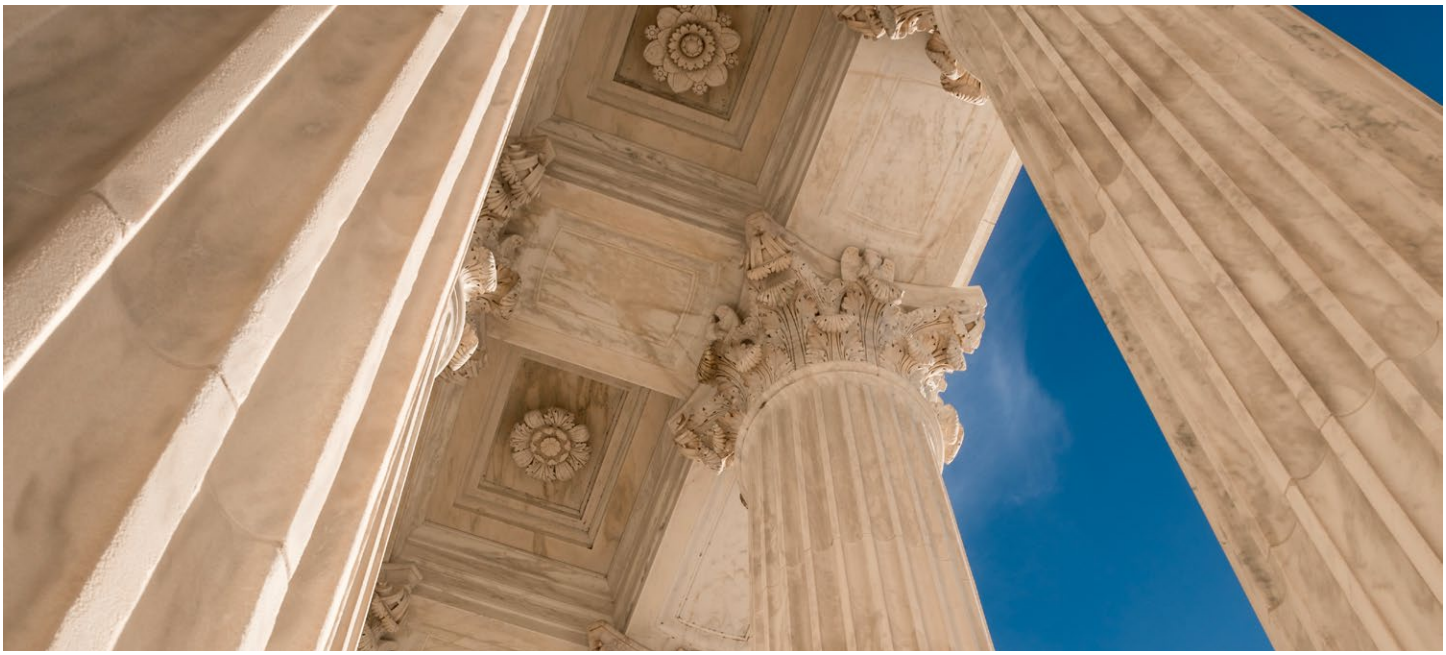
REGULATING TOBACCO MARKETING

A "Commercial Speech" Primer for New York State

Many jurisdictions attempt to regulate the ways tobacco companies market their harmful products.

In addition to federal and state laws that might preempt[1] (in other words, restrict or override) such efforts, New York State localities should also be aware of limits imposed by the First Amendment of the U.S. Constitution, as well as Article 1, Section 8 of the New York State Constitution.[2] The Public Health Law Center has prepared this short primer for the New York State public health community on important considerations to keep in mind in any attempt to regulate the marketing of commercial tobacco products.[3]



Key Takeaways

- Although New York State and local jurisdictions have authority to regulate much of the marketing of tobacco products, potential legal challenges may arise if regulations are not drafted carefully. These challenges are often based on preemption or constitutional grounds.
- Preemption challenges may occur when a state or local government attempts to regulate cigarette advertising content. For example, the Federal Cigarette Labeling and Advertising Act preempts state and local governments from regulating cigarette advertising content, but allows them to ban or restrict the time, place, and manner of the advertising or promotion of cigarettes. Similarly, New York State law may preempt or restrict some local regulations that regulate tobacco product advertising.
- Constitutional legal challenges to tobacco marketing regulations may be based on possible violations of the First Amendment, which protects core speech and most commercial speech.
- To determine whether a tobacco marketing regulation violates First Amendment commercial speech protections, courts look to previous U.S. Supreme Court decisions for guidance.
- The U.S. Supreme Court has developed a series of tests to determine whether a particular regulation violates the First Amendment's speech protections. Different tests are applied depending on what type of speech is being regulated.
- To help ensure that a tobacco marketing regulation will withstand a First Amendment challenge, drafters need to assess how well the proposed regulation advances the government's interest and how severely it curtails freedom of speech. The chart at the end of this resource summarizes First Amendment tests for each type of speech regulated and provides drafting tips. Regulations should be written to achieve each regulatory goal and not be more extensive than necessary.
- Attempts to regulate tobacco marketing should be approached with caution and involve discussions with legal counsel.

The First Hurdle: Federal and State Preemption

States and local jurisdictions possess broad authority to regulate tobacco products, including the ways in which they are advertised. The Federal Cigarette Labeling and Advertising Act (FCLAA) preempts state and local governments from regulating the content of cigarette advertising, but they retain the authority to impose "specific bans or restrictions on the time, place, and manner,

but not content, of the advertising or promotion of any cigarettes."[4] Note that the FCLAA only regulates cigarette promotions, so restrictions on ads or promotions for other kinds of tobacco, such as smokeless tobacco, cigars or electronic cigarettes, are not affected by the law.[5]

The Second Hurdle: The First Amendment

Even if a proposed law seems safe from FCLAA preemption, it may still face another legal hurdle: the First Amendment.[6] The United States Supreme Court has repeatedly clarified that the First Amendment protects corporate speakers and commercial speech, or speech that proposes a commercial transaction, like an advertisement. (A "corporate speaker" is a business or similar entity that communicates by, for example, delivering a message to the public.) The extent to which corporate and commercial speech is protected, however, depends upon the type of regulation.

When courts evaluate whether a law violates the U.S. Constitution, they look to previous cases for guidance. Over the years the Supreme Court has established tests to help determine whether the First Amendment's speech protections are being violated; different tests are applied depending on the type of speech at issue and the form that the regulation takes. First Amendment free speech tests typically consist of several components, often called prongs. If the law being challenged meets each prong's requirement, then the law is "constitutional." If the law fails to meet any prong's requirement, it is "unconstitutional" because it violates the First Amendment and is therefore invalid.

There are several ways in which state or local governments might pass laws affecting commercial speech. Knowing which of the following categories a proposed law falls into will determine which test should be applied to a law and will help to ensure that the law is drafted to best withstand First Amendment scrutiny.

New York State's Protection of Free Speech

New York State courts have confirmed that state constitutional rights to free speech are similar to the federal First Amendment rights to free speech and that they protect speech as much or more than the federal Constitution.[7] If a case raises both federal and state free speech claims, the reviewing court begins by assessing the former and then, if necessary, will analyze the latter.[8] Because state and federal approaches to free speech are very similar, this publication notes only where New York State courts have explicitly weighed in on the similarities or distinctions between the two.

Commercial versus Core Speech

As a preliminary matter, jurisdictions should determine whether a proposed regulation implicates commercial versus core speech. That inquiry affects the test a reviewing court will use to analyze the law.

Core speech includes anything relating to "matters of public concern," including expressing political or cultural opinions or conveying scientific information.[9] Virtually every form of expression can qualify as core speech, receiving full First Amendment protection, unless it falls within one of a few narrow and well-defined exceptions, such as obscenity, fighting words, and commercial speech.[10]

Commercial speech is any "expression related *solely* to the economic interests of the speaker and its audience" — typically speech proposing an economic transaction such as advertising, soliciting, and marketing communications.[11] Commercial speech is protected by the First Amendment — since this speech can convey valuable information and is essential for the commercial

marketplace — but it is afforded less protection than "other constitutionally guaranteed expression" because it "occurs in an area traditionally subject to government regulation."[12]

Whether a regulation targets commercial speech or core speech is a fact-specific inquiry and is based on the "'common-sense' distinction between speech proposing a commercial transaction … and other varieties of speech."[13] For instance, a law prohibiting tobacco companies from sending direct mail advertisements for specific tobacco products to adult customers would probably be analyzed as a restriction of commercial speech. But a law that prohibited tobacco companies from engaging in *any* direct mail efforts, including sending political fliers, would probably be analyzed as a restriction of core speech. Similarly, New York State's law that restricts the public display of tobacco and vaping product advertising to 1,500 feet of a school[14] would probably be analyzed as a restriction of commercial speech. However, a law that prohibited all outdoor tobacco advertising *anywhere in a municipality* would likely be analyzed as a restriction of core speech. Jurisdictions should carefully consider how much and what kinds of communications might be covered by a proposed regulation.

Restrictions on Speech Versus Restrictions on Conduct

Some laws restrict conduct but have an incidental effect on expression. In the landmark case *United States v. O'Brien*,[15] for example, a Vietnam war protester was arrested for burning his Selective Service registration certificate. Burning his draft card was undeniably an expressive act, but the Supreme Court reviewed the law banning such behavior with a relatively lenient level of scrutiny because the government act was directed at the "nonspeech" elements of his conduct, i.e., the conduct's effect on the implementation of the draft during wartime.[16] Similarly, in *Ward v. Rock Against Racism*,[17] the Court reviewed a New York City rule that limited the volume of concert performances in Central Park. When a nonprofit, Rock Against Racism, complained that the rules limited its artistic expression and thus its First Amendment rights, the Court upheld the rules, concluding they were valid time, place, and manner restrictions.

Many jurisdictions have ordinances that limit things like the size and location of advertisements or where tobacco retailers can place their products. Although the courts typically recognize, for instance, that the location and design of advertisements and even the placement of products can contain an expressive element, those regulations often qualify for the more lenient levels of scrutiny reserved for conduct-based regulations that incidentally burden speech.[18] Jurisdictions considering restrictions will want to pay close attention to whether their regulations are targeted at the expressive conduct of a retailer or if they only incidentally burden expression.

For example, a New York city could pass an ordinance prohibiting retailers from placing advertisements that obstruct their windows and justify it as a safety measure, explaining that

the rule ensures that passersby and law enforcement officers can view the interior of the store. That rule would likely be reviewed as a conduct-based regulation that incidentally burdens speech. However, if a city were to pass the same ordinance but apply it only to advertisements for tobacco products, a reviewing court would likely conclude that the ordinance was targeting the expressive component of the ads and not just safety concerns, and a different level of scrutiny — like the *Central Hudson* test described below — would apply.

Central Hudson Gas & Electric v. Public Service Commission of New York (1980)[19] established a four-part test to determine when governmental regulation of commercial speech is constitutional. Under this test, the government can regulate commercial speech if a substantial government interest is directly advanced by the regulation, and if the regulation is not broader than necessary to achieve that goal.

1 Restrictions on core speech

If a regulation restricts core speech, it must satisfy a test called "strict scrutiny." To prevail under that test, the burden is on the government to prove that the regulation:

(1) Furthers **a compelling interest**; and

(2) Is **narrowly tailored** to achieve that interest.[20]

The "strict scrutiny" test is very exacting, and has sometimes been called "strict in theory, but fatal in fact."[21] It is the "rare case[] in which a speech restriction withstands strict scrutiny."[22] The most common stumbling block is the "narrow tailoring" prong. A speech restriction must be "the least restrictive means among available, effective alternatives" to achieve the government's goals.[23] If there are *any other means* that could achieve the government's goal while imposing less of a burden on expression, a law will fail the second strict scrutiny prong and be struck down.

Drafting Tips: The strict scrutiny test is notoriously difficult to satisfy, and public health professionals should work to craft regulations in a way that avoids triggering strict scrutiny in the first place. If a jurisdiction drafts a law that may call for strict scrutiny review, the law should include findings that clearly identify the government's compelling interest, including studies that document the problem to be addressed. Those findings can also explain how there are no other ways of achieving the government's compelling interest that impose less burdensome restrictions on speech.

2 Restrictions on commercial speech, such as a ban on in-store tobacco ads

When faced with a challenge to a law limiting or banning commercial speech, the court usually applies the *Central Hudson* test.[24] Given that many restrictions of tobacco advertising will be assessed under the *Central Hudson* framework, the four-factor test is described below.[25]

(1) **Does the regulation restrict protected speech?**

(a) If the regulation does not restrict protected speech, the regulation is almost certainly consistent with the First Amendment, and a reviewing court need not resolve the remaining three questions. If the answer is "yes," the reviewing court will go to the next step of the analysis.

(b) Advertisements and marketing proposing commercial transaction are protected by the First Amendment, but the government can prohibit false and deceptive advertisements and advertisements for illegal activity.[26] That means that a local jurisdiction can almost always prohibit advertisements proposing sales that are prohibited by law, such as advertisements for illicit substances, e.g., "Heisenberg's Meth for Sale." (Heisenberg was the alias for a methamphetamine dealer in the show *Breaking Bad*.) In contrast, a city that prohibits a type of transaction, such as tobacco sales that involve discounts or coupons,[27] is not restricting speech that warrant further analysis under *Central Hudson*.[28]

(2) **Is the law justified by a substantial governmental interest?**

(a) If the answer is "no," the regulation fails the *Central Hudson* test and is deemed a violation of the First Amendment. If "yes," the reviewing court must go to the next step in the analysis. Given the negative health consequences linked to tobacco use, courts have consistently found that tobacco control interventions invoke a substantial government interest.

(b) This is a less exacting standard than "strict scrutiny," which requires a "compelling" state interest. But it is not as lenient as "rational basis review" — the lowest level of scrutiny — which requires the government to have only a "legitimate" goal.

(3) **Does the law directly advance the governmental interest?**

(a) If the answer is "no," the regulation fails the *Central Hudson* test and is deemed a violation of the First Amendment. If "yes" (that is, the government makes a showing that the law is likely to be effective), the reviewing court must go to the next step in the analysis.

(b) A "regulation may not be sustained if it provides only ineffective or remote support for the government's purpose."[29] The government can supply evidence, including empirical studies, to establish the connection between the law and the government interest, and can also cite to "history, consensus, and simple common sense."[30]

(4) **Is there a reasonable fit between the goal (the government's interest) and the means chosen to accomplish the goal?**

(a) If the answer is "no," the regulation fails the *Central Hudson* test and is deemed a violation of the First Amendment.

(b) To satisfy this prong, the government must establish "a reasonable fit between the legislature's ends and the means chosen to accomplish those ends."[31] As with the second prong, this requirement sits somewhere in between rational basis and *O'Brien* scrutiny, on the one hand, and strict scrutiny on the other. The government must do more than establish a "rational connection" between the government interest and the means chosen for pursuing it (as is the case with rational basis review) or that the means chosen are "appropriately narrow" (as is the case with *O'Brien*). But it need not prove that its method is the least restrictive means of achieving that goal (as is the case with strict scrutiny).[32]

Although less exacting than strict scrutiny, the *Central Hudson* test is still a difficult one for a law to pass. Courts primarily focus on the third and fourth prongs of this test. In most cases, the Supreme Court has found that the restriction did not meet one or both of those prongs.[33] Only governments with the resources to defend their laws in court should enact a law restricting commercial speech.

Drafting Tips: The *Central Hudson* test is less restrictive than the strict scrutiny framework, but jurisdictions should approach drafting laws that restrict commercial free speech in a similar way. After all, at the time of drafting, legislators will not know what standard of review will be applied at some point in the future when a lawsuit is eventually filed. Therefore, they should hope for the best (a lenient standard of review) and prepare for the worst (strict scrutiny). A law restricting commercial speech should restrict the least amount of speech possible while still achieving the law's goal. Even though the first and second prongs of the *Central Hudson* test are usually easily met, it is important to fully document the extent of the problem the law was drafted to solve. This documentation may be included in the law's findings (sometimes included as "whereas" clauses preceding the text of the law). The findings should also indicate why the law's approach must be taken and explain why other approaches to solving the problem that

have a lesser impact on commercial speech would not work or why they did not work in the past. This may help show that the prongs above are met.

3 Regulations of conduct that incidentally burden expression, such as a ban on self-service tobacco displays or a requirement that tobacco packages be shelved so the tax stamp is visible

Laws that are otherwise content-neutral and regulate conduct with only an incidental impact on expression are analyzed under either the *O'Brien* or *Ward v. Rock* standards. In practice, those two tests are nearly identical,[34] and require that:

(1) The regulation furthers an important or substantial governmental interest;

(2) The governmental interest is unrelated to the suppression of free expression;

(3) The incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[35]

For the last prong, the Supreme Court has qualified that it "need not be the least speech-restrictive means of advancing the Government's interests."[36] Rather, it will be upheld provided that the "regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."[37] *O'Brien/Ward* scrutiny is typically more lenient than *Central Hudson*, but jurisdictions must be careful to ensure that their regulation really is targeting conduct and is unrelated to the "communicative impact" of the conduct.[38]

Drafting Tips: The first question that advocates and lawmakers should ask themselves when crafting a new law is: "Why are we creating this law?" For the easier *O'Brien/Ward* test to be applied, the law's purpose must not be to limit communication; any effect on speech must be an unintended side effect of a conduct regulation. (On the other hand, if the law's goal is to restrict commercial speech, the harder-to-pass *Central Hudson* test would be applied.)

In addition, drafters should show that the law's goal is being met without a wider-than necessary impact on expressive conduct. The findings must clearly state the reason for the law and include as much research as possible showing the need for the law. For example, if a law is drafted to require that tobacco be shelved so the tax stamps on the bottom must be visible to facilitate a tax inspection, the law should include findings that show there is a real need for the government to do this inspection. Findings, for instance, might include a study showing the extensiveness of illicit trade and tax evasion and the magnitude of lost government tax revenue.

Make sure the findings do not suggest that the law has a hidden purpose of suppressing speech. Do not, for example, include findings showing that adults who used to smoke and who see cigarette logos on the fronts of the packages are more likely to begin smoking again. Findings based on suppressing speech will undermine the argument that any impact on commercial speech is incidental and not the purpose of the law.

4 Compelled factual statements in commercial speech, such as a law requiring a warning about the health impacts of a product[39]

If a law requires that a factual statement be included in certain commercial speech (such as a health warning about the deadly impact of cigarette smoking required at retail outlets across the U.S.),[40] the court would apply a test based on a case called *Zauderer*,[41] and would ask:

(1) Is the warning (aka disclosure requirement) reasonably related to a legitimate governmental interest?

(2) Is the disclosure requirement purely factual and uncontroversial?

(3) Is the disclosure unjustified or unduly burdensome?

If these three prongs are met, then a court would probably hold that the law is consistent with the First Amendment.[42] This is a less stringent test than *Central Hudson* because "disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech" and because the speaker's constitutional interest in omitting relevant and factual information is more limited.[43] Regulations like those requiring restaurants to post calorie counts on their menus or sodium warnings have been upheld under the *Zauderer* test because they advance the "First Amendment goal of the discovery of truth and contribute[] to the efficiency of the 'marketplace of ideas.'"[44]

Drafting Tips: Making sure that any required disclosure contains only uncontroversial, indisputable facts. Including findings showing that those facts are backed up by strong research and will help a court conclude that the required warning or disclosure is constitutional under the First Amendment. Further, any law compelling speech should include many factual findings supporting the need for the warning or disclosure it is requiring, so the court can see that the intent of the law was to protect public health by educating consumers. If, for example, the disclosure requirement is likely to prevent consumer deception, factual findings should similarly explain how the disclosure will achieve its purpose. This will help demonstrate the government's legitimate interest in having the warning posted.

5 Compelled opinion statements, such as a law requiring a point-of-purchase ad stating "Smoking isn't cool"

A new law might require speech that, instead of being a mere factual statement as described above, constitutes an opinion statement with which the speaker (usually a manufacturer or a retailer) disagrees. This is an example of *compelled opinion speech*. The Supreme Court has taken a very dim view of compelled opinion statements.[45] The Court has "strongly suggested that … Central Hudson scrutiny is not appropriate in a case involving compelled speech rather than restrictions on speech."[46] It is very likely that a reviewing court will apply the strict scrutiny test described above or even decline to apply any balancing test at all and instead strike down outright a law that compels opinion speech. It is unlikely that a compelled opinion statement such as "Smoking isn't cool" would survive a First Amendment challenge if the strict scrutiny test is applied, because compelling an opinion statement would probably not be considered the least speech-restrictive means to reduce tobacco use.

Drafting Tips: Compelling opinion statements are likely to trigger a strict scrutiny analysis and may be outright struck down. As described above, public health professionals should avoid drafting ordinances that could be construed as compelling an opinion statement. This is why compelled disclosures should stick to only uncontroversial, indisputable facts and should not include unnecessarily, highly emotive content. While not free, launching paid media campaigns that promote public health are a legally sound way for a government to convey messaging.

6 Government speech, including compelled speech identified as being from the government, such as the Surgeon General's warning on tobacco packages

The First Amendment "does not regulate government speech."[47] Government speech can include things like official government communications or public-information campaigns. That is true even if the government speech is funded by private parties through mandatory fees.[48]

Sometimes, however, the government might require a private party to carry a warning label, often attributing the content of the warning to the government. An obvious example would be is the "SURGEON GENERAL'S WARNING" label on cigarettes. Although such labels clearly identify the message as coming from the government, this compelled speech still represents a burden on the speaker. Because of that, courts will typically apply the *Zauderer* test to determine if the required label or disclosure is permissible, provided it is related to a purely factual matter.[49] (Another recent example is the federal requirement for graphic warning labels on cigarettes, which the tobacco industry has legally challenged since 2009 on various grounds, including claims that it violates the First Amendment by being overbroad. For more on these law suits, see the Public Health Law Center's Litigation Tracker cited below.[50])

Drafting Tips: Because none of the First Amendment tests apply to government speech, government public health campaigns and messaging about tobacco use are quite likely to win a challenge in court. This is true even if those campaigns are subsidized by mandatory fees levied on tobacco retailers or manufacturers. Jurisdictions can purchase anti-tobacco advertisements on billboards or create websites discussing the health effects of commercial tobacco, and they can do so without having to generate the sort of "findings" required to satisfy other First Amendment tests. However, the speech must actually come from the government. If the government compels a private entity to carry a government message — by, for example, placing "SURGEON GENERAL" warnings on cigarette packages — a reviewing court would likely apply the *Zauderer* test for compelled disclosures.

Conclusion

To determine whether a tobacco marketing regulation might violate the First Amendment, drafters should analyze the regulation carefully, and ask: What is the law regulating? Is the law regulating speech, expressive conduct, or non-expressive conduct? How is the speech being regulated? Focusing on these questions can help drafters identify which test the court would apply if the law is ever challenged, and how they can best draft the law to meet the different test prongs.

The following chart, **Types of Laws Affecting Commercial Speech and the Tests Applied** , may be useful when drafting state or local laws that restrict the advertising or promotion of tobacco products and that are likely to pass the FCLAA and First Amendment hurdles. It offers guidance on which test would be applied to a new law challenged in court, and it can be used to help draft the strongest law possible.

If you're working on New York State commercial tobacco control issues and need assistance, contact the Public Health Law Center at (651) 290-7506 or phlc.nys@mitchellhamline.edu.

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Types of Laws Affecting Commercial Speech and the Tests Applied

1 Restrictions on core speech

VERY HIGH HURDLE

Example

Ban on tobacco industry research reports

Test Applied by Courts

Strict Scrutiny

Two prongs:

1. Does the law further a compelling state interest?
2. Is the law narrowly tailored (the least restrictive means) to achieve that interest?

Drafting Tips

- Avoid drafting laws that might trigger strict scrutiny analysis. Instead, determine if there are other means of achieving your public health goal that do not burden core speech rights.

2 Restrictions on commercial speech

HIGH HURDLE

Example

Ban on in-store tobacco ads

Test Applied by Courts

Central Hudson Gas v. Public Services Commission, 447 U.S. 557 (1980)

Four prongs:

1. Does the regulation restrict protected speech?
2. Is the law justified by a substantial governmental interest?
3. Does the law directly advance the governmental interest?
4. Is there a reasonable fit between the goal (the government's interest) and the means chosen to accomplish the goal?

Drafting Tips

- Fully document the extent of the problem the law was drafted to solve, and include a careful, thorough analysis of how the law would impact commercial speech in the law's "findings" (sometimes included as "whereas" clauses preceding the text of the law that document, through statistical data or other means, the problem the law was drafted to solve and how).
- Clearly state the government's goal in enacting the law, because doing so helps to show the law satisfies prong two: that the government has a substantial interest in solving the problem, and prong three: that the law as written will achieve the goal it seeks.
- The law must clearly advance the objective the government enacted the law to achieve.
- The findings should also indicate why the law's approach must be taken and why other approaches to solving the problem that have a lesser impact on commercial speech would not work or, if they were tried before, have not worked in the past.
- Be sure that the new law restricts the least amount of speech possible, while still achieving the law's goal. The Supreme Court does not explicitly demand that the government use the least restrictive means, but a law has a better chance of surviving judicial scrutiny if it is as narrowly tailored as possible.

3 Regulations of conduct that incidentally burdens expression

MODERATE HURDLE

Examples

A law requiring tobacco packages be displayed so that the tax stamp is visible without having to pick up each package; a ban on self-service tobacco displays

Test Applied by Courts

O'Brien/Ward scrutiny
United States v. O'Brien, 391 U.S. 367 (1968); *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)

Three prongs:

1. Does the regulation further an important or substantial governmental interest?
2. Is the governmental interest unrelated to the suppression of free expression?
3. Is the incidental restriction on alleged First Amendment freedoms no greater than is essential to the furtherance of that interest or would the government interest would be achieved less effectively absent the regulation?

Drafting Tips

- The findings must clearly state the reason for the law and include as much research as possible showing the need for the law.
- The law's purpose must *not* be to limit communication—any effect on speech must be an incidental side-effect of a conduct regulation.
- Drafters should show that the law's goal is being met without a wider than necessary impact on expressive conduct.
- The findings must not suggest that the law's real purpose is to suppress speech, because that will undermine the argument that any impact on commercial speech is incidental and not the purpose of the law.

4 Compelled actual statements (including government speech, such as public health messaging)

MODERATE HURDLE

Examples

1. A law requiring point-of-purchase statement that "Smoking causes lung cancer"
2. A required warning statement on tobacco products that is attributable to the Surgeon General

Test Applied by Courts

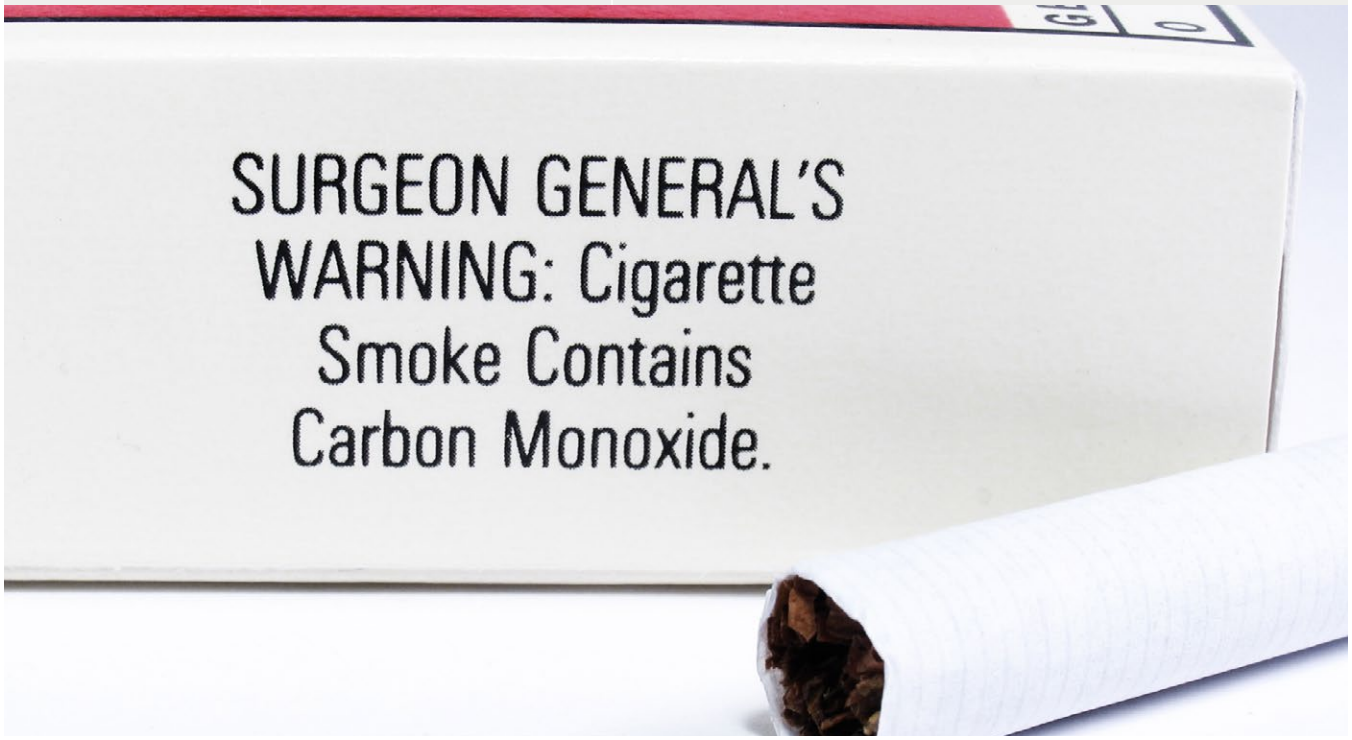
Zauderer v. Office. of Disciplinary Counsel. of Supreme Ct. of Ohio, 471 U.S. 626 (1985)

Three prongs:

1. Is the warning (aka disclosure requirement) reasonably related to a legitimate governmental interest?
2. Is the disclosure requirement purely factual and uncontroversial?
3. Is the disclosure unjustified or unduly burdensome?

Drafting Tips

- Any required disclosure should contain only uncontroversial and indisputable facts.
- Findings must show that those facts are backed up by strong research.
- Many factual findings should be included to support that the intent of the warning or disclosure is to protect citizens' health.
- Findings should also show that consumers are likely to be deceived or otherwise harmed without receiving the factual warning or disclosure.



5 Compelled opinion statements

VERY HIGH HURDLE

Example	Test Applied by Courts	Drafting Tips
Law requiring counter ad at point of purchase stating "Smoking isn't cool"	Strict scrutiny (see above) or direct prohibition	• Avoid drafting laws that might trigger strict scrutiny analysis. Instead, determine if there are other means of achieving your public health goal that do not compel opinion statements.

6 Government speech (public health messaging)

VERY LOW HURDLE

Example	Test Applied by Courts	Drafting Tips
A government-funded anti-smoking billboard	No First Amendment concern	• The speech should clearly be by and from the government and not, for example, by compelling private speakers to make a statement that is attributed to the government. • It should not matter if the tobacco industry or retailers are compelled to subsidize the government speech.

Endnotes

1 Public Health Law Center, *Why Preemption Matters for Tobacco Control* (2023).

2 Article 1, Section 8 reads:

> Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

3 The Public Health Law Center recognizes that traditional and commercial tobacco are different in the ways they are planted, grown, harvested, and used. Traditional tobacco is and has been used in sacred ways by Indigenous communities and tribes for centuries. In comparison, commercial tobacco is manufactured with chemical additives for recreational use and profit, resulting in disease and death. For more information, visit http://www.keepitsacred.itcmi.org. When the word "tobacco" is used throughout this document, a commercial context is implied and intended.

4 15 U.S.C. 1334(c).

5 *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 553 (2001).

6 Technically, the First Amendment only restricts *Congress's* ability to regulate speech. *See* U.S. Const. amend. I (*Congress* shall make no law … abridging the freedom of speech" (emphasis added)). The First Amendment's free speech protections have been "incorporated" against the states via the Fourteenth Amendment's Due Process Clause. *See Gitlow v. People of State of New York*, 268 U.S. 652, 666 (1925). For all practical purposes, the Constitution provides near identical protections against both federal and state restrictions of free speech.

7 The free speech provision found in the N.Y. Constitution, article I, § 8 was added in 1821 as part of the New York Bill of Rights, which was essentially based on the Bill of Rights contained in the United States Constitution. *SHAD All. v. Smith Haven Mall*, 488 N.E.2d 1211, 1213 (N.Y. 1985). *See People ex rel. Arcara v. Cloud Books, Inc.*, 503 N.E.2d 492, 495 (N.Y. 1986).

8 *See Allstate Ins. Co. v. Serio*, 774 N.E.2d 180, 185 (N.Y. 2002).

9 *See Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of California*, 475 U.S. 1, 9 (1986) (*quoting Thornhill v. State of Alabama*, 310 U.S. 88, 101 (1940)).

10 *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992).

11 *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 561 (1980) (emphasis added).

12 *Id.* at 562–63. Not all of the Supreme Court Justices agree that there should be a distinction between core and commercial speech. Justice Thomas has authored several concurring opinions in which he has argued that commercial speech should receive the same level of constitutional protections as any other form of speech. *See Matal v. Tam*, 582 U.S. 218, 254 (2017) (J. Thomas, concurring); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 572 (2001) (J. Thomas, concurring); 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 518 (1996) (J. Thomas, concurring).

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

14 NYS Public Health Law Art. 13-F § 1399-DD-11399-DD-1 2(a), https://www.nysenate.gov/legislation/laws/PBH/1399-DD-1.

15 *United States v. O'Brien*, 391 U.S. 367 (1968).

16 *Id.* at 376–77.

17 *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

18 *See, e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 569 (2001) (discussing the "communicative component" of product placement).

19 *See* Cent. Hudson Gas & Elec. Corp, *supra* note 11.

20 *See Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 171 (2015). New York courts also use a strict scrutiny test for content-based restrictions of "core" speech. *See, e.g., Town of Islip v. Caviglia*, 540 N.E.2d 215, 221 (N.Y. 1989) (explaining that content-based regulations are "presumptively invalid and therefore subject to strict scrutiny").

21 *Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980) (Marshall, J., concurring).

22 *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 444 (2015).

23 *Ashcroft v. Am. C.L. Union*, 542 U.S. 656, 666 (2004).

24 *Cent. Hudson*, 447 U.S. 557. *See Matal v. Tam*, 582 U.S. 218 (2017). Typically, courts will use the strict scrutiny framework to review any speech regulations that make content-, viewpoint-, or speaker-based distinctions. Some cases, like *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), suggest that a content- or speaker-based restriction within the commercial free speech realm might receive strict scrutiny or some form of more heightened scrutiny above *Central Hudson*, but the Second Circuit and other Circuits consistently rule that *Central Hudson* applies in full in those situations. *See, e.g., Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367 (2002) (reaffirming the vitality of *Central Hudson*); *Anderson v. Treadwell*, 294 F.3d 453, 460 (2d Cir. 2002) (clarifying that *Central Hudson* applies to commercial speech restrictions even when they make content-based distinctions). Thus, local jurisdictions can pass tobacco-specific advertising restrictions without triggering a strict scrutiny analysis.

25 New York State courts have adopted the *Central Hudson* framework for analyzing commercial free speech cases under the New York Constitution. *See OTR Media Grp., Inc. v. City of New York*, 920 N.Y.S.2d 337, 338 (N.Y. App. Div. 2011) (noting that New York State courts apply Central Hudson and listing cases).

26 *See Cent. Hudson*, 447 U.S. at 563.

27 *See* NYS Public Health Law Article 13-F § 1399-BB-1(a), https://www.nysenate.gov/legislation/laws/PBH/1399-BB.

28 *See Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence, R.I.*, 731 F.3d 71, 78 (1st Cir. 2013) (upholding a restriction on advertisements because it "only precludes licensed tobacco retailers from offering what the Ordinance explicitly forbids them to do, and that offers to engage in banned activity may be freely regulated by the government").

29 *Cent. Hudson*, 447 U.S. at 564.

30 *Id.* at 555.

31 *Cent. Hudson*, 447 U.S. at 556.

32 The Supreme Court will sometime use language that is similar to the strict scrutiny test, asking whether the restriction is "more extensive than is necessary" to achieve the government's interest. *Cent. Hudson*, 447 U.S. at 566. "If the word 'necessary' is interpreted strictly, these statements would translate [the *Central Hudson* test] into the 'least-restrictive-means' test." *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 476 (1989). The Court has clarified, however, that "the word 'necessary' is sometimes used more loosely" and that its "commercial speech cases support a more flexible meaning," such that regulations will be upheld provided they are "narrowly drawn" or "no more extensive than reasonably necessary to further substantial interests." *Id.* at 476–77 (citations omitted).

33 *See, e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 561–67 (2001) (ruling that a regulation prohibiting outdoor advertising of smokeless tobacco products within 1,000 feet of schools or playgrounds was too broad and did not satisfy the fourth prong of the *Central Hudson* test).

34 *See Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 661–68 (1994) (using the two tests interchangeably).

35 *Id.* at 662. New York State courts use a similar test under the state Constitution. *See People v. Barton*, 861 N.E.2d 75, 80 (N.Y. 2006).

36 *Turner Broad. Sys., Inc.*, 512 U.S. at 662.

37 *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)). New York State courts have also engaged in discussions over their mirror-image test for conduct-based regulations, concluding similarly that the government need not literally pursue the least restrictive means. *See Town of Islip v. Caviglia*, 540 N.E.2d 215, 223 (N.Y. 1989) (rejecting the dissent's call for a least-restrictive-means test).

38 *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 567 (2001).

39 Compelled statements regarding the health effects of smoking cigarettes are likely preempted under the FCLAA. The Supreme Court has not weighed in on whether compelled statements regarding *environmental* effects are also preempted, but there is nothing explicit in the text of the FCLAA that would apply to environmental warnings.

40 *See, e.g., Court Issues Order Requiring Cigarette Companies to Post Corrective Statements; Resolves Historic RICO Tobacco Litigation*, U.S. Dep't Justice Press Release (Dec. 6, 2022), https://www.justice.gov/opa/pr/court-issues-order-requiring-cigarette-companies-post-corrective-statements-resolves-historic.

41 *Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio*, 471 U.S. 626, 651 (1985).

42 Some courts treat this prong as a precondition for *Zauderer* scrutiny. Hence, if a disclosure is inaccurate or controversial, the court would decline to analyze whether it is "reasonably related to a governmental interest," per *Zauderer*, and would apply *Central Hudson* or some other form of scrutiny. *See, e.g., R.J. Reynolds Tobacco Co. v. U.S. Food & Drug Admin.*, No. 6:20-CV-00176, 2022 WL 17489170, at *15 (E.D. Tex. Dec. 7, 2022). In practice, the difference between a "prong" and a "precondition" matter little for drafters, as they should attempt to avoid compelling inaccurate or controversial messages either way.

43 *Id.*

44 *New York State Rest. Ass'n v. New York City Bd. of Health*, 556 F.3d 114, 132 (2d Cir. 2009). *Zauderer* requires a lower threshold, in part because the compelled disclosure protected against the "deception of consumers." *Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio*, 471 U.S. 626, 651 (1985). The Second Circuit, however, has held that "*Zauderer's* holding was broad enough to encompass nonmisleading disclosure requirements" as well. *New York State Rest. Ass'n v. New York City Bd. of Health*, 556 F.3d 114, 133 (2d Cir. 2009). Thus, in New York and the Second Circuit, the compelled disclosure need not be justified as a corrective to deceptive communications in order to qualify for *Zauderer* treatment. *See also Nat'l Rest. Ass'n v. New York City Dep't of Health & Mental Hygiene*, 49 N.Y.S.3d 18, 25 (1st Dept. 2017) (upholding a sodium-disclosure requirement and explaining *Zauderer* applies "in cases like this where the requirement is for the purpose of improving consumer knowledge about potential health risks").

45 The Supreme Court has long held that "one important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995); *see also W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (" If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."); *303 Creative LLC v. Elenis*, 600 U.S. 570, 588 (2023).

46 *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 580 n.10 (2005).

47 *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467 (2009).

48 *See Johanns*, 544 U.S. at 554.

49 *See Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 22 (D.C. Cir. 2014) (explaining that *Zauderer* should apply to situations like the proposed FDA-mandated warnings for cigarettes).

50 *See, e.g.*, the Public Health Law Center's overviews of the following cases: *Philip Morris v. FDA* (2022), https://www.publichealthlawcenter.org/litigation-tracker/philip-morris-v-fda-2020; *R.J. Reynolds v. FDA* (2020), https://www.publichealthlawcenter.org/litigation-tracker/rj-reynolds-v-fda-2020; and *Discount Tobacco City & Lottery v. FDA* (2009), https://www.publichealthlawcenter.org/litigation-tracker/discount-tobacco-city-lottery-inc-et-al-v-us-et-al-674-f3d-509-6th-cir-2010. *See also* Public Health Law Center, *Cigarette Graphic Warnings and the Divided Federal Courts* (2015), https://publichealthlawcenter.org/sites/default/files/resources/Tobacco-Control-Legal-Consortium-Cigarette-Graphic-Warnings-and-the-Divided-Federal-Courts.pdf.