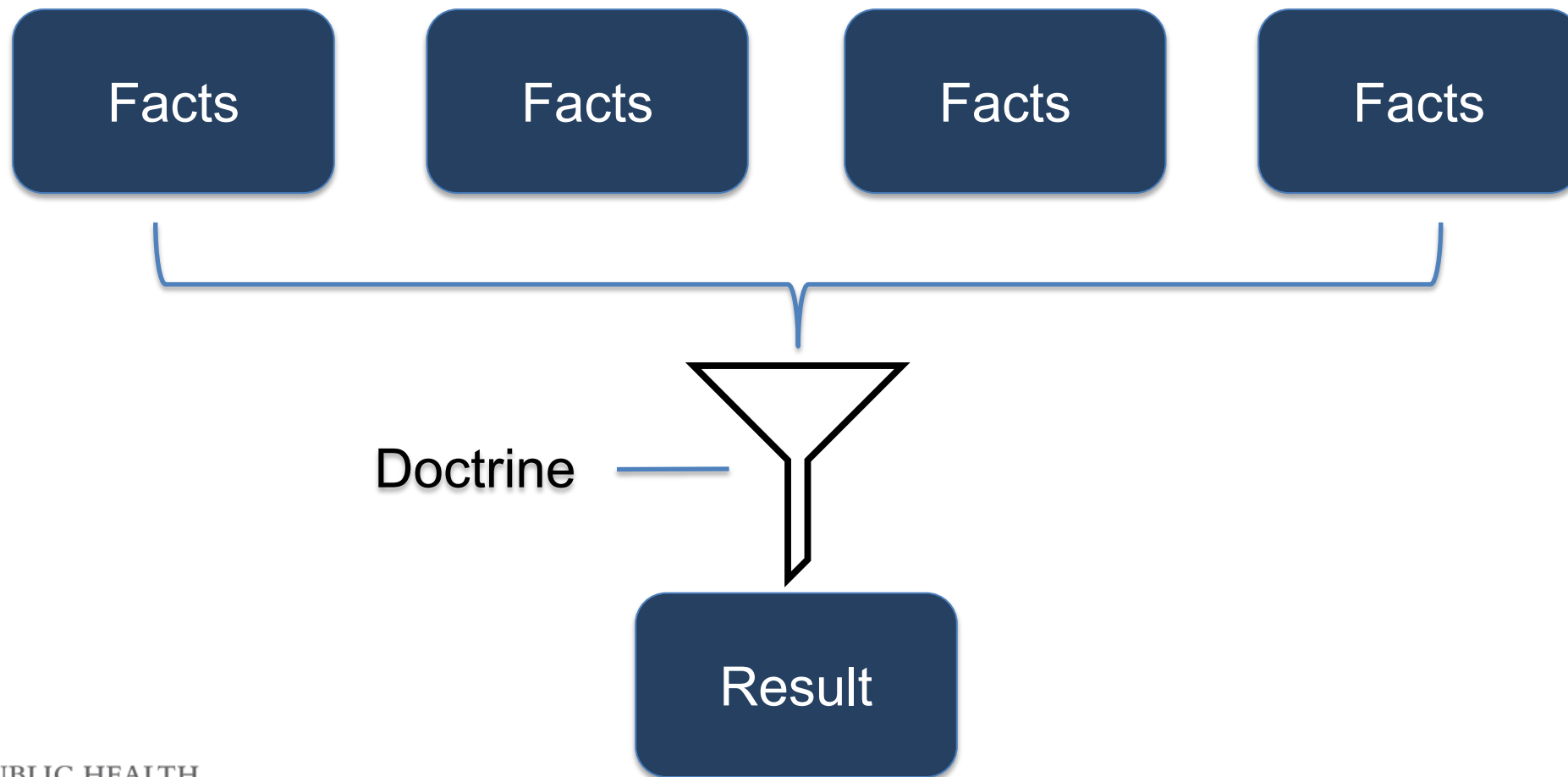


# INTRODUCTION TO DOCTRINES AND RULES

- Judges make decisions based on facts and the law
- They also adhere to “precedent” – resolving the case similarly to how courts have done in the past
- The rules or “doctrines” used by previous courts are key



# INTRODUCTION TO DOCTRINES AND RULES



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Level of Scrutiny	State Interest	Means Used to Achieve the State Interest

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Strict	Compelling actual purpose	Necessary/Least restrictive means
Intermediate	Important actual purpose	Substantially related
Rational	Legitimate conceivable purpose	Rationally related



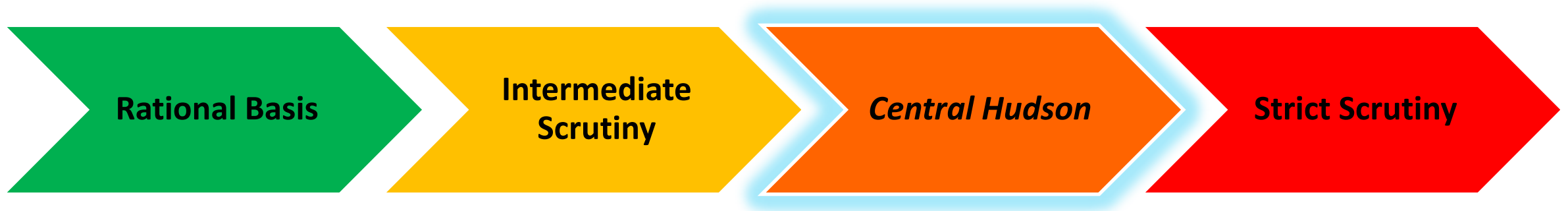
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# INTRODUCTION TO DOCTRINES AND RULES



# FIRST AMENDMENT TESTS



# CENTRAL HUDSON

- Applies when the government is restricting or regulating commercial speech; a “default” test for commercial speech cases
  - E.g. ban on in-store ads



# CENTRAL HUDSON

- Does the law restrict protected speech?
- Is the law justified by a substantial governmental interest?
- Does the law directly advance the governmental interest?
- Is there a reasonable fit between the goal and the means chosen to accomplish the goal?



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# FIRST AMENDMENT TESTS



# O'BRIEN/WARD

- Applies to conduct-based regulations.
  - E.g. Prohibiting self-service displays





# O'BRIEN/WARD

- Does the regulation further an important or substantial governmental interest?
- Is the governmental interest unrelated to the suppression of free expression?
- Would the interest be achieved less effectively without the regulation?



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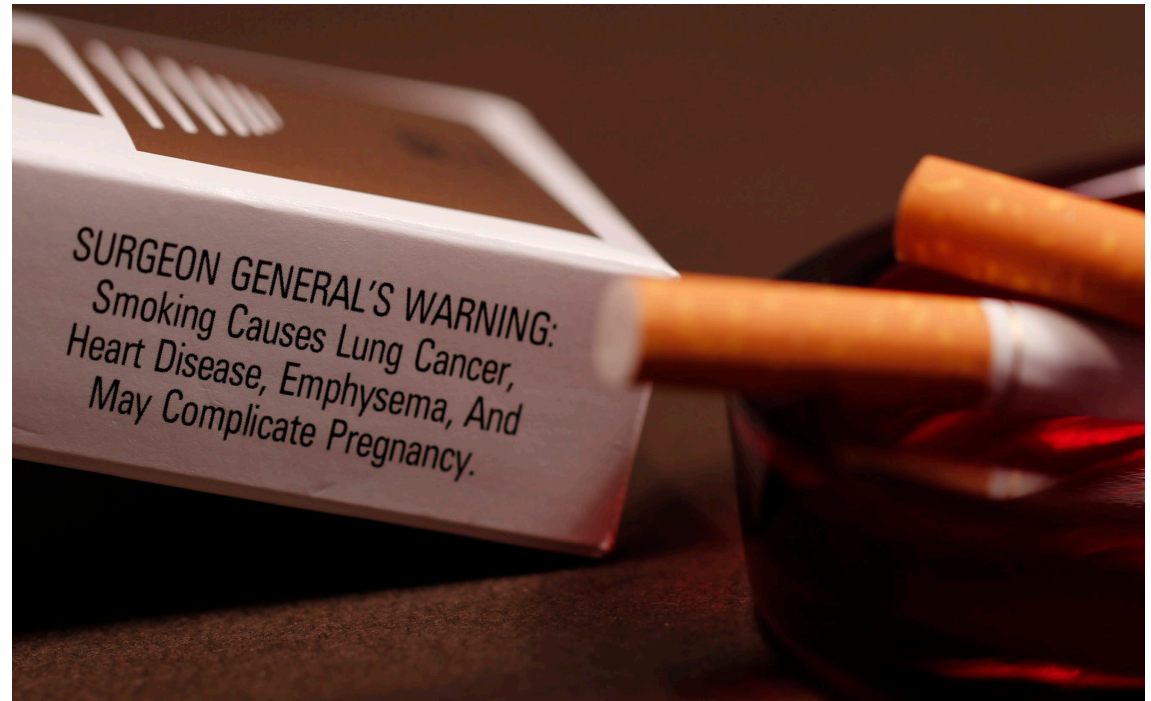


# FIRST AMENDMENT TESTS



# ***ZAUDERER***

- Applies to compelled disclosures.
  - E.g. surgeon general's warning

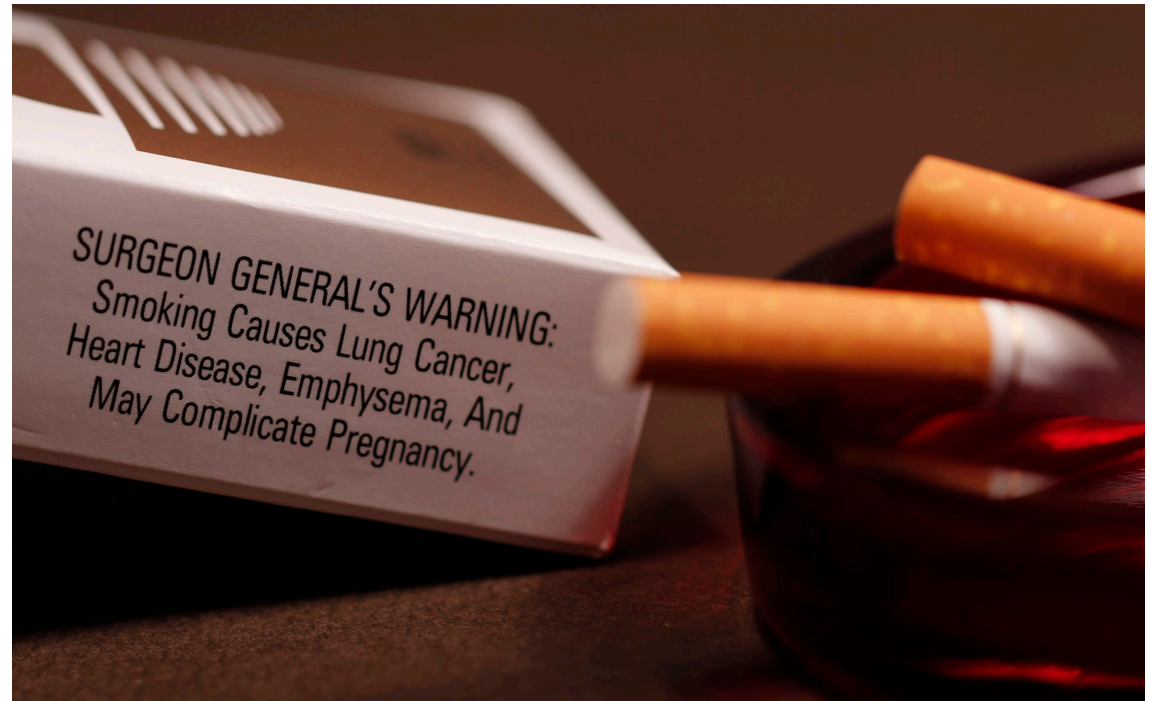


# ***ZAUDERER***

Is the disclosure requirement:

- reasonably related to a legitimate governmental interest?\*
- purely factually, accurate, and uncontroversial?
- unjustified or unduly burdensome?

\* Preventing deception

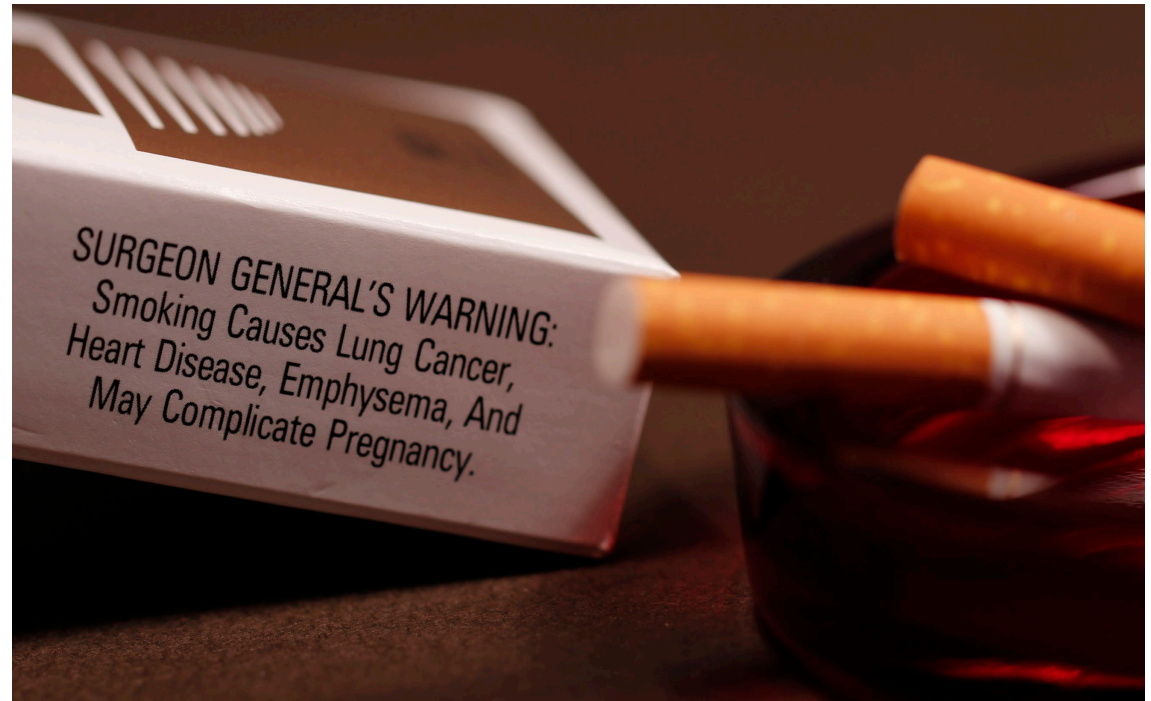


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## ***R.J. REYNOLDS V. FDA (2024)***

- 5<sup>th</sup> Circuit Case
- Whether FDA's graphic warning labels violate the First Amendment



<https://www.fda.gov/>

## ***R.J. REYNOLDS V. FDA (2024)***

Does *Zauderer* apply?

- Were warnings purely factual and uncontroversial?
- Do the warnings advance a legitimate interest?
- Are the warnings unduly burdensome?



<https://www.fda.gov/>



## ***R.J. REYNOLDS V. FDA (2024)***

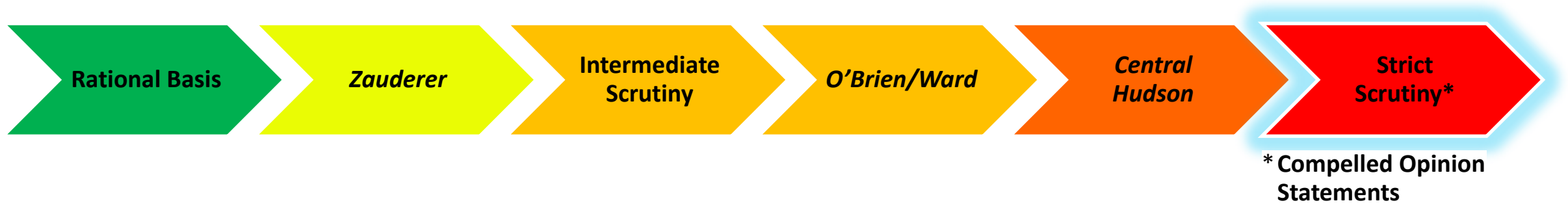
Does *Zauderer* apply?

- Were warnings purely factual and uncontroversial? **Yes**
- Do the warnings advance a legitimate interest? **Yes**
- Are the warnings unduly burdensome? **No**

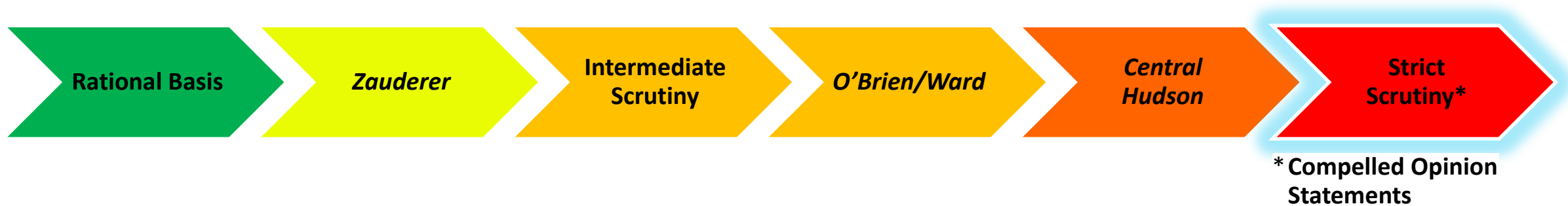


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# FIRST AMENDMENT TESTS



# FIRST AMENDMENT TESTS



Government Speech

# FIRST AMENDMENT TESTS



*Zauderer*

- Compelled disclosures

*O'Brien/Ward*

- Restricting conduct with incidental effect on expression

*Central Hudson*

- Limits or restrictions of commercial speech

# WHICH TESTS APPLIES?

- Review the hypothetical
- Ask yourself what test might apply if the law is challenged on First Amendment grounds



# WHICH TESTS APPLIES?

- A city ordinance requiring retailers keep tobacco-related products at the back of the store so that they are less visible to shoppers.



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**(Probably) *Central Hudson***



# WHICH TESTS APPLIES?

- A state law banning all ads, including tobacco ads, from the storefront windows of retailers.





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**(Probably) *O'Brien/Ward***



# WHICH TESTS APPLIES?

- A city law that bans retailers from advertising that they sell discounted tobacco products. Assume the city also bans retailers from selling discounted tobacco products.



## WHICH TESTS APPLIES?

- A city law that bans retailers from advertising that they sell discounted tobacco products. Assume the city also bans retailers from selling discounted tobacco products.

**(Probably) No First Amendment concerns.**



# WHICH TESTS APPLIES?

- A state law requiring that all e-cigarettes carry a label saying: “Vaping isn’t cool.”



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**(Probably) *Central Hudson*, Strict Scrutiny, or per se prohibition**



# WHICH TESTS APPLIES?

- A state funded public ad campaign paying for billboards stating: “Vaping isn’t cool.”



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**(Probably) No First Amendment concerns.**



# WHICH TESTS APPLIES?

- A state law requiring labels on electronic cigarettes warning that improper use or disposal could cause fires or explosions.





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**(Probably) *Zauderer***



# WHICH TESTS APPLIES?

- A state law prohibiting tobacco advertisements within 1,000 feet of schools or other youth-oriented facilities.



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**(Probably) *Central Hudson***



# WHICH TESTS APPLIES?

- A statewide ban on the sale of tobacco products.



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**(Probably) No First Amendment concerns.**



# SUCCESSFUL LAWS

- Plan for strict scrutiny, hope for rational basis
- Provide evidence and findings
- Think carefully about the law's “fit” with your actual goals relative to alternative approaches



# CONTACT US



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