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Regulating Marijuana Advertising and Marketing to Promote Public Health: Navigating the Constitutional Minefield

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REGULATING MARIJUANA ADVERTISING AND MARKETING TO PROMOTE PUBLIC HEALTH: NAVIGATING THE CONSTITUTIONAL MINEFIELD

by

Leslie Gielow Jacobs*

Marijuana legalization, at least to some extent, is now a reality in half of the United States. This shift reflects on one hand the good reasons to decriminalize marijuana use and to legalize and regularize its cultivation, distribution, and retail sale. However, legalization also introduces substantial public health dangers and injects the potent tool of advertising and marketing to promote marijuana into the struggle for persuasive influence between sellers aimed at increasing profits and regulators trying to minimize the damages to public health. Limits on advertising and marketing to reduce adverse public health consequences are difficult to impose because of the increasingly aggressive interpretations of the protections for advertising articulated by the Supreme Court. Regulators must understand the types of regulations that will provoke constitutional challenges, and how a court's analysis of each type of regulation will proceed. This Article is the first to provide detailed analysis and concrete, step-by-step guidance for regulators seeking to balance the electoral mandate to provide access to marijuana products with their ongoing and urgent responsibilities to protect public health. It provides regulators with the knowledge they need to understand the constitutional implications of a wide range of options, and to make choices that implement their public health objectives without provoking expensive legal challenges.

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INTRODUCTION

Marijuana as a legal and available consumer product is becoming the reality at the state level, across the nation. Now, after the 2016 election, “more than half of the states in the U.S. now have comprehensive medical marijuana laws and roughly one fifth of the population lives in a place where adults 21 and older can legally consume weed for fun.”¹ This shift reflects the good reasons to de-criminalize marijuana use and to legalize and regularize its cultivation, distribution and retail sale.² Some

¹ Katy Steinmetz, *How the 2016 Election Became a Watershed for Weed*, TIME (Nov. 10, 2016), <http://time.com/4557472/marijuana-2016-states-legalized>.

² The Editorial Board, *Repeal Prohibition, Again*, N.Y. TIMES (July 26, 2014), https://www.nytimes.com/interactive/2014/07/27/opinion/sunday/high-time-marijuana-legalization.html?_r= (calling for federal de-criminalization of marijuana, noting the high social costs of criminalization and the debate among scientists as to health effects, and opining that problems associated with creating systems for regulating manufacture, sale and marketing are “solvable”).

of these reasons are to promote public health.³ But the news is not all rosy on the public health front.⁴ Very good reasons exist to limit marijuana use by minors and by adults.⁵ At least to the supply side, criminalization is a single, definitive prevention strategy. Legalization introduces complexity for regulators, who must craft methods to channel the incentives and behaviors of the many actors in the supply chain away from dangerous outlets for their marijuana products while the law also allows them to cultivate demand generally.⁶

Legalization also injects the potent tool of advertising and marketing to promote marijuana into the struggle for persuasive influence between sellers aimed at increasing profits and regulators trying to minimize the damages to public health.⁷ With respect to minors particularly, the evidence is well established linking advertising of dangerous products, such as alcohol and tobacco, to early initiation and adverse health consequences that public agencies spending public funds must address.⁸ Short of banning it entirely, government entities charged with promoting public health have broad authority to limit access to a potentially dangerous product like marijuana. For example, they can define lawful attributes of the product, or limit how, where or when the product can be sold.⁹ Once some of the marijuana sale transactions become legal, however, limits on advertising and marketing to reduce adverse public health consequences become much more difficult to impose because of the increasingly aggressive interpretations of protections for advertising articulated by the Supreme Court.¹⁰

³ Natalie McGill, *As Marijuana Decriminalization Spreads, Public Health Prepares*, THE NATION'S HEALTH (Sept. 2014) ("Decriminalization has been supported by many health equity advocates because of disparities in law enforcement and imprisonment for marijuana possession among U.S. populations."); Nikhil "Sunny" Patel & J. Wesley Boyd, *It's Time to Legalize Marijuana: A Public Health Perspective*, PSYCHOLOGY TODAY: ALMOST ADDICTED (Oct. 21, 2016), <https://www.psychologytoday.com/blog/almost-addicted/201610/its-time-legalize-marijuana-public-health-perspective>.

⁴ McGill, *supra* note 3, at 1 ("[E]merging research already shows the potential short- and long-term effects of marijuana use on public health.").

⁵ *NIDA Review Summarizes Research on Marijuana's Negative Health Effects*, Nat'l Inst. on Drug Abuse (June 4, 2014), <https://www.drugabuse.gov/news-events/news-releases/2014/06/nida-review-summarizes-research-marijuanas-negative-health-effects>.

⁶ Sam Kamin, *Legal Cannabis in the U.S.: Not Whether but How?*, 50 U.C. DAVIS L. REV. 617, 637–38 (2016).

⁷ *Id.* at 652 ("In an unregulated [marijuana] market, there will be no check on the desire of businesses to increase profits at the expense of customers.").

⁸ Reiner Hanewinkel et al., *Cigarette Advertising and Teen Smoking Initiation*, 127 PEDIATRICS 271, 271–72 (2011), <https://pediatrics.aappublications.org/content/pediatrics/127/2/e271.full.pdf> (tobacco); Rebecca L. Collins et al., *Forging the Link Between Alcohol and Underage Drinking*, RAND CORP. (2006), http://www.rand.org/pubs/research_briefs/RB9073.html (alcohol).

⁹ See Kamin, *supra* note 6, at 642; see, e.g., U.S. DEP'T OF HEALTH AND HUMAN SERVS., OEI-09-91-00654, YOUTH AND ALCOHOL: CONTROLLING ALCOHOL ADVERTISING THAT APPEALS TO YOUTH (1991).

¹⁰ See *infra* Part II.

Colorado's marijuana mantra for edibles is "start low and go slow."¹¹ While this directive is excellent advice for marijuana consumers, it is not a rule governmental entities should follow with respect to enacting laws and regulations to protect public health. The histories of other hazardous products, such as alcohol and tobacco, provide ample demonstration that the natural outcome of competitive forces producing and marketing marijuana products will adversely affect public health, if left unchecked.¹² Regulators' first line of defense must be to regulate the product qualities, market structure, and sales practices. A second line of defense must, however, inevitably be to limit potentially hazardous demand-stoking advertising and marketing practices to the extent permissible, without provoking costly legal challenges. To do this, regulators must understand the types of regulations that will provoke constitutional challenges, and how a court's analysis of the regulation will proceed. To the extent that marijuana vendors can plausibly claim that regulations restrict their communication to customers, regulators must be prepared, in advance, to present evidence showing how regulations promote defined public health objectives and why the many other options in the regulatory tool-kit will not work. Regulators can succeed in these challenges or, better yet, fend them off by being prepared.

Part I compares the background of imposing restrictions on marijuana advertising with the regulatory histories of alcohol and tobacco. While the particular restrictions imposed offer guidance, and judicial decisions provide principles and illustrate some particular applications, the fact that many of the advertising and marketing restrictions in the alcohol and tobacco markets are not imposed by law and so have not been reviewed by courts limits the guidance they can provide. Additionally, illegality of marijuana at the federal level changes the background for marijuana regulators, creating challenges in some respects and in others, creating an artificial sense of security.

Part II sets out the constitutional spectrum of the types of advertising and marketing regulations, and the analysis that courts will employ. The subparts provide self-contained guidance as to the particular types of restrictions, as well as a comprehensive listing of the range of options available.

Part III briefly summarizes the steps of analysis that regulators should employ as they develop a comprehensive strategy to limit the adverse public health effects of legal marijuana products. This analysis will also provide help to regulators in their efforts to devise effective and

¹¹ Ana Cabrera & Sara Weisfeldt, *NYT's Dowd Inspires Campaign to Educate Colorado About Pot Edibles*, CNN (Sept. 18, 2014), <http://www.cnn.com/2014/09/17/us/colorado-marijuana-edibles-billboard-maureen-dowd>.

¹² Kamin, *supra* note 6, at 652 ("[A]s with the tobacco and alcohol industries, there is reason to be concerned that a commercial marijuana industry will seek to profit from the heavy users who account for the overwhelming majority of marijuana consumed.").

defensible regulations to address particular problems that will inevitably become apparent as a legalized marijuana regime unfolds.¹³

I. MARIJUANA COMPARED TO OTHER HEALTH-HAZARD PRODUCT MARKETING REGIMES

Efforts to regulate advertising of other health-hazard products provide important guidance for marijuana regulators. This Part briefly reviews the histories of alcohol and tobacco advertising regulation, highlighting aspects that will be helpful to marijuana regulators. After these reviews, it points out the unique challenges faced by marijuana regulators because the product is illegal federally.

A. *Alcohol*

For a long time, people have been drinking alcohol—for pleasure, for health, and as a substitute for unsafe drinking water.¹⁴ In the United States, the temperance movement, spearheaded by religious organizations, successfully provoked the passage, ratification and implementation of the Eighteenth Amendment, which outlawed the manufacture, transport and sale of alcohol.¹⁵ In 1933, the Twenty-first Amendment repealed Prohibition and gave primary authority for the intra-state distribution and sale of alcohol to the individual states.¹⁶ Regulations vary among states, and within the states, according to the type of beverage, with higher alcohol content being regulated more strictly. States generally follow one of two regulatory models—public monopoly or private licensing—and the models may vary within a state according to the type of beverage.¹⁷ Most states limit their government monopoly to the sale of distilled spirits. To avoid the problems of vertical integration, states follow a “three tier” system of alcohol distribution under which the producers, distributors and retailers must be separately

¹³ This Article provides general doctrinal guidance and does not constitute or replace legal advice.

¹⁴ Jon P. Nelson, *Advertising Bans in the United States*, EH.NET ENCYCLOPEDIA (May 20, 2004), <https://eh.net/encyclopedia/nelson-adbans>.

¹⁵ *Prohibition: United States History [1920-1933]*, ENCYCLOPEDIA BRITANNICA (Aug. 11, 2016), <https://www.britannica.com/event/Prohibition-United-States-history-1920-1933>.

¹⁶ U.S. CONST. amend. XXI §§ 1–2 (“Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed. Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.”).

¹⁷ Alexander C. Wagenaar & Harold D. Holder, *A Change from Public to Private Sale of Wine: Results from Natural Experiments in Iowa and West Virginia*, 52 J. STUD. ON ALCOHOL 162, 173 (1991) (“Some states set up a monopoly system for distributing alcohol for off-premise consumption, while others established a system of licensed private alcohol retailers.”).

owned.¹⁸ To the extent that states permit private sales, an Alcohol Beverage Control (ABC) agency typically grants licenses and determines the places and conditions of sale.¹⁹ The federal government regulates the interstate alcohol trade.²⁰ Three agencies administer different aspects of alcoholic beverage control, which includes marketing, advertising, labeling and promotions.²¹

Governments imposed various prohibitions on alcoholic beverage advertisements free of constitutional restraint until the United States Supreme Court interpreted the Constitution to protect commercial speech in the mid-1970s.²² In two cases, the Court reviewed and struck down alcohol advertising restrictions specifically. In *Rubin v. Coors Brewing Co.*,²³ the Court invalidated a federal law that prohibited beer labels from stating alcohol content and in *44 Liquormart, Inc. v. Rhode Island*, it held a state ban on advertising alcohol prices to be unconstitutional.²⁴ In both cases, it rejected the “greater-includes-the-lessor” reasoning offered by the government, under which “because the government could have enacted a wholesale prohibition of [the product or activity] it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising.”²⁵ Instead, the Court stated clearly that “the First Amendment directs that government may not suppress speech as easily as it may suppress conduct, and that speech restrictions cannot be treated as simply another means that the government may use to achieve its ends,” and that this rule applies to commercial, as well as fully protected, speech.²⁶

The change in the Court’s interpretation of the scope of the free speech guarantee prompted changes in alcohol advertising regulations. Producers of all three types of alcoholic beverages—beer, wine and distilled spirits—had for many years “self-regulated” through voluntary advertising codes adopted by their associations (Beer Institute, Wine Institute, and Distilled Spirits Council of the United States).²⁷ Within a

¹⁸ *Birth of State Based, Three Tier Alcohol Regulation*, MONT. BEER AND WINE DISTRIBS., <http://mbwda.com/birth-of-state-based-three-tier-alcohol-regulation>.

¹⁹ *TTB Regulated Industries*, U.S. DEP’T OF TREASURY, ALCOHOL AND TOBACCO TAX AND TRADE BUREAU, <https://www.ttb.gov> (listing United States alcohol beverage control authorities, state by state).

²⁰ YOUTH AND ALCOHOL, *supra* note 9.

²¹ *Id.* (listing Bureau of Alcohol, Tobacco and Firearms; the Federal Drug Administration; and the Federal Trade Commission as federal regulatory agencies).

²² *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976) (“[S]peech does not lose its First Amendment protection because money is spent to project it.”).

²³ 514 U.S. 476, 478 (1995).

²⁴ 517 U.S. 484, 489 (1996).

²⁵ *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 346 (1986).

²⁶ *44 Liquormart, Inc.*, 517 U.S. at 512.

²⁷ See JANET M. EVANS & RICHARD F. KELLY, FEDERAL TRADE COMM’N, SELF-

year of the 44 *Liquormart* decision, the Distilled Spirits Council announced that it would remove the ban on television and radio advertising from its Code of Good Conduct.²⁸ The Federal Trade Commission (FTC) backed away from regulating alcohol advertising and articulated a policy to rely upon industry self-regulation as the primary means to achieve the public health goal of avoiding the adverse effects of underage drinking.²⁹ The codes cover many marketing methods, ostensibly restricting practices and portrayals that appeal to teens and college students. With respect to different media, they adopt the rule that advertisements may not be placed in media where over 30% of the audience is below the legal drinking age.³⁰ Because these standards are voluntary, they have not been challenged in court or reviewed under the increasingly stringent commercial speech standards.

Currently, yearly alcohol advertising expenditures in the United States in “measured media” are over \$2 billion.³¹ According to the FTC, these advertisers spend two to three times that amount in unmeasured promotions, such as “sponsorships, Internet advertising, point-of-sale materials, product placement, items with brand logos, and other means.”³² The goal of these marketing practices is to “embed brands in the lives and lifestyles of consumers.”³³ The means include Internet marketing use of “contests, games, slang, and cartoons;” “[p]aid placements of products in films, television, books, and video games;” “[i]dentifying the product with popular music;” and placements in “hip” clubs or media outlets, and sponsorship of concerts and events.³⁴ Studies confirm that underage drinking positively correlates to advertising exposure.³⁵ Not surprisingly, researchers have concluded that industry

REGULATION IN THE ALCOHOL INDUSTRY: A REVIEW OF INDUSTRY EFFORTS TO AVOID PROMOTING ALCOHOL TO UNDERAGE CONSUMERS (1999).

²⁸ Stuart Elliott, *Liquor Industry Ends Its Ad Ban in Broadcasting*, N.Y. TIMES (Nov. 8, 1996), <http://www.nytimes.com/1996/11/08/business/liquor-industry-ends-its-ad-ban-in-broadcasting.html>.

²⁹ JANET M. EVANS & RICHARD F. KELLY, *supra* note 27, at 2–3; JANET M. EVANS ET AL., FEDERAL TRADE COMM’N ALCOHOL MARKETING AND ADVERTISING: A REPORT TO CONGRESS, at *i* (2003).

³⁰ James F. Mosher, *Alcohol Industry Voluntary Regulation of Its Advertising Practices: A Status Report*, CTR. FOR ALCOHOL MKTG. AND YOUTH 2 (Feb. 2006), http://www.camy.org/_docs/washingtonupdate/industrycode.pdf.

³¹ Kantar Media & OAAA, *Advertising Spending of the Beer, Wine and Liquor Industry in the United States in 2013*, by Medium (in Thousand U.S. Dollars), STATISTA, <https://www.statista.com/statistics/245318/advertising-spending-of-the-alcohol-industry-in-the-us-by-medium>.

³² David Jernigan & James O’Hara, *Alcohol Advertising and Promotion*, in REDUCING UNDERAGE DRINKING: A COLLECTIVE RESPONSIBILITY 625, 625 (Richard J. Bonnie & Mary Ellen O’Connell eds., 2004).

³³ *Id.*

³⁴ *Id.*

³⁵ Timothy S. Naimi et al., *Amount of Televised Alcohol Advertising Exposure and the Quantity of Alcohol Consumed by Youth*, 77 J. STUD. ON ALCOHOL 723, 723 (2016).

standards designed to protect against these practices leave holes that allow youth exposure in excess of the guidelines and enforcement of the standards is “lax.”³⁶

B. Tobacco

As with alcohol, people have been using tobacco products for many centuries. By the 1700s, people had recognized that the products were addictive and documented some the adverse health effects.³⁷ In the late 1800s, mechanized production made inexpensive cigarettes available, and because they were sold individually, accessible to children.³⁸ By 1890, over half the states and territories had established minimum-age laws.³⁹ Between 1895 and 1921, fifteen states completely banned cigarette sales.⁴⁰ In 1929, the first statistical link between smoking tobacco and lung cancer was reported.⁴¹ By 1939, all states had enacted minimum-age laws for purchase of tobacco products.⁴² Starting around this time, the FTC began to issue complaints against tobacco companies, identifying various advertising claims as “unfair and deceptive.”⁴³ In 1964, the Surgeon General’s advisory committee reported that cigarette smoking presents a substantial health hazard.⁴⁴ Congress enacted the Federal Cigarette Labeling and Advertising Act (FCLAA) in 1965.⁴⁵ The FCLAA required a health warning on cigarette packages and also required the FTC to report annually to Congress on the effectiveness of cigarette labeling and current practices and methods of cigarette advertising and promotion, and to offer such recommendations for legislation as it deemed appropriate.⁴⁶ In 1970, Congress strengthened the statement to read: “Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health.”⁴⁷ The required warnings have

³⁶ Jernigan & O’Hara, *supra* note 32.

³⁷ Dorie E. Apollonio & Stanton A. Glantz, *Minimum Ages of Legal Access for Tobacco in the United States from 1863 to 2015*, 106 AM. J. PUB. HEALTH 1200, 1201 (2016) (European studies document that smoking out of a pipe may cause cancers of the lips and throat).

³⁸ *Id.*

³⁹ *Id.* (the minimum age varied from 14 to 24).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ Nelson, *supra* note 14.

⁴⁴ Apollonio & Glantz, *supra* note 37, at 1201.

⁴⁵ Federal Cigarette Labeling and Advertising Act of 1965, Pub. L. No. 89-92, 79 Stat. 282 (1966) (codified as amended at 15 U.S.C. §§ 1331–1341).

⁴⁶ *Id.* at 1333–1334; Nelson, *supra* note 14.

⁴⁷ Public Health Cigarette Smoking Act of 1969, Pub. L. 91-222, 84 Stat. 87 (1970) (codified as amended at 15 U.S.C. §§ 1331–1338 (2012)); Arlen W. Langvardt, *Tobacco Advertising and the First Amendment: Striking the Right Balance*, 5 WM. & MARY BUS. L. REV. 331, 338 (2014).

since changed twice more.⁴⁸ Two courts of appeal reached different results as to the constitutionality of the most recent graphic warning mandated by the Family Smoking Prevention and Tobacco Control Act of 2009 (Tobacco Control Act)⁴⁹ and implemented by the Food and Drug Administration (FDA).⁵⁰ In response to the invalidation, the FDA removed the mandate and has yet to propose new warnings.⁵¹

Congress's 1970 amendments also banned cigarette advertisements from radio and television.⁵² A split three-judge panel upheld it against a constitutional challenge and the Supreme Court affirmed.⁵³ Tobacco companies were not the original challengers, and have not brought a renewed challenge to the ban, so it remains untested under the Court's increasingly stringent commercial speech jurisprudence.⁵⁴

Starting in the mid-1980s, tobacco companies began to work aggressively through Congress, and through state legislatures, to pass laws prohibiting lower levels of government from regulating their products, practices and advertisements.⁵⁵ So, as the Court tightened the constitutional protections for advertising, preemption provisions in new laws presented hurdles for regulators as well. In *Lorillard Tobacco Co. v. Reilly*,⁵⁶ the Court reviewed state labeling and advertising regulations. It held that Congress had preempted the advertising and labeling requirements applied to cigarettes.⁵⁷ It reviewed the advertising restrictions applied to other tobacco products, upholding some and finding others to be insufficiently well-tailored,⁵⁸ and offered observations

⁴⁸ CTRS. FOR DISEASE CONTROL AND PREVENTION, *2000 Surgeon General's Report Highlights: Warning Labels*, https://www.cdc.gov/tobacco/data_statistics/sgr/2000/highlights/labels/index.htm.

⁴⁹ Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776, 1843 (2009) (codified as amended at 15 U.S.C. § 1333(d) (2012)).

⁵⁰ *Compare* Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 554–69 (6th Cir. 2012) (upholding graphic warnings) *with* R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1218–21 (D.C. Cir. 2012) (invalidating graphic warnings).

⁵¹ U.S. FOOD & DRUG ADMIN., *Cigarette Graphic Health Warnings* (Mar. 23, 2017), <https://www.fda.gov/TobaccoProducts/Labeling/Labeling/ucm257774.html>.

⁵² 15 U.S.C. § 1335 (2012).

⁵³ *Capital Broad. Co. v. Mitchell*, 333 F. Supp. 582, 586 (D.D.C. 1971), *affirmed by* *Capital Broad. Co. v. Acting Attorney Gen.*, 405 U.S. 1000 (1972).

⁵⁴ Comprehensive Smokeless Tobacco Health Education Act of 1986, 15 U.S.C. §§ 4401–4408 (2012) (Prohibits smokeless tobacco advertising on television and radio); Langvardt, *supra* note 47, at 342 (explaining that cigarette companies may be content with the ban and a trade-off for freedom to advertise elsewhere).

⁵⁵ NAT'L CANCER INST., *STATE AND LOCAL LEGISLATIVE ACTION TO REDUCE TOBACCO USE* 51 (Donald R. Shopland ed., 2000) (“[T]he promotion of preemptive legislation at the state and federal level has now become the tobacco industry’s chief strategy for eradicating local tobacco control ordinances.”).

⁵⁶ *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).

⁵⁷ *Id.* at 551.

⁵⁸ *Id.* at 565–66 (“A careful calculation of the costs of a speech regulation does not mean that a State must demonstrate that there is no incursion on legitimate speech interests, but a speech regulation cannot unduly impinge on the speaker’s

that provide important guidance for regulators seeking to restrict advertising to protect children's health. The Court agreed that "the State's interest in preventing underage tobacco use is substantial, and even compelling," but it noted that on the other side of the balance, "it is no less true that the sale and use of tobacco products by adults is a legal activity," and so long as it is, "tobacco retailers and manufacturers have an interest in conveying truthful information about their products to adults, and adults have a corresponding interest in receiving truthful information about tobacco products."⁵⁹

A number of tobacco advertising restrictions stem from the Master Settlement Agreement of 1998, through which the four largest tobacco companies in the U.S. settled claims brought by the Attorneys General of 46 states and the District of Columbia for health care payments made by the states for tobacco-related diseases.⁶⁰ Prohibited practices include direct and indirect targeting of youth; use of cartoon characters ("Joe Camel"); use of billboards, transit advertisements, and other outdoor advertising not in direct proximity to a retail establishment that sells tobacco products; product placements in entertainment media; free tobacco product samples, with exceptions for adult-only facilities; gifts to youth in exchange for proofs of purchase; branded merchandise; and brand name sponsorships.⁶¹

In 2009, the Tobacco Control Act imposed further advertising restrictions and granted the FDA the authority to regulate many aspects of tobacco products, including marketing and advertising, which the Court had previously deemed unconstitutional.⁶² It put in place specific restrictions on marketing tobacco products to children.⁶³ In addition to banning sales to minors, the Act restricts vending machine sales, with exceptions in adult-only facilities; bans the sale of packages of fewer than 20 cigarettes; bans tobacco-brand sponsorships of sports and entertainment events or other social or cultural events; bans free giveaways of sample cigarettes and brand-name non-tobacco promotional items; and restricts free samples of smokeless tobacco, with exceptions in qualifying adult-only facilities.⁶⁴ Tobacco manufacturers challenged most

ability to propose a commercial transaction and the adult listener's opportunity to obtain information about products.").

⁵⁹ *Id.* at 564.

⁶⁰ TOBACCO CONTROL LEGAL CONSORTIUM, THE MASTER SETTLEMENT AGREEMENT: AN OVERVIEW (2015), <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-fs-msa-overview-2015.pdf>.

⁶¹ *Id.*

⁶² 21 U.S.C. § 387a (2012).

⁶³ *Id.* §§ 387a-1, 387c, 387f-1, 387g.

⁶⁴ *Id.* §§ 387a-1, 387f-1, 387g; U.S. FOOD & DRUG ADMIN., *Overview of the Family Smoking Prevention and Tobacco Control Act* (Nov. 2015), http://government.report/Resources/Whitepapers/d3c9325f-9933-4cdd-9695-35b8c4f00885_FamSmkngPreventionTCA_FNL_508.pdf.

of these provisions, and a Sixth Circuit panel upheld them.⁶⁵ The court, however, invalidated regulations that restricted the use of color and imagery on cigarette packages and in most tobacco advertising,⁶⁶ finding that “these forms of advertising ha[ve] great expressive value for the tobacco industry, and its suppression would be an undue burden on Plaintiffs’ free speech.”⁶⁷

C. *Marijuana*

Marijuana is currently an illegal product at the federal level and in a majority of states.⁶⁸ This has not always been the case. Through the first third of the twentieth century, marijuana—or cannabis⁶⁹—like opiates and cocaine, was sold in drug stores in liquid form, refined as hashish, and used as an ingredient in over-the-counter medicines.⁷⁰ Sellers could market and advertise these products freely. An 1862 Vanity Fair advertisement for “hasheesh candy” claimed it to be a “wonderful Medicinal Agent for the cure of Nervousness, Weakness, [and] Melancholy,” as well as a “pleasurable and harmless stimulant” that provides “all classes” with “new inspiration and energy.”⁷¹ “The federal government first regulated marijuana in 1937, when Congress passed the Marijuana Tax Act,” which ostensibly was a revenue measure that essentially prohibited the product.⁷² The Boggs Act followed in 1952, which “provided stiff mandatory sentences for offenses involving a variety of drugs, including marijuana.”⁷³ In 1970, Congress passed the Controlled Substances Act, “which established categories, or schedules, into which individual drugs were placed depending on their perceived medical usefulness and potential for abuse.”⁷⁴ “Schedule 1, the most restrictive category, contained drugs that the federal government deemed as having no valid medical uses and a high potential for abuse.”⁷⁵

⁶⁵ *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 518 (6th Cir. 2012).

⁶⁶ 21 C.F.R. § 1140.32 (2016).

⁶⁷ *Disc. Tobacco City & Lottery, Inc.*, 674 F.3d at 547.

⁶⁸ Jeremy Berke, *Jeff Sessions Says He Will Enforce Federal Marijuana Laws*, BUS. INSIDER (Mar. 9, 2017), <http://www.businessinsider.com/sessions-says-he-will-enforce-federal-weed-laws-2017-3>.

⁶⁹ Jon Gettman, *Marijuana vs. Cannabis: Pot-Related Terms to Use and Words We Should Lose*, HIGH TIMES (Sept. 10, 2015), <http://hightimes.com/culture/marijuana-vs-cannabis-pot-related-terms-to-use-and-words-we-should-lose/>.

⁷⁰ Stephen Siff, *The Illegalization of Marijuana: A Brief History*, ORIGINS (May 2014), <http://origins.osu.edu/article/illegalization-marijuana-brief-history>.

⁷¹ *Id.*

⁷² Scott C. Martin, *A Brief History of Marijuana Law in America*, TIME (Apr. 20, 2016), <http://time.com/4298038/marijuana-history-in-america>.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

Marijuana was placed into Schedule I, in addition to heroin and LSD.⁷⁶ Thus far, the Drug Enforcement Administration has refused calls to reconsider marijuana's classification.⁷⁷ Possessing, growing, and distributing marijuana remain federal crimes.⁷⁸ In response to legalization of various uses by states, the Department of Justice during the Obama Administration issued a memorandum reciting federal enforcement priorities and its intent to defer to state regulatory authorities to manage other areas, which provided some room for states to allow marijuana cultivation, distribution, and sale.⁷⁹ The position of the new administration with respect to marijuana crime enforcement is not clear.⁸⁰ Whatever the federal enforcement position may be, the illegality of marijuana at the federal level changes the landscape in a number of ways for regulators seeking to curtail marketing and advertising of state-legalized marijuana from that presented in the contexts of alcohol or tobacco.

1. Federal Regulatory Support or Interference

With respect to the legal alcohol and cigarette products, state regulators can piggyback their own efforts on the actions and output of the many parts of the federal bureaucracy focused on the same product.⁸¹ These actions include laws by Congress setting policy objectives and creating agencies, actions by agencies created to regulate the health and safety of the product, and studies paid for by government funds of public health impacts and the efficacy of various regulatory options short of

⁷⁶ *Id.*

⁷⁷ Carrie Johnson, *DEA Rejects Attempt to Loosen Federal Restrictions on Marijuana*, NPR (Aug. 10, 2016), <http://www.npr.org/2016/08/10/489509471/dea-rejects-attempt-to-loosen-federal-restrictions-on-marijuana>.

⁷⁸ *Federal Marijuana Law*, AMERICANS FOR SAFE ACCESS, http://www.safeaccessnow.org/federal_marijuana_law (Possession, up to 1 year for a first time offense; cultivation, anywhere between 5 years to life depending on the amount being produced; and Distribution, 5 years or more depending on the amount).

⁷⁹ U.S. DEP'T OF JUSTICE, GUIDANCE REGARDING MARIJUANA ENFORCEMENT (Aug. 29, 2013), reprinted in 26 Fed. Sent'g Rep. 4, 217•18 (2014); Marijuana Policy Project, *Federal Enforcement Policy*, MPP.org, <https://www.mpp.org/federal/federal-enforcement-policy-on-state-marijuana-laws>.

⁸⁰ Andrew Blake, *Governors from Marijuana States Plea with Trump Administration to Keep Pot Policies in Place*, WASH. TIMES (Apr. 4, 2017), <http://www.washingtontimes.com/news/2017/apr/4/governors-marijuana-states-plea-trump-administrati>; Polly Washburn, *Deputy Attorney General Rod Rosenstein: "From a legal and scientific perspective, marijuana is an unlawful drug."* CANNABIST (June 13, 2017), <http://www.thecannabist.co/2017/06/13/rod-rosenstein-marijuawarnerna-unlawful-schedule-i/81433/> (Deputy Attorney General Rod Rosenstein stated "[m]aybe there will be changes to [the Cole Memorandum] in the future but we're still operating under that policy which is an effort to balance the conflicting interests with regard to marijuana.").

⁸¹ JAMES F. MOSHER & ELENA N. COHEN, JOHNS HOPKINS UNIV. SCH. OF PUB. HEALTH, CTR. ON ALCOHOL MARKETING AND YOUTH, STATE LAWS TO REDUCE THE IMPACT OF ALCOHOL MARKETING ON YOUTH: CURRENT STATUS AND MODEL POLICIES 4 (2012) (describing the interaction of federal and state laws regulating alcohol marketing).

entire prohibition.⁸² Several federal agencies oversee the marketing and advertising of alcohol and cigarettes, engage in rulemaking, impose requirements relating to truth in advertising, disclose dangers, and create labeling requirements to provide consumers information.⁸³

None of these types of assistance exist for marijuana.⁸⁴ Neither the federal government nor other states exist as open laboratories of experiment for regulatory options with respect to health, safety, or marketing and advertising. The illegality of marijuana not only leads to a dearth of regulatory assistance but also a lack of critical information upon which regulations are based. Federal illegality leads to a lack of funding for marijuana research and numerous others barriers and disincentives.⁸⁵ These restrictions severely limit the ability of states to gain the information necessary to draw effective conclusions to impose regulations on marijuana products and marketing and advertising themselves.⁸⁶

Marijuana regulators also face a different landscape with respect to federal interference because of the blanket illegality of the product at the federal level. Until marijuana can be marketed legally at the federal level, the threat of piecemeal preemption of various state and local regulatory innovations through newly enacted federal laws is much less than with legal products, such as cigarettes.⁸⁷ The threat of preemption through the

⁸² *Id.* at 3.

⁸³ See, e.g., *Cigarette Report for 2013*, FED. TRADE COMM'N (2016), <https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-cigarette-report-2013/2013cigaretterpt.pdf> (describing laws that apply to tobacco marketing); *Truth in Advertising*, FEDERAL TRADE COMM'N, <https://www.ftc.gov/news-events/media-resources/truth-advertising> (describing laws that prohibit fraud and require truth in advertising); *TTB Regulated Industries*, U.S. DEP'T OF TREASURY, ALCOHOL AND TOBACCO TAX AND TRADE BUREAU, <https://www.ttb.gov/> (describing operations of the Alcohol and Tobacco Tax and Trade Bureau); *Alcohol Advertising*, FED. TRADE COMM'N. (Sept. 2013), <https://www.consumer.ftc.gov/articles/0391-alcohol-advertising> (describing the Federal Trade Commission's oversight of alcohol advertising and marketing).

⁸⁴ Jequetta Byrd & Laura Lieberman, *Marijuana in America, 2015: A Survey of Federal and States' Responses to Marijuana Legalization and Taxation*, BLOOMBERG BNA (Nov. 13, 2015), <https://www.bna.com/marijuana-america-2015-n57982063540> (noting that a bill introduced by Rep. Jared Polis's (D-Colo.) H.R. 1013, introduced Feb. 20, 2015, proposed legalizing marijuana possession and transactions, and along with that, proposed transferring jurisdiction over marijuana enforcement from the Drug Enforcement Administration to the Bureau of Alcohol, Tobacco, Firearms and Explosives; and renaming the Alcohol and Tobacco Tax and Trade Bureau the Alcohol, Tobacco and Marijuana Tax and Trade Bureau).

⁸⁵ See Bob Grant, *National Academies Detail the State of Weed Science*, SCIENTIST (Jan. 12, 2017), <http://www.the-scientist.com/?articles.view/articleNo/47980/title/National-Academies-Detail-the-State-of-Weed-Science>; John Hudak and Grace Wallack, *Ending the U.S. Government's War on Medical Marijuana Research*, BROOKINGS INST. (Oct. 20, 2015), <https://www.brookings.edu/research/ending-the-u-s-governments-war-on-medical-marijuana-research/>.

⁸⁶ See Grant, *supra* note 85.

⁸⁷ *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 551 (2001) (federal marketing restrictions preempt state laws); Family Smoking Prevention and Tobacco Control

Controlled Substances Act, however, clearly exists, although the extent of preemption is not at all clear.⁸⁸ For local regulators, the threat of preemption through industry-sponsored provisions in state regulations exists as well.⁸⁹

2. State Monopoly

States can choose from a number of distribution models for health-hazard products.⁹⁰ A “wealth of information” supports the conclusion that state-run alcohol distribution monopolies “are better for public health than less regulated options.”⁹¹ This model best promotes public health in part because it is the most effective in limiting aggressive marketing techniques, including all different types of product advertising.⁹² Despite these potential benefits,⁹³ a state-run distribution system is not a realistic option so long as marijuana remains illegal federally.⁹⁴ According to one

Act, Pub. L. No. 111-31, 123 Stat. 1776, § 387p(2)(A) (2009) (codified as amended at 15 U.S.C. § 1333(d) (2012)) (preempting state and local governments from regulating tobacco product standards, premarket review, manufacturing practices, labeling, and product registration).

⁸⁸ Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. OF HEALTH CARE L. & POL’Y 5, 6–8 (2013).

⁸⁹ James F. Mosher, *The Perils of Preemption*, in AMERICAN MEDICAL ASSOCIATION: ALCOHOL ISSUES 2 (2001) (noting that state-level preemption is one of the alcohol industry’s “most potent weapons” against local public health regulations); *Preemption: The Biggest Challenge to Tobacco Control*, TOBACCO CONTROL LEGAL CONSORTIUM (2014) (same issue with respect to tobacco companies).

⁹⁰ JONATHAN P. CAULKINS ET AL., RAND CORP. CONSIDERING MARIJUANA LEGALIZATION: INSIGHTS FOR VERMONT AND OTHER JURISDICTIONS 49 (2015) (surveying regulatory options).

⁹¹ *Id.* at 61.

⁹² *Id.* at 62 (“[I]f a government monopoly controlled supply, firms would have no incentive to spend their money promoting consumption of the government’s product, even if they technically retained that [constitutional] right. So placing the entire distribution system in the government’s hands sidesteps concerns about commercial advertising.”); Robin Room, *Why Have a Retail Alcohol Monopoly?*, CTR. FOR SOCIAL RESEARCH ON ALCOHOL AND DRUGS, STOCKHOLM UNIVERSITY (2001), <http://www.robinroom.net/retail.htm> (“The fundamental justification for a government retail monopoly is that it occupies a field which otherwise would be occupied by private interests in competition with each other. . . . In line with their duty of social responsibility, government retail monopolies are typically more restrained in sales promotions than would be true for a privatized retail market.”).

⁹³ CAULKINS ET AL., *supra* note 90, at 62 (recognizing that “[l]imiting advertising is a mixed blessing” and “losing [advertising’s information and efficiency] functions represents a real loss to society,” but noting that “the loss could be partially offset by peer-to-peer sharing of user-generated information, which has long been prominent for marijuana, perhaps because of the scarcity of traditional advertising”).

⁹⁴ Joel Warner, *Marijuana Legalization: Should Bernie Sanders’ Home State Embrace Socialized Cannabis?*, INT’L BUS. TIMES (Jan. 24, 2016), <http://www.ibtimes.com/marijuana-legalization-should-bernie-sanders-home-state-embrace-socialized-cannabis-2276680> (“[L]ikely the biggest reason of all options like a state-run program aren’t getting more attention is that many people worry having state workers sell marijuana would put Vermont on a collision course with the federal government”); *id.* (quoting a co-author of a report to Vermont on regulatory options to say: “[B]ecause of the

of the co-authors of a report to Vermont assessing regulatory options, “[B]ecause of the government prohibition, most states aren’t really talking about [a state-run monopoly] because they don’t want to put their employees at risk of arrest.”⁹⁵ Although it is possible for a state to create a private monopoly,⁹⁶ this model would not achieve the benefits of a monopoly run by an entity with a public mandate to promote public health in addition to raising revenue.⁹⁷ In sum, so long as marijuana remains illegal federally, states will need to cede control of the distribution process to private actors with profit-generation motives that incentivize aggressive marketing and advertising. This reality means that states seeking to avoid the public health costs of youth and intemperate adult marijuana use will need to navigate the constitutional minefield of marketing and advertising regulations.

3. *Does the Federal Constitution Apply?*

The First Amendment of the United States Constitution prohibits governments at all levels from “abridging the freedom of speech.”⁹⁸ This guarantee is not absolute, even with respect to core political speech.⁹⁹ The Supreme Court has interpreted the First Amendment’s protection to extend to commercial advertising.¹⁰⁰ Some boundaries of this protection

government prohibition, most states aren’t really talking about this because they don’t want to put their employees at risk of arrest”); Pat Oglesby, *Marijuana Advertising: The Federal Tax Stalemate*, HUFFINGTON POST (Aug. 25, 2013), http://www.huffingtonpost.com/pat-oglesby/marijuana-advertising-the_b_3810341.html (“[The state-monopoly] model, free of the profit motive, provides the least possible incentive for advertising—and it’s the model Uruguay is using for marijuana. But using the monopoly model would mean the state would sell marijuana itself and violate federal law—which continues to outlaw marijuana.”).

⁹⁵ Warner, *supra* note 94.

⁹⁶ Tim Fernholz, *The Next US State Voting to Legalize Pot Would Also Create the First Marijuana Grower Monopoly*, QUARTZ (Nov. 2, 2015), <https://qz.com/538861/the-next-us-state-voting-to-legalize-pot-would-also-create-the-first-marijuana-grower-monopoly> (describing the private monopoly that would have been created through a 2016 ballot initiative to legalize recreational marijuana: “The Ohio bill would authorize 10 production facilities to serve as the only legal sources of marijuana within the state—and the land for these parcels is owned by the backers of the proposition. These facilities would be exempt from local regulation and taxed at a level set by the referendum”).

⁹⁷ See Warner, *supra* note 94 (quoting Beau Kilmer, co-director of RAND’s Drug Policy Research Center and co-author of a report to Vermont assessing distribution options, “[i]f you are thinking about this from a public-health perspective and are still trying to bring in state revenue, the approach that probably makes the most sense is the government monopoly”).

⁹⁸ U.S. CONST. amend. I.

⁹⁹ *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 262 (2002) (government may restrict speech when it has a compelling purpose and the means are narrowly tailored to fulfill it).

¹⁰⁰ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).

are in flux.¹⁰¹ A critical aspect of the Court's interpretation that is not likely to change is that First Amendment protection for an advertisement applies only if it promotes a "lawful" product or service.¹⁰² Marijuana is not lawful at the federal level. One court¹⁰³ and some commentators have concluded that this means that the federal Constitution's free speech guarantee does not protect marijuana advertising in states where it is legal.¹⁰⁴

It is not at all clear, however, that other courts will agree. In *Bigelow v. Virginia*,¹⁰⁵ the Supreme Court held that a Virginia statute making it a misdemeanor to encourage the procurement of an abortion violated the First Amendment when the statute was applied to a Virginia newspaper editor who had published an advertisement from a New York abortion referral service regarding legal abortions in New York. Courts have read this holding as articulating "a strong position against the constitutionality of a prohibition by one locality . . . on advertising regarding activities lawful in another locality."¹⁰⁶ These courts have "interpreted *Bigelow* to mean that an activity is 'lawful' under the *Central Hudson* test so long as it is lawful where it will occur."¹⁰⁷ *Bigelow*, which deals with different

¹⁰¹ See *infra* Part I.

¹⁰² Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 563 (1980) ("[T]here can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity.").

¹⁰³ Mont. Cannabis Indus. Ass'n v. Montana, 368 P.3d 1131, 1150 (Mont. 2016) ("[A]n activity that is not permitted by federal law—even if permitted by state law—is not a 'lawful activity' within the meaning of *Central Hudson*'s first factor.").

¹⁰⁴ Jacob Sullum, *Are Marijuana Ad Restrictions Constitutional?*, REASON (Mar. 15, 2013), <http://reason.com/blog/2013/03/15/are-marijuana-ad-restrictions-constituti> ("Since marijuana is still prohibited by federal law, a First Amendment challenge to advertising restrictions like those suggested by the task force would not be viable."); Jacob Sullum, *Legalize It, But Don't Advertise It: High Times Fights Colorado's Restrictions on Marijuana-Related Speech*, FORBES (Aug. 28, 2014), <http://www.forbes.com/sites/jacobsullum/2014/08/28/legalize-it-but-dont-advertise-it-high-times-fights-colorados-onerous-restrictions-on-marijuana-related-speech/#4be33acb4656> (quoting UCLA law Professor Eugene Volokh: "I don't see how marijuana sales are lawful, given the federal prohibition, so I think advertising marijuana is not protected under commercial speech doctrine"); Alex Kreit, *What Will Federal Marijuana Reform Look Like?* 65 CASE W. RES. L. REV. 689, 714 (2015) ("Federal prohibition . . . allow[s] for a complete ban on marijuana advertising because there is no First Amendment right to advertise the sale of an illegal good.").

¹⁰⁵ *Bigelow v. Virginia*, 421 U.S. 809, 829 (1975).

¹⁰⁶ Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Worcester, 851 F. Supp. 2d 311, 315 (D. Mass. 2012).

¹⁰⁷ *Id.* (citing *Katt v. Dykhouse*, 983 F.2d 690, 696 (6th Cir. 1992); *Record Revolution No. 6, Inc. v. City of Parma*, 638 F.2d 916, 937 (6th Cir. 1980), *rev'd on other grounds*, 456 U.S. 968 (1982); *Wash. Mercantile Ass'n v. Williams*, 733 F.2d 687, 691 (9th Cir. 1984)); see also *Coyote Publ'g, Inc. v. Miller*, 598 F.3d 592, 607 (9th Cir. 2010) ("It is consistent with fundamental precepts of our federal system that the law of the jurisdiction where the transaction is proposed should govern the legality of those transactions, as citizens of one state ordinarily are free to travel to another state and have their behavior governed by the law of that second state.").

judgments about the lawfulness of an activity by coequal sovereigns, does not fully address the jurisprudential status of selling marijuana where the activity is simultaneously lawful under state law but unlawful under federal law in the place “where it will occur.”¹⁰⁸ As a matter of enforcement authority, the federal judgment that the activity is unlawful clearly prevails.¹⁰⁹ But as a matter of constitutional free speech protection, where the Court has been ratcheting up protections for advertisements¹¹⁰ and condemning restrictions that keep consumers “in the dark” to promote government policies,¹¹¹ it seems unlikely that it, the ultimate arbiter, would allow a state that has legalized the sale of marijuana to regulate by suppressing speech that, according to the Court, consumers very much need and value highly.¹¹² Lower courts, which will issue the first interpretations, may reasonably read the Court’s precedent in this way. At the very least, litigants will raise the federal constitutional issue and argue it strenuously, imposing costs on regulators and causing delays.¹¹³ Moreover, many state constitutions have similar free speech guarantees that protect advertising.¹¹⁴ Colorado and California, two states that have legalized the sale of marijuana, have constitutions that protect advertisements at least as much as the constitutional free speech guarantee.¹¹⁵ California’s Supreme Court has explicitly likened its methodology in interpreting the state constitutional commercial speech

¹⁰⁸ *Nat’l Ass’n of Tobacco Outlets, Inc.*, 851 F. Supp. 2d at 315 (citing *Bigelow*, 421 U.S. at 824).

¹⁰⁹ U.S. CONST. Art. VI, cl. 2 (federal laws made pursuant to the Constitution are the “supreme law of the land”).

¹¹⁰ See *supra* Part II.B.1.b.

¹¹¹ 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996); see *supra* Part II.B.1.b.ii.

¹¹² *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.”).

¹¹³ *Trans-High Corp. v. Brohl*, No. 14-CV-00370-MSK-MJW, 2014 WL 4063354 (D. Colo. Aug. 18, 2014) (challenging marijuana advertising restrictions and basing free speech claims on the United States Constitution, dismissed for lack of standing).

¹¹⁴ *Gerawan Farming, Inc. v. Lyons*, 12 P.3d 720, 736 (Cal. 2000); *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 959 (2002); Sullum, *Marijuana Ad Restrictions*, *supra* note 104.

¹¹⁵ *Gerawan Farming*, 12 P.3d at 734 (“[A]s to the points noted in our discussion of the First Amendment’s free speech clause and its right to freedom of speech, Article I’s free speech clause and its right to freedom of speech, *mutatis mutandis*, are at least in accord” (emphasis in original)); *id.* at 736 (“[A]rticle I’s right to freedom of speech protects commercial speech, at least in the form of truthful and nonmisleading messages about lawful products and services.”); Jacob Sullum, *Would Colorado’s Courts Overturn Restrictions on Marijuana Ads?*, REASON: HIT & RUN (Mar. 18, 2013), <https://reason.com/blog/2013/03/18/will-colorados-courts-overturn-restricti> (quoting a Colorado lawyer who specializes in free speech: “The Colorado Supreme Court has repeatedly held that Article II, Section 10, of the state constitution, which prohibits any law impairing the freedom of speech and promises that ‘every person shall be free to speak, write or publish whatever he will on any subject,’ is more protective than the First Amendment”).

protection to the tests and categories articulated by the United States Supreme Court.¹¹⁶ Additionally, marijuana could become lawful, at least in some respects, under federal law,¹¹⁷ which would mean that advertisements would certainly receive First Amendment protection. For all of these reasons, regulators should assume that United States Supreme Court commercial speech precedent will guide the analysis of marijuana marketing and advertising restrictions.

4. *Barriers to Advertising that Stem from Federal Illegality*

In addition to the obstacles that face regulators, marijuana vendors in states that have legalized the product face a number of disincentives and difficulties to advertise that stem from federal illegality. As with the other differences noted above, these forces acting on distributors are part of the legal landscape that state regulators must understand and incorporate into their policy plans.

The most obvious disincentive is the threat of prosecution for engaging in the federal crime of selling a Schedule I narcotic.¹¹⁸ Sellers may experience this disincentive and craft their advertisements in ways that refer to the product indirectly.¹¹⁹ Broadcasters may also fear adverse action.¹²⁰ The Federal Communications Commission (FCC), which

¹¹⁶ *Kasky*, 27 Cal. 4th at 959 (“This court has never suggested that the state and federal Constitutions impose *different boundaries* between the categories of commercial and noncommercial speech” (emphasis in original)).

¹¹⁷ Patrick Oglesby, *Marijuana Legalization Grows Closer with Senate Tax Proposal*, HILL (Apr. 9, 2017), <http://origin-ny1.thehill.com/blogs/pundits-blog/economy-budget/327694-marijuana-legalization-grows-closer-with-senate-tax>.

¹¹⁸ David Oxenford, *The Murky State of Rules on Broadcast Advertising of Marijuana Products in States Which Have Legalized Its Sale or Use*, BROAD. LAW BLOG (Feb. 20, 2016), <http://www.broadcastlawblog.com/2016/02/articles/the-murky-state-of-rules-on-broadcast-advertising-of-marijuana-products-in-states-which-have-legalized-its-sale-or-use/> (“Promoting a business that is not legal under Federal law is dangerous.”).

¹¹⁹ All Things Considered, *The Growing Industry of Marijuana Advertising*, NPR (Apr. 6, 2014), <http://www.npr.org/2014/04/06/299913844/the-growing-industry-of-marijuana-advertising> (noting that an advertising clip doesn’t mention marijuana, “but it seems pretty clear that when they’re talking about”); Erik Devaney, *Marijuana Marketing: Can the Blossoming Cannabis Industry Overcome “Stoner” Stereotypes?*, HUBSPOT (Apr. 20, 2015), <https://blog.hubspot.com/marketing/marijuana-marketing#sm.0000nqloofgzjeh7pq81xxpmpb3bb> (noting that “something is noticeably missing from dāmā’s marijuana billboard,” which shows “a high-quality photo of a backpack-clad couple on a mountaintop, accompanied by some very professional-looking branding [and] looks like it could be advertising mountain climbing shoes, or an energy drink, or a number of other products;” claiming that the advertiser’s purpose is to “tak[e] a more sophisticated approach to their marketing—i.e., portraying an active, natural lifestyle as opposed to simply displaying product” and thereby “help[] to reshape the public’s perception of marijuana and marijuana users,” while also noting that “[a]t the federal level, it’s still technically illegal to advertise marijuana and marijuana-related products”).

¹²⁰ Dan Adams, *For Marijuana Advertisers, Options are Limited*, BOSTON GLOBE (Mar. 1, 2017), <https://www.bostonglobe.com/business/2017/03/01/for-marijuana-advertisers-options-are-limited/bNLDg38KHaqRvP4wFggjN/story.html>.

regulates broadcasters, “has provided no advice whatsoever.”¹²¹ Careful analysis of the FCC’s actions and guidance with respect to other products may suggest that adverse action against broadcasters is unlikely.¹²² Nevertheless, cautious broadcasters may choose to heed the advice that “as regulated entities[, they] need to be very restrained in their desires to run ads for these dispensaries that appear to be legal under state laws.”¹²³ Nonregulated entities, such as media companies, “generally avoid selling ad space to businesses in the cannabis industry.”¹²⁴ Facebook, Twitter, Google, and other search engines also do not allow marijuana advertising.¹²⁵ These private responses to federal illegality are part of the background against which regulators must form current policies, but they are unpredictable and cannot be relied upon to remain constant as social attitudes and marijuana laws change.

Another advertising disincentive stems from the special treatment of marijuana business expenses in the federal tax code. Somewhat oddly, federal law requires sellers to pay taxes on income earned from illegal transactions.¹²⁶ A benefit that goes along with the tax liability is the ability to deduct business expenses incurred through illegal transactions in the same way as otherwise.¹²⁷ These expenses include “perfectly normal” selling expenses such as “travel, utilities, salaries[;]” “state taxes or fees paid to comply with the law and to file tax returns[;]” and “advertising.”¹²⁸ But this is not so for sales of marijuana.¹²⁹ The Federal Income Tax

¹²¹ Oxenford, *supra* note 118.

¹²² Judy Endejan, *Can Puff the Magic Dragon Lawfully Advertise His Wares?*, 31 COMM’NS LAWYER 16 (2015) (noting that analogous FCC regulations of lotteries suggest the FCC would not act adversely against a broadcaster who ran an advertisement for marijuana in a state where it is illegal, and that changed social mores may reduce the possibility that the FCC would deny a license based on listener complaints).

¹²³ Oxenford, *supra* note 118.

¹²⁴ Devaney, *supra* note 119.

¹²⁵ Matt Ferner, *Marijuana Ads Banned on Google, Facebook and Twitter*, HUFFINGTON POST (Jan. 22, 2014), http://www.huffingtonpost.com/2014/01/22/google-facebook-ban-marijuana_n_4646916.html (quoting a Facebook representative: “The legality around the sale and use of marijuana greatly varies around the world, . . . which is part of the reason why we strictly prohibit the promotion of the sale and use of the drug itself. The risk of attempting to allow ads promoting the drug in certain states or countries where it is legal is too high for us to consider at this time”).

¹²⁶ I.R.S. OFFICE OF CHIEF COUNSEL, CHIEF COUNSEL MEMORANDUM NO. 2015504011 2 (Jan. 23, 2015), <https://www.irs.gov/pub/irs-wd/201504011.pdf> (“Though a medical marijuana business is illegal under federal law, it remains obligated to pay federal income tax on its taxable income because § 61(a) does not differentiate between income derived from legal sources and income derived from illegal sources.”).

¹²⁷ *Id.* at 3.

¹²⁸ Oglesby, *supra* note 94.

¹²⁹ A tax benefit that marijuana sellers continue to receive so long as the product remains illegal is no federal excise tax. Byrd and Lieberman, *supra* note 84 (noting that a proposed House bill would both legalize marijuana sales and impose an excise

Code's section 280E says taxpayers "trafficking in controlled substances" get "no deduction" for any expenses beyond the cost of producing or buying inventory.¹³⁰ Dispensaries may be able to recover costs incurred through services, such as palliative care, provided by their separate, lawful business.¹³¹ Nevertheless, the core prohibition of 280E remains the law.¹³² The treatment of marijuana business expenses is an "aberration" compared to the deductibility of expenses related to the sale of other illegal products and services.¹³³ Tax scholars have argued that a more rational policy would treat businesses that sell marijuana the same as those that engage in other profit-generating transactions that are illegal under federal law.¹³⁴ Members of the marijuana industry listed "the federal tax situation" as take-away number one from a recent conference, calling it "the biggest threat to [marijuana] businesses" which "could push the entire industry underground."¹³⁵ Others have observed that the continued existence of Section 280E at the federal level, and perhaps a counterpart in the state tax code, creates an opportunity for state regulators to achieve the public benefits of reduced marijuana advertising in a way that does not violate the federal or state constitutions.¹³⁶ Regulators seeking to manage the relationship between marijuana advertising and public harms must take into account the incentives created by various tax strategies, both those within their

tax on marijuana products).

¹³⁰ 26 U.S.C. § 280E (2012) ("Expenditures in connection with the illegal sale of drugs. No deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or business if such trade or business (or the activities which comprise such trade or business) consists of trafficking in controlled substances (within the meaning of schedule I and II of the Controlled Substances Act) which is prohibited by Federal law or the law of any State in which such trade or business is conducted.").

¹³¹ *Californians Helping to Alleviate Med. Problems, Inc., v. Comm'r*, 128 T.C. 173, 174 (2007).

¹³² I.R.S. OFFICE OF CHIEF COUNSEL, *supra* note 126, at 4; *Californians Helping*, 128 T.C. 173.

¹³³ Oglesby, *supra* note 94.

¹³⁴ Carrie F. Keller, *The Implications of I.R.C. § 280E in Denying Ordinary and Necessary Business Expenses to Drug Traffickers*, 47 ST. LOUIS U. L.J. 157, 158 (2003); Robert W. Wood, *Harvard Law School Offers "Tax Planning For Marijuana Dealers" – No Joke*, FORBES (Apr. 25, 2013), <http://www.forbes.com/sites/robertwood/2013/04/25/harvard-law-school-offers-tax-planning-for-marijuana-dealers-no-joke/#e4d4dee65775>; Joel S. Newman, *CHAMP: How the Tax Court Finessed a Bad Statute*, 116 TAX NOTES 887, 888 (2007) ("[A]ll criminals should be treated the same. . . . Why should drug dealers be treated one way and prostitutes another?").

¹³⁵ *Marijuana Business Conference Wrapup: 36 Tips, Lessons & Takeaways for the Cannabis Industry*, MARIJUANA BUS. DAILY (Nov. 15, 2012), <http://mjbizdaily.com/marijuana-business-conference-wrapup-36-tips-lessons-take-aways-for-the-cannabis-industry>.

¹³⁶ Oglesby, *supra* note 94 ("280E does not ban advertising; it just makes it more expensive. More expensive sounds good: A peace settlement in one theater of the national War on Drugs could involve, among other things, (1) legalization of marijuana, (2) retention of 280E's financial burden on advertising, and (3) imposition of whatever restrictions on advertising are Constitutionally permissible.").

control and those outside their control but acting on the entities they seek to regulate.

II. REGULATORY OPTIONS WITHIN THE SPECTRUM OF CONSTITUTIONAL PROTECTIONS FOR ADVERTISING AND MARKETING

The Constitution's free speech guarantee protects communications from restrictions imposed by government actors.¹³⁷ A government actor, in turn, can justify restricting speech by showing that its purpose for doing so is sufficiently important and its choice of the means of restricting speech is adequately tailored to achieve it.¹³⁸ The level of protection for the speech, and the magnitude of the showing the government must make to justify a speech restriction occupy different locations on a spectrum depending upon the type of speech affected and whether a regulation targets the speech directly or impacts it only incidentally.¹³⁹ The level of review that courts will apply to regulations of marijuana-related speech, and the options available to regulators, will vary according to where the regulated speech falls within this spectrum. The discussion below first identifies the two endpoints of the spectrum. On one side, speech is most highly protected from restrictions and on the other side, government entities receive the greatest constitutional latitude to take actions that may restrict speech. The discussion then works inward to the permutations of regulations that impact advertising, which falls into the constitutional category of "commercial speech,"

¹³⁷ U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech."); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (incorporating the Free Speech Clause guarantee to apply against states and localities through the Due Process Clause of the Fourteenth Amendment).

¹³⁸ *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (to justify a content-based statute, "the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end" (quoting *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987))); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (content-neutral time, place or manner regulations "are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information"); *United States v. O'Brien*, 391 U.S. 367, 377 (1968) ("[A] governmental regulation [of expressive conduct] is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.").

¹³⁹ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) ("Our precedents . . . apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content. . . . In contrast, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue" (citations omitted)).

explaining the rules and identifying issues and options for state regulators. Appendix A contains a graphic illustration of the Regulated Speech Impact Spectrum.¹⁴⁰

A. *The Two Extremes: Full Free Speech Protection and None At All*

1. *Fully Protected Speech*

The federal Constitution protects speech on the subject of marijuana as fully as it protects speech on other subjects.¹⁴¹ Less than full protection attaches only when a speaker “propose[s] a commercial transaction”¹⁴² or engages in “expression related solely to the economic interests of the speaker and its audience.”¹⁴³ The line between this category of “commercial speech” and fully protected speech is far from clear.¹⁴⁴ At

¹⁴⁰ An excellent recent article, Tamara Lange et al., *Regulating Tobacco Product Advertising and Promotions in the Retail Environment: A Roadmap for States and Localities*, 43 J.L. & MED. ETHICS 878 (2015), provides advice to regulators, and sets out applicable constitutional categories, in the context of tobacco advertising. It also provides a summary of best practices and a table of legal standards applicable to various types of government regulations. Both its substance and structure provided very helpful guidance to me as I wrote this Article.

¹⁴¹ See *Morse v. Frederick*, 551 U.S. 393, 405 (2007) (equating student’s advocacy of drug use with speech filled with sexual innuendo, which if delivered “in a public forum outside the school context” would have been fully protected, but finding, in both instances, that the students’ speech rights were circumscribed by the “special characteristics of the school environment”); *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 325 (2002) (upholding content-neutral park permit scheme as applied to speaker who wanted to hold a rally advocating legalization of marijuana, but noting that the city denied the permit because the speaker’s viewpoint was “disfavored,” the denial “would of course be unconstitutional”).

¹⁴² 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 518 (1996) (Thomas, J., concurring) (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)).

¹⁴³ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 561 (1980); *Hunt v. City of Los Angeles*, 638 F.3d 703, 715 (9th Cir. 2011) (“Where the facts present a close question, ‘strong support’ that the speech should be characterized as commercial speech is found where the speech is an advertisement, the speech refers to a particular product, and the speaker has an economic motivation.”) (citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66–67 (1983)); see also Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 LOY. L.A. L. REV. 67, 74–75 (2007) (The definition of commercial speech for the Court is “speech advocating the sale of commercial products or services.”).

¹⁴⁴ *Charles v. City of Los Angeles*, 697 F.3d 1146, 1151 (9th Cir. 2012) (“[I]n many areas ‘the boundary between commercial and noncommercial speech has yet to be clearly delineated.’”); Samuel A. Terilli, *Nike v. Kasky and the Running-But-Going-Nowhere Commercial Speech Debate*, 10 COMM. L. & POL’Y 383, 386 (2005) (“[T]here remains soft, uncertain ground and multipart balancing tests created by courts to attempt to bring order to the inherently disordered nature of speech and commerce. In this legal marshland, the commercial speech doctrine has become a linguistic quagmire for speakers with commercial interests and for speech that may or may not be deemed commercial.”). The United States Supreme Court has acknowledged that “ambiguities may exist at the margins of the category of commercial speech.”

least, however, restrictions of speech relating to marijuana that are not primarily directed from a seller to buyers for the purpose of promoting sales are evaluated under the rules that apply to fully protected, rather than commercial, speech.¹⁴⁵

Recent cases address speech restrictions that are clearly on the fully-protected side of the line. One case involved one of the new marijuana regulations enacted in Colorado after legalization.¹⁴⁶ This rule required that magazines whose “primary focus is marijuana or marijuana businesses” be sold only from behind the counter in stores where persons under twenty-one years old are present.¹⁴⁷ After *High-Times* magazine filed a lawsuit, and with the acquiescence of the state’s attorney general, a federal court enjoined enforcement of the provision, reasoning that it presented a blatant violation of the Constitution’s free speech guarantee.¹⁴⁸ In another case, the Court of Appeals for the Eighth Circuit held that Iowa State University could not prevent a marijuana law reform advocacy group from distributing a t-shirt with the Iowa State University mascot on one side and a marijuana leaf on the other.¹⁴⁹ By allowing all student groups to use the mascot subject only to ministerial approval requirements, the school had created a limited public forum, which the Constitution required that it administer without respect to the student groups’ viewpoints.¹⁵⁰

Because speech that references marijuana or that is offered by marijuana vendors may be subject to different levels of judicial evaluation, a court must make the initial determination of whether the regulated speech is fully protected or is advertising that falls into the category of commercial speech¹⁵¹ before conducting its analysis of the government’s purpose and the tailoring of its means to achieve it.¹⁵²

Edenfield v. Fane, 507 U.S. 761, 765 (1993); *see also* *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419 (1993) (recognizing “the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category”); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985) (stating that “the precise bounds of the category of . . . commercial speech” are “subject to doubt, perhaps”).

¹⁴⁵ *See* *Trans-High Corp. v. Colorado*, 58 F. Supp. 3d 1177, 1180 (D. Colo. 2013).

¹⁴⁶ *Id.* at 1179.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ David Pitt, *Iowa State University Loses Appeal in Marijuana T-Shirt Case*, ASSOCIATED PRESS (Feb. 13, 2017), <https://apnews.com/0e1af5be0b42472ca3ac7099cfadca20/Iowa-State-University-loses-appeal-in-marijuana-T-shirt-case>.

¹⁵⁰ *Id.*

¹⁵¹ The fact that speech is contained within an advertising communication is not sufficient to classify it as commercial speech. Rather, courts must assess multiple factors. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66–68 (1983).

¹⁵² *See* *Mercury Cas. Co. v. Jones*, 214 Cal. Rptr. 3d 313, 327 (Ct. App. 2017) (addressing the question “whether [the challenged code section] encompasses only commercial speech or whether . . . it encompasses both commercial and noncommercial speech” because “different levels of scrutiny are implicated depending on whether commercial or noncommercial speech is involved.”); *Kasky v.*

Regulators must be alert to this inquiry and narrow regulations of marijuana communications to include only advertisements that are properly classified as commercial speech.

2. *No Speech Protection*

Regulations of sales conduct that do not impact seller-to-consumer communication do not receive Free Speech Clause protection.¹⁵³ In the marketing context, whether a particular sales practice is “expressive” and thus protected by the free speech guarantee is a judicial determination that hinges on whether the seller intends to communicate a message by means of the conduct and whether an audience is likely to understand it as a communication.¹⁵⁴ Many aspects of marijuana sales transactions do not even arguably send a communication. These include regulations of the quality and potency of the products, the variety of products (liquid, weed, edible), permissible product ingredients, the type and permissible locations and hours of operation of retail vendors, retail licensing, minimum purchasing ages, and maximum quantities of purchase.¹⁵⁵ None of the heightened levels of Free Speech Clause reviews apply to these types of regulations.¹⁵⁶ They are subject only to minimum due process and equal protection rational basis review.¹⁵⁷

The line between expressive and non-expressive sales practices is

Nike, Inc., 45 P.3d 243, 247 (2002) (addressing the “issue . . . whether defendant corporation’s false statements are commercial or noncommercial speech for purposes of constitutional free speech analysis under the state and federal Constitutions” because “commercial speech receives a lesser degree of constitutional protection than many other forms of expression, and because governments may entirely prohibit commercial speech that is false or misleading” and leaving for resolution by the lower court “whether any false representations were made”).

¹⁵³ See *Hightower v. City and Ct.y of San Francisco*, 77 F. Supp. 3d 867, 880 (N.D. Cal. 2014) (finding that multiple instances of public nudity prohibited by ordinance were not communications, and therefore did not “constitute expressive conduct protected by the First Amendment”).

¹⁵⁴ *Spence v. Washington*, 418 U.S. 405, 410–11 (1974) (Conduct is expressive and protected by the First Amendment if “[a]n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood [is] great that the message would be understood by those who viewed it.”).

¹⁵⁵ INST. OF MED., *LEGAL STRATEGIES IN CHILDHOOD OBESITY PREVENTION: WORKSHOP SUMMARY 33* (2011) (“Regulations on the sale and advertising of foods can be tailored in a variety of ways so as not to constitute unlawful restrictions on free speech. . . . Increasing the price of a product, limiting per capita purchases, banning or limiting harmful products or ingredients, and instituting age limits on the sale of a product have all yielded benefits with other products and could be applied to foods.”); Tamara Lange et al., *Regulating Tobacco Product Advertising and Promotions in the Retail Environment: A Roadmap for States and Localities*, 43 J.L. & MED. ETHICS 878, 890 (2015) (“Non-speech interventions may include tobacco retailer licensing schemes, reducing the number and density of tobacco outlet, raising the minimum legal sales age to 21 years old, and banning tobacco sales in pharmacies or other retail outlets.”).

¹⁵⁶ *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 470 (1997).

¹⁵⁷ *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 491 (1955).

hazy at the intersection. Two recent federal court decisions upholding local restrictions on price discounting practices by tobacco companies help locate the boundary.¹⁵⁸ In both cases, tobacco companies argued that the ordinances restricted commercial speech because by “prohibiting the sale and the offer to sell cigarettes and tobacco products below the listed price, the ordinance[s] impermissibly restrict[] plaintiffs’ ability to communicate discount pricing and deal information to consumers” and “that they use coupons and discount offers to tell their consumers that they are “getting a deal” if they purchase the product at a particular price, to encourage them to purchase a particular brand, or to make their purchase at a particular location.”¹⁵⁹ Both courts relied on the Supreme Court’s decision in *44 Liquormart, Inc. v. Rhode Island*¹⁶⁰ involving alcohol price advertising. Although the Court invalidated the state’s price advertising ban, the Justices in various opinions distinguished “alternative forms of regulation that would not involve any restriction on speech,”¹⁶¹ such as “establishing minimum prices”¹⁶² and limiting “per capita purchases.”¹⁶³ Applying this reasoning, both courts held that the ordinances before them “only regulate[d] an

¹⁵⁸ [T]hese pricing practices often play out in the following manner:

1. § 17-176(b)(1). A consumer receives a coupon in the mail from the Lorillard Tobacco Company offering \$1 off of the listed price for a pack of Newport cigarettes. The consumer may redeem the coupon at any store that sells Newport cigarettes.

2. § 17-176(b)(2). A retailer provides a promotion whereby upon purchasing two packs of Marlboro cigarettes, a consumer receives \$2 off of the listed price for purchasing a third pack of Marlboro cigarettes.

3. § 17-176(b)(3). In exchange for purchasing a pack of Camel cigarettes, a retailer provides a consumer with a free, or discounted, lighter bearing the Camel logo.

4. § 17-176(b)(4). A retailer provides a one-day sale where all American Spirit cigarettes are sold at \$1 off of the listed price; STATE AND CMTY. TOBACCO CONTROL RESEARCH, REGULATING PRICE DISCOUNTING IN PROVIDENCE, RI 4 (2013).

Price discounting is a strategy employed by the tobacco industry to influence tobacco purchasing and use among potential customers who would otherwise be deterred by higher tobacco prices. Price discounting involves a number of tactics that may be geared toward tobacco wholesalers, retailers, or directly to consumers. Popular direct-to-consumer promotions include: cents or dollar-off promotions, multi-pack discounts, and other price-related incentives such as buy-some-get-some-free deals.

Nat’l Ass’n of Tobacco Outlets, Inc. v. City of New York, 27 F. Supp. 3d 415, 419 (S.D.N.Y. 2014).

¹⁵⁹ *Id.* at 421 (“In *National Association of Tobacco Outlets, Inc. v. City of Providence, Rhode Island*, 731 F.3d 71 (1st Cir. 2013), the First Circuit considered a similar challenge to the one presently before this court.”).

¹⁶⁰ *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); *Nat’l Ass’n of Tobacco Outlets*, 27 F. Supp. at 422; *Nat’l Ass’n of Tobacco Outlets*, 731 F.3d at 77.

¹⁶¹ *44 Liquormart, Inc.*, 517 U.S. at 507.

¹⁶² *Id.* at 530 (O’Connor, J., concurring).

¹⁶³ *Id.* at 507.

economic transaction—the sale of tobacco products below the listed price” and because they did not “restrict the dissemination of pricing information,” the First Amendment’s free speech analysis did not apply.¹⁶⁴

Additionally, and importantly, both courts rejected the tobacco companies’ argument that the ordinances unconstitutionally restricted commercial speech because they were prevented “from offering to sell cigarettes and tobacco products below the listed price.”¹⁶⁵ The courts reasoned that a prerequisite to First Amendment protection for commercial speech is that the speech offers to engage in a legal transaction.¹⁶⁶ Because the pricing restrictions contained within the ordinances were lawful, “the offers that are restricted by the ordinance[s] are offers to engage in an unlawful activity—namely, the sale of cigarettes and tobacco products below the listed price.”¹⁶⁷ Consequently, the offers were not protected under the Constitution as commercial speech.¹⁶⁸

Both holdings that pricing practices are not speech and that governments may restrict advertising of conduct that they have lawfully prohibited are significant in the context of marijuana regulation. Pricing practices are a key tool of manufacturers to stimulate demand generally and among populations particularly vulnerable to adverse effects.¹⁶⁹ Advertisements for “five free joints to new customers,” and “a free pipe packed with marijuana and a free week of yoga” found in a pull-out supplement to a Colorado newspaper confirm that marijuana sellers will employ these same types of price discounting techniques so long as they are legal.¹⁷⁰ Regulating these pricing techniques directly, rather than the advertising of them, may accomplish public health objectives without incurring the cost and risk of a constitutional challenge.

¹⁶⁴ *Nat’l Ass’n of Tobacco Outlets*, 27 F. Supp. 3d at 423; *Nat’l Ass’n of Tobacco Outlets*, 731 F.3d at 77.

¹⁶⁵ *Nat’l Ass’n of Tobacco Outlets*, 27 F. Supp. 3d at 423.

¹⁶⁶ *Id.* (“[T]he Supreme Court has made clear that the ‘government may ban commercial speech related to illegal activity’” (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 563–64 (1980))).

¹⁶⁷ *Nat’l Ass’n of Tobacco Outlets*, 27 F. Supp. 3d at 423; *see also Nat’l Ass’n of Tobacco Outlets*, 731 F.3d at 78.

¹⁶⁸ The Court’s recent decision in *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017) confirms that regulations of pricing practices aimed at preventing discounting restrict conduct, not speech. *See* Leslie Gielow Jacobs, *Memo to Cannabis Regulators: The Expressions Hair Design Decision Does Not Limit Your Broad Authority to Restrict All Forms of Discounting*, 49 U. PAC. L. REV. 67 (2017).

¹⁶⁹ TOBACCO CONTROL LEGAL CONSORTIUM, CIGARETTE MINIMUM PRICE LAWS (2011); STATE AND CMTY. TOBACCO CONTROL RESEARCH, *supra* note 158, at 4.

¹⁷⁰ Jeremy W. Peters, *New Fuel for Local Papers: Medical Marijuana Ads*, N.Y. TIMES (Oct. 4, 2010), http://www.nytimes.com/2010/10/05/business/media/05pot.html?_r=1&ref=todayspaper&pagewanted=all.

B. The Middle Ground: Different Levels of Protection According to the Type of Speech Impact

1. Commercial Speech Restrictions

a. The Category of Commercial Speech

Advertising through various types of media has been a critical product marketing tool for centuries. But it was not until the mid-1970s that the United States Supreme Court interpreted the First Amendment's free speech protection to extend to commercial messages.¹⁷¹ In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Court invalidated a state law that prohibited advertising of prescription drug prices.¹⁷² The Court condemned what it characterized as the "highly paternalistic approach" adopted by the state of keeping truthful price information from consumers based on the assumption that they will not use it well.¹⁷³ Instead, it interpreted the Constitution to require the alternative assumption, which is "that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them."¹⁷⁴ While it acknowledged that advertising may seem "tasteless and excessive," the Court noted that it "is nonetheless dissemination of information" and the "free flow of commercial information is indispensable" to promote "intelligent and well informed" decision-making, which fulfills the public interest in "the proper allocation of resources in a free enterprise system" and "the formation of intelligent opinions as to how that system ought to be regulated or altered."¹⁷⁵ Through this reasoning, the Court created the jurisprudential category of commercial speech.

Although it interpreted the Constitution to protect commercial speech, the Court also noted "commonsense differences" between it and fully protected speech that "suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired."¹⁷⁶ Specifically, "the greater objectivity and hardiness of commercial speech[] may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker. . . . appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive," and render "inapplicable the prohibition

¹⁷¹ *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975) ("The relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas.").

¹⁷² *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

¹⁷³ *Id.* at 770.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 765.

¹⁷⁶ *Id.* at 771 n.24.

against prior restraints.”¹⁷⁷

Over the last four decades, the Supreme Court and lower courts have developed the boundaries of the category of commercial speech and the analysis to determine the constitutionality of regulations applied to it. Like other types of speech, the category of commercial speech includes more than written or spoken words. Speech is a communication that may occur through various means, including graphics,¹⁷⁸ images,¹⁷⁹ colors,¹⁸⁰ sounds,¹⁸¹ size,¹⁸² other attention-drawing devices such as pop-up advertisements or lights,¹⁸³ and likely more subtle, “embedded,” forms of product promotion as well.¹⁸⁴ As noted above, the line between commercial speech and fully protected speech is not bright.¹⁸⁵ Commercial speech is advertising, but a publication that is advertising may contain communications that are fully protected speech.¹⁸⁶ The

¹⁷⁷ *Id.*

¹⁷⁸ *See, e.g.*, *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2242 (2015) (Confederate flag logo on proposed commemorative license plate); *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 564–65 (6th Cir. 2012) (graphics on a cigarette warning label).

¹⁷⁹ *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 647 (1985) (illustration of an intrauterine device in attorney advertisement); *Saint John’s Church in the Wilderness v. Scott*, 296 P.3d 273, 283 (Colo. App. 2012) (images of mutilated fetuses).

¹⁸⁰ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 510 (1969) (black armband); *Jeglin v. San Jacinto Unified Sch. Dist.*, 827 F. Supp. 1459, 1462 (C.D. Cal. 1993) (colors and logos of sports teams adopted by gangs).

¹⁸¹ *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (music).

¹⁸² *See, e.g.*, *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015) (ordinance regulating size of temporary directional signs); *Peterson v. Village of Downers Grove*, 150 F. Supp. 3d 910, 929 (N.D. Ill. 2015) (ordinance restricting total area of signage).

¹⁸³ Rebecca Tushnet, *Attention Must Be Paid: Commercial Speech, User-Generated Ads, and the Challenge of Regulation*, 58 *BUFF. L. REV.* 721, 725 (2010) (“As we are exposed to more and more, it becomes harder to get our attention, so promoters are forced to further extremes. Advertising clutter drives marketers to put messages on fire hydrants and potholes, on eggs, in urinals, on the bellies of pregnant women, and anywhere else that might surprise us out of our willful disregard.”).

¹⁸⁴ Rita Marie Cain, *Embedded Advertising on Television: Disclosure, Deception and Free Speech Rights*, 30 *J. PUB. POL’Y & MKTG.* 226, 230 (2011) (“[T]he law is clearly unsettled regarding undisclosed advertising and whether it is inherently deceptive or entitled to free speech protection under the First Amendment.”).

¹⁸⁵ *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571 (2011) (finding that there was “no need to determine whether all speech hampered by [the regulation] is commercial” because the regulation was invalid under commercial speech analysis); *Edenfield v. Fane*, 507 U.S. 761, 765 (1993) (“ambiguities may exist at the margins of the category of commercial speech”); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419 (1993) (noting “the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category”).

¹⁸⁶ *See Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 474 (1989) (discussing whether “pure speech and commercial speech [were] ‘inextricably intertwined’” in a single communication); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983) (the mailing subject to regulations, which were conceded to be advertisements, “must be examined carefully to ensure that speech deserving of

California Supreme Court sifted through the Supreme Court's decision and identified three factors relevant to placing a communication into the commercial speech category. These are a commercial speaker, intended commercial audience, and representations of fact of a commercial nature.¹⁸⁷ This is only one articulation. Nevertheless, it provides general guidance for most cases and captures the essence of the communications that states may regulate subject to the judicial review that applies to commercial speech.

b. Central Hudson Test

Defining the category of commercial speech is important so long as a different and more deferential level of judicial review applies to regulations of it. In *Central Hudson Gas & Electric Co. v. Public Service Commission of N.Y.*,¹⁸⁸ the Court borrowed from its intermediate-level test for assessing content-neutral time, place, and manner regulations to create a similar standard of review for commercial speech restrictions.¹⁸⁹ Under the *Central Hudson* test, courts were directed to assess the weight of the government's purpose and the degree of tailoring of the speech-restrictive means apparent in the regulation more deferentially than they do when the government restricts fully protected speech based upon its content.¹⁹⁰

For a number of years, Justice Thomas has advocated that the Court apply to regulations of truthful commercial speech the same strict scrutiny review it applies to restrictions of fully protected speech.¹⁹¹ The

greater constitutional protection is not inadvertently suppressed”).

¹⁸⁷ See *Kasky v. Nike, Inc.*, 45 P.3d 243 (2002).

¹⁸⁸ *Cent. Hudson Gas & Elec. Co. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

¹⁸⁹ *Id.* at 566.

¹⁹⁰ *Id.*; see *infra* (describing the four-part *Central Hudson* test).

¹⁹¹ *Matal v. Tam*, 137 S. Ct. 1744, 1769 (2017) (Thomas, J., concurring in part and concurring in the judgment) (writing separately because he “continue[s] to believe that when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as ‘commercial’” (quoting *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 572 (2001) (Thomas, J., concurring)); see also *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 522–23 (1996) (Thomas, J., concurring) (“I do not see a philosophical or historical basis for asserting that ‘commercial’ speech is of ‘lower value’ than ‘noncommercial’ speech” and “I do not join the principal opinion’s application of the *Central Hudson* balancing test because I do not believe that such a test should be applied to a restriction of ‘commercial’ speech, at least when, as here, the asserted interest is one that is to be achieved through keeping would-be recipients of the speech in the dark.”); *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 504 (1997) (Thomas, J., dissenting) (“I continue to disagree with the use of the *Central Hudson* balancing test and the discounted weight given to commercial speech generally.”); *Greater New Orleans Broad. Ass’n, Inc. v. United States*, 527 U.S. 173, 197 (1999) (Thomas, J., concurring) (“I continue to adhere to my view that ‘[i]n cases such as this, in which the government’s asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace,’ the *Central Hudson* test should not be applied because ‘such an

Court has not adopted this position,¹⁹² but has tightened its application of the *Central Hudson* test, invalidating all of the commercial speech restrictions it has reviewed in the past twenty years.¹⁹³ Two recent opinions authored by Justice Kennedy and joined, in combination, by a majority of the current Justices, state that an unspecified form of “heightened scrutiny”¹⁹⁴ applies to some subset of commercial speech restrictions.¹⁹⁵ Despite this movement, however, and despite continuing requests that the Court explicitly abandon the *Central Hudson* test,¹⁹⁶ the Justices have not combined into a majority Court to do so. Because *Central Hudson* remains the law, the Court’s recent applications of this test provide the best guide for regulators when crafting new policies.¹⁹⁷

The *Central Hudson* test contains four prongs. The first prong is not a part of the end/means balancing but is rather a prerequisite to First Amendment protection.¹⁹⁸ For commercial speech to receive free speech

“interest” is *per se* illegitimate and can no more justify regulation of “commercial speech” than it can justify regulation of “noncommercial” speech” (citation omitted)).

¹⁹² *Matal*, 137 S. Ct. at 1764 (declining to decide which test should apply to trademark disparagement condition because it fails *Central Hudson* scrutiny); *id.* at 1767 (Kennedy, J., concurring) (applying “heightened scrutiny” because the disparagement provision was viewpoint discriminatory); *Lorillard Tobacco Co.*, 533 U.S. at 554 (noting that “several Members of the Court have expressed doubts about the *Central Hudson* analysis and whether it should apply in particular cases” but finding no need to “break new ground”).

¹⁹³ See *Annotation 17-First Amendment*, FIND LAW, <http://constitution.findlaw.com/amendment1/annotation17.html> (“Recent decisions suggest, however, that [although] further distinctions may exist[] [m]easures aimed at preserving ‘a fair bargaining process’ between consumer and advertiser may be more likely to pass the test.”); C. Edwin Baker, *The First Amendment and Commercial Speech*, 84 IND. L.J. 981, 983 (2009) (“As of 2007, . . . the trend [of the Court’s commercial speech protections] is apparently toward being more protective.”).

¹⁹⁴ *Matal*, 137 S. Ct. at 1767–68 (Kennedy, J. concurring) (purporting to apply “heightened scrutiny,” but finding that the means of excising disparaging content “bears no plausible relation” to trademark law’s goal of “facilitat[ing] source identification”).

¹⁹⁵ See *id.* at 1767 (viewpoint discrimination apparent in a regulation of commercial speech “necessarily invokes heightened scrutiny”); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565 (2011) (Because the law at issue is “designed to impose a specific, content-based burden on protected expression[, i]t follows that heightened judicial scrutiny is warranted.”).

¹⁹⁶ Brief Amicus Curiae of Pac. Legal Found. in Support of Respondent at 11, *Lee v. Tam*, 137 S. Ct. 30 (2016) (No. 15-1293) (“This Court should quell any remaining confusion by expressly overruling *Central Hudson*.”).

¹⁹⁷ See *Retail Digital Network, LLC v. Prieto*, 861 F.3d 839 (9th Cir. 2017) (en banc) (reviewing the Court’s jurisprudence and noting that in commercial speech cases, it was joined by the Second, Fourth, Sixth, and Eighth Circuits in the conclusion that the *Central Hudson* test continues to apply and that other circuits have refused to decide the issue or addressed it outside the context of commercial speech).

¹⁹⁸ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980) (“At the outset, we must determine whether the expression is protected by

protection, it must (1) “concern lawful activity and not be misleading.”¹⁹⁹ The other inquiries are: (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.”²⁰⁰ The first prong creates substantial leeway for regulators to restrict marijuana advertising and marketing practices to promote public health, so long as they act thoughtfully and with foresight. The second prong will not be difficult for regulators to meet, since they may have a number of legitimate and substantial reasons to limit consumption of marijuana products. Clear and precise vision with respect to the prong-two purpose for imposing a commercial speech restriction is critical, however, because the prong three and four tailoring determinations hinge upon the “fit” between the purpose and the means of restricting speech. The prong three and four determinations will be the most difficult for regulators to meet, so they must act carefully and with regard to evidence in crafting advertising restrictions to meet particular purposes.

i. Prerequisites to Federal Constitution Protection: Speech Concerns Lawful Activity and is Not Misleading

The first prong of the *Central Hudson* test is particularly important to regulators, both because of the legitimate bases for speech restrictions that it contains, and because it is likely to survive even if the Court “overrules” application of the *Central Hudson* test to some subset of commercial speech regulations.²⁰¹ Even as the Court has ratcheted up the review of advertising regulations, it has continued to emphasize that the constitutional protection accorded to commercial speech hinges on its link to lawful commercial transactions²⁰² and its value in informing consumers’ choices.²⁰³ And, even as the Court has suggested that

the First Amendment.”).

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ Even Justice Thomas, who has advocated consistently for raising the level of scrutiny for restrictions of commercial speech, would limit the scope of constitutional protection to truthful speech that promotes transactions that are lawful. *Greater New Orleans Broad. Ass’n, Inc. v. United States*, 527 U.S. 197, 197 (1999) (Thomas, J., concurring in judgment) (government does not have a legitimate interest in keeping “legal users of a product or service ignorant”); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 572 (2001) (Thomas, J., concurring in part and concurring in the judgment) (strict scrutiny is appropriate “when the government seeks to restrict truthful speech in order to suppress the ideas it conveys”).

²⁰² *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011) (“[T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech. That is why a ban on race-based hiring may require employers to remove ‘White Applicants Only’ signs.”) (citing *Rumsfeld v. Forum for Acad. Inst. Rights, Inc.*, 547 U.S. 47, 62 (2006)).

²⁰³ *Sorrell*, 564 U.S. at 566 (“A ‘consumer’s concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue.’ . . . That reality has great relevance in the fields of medicine and public

commercial speech and noncommercial speech are the same in some respects, the Court has continued to recognize that commercial speech is different in that governments have greater ability to determine the truth or falsity of commercial speech and regulate it to prevent consumers from being deceived or misled.²⁰⁴ So each of the requirements contained within *Central Hudson's* first prong—that the proposed transaction is lawful and that the communication is not misleading—provide significant and durable leeway for states to regulate potentially harmful products to promote public health.

The background to any state regulation of marijuana is federal law, under which it is “a felony for any person to place in any newspaper, magazine, handbill, or other publications, any written advertisement knowing that it has the purpose of seeking or offering illegally to receive, buy, or distribute a Schedule I controlled substance, which includes marijuana.”²⁰⁵ Federal prosecutors have in the recent past targeted media outlets that publish marijuana advertisements,²⁰⁶ and the U.S. Postal Service refuses to handle publications with marijuana advertisements.²⁰⁷ The U.S. Patent and Trademark Office refuses to register marijuana product trademarks.²⁰⁸ So long as marijuana remains illegal federally, state and local regulations will apply to the types of advertisements and venues hardy enough to exist despite the threat of federal criminal prosecution.²⁰⁹

health, where information can save lives.” (quoting *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977)).

²⁰⁴ *Edenfield v. Fane*, 507 U.S. 761, 768 (1993) (“the State may ban commercial expression that is fraudulent or deceptive without further justification”); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 638 (1985) (“The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading”); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 69 (1983) (“The State may deal effectively with false, deceptive, or misleading sales techniques.”); *In re R.M.J.*, 455 U.S. 191, 203 (1982) (commercial speech that is false or misleading is not entitled to First Amendment protection and “may be prohibited entirely”); *Bates*, 433 U.S. at 383 (“[T]he leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena.”).

²⁰⁵ Kelley Beaucar Vlahos, *U.S. Postal Service to Newspapers: Your Marijuana Ads Are Illegal*, FOX NEWS (Dec. 4, 2015), <http://www.foxnews.com/politics/2015/12/04/u-s-postal-service-to-newspapers-your-marijuana-ads-are-illegal.html>.

²⁰⁶ Michael Montgomery, *Feds to Target Newspapers, Radio for Pot Ads*, SAN DIEGO UNION TRIB. (Oct. 12, 2011), <http://www.sandiegouniontribune.com/news/watchdog/sdut-feds-target-newspapers-radio-marijuana-ads-2011oct12-htlmlstory.html>.

²⁰⁷ Vlahos, *supra* note 205.

²⁰⁸ Hilary Bricken, *Protect Your Cannabis Brand with a Trademark*, CANNA LAW BLOG (May 1, 2013), <http://www.cannalawblog.com/protect-your-cannabis-brand-with-a-trademark/>.

²⁰⁹ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 (1976) (noting that “commercial speech may be more durable than other kinds” and that “[s]ince advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely” (footnote omitted)).

With respect to state law, as noted above, the requirement that protected commercial speech propose a lawful transaction means that states may prohibit advertising of a product that is illegal entirely, or of features of the product or the method of offering it for sale that are unlawful when the sale of the product is not entirely illegal. With respect to marijuana, states that have legalized marijuana for medical use have already experienced partial legality.²¹⁰ In those states, advertising is protected so long as it is proposing the sale of marijuana for the medical uses that make it legal.²¹¹ In states that legalize the sale of marijuana for recreational uses, the protection for offers of sale extends to those uses.²¹² Nevertheless, free speech protection will not extend to types of marijuana products²¹³ or marketing practices²¹⁴ if the State has made them unlawful. So, if a state were to limit single retail purchases to small amounts, advertising offers of bulk sales would not be protected. Similarly, if a state were to prohibit sales of marijuana of certain potencies, impose an age limit for purchase, or prohibit price discounting practices such as coupons or two-for-one offers, its power to prohibit advertising offers of sale of the product with these features, to the prohibited audience, or including unlawful discounting tactics would follow the illegality of the conduct itself.

Regulators should always keep this potent linkage between their power to prohibit conduct surrounding the sale of marijuana products and the power to limit advertising without Free Speech Clause restraint and strongly consider restricting product varieties and methods of sale that are likely to lead to public health harms. If states allow dangerous varieties of the product to be sold, or allow marketing practices that encourage consumers to abuse the product, and then seek to impose advertising restrictions to limit those effects, they will face tight constitutional restraints and have difficulty justifying why they must use these means of prohibiting speech to achieve their public health objectives rather than prohibit the product feature or marketing practice directly.

²¹⁰ Peters, *supra* note 170.

²¹¹ *Medical Marijuana Program Advertising Guide*, CONN. DEP'T OF CONSUMER PROT. 2 (May 12, 2016), http://www.ct.gov/dcp/lib/dcp/drug_control/mmp/pdf/medical_marijuana_advertising_guide.pdf (prohibiting advertisements that "contain statements, designs, representations, pictures, or illustrations that encourage or represent the use of marijuana for a condition other than a debilitating medical condition").

²¹² Endejan, *supra* note 122, at 1, 16.

²¹³ John Ingold, *New Study Reveals What Makes Marijuana Edibles Most Attractive to Young Kids*, DENVER POST (Sept. 8, 2016), <http://www.denverpost.com/2016/09/08/marijuana-edibles-attractive-kids/> (Colorado forbids edible marijuana candy to be in animal or fruit shapes).

²¹⁴ Brendan Saloner et al., *Policy Strategies to Reduce Youth Recreational Marijuana Use*, 135 PEDIATRICS 955, 956–57 (2015) (recommending that states require that marijuana edibles be sold in child-proof packaging).

Federal and state laws prohibit false or misleading advertising.²¹⁵ Agencies exist at the federal and state levels to enforce these laws, and many laws also provide for private actions.²¹⁶ Federal and state laws also prohibit various methods of unfair competition, and federal law protects trademarks against infringement.²¹⁷ Marijuana sellers must comply with these generally applicable laws, which make certain types of speech unlawful.²¹⁸ Although the illegality of marijuana federally means that marijuana sellers cannot use federal law as a shield, vendors of lawful products may use them as a sword to stop marijuana-product marketing practices. For example, companies that branded their marijuana products with names and packaging confusingly similar to Hershey's candy bars have already faced lawsuits.²¹⁹

With respect to advertising, while the truth or falsity of a claim can be verified, whether a particular claim is misleading is less clear.²²⁰ Agencies may receive substantial discretion to make these judgments when implementing statutory mandates.²²¹ When reviewing particular applications, the Court has distinguished circumstances in which an advertisement is misleading on its face, in which case it is not protected by the free speech guarantee, from those in which an advertisement has a tendency or capacity to mislead, in which case the *Central Hudson* analysis

²¹⁵ See 15 U.S.C. § 45(a)(1) (2012) (“Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.”); CAL. BUS. & PROF. CODE § 17200 (West 2017) (defining unfair competition as, among other things, any unfair, deceptive, untrue or misleading advertising); *id.* at § 17500 (prohibiting false and misleading advertising); CAL. CIV. CODE § 1770 (West 2017) (listing a number of deceptive acts that are deemed to be unlawful, including, but not limited to, advertising goods or services with the intent not to sell them as advertised and knowingly making untrue or misleading statements in advertisements). See generally *Checklist of Significant California and Federal Consumer Laws*, CAL. DEP’T OF CONSUMER AFFAIRS (July 2012), http://www.dca.ca.gov/publications/legal_guides/m-1.shtml.

²¹⁶ *Division of Advertising Practices*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc/bureaus-offices/bureau-consumer-protection/our-divisions/division-advertising-practices> (describing the Federal Trade Commission, Division of Advertising Practices); *About the Office of the Attorney General*, CAL. DEP’T OF JUSTICE, OFFICE OF THE ATTORNEY GENERAL, <https://oag.ca.gov/office>; CAL. BUS. & PROF. CODE § 17200 (West 2017) (authorizing public prosecution and private actions for false advertising).

²¹⁷ 15 U.S.C. § 1114.

²¹⁸ U.S. CONST. VI, cl. 2.

²¹⁹ Alison Malsbury, *Pot Parody: Not So Funny After All*, CANNA LAW BLOG (Apr. 23, 2015), <http://www.cannalawblog.com/pot-parody-not-so-funny-after-all/> (names included “Mr. Dankbar,” “Reefer’s Peanut Butter Cups,” “Hasheath,” and “Ganja Joy”).

²²⁰ Rebecca Tushnet, *It Depends on What the Meaning of “False” Is: Falsity and Misleadingness in Commercial Speech Doctrine*, 41 LOY. L.A. L. REV. 227, 227–28 (2007).

²²¹ POM Wonderful, LLC v. FTC, 777 F.3d 478, 492, 499–500 (D.C. Cir. 2015) (Federal Trade Commission’s finding that a truthful advertisement nonetheless implies a misleading message to a minority of consumers, and therefore receives no First Amendment protection, is subject to substantial-evidence rather than de novo review).

applies.²²² When addressing newly-legalized marijuana, regulators should consider the background environment of false or deceptive advertisement restrictions and remedies and consider the need and justification for marijuana-specific false or deceptive advertising restrictions. If they seek to restrict marijuana marketing practices particularly, on this ground, regulators should collect evidence to support their decision that particular claims or practices are false or deceptive.²²³

ii. Substantial Government Interest

Central Hudson's prong two asks only whether the government has a substantial or important reason to take some type of action, leaving the questions related to the means of restricting constitutionally protected speech to prongs three and four. Because the focus of prong two is exclusively on the importance of the government's purpose in the instance of marijuana advertising regulations, this prong will not be difficult for regulators to meet. Marijuana remains illegal federally and in the majority of states for a reason. Marijuana use creates adverse public health effects, and states and localities that have legalized marijuana maintain an interest in reducing those adverse effects, which courts will deem to be substantial.²²⁴ Regulators may also have legitimate and substantial interests that are market-based, such as providing full information to consumers about the qualities of marijuana products or promoting competition and consumer choice by preventing a few major marijuana distributors from dominating the retail market.²²⁵ Governments may have other substantial objectives for regulating the many aspects of marijuana production and sale, including advertising.

Reducing demand for a lawful product for the purpose of promoting public health is a substantial government purpose. Nevertheless,

²²² *Mass. Ass'n of Private Career Schs. v. Healey*, 159 F. Supp. 3d 173, 203 (D. Mass. 2016).

²²³ *Five Tricky Ad Trends to Watch in 2015*, TRUTH IN ADVERT. (Jan. 5, 2015), <https://www.truthinadvertising.org/five-tricky-ad-trends-watch-2015> (Washington advertising rules prohibit advertisements from representing that "the use of marijuana has curative or therapeutic effects"); Sean O'Connor & Sam Mendez, WASH. UNIVERSITY SCHOOL OF LAW, CONCERNING CANNABIS-INFUSED EDIBLES: FACTORS THAT ATTRACT CHILDREN TO FOODS (June 28, 2016), <http://lcb.wa.gov/publications/Marijuana/Concerning-MJ-Infused-Edibles-Factors-That-Attract-Children.pdf> (reporting findings on product qualities and marketing techniques that impact children's choices).

²²⁴ *Marijuana and Public Health*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Jan. 26, 2017), <https://www.cdc.gov/marijuana/health-effects.htm>.

²²⁵ See *Granholm v. Heald*, 544 U.S. 460, 466 (2005) (maintaining a "three-tier distribution scheme" [for alcohol] is a legitimate governmental interest); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 715 (1984) (noting that "exercising control over . . . how to structure the liquor distribution system" is a legitimate government purpose); *Retail Digital Network, LLC v. Appelsmith*, 810 F.3d 638, 652 (9th Cir. 2016) ("[T]he State's goal of suppressing a particular commercial structure, rather than a particular commercial message, remains valid.").

reducing demand by means of restricting protected commercial speech is fraught with constitutional danger. Although prongs three and four address the means of restricting speech, and are the point at which advertising restrictions aimed at reducing demand will fail, regulators must be aware of the limits of restricting advertising to reduce demand before they choose to do so. The Court has emphasized repeatedly that regulators may not suppress advertising of a product to an audience that may lawfully acquire it because the protected speech is “too persuasive.”²²⁶ Regulators may not rest their decisions to restrict truthful advertising “on the offensive assumption that the public will respond ‘irrationally’ to the truth”²²⁷ or “keep people in the dark for what the government perceives to be their own good.”²²⁸ Government regulators may not “prevent[] the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with the information”²²⁹ even when the demand-increasing effect of advertisement²³⁰ and the public health dangers of overuse or misuse of the product are acknowledged and indisputable.²³¹ Such an approach is “highly paternalistic”²³² and will not survive review under *Central Hudson* prongs three or four, or both.

To avoid these problems, regulators must identify whether one of their purposes for restricting marijuana advertising is to reduce demand and, if so, frame it in a way that can pass *Central Hudson* review or abandon it as a viable justification for restricting speech. Restricting advertising to prevent adults from being persuaded to make lawful marijuana purchases because overuse or misuse of the product generally leads to adverse public health consequences will not pass *Central Hudson* review. Attempts to narrow the purpose to promoting “responsible drug use” or “temperance” are unlikely to be successful because, even if courts accept the purpose as substantial, regulators will have difficulty meeting prongs three and four.²³³

²²⁶ Sorrell v. IMS Health Inc., 564 U.S. 552, 577–78 (2011).

²²⁷ 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 503 (1996) (quoting Linmark Assocs., Inc. v. Twp. of Willingboro, 431 U.S. 85, 96 (1977)).

²²⁸ 44 Liquormart, Inc., 517 U.S. at 503.

²²⁹ Thompson v. W. States Med. Ctr., 535 U.S. 357, 374 (2002).

²³⁰ Henry Saffer, *Alcohol Advertising and Youth*, 14 J. STUDIES ON ALCOHOL 173 (2002) (twenty-country study concludes that alcohol advertising bans reduce consumption); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 557–58 (2001) (accepting the commonsense linkage between advertising and increased underage demand for cigarettes).

²³¹ Rubin v. Coors Brewing Co., 514 U.S. 476, 485 (1995) (beer); 44 Liquormart, Inc., 517 U.S. at 510 (alcohol); Lorillard Tobacco Co., 533 U.S. at 570 (tobacco).

²³² Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976).

²³³ Retail Digital Network, LLC v. Prieto, 861 F.3d 839, 849 n.12 (9th Cir. 2017) (en banc) (assuming that promoting temperance is a substantial interest but finding the means of prohibiting advertising did not directly advance it); Mo. Broad. Ass’n v. Lacy, 846 F.3d 295, 301–02 (8th Cir. 2017) (finding that “the common sense link

As noted above, states have much more leeway to restrict advertising to prevent consumers from being persuaded to enter illegal marijuana transactions. The ability of regulators to restrict advertising to reduce demand thus hinges on the extent to which they have carved out a realm of marijuana purchases that remain unlawful. States may restrict advertising of product varieties and pricing practices that they have made illegal.²³⁴ When states prohibit certain identifiable features or pricing practices, they can tailor restrictions to prevent only transactions that are illegal and thereby avoid the other steps in the *Central Hudson* analysis.

States may also restrict advertising to consumers who may not legally purchase the product. With respect to marijuana, the most obvious and likely limit that states may and should impose is an age requirement for purchase and use.²³⁵ Reducing underage use of products with minimum-age purchase requirements is a significant government purpose.²³⁶ States may restrict advertising for the purpose of preventing an underage audience that may not legally purchase the product from being persuaded to do so and may restrict marketing practices with expressive elements, such as display and placement, to limit underage access to the product itself.²³⁷ Crafting regulations to serve the purpose of reducing demand by one segment of an audience when other segments retain a constitutional right to receive the information is more difficult than creating a regulation that prohibits advertising a product with qualities that cannot be sold to anyone, because the regulation that impacts a mixed audience must pass *Central Hudson* review.²³⁸

iii. Means Directly Advance the Purpose

The second prong of the *Central Hudson* test identifies the government's purposes for restricting speech that a court will accept as substantial. Through the prong three and four inquiries, the government must show that its choice of means—restricting protected speech—is

between advertising promotions and increasing demand for alcohol does not demonstrate the challenged restrictions directly advance the interest in promoting responsible drinking” because “[a] theoretical increase in demand for alcohol based on a lower price does not necessarily mean any consumption of that alcohol is irresponsible” and, as to the specific regulations, finding “[t]he multiple inconsistencies within the regulations poke obvious holes in any potential advancement of the interest in promoting responsible drinking, to the point the regulations do not advance the interest at all”).

²³⁴ See, e.g., OR. REV. STAT. § 475B.025(2)(f) (2017).

²³⁵ See, e.g., *id.* at § 475B.260(1)(a).

²³⁶ *Lorillard Tobacco Co.*, 533 U. S. at 570.

²³⁷ *Id.* at 571 (“To the extent that federal law and the First Amendment do not prohibit state action, States and localities remain free to combat the problem of underage tobacco use by appropriate means.”).

²³⁸ *Mo. Broad. Ass’n v. Lacy*, 846 F.3d 295, 300–01 n.6 (8th Cir. 2017) (accepting state’s purpose to promote “responsible” drinking as substantial but finding that the regulations were not tailored to reduce excessive drinking specifically).

appropriate and necessary to achieve its substantial purposes.²³⁹ Where the government asserts more than one purpose for regulating, a court will assess the end/means fit with respect to each purpose separately.²⁴⁰ As noted above, the strongest and most certainly substantial basis for a state to restrict advertising is the purpose of preventing underage marijuana use. The Court has evaluated tobacco advertising restrictions imposed for this purpose under the *Central Hudson* test, and its application of prongs three and four, as well as the applications by lower courts reviewing alcohol and tobacco advertising restriction aimed at preventing underage use, provide important guidance for marijuana advertising regulators.²⁴¹ This Section will discuss analysis of regulations aimed at reducing underage use as an example that regulators can apply more generally when crafting regulations to “directly advance” other substantial purposes.

Prong three requires that an advertising restriction “directly advance” the government’s substantial purpose.²⁴² This prong requires proof of two things: first, that “the harms [the government] recites are real” and second, “that its restriction will in fact alleviate them to a material degree.”²⁴³ The first showing follows from the government’s substantial purpose established in prong two. So, when a government asserts a purpose to prevent underage marijuana use, prong three requires that it show with evidence, rather than “speculation and conjecture,” that the danger that minors will use marijuana exists.²⁴⁴ Note that the prong three showing is not that the product is dangerous for minors,²⁴⁵ but rather that minors will use marijuana even though it is unlawful for them. Regulators will have little difficulty making this showing.²⁴⁶

²³⁹ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 564 (1980).

²⁴⁰ *Id.*

²⁴¹ *See, e.g., Nat’l Ass’n of Tobacco Outlets, Inc. v. City of New York*, 27 F. Supp. 3d 415 (S.D.N.Y. 2014).

²⁴² *Cent. Hudson Gas & Elec. Corp.*, 477 U.S. at 564.

²⁴³ *Greater New Orleans Broad. Ass’n, Inc. v. United States*, 527 U.S. 197, 198 (1999) (quoting *Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993)).

²⁴⁴ *Id.*

²⁴⁵ States need not present evidence to show this because they have the power to make use of the product by minors illegal subject only to minimum rational basis scrutiny. *Nat’l Ass’n of Tobacco Outlets*, 27 F. Supp. 3d at 423 (“[T]he Supreme Court has made clear that the government may ban commercial speech related to illegal activity.” (citation omitted)).

²⁴⁶ *Monitoring the Future Survey: High School and Youth Trends*, NAT’L INST. OF HEALTH (2016), <https://www.drugabuse.gov/publications/drugfacts/monitoring-future-survey-high-school-youth-trends> (presenting statistics on teen drug use and concluding that use is higher among 12th graders in states that have legalized marijuana); ROCKY MOUNTAIN HIGH INTENSITY DRUG TRAFFICKING AREA, *The Legalization of Marijuana in Colorado, The Impact* 37 (2015), <http://www.rmhidta.org/html/2015%20PREVIEW>

The second part of the prong three showing is that the means chosen by the state—restricting speech—will be effective in reducing the harm that it has shown to exist.²⁴⁷ This causation showing can be challenging for regulators to present effectively. It generally should not be difficult to show that advertising increases demand for products, including marijuana.²⁴⁸ Although the prong is stated as forward-looking, in fact governments seeking to regulate a newly legal product like marijuana can only present evidence from the past and from analogous products to show this cause-and-effect relationship between advertising and youth demand. The Court has acknowledged generally “the theory that product advertising stimulates demand for products, while suppressed advertising may have the opposite effect.”²⁴⁹ Studies exist relating to alcohol,²⁵⁰ tobacco,²⁵¹ and e-cigarettes²⁵² linking advertising to increased use by teens,²⁵³ and since the legalization of marijuana for medical use in some states, such studies linking advertising of marijuana to increased use by teens exist as well.²⁵⁴

The more difficult part of the “direct advancement” showing is that the particular restrictions are targeted to reduce the particular problem of underage use²⁵⁵ which justifies them, and that the entire scheme of

[%20Legalization%20of%20MJ%20in%20Colorado%20the%20Impact.pdf](#).

²⁴⁷ *Greater New Orleans Broad. Ass’n*, 527 U.S. at 188.

²⁴⁸ Regulators have had difficulty showing that warnings reduce demand. *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1220 (D.C. Cir. 2012) (government failed to show “direct advance[ment]” when their own study showed that warnings only reduced demand by “a mere 0.088%”).

²⁴⁹ *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 557 (2001); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995); *United States v. Edge Broad. Co.*, 509 U.S. 418, 434 (1993); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 568–69 (1980).

²⁵⁰ Saffer, *supra* note 230, at 173.

²⁵¹ Lois Biener & Michael Siegel, *Tobacco Marketing and Adolescent Smoking: More Support for a Causal Inference*, 90 AM. J. PUB. HEALTH 407 (2000).

²⁵² Matt Wotus, *Advertisements Seem to Be Driving the Demand for E-Cigarettes Among Teenagers*, GENERATION PROGRESS (Mar. 22, 2016), <http://genprogress.org/voices/2016/03/22/42762/advertisements-seem-to-be-driving-the-demand-for-e-cigarettes-among-teenagers/>.

²⁵³ Victor C. Strasburger, *Policy Statement—Children, Adolescence, Substance Abuse, and the Media*, 126 PEDIATRICS 791, 792 (2010) (“The power of advertising to influence children and adolescents (and adults, for that matter) is incontrovertible. Advertising works; otherwise, companies would not spend billions of dollars on it. Many ads use celebrity endorsers, humor, rock music, or attractive young models, all of which have been shown to be effective with children and adolescents. Advertising makes smoking and drinking seem like normative activities and may function as a ‘superpeer’ in subtly pressuring teenagers to experiment. Research has revealed that advertising may be responsible for up to 30% of adolescent tobacco and alcohol use.”).

²⁵⁴ Elizabeth J. D’Amico, *Adolescents Who View Medical Marijuana Advertising Are More Likely to Use the Drug*, RAND CORP. (July 6, 2015), <http://www.rand.org/news/press/2015/07/06.html>.

²⁵⁵ *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 561 (2001) (state had demonstrated direct advancement by “preventing targeted campaigns and limiting

advertising restrictions is consistent with purpose.²⁵⁶ Regulators must present evidence or be able to support by common sense that the advertisements they restrict are likely to be seen by minors. Advertisers are highly sensitive to the content of their audience, so data about the likely percentages of underage viewers likely will exist. Nevertheless, regulators should anticipate challenges and support every restriction by demonstrating the link to youth viewing on its face or with background evidence.

Regulators must also be certain that their scheme of regulations consistently seeks to minimize the harm of youth marijuana use. That is, they should be prepared to address the questions of “under-inclusion” familiar from the constitutional ends/means tailoring tests more rigorous than rational basis scrutiny.²⁵⁷ With respect to marijuana advertising restrictions, the scheme should show that the government is restricting types of advertisements that present the same type of harm in the same way.²⁵⁸ The Court has applied this requirement strictly, rejecting a law that required retail tobacco advertisements to be posted higher than five feet, reasoning that children below that height could look up and view the signs.²⁵⁹

iv. Means No Greater Than Necessary to Advance Purpose (Tailoring)

The fourth prong of the *Central Hudson* test requires a showing that meets the second, “over-inclusion” side of the familiar inquiry into whether the chosen means—restricting protected speech—is sufficiently tailored to achieve the government’s purpose.²⁶⁰ While in prong three, regulators show that restricting advertisements is necessary to achieve their purpose, this prong requires them to show that they are not

youth exposure to advertising”); *Mo. Broad. Ass’n v. Lacy*, 846 F.3d 295, 301 (8th Cir. 2017) (“[T]he common sense link between advertising promotions and increasing demand for alcohol does not demonstrate the challenged restrictions directly advance the interest in promoting responsible drinking. A theoretical increase in demand for alcohol based on a lower price does not necessarily mean any consumption of that alcohol is irresponsible.”).

²⁵⁶ *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 88–89 (1995) (finding entire scheme of advertising regulations to undercut state’s interest in reducing demand).

²⁵⁷ *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955) (under minimal economic regulation review regulators can take “one step at a time” rather than address all sources of the same harm in the same way).

²⁵⁸ *Rubin*, 514 U.S. at 488–89 (finding that a state law that prohibited beer labels from displaying alcohol content did not directly advance the purpose of preventing “strength wars” because it did not prohibit such information in beer advertising, or on labels of higher-content types of alcohol); see also *Mo. Broad. Ass’n*, 846 F.3d at 301 (“The multiple inconsistencies within the regulations poke obvious holes in any potential advancement of the interest in promoting responsible drinking, to the point the regulations do not advance the interest at all.”).

²⁵⁹ *Lorillard Tobacco Co.*, 533 U.S. at 566.

²⁶⁰ *Greater New Orleans Broad. Ass’n, Inc. v. United States*, 527 U.S. 197, 188 (1999).

restricting a significant amount of speech that they do not need to restrict to achieve their end.²⁶¹ This prong also requires regulators to demonstrate that they are using the least restrictive means of restricting speech rather than some alternate regulatory device.²⁶² Again, the example of regulations aimed at restricting underage use of marijuana is helpful to understand the difficulties in tailoring regulations more generally.

In *Lorillard Tobacco Co. v. Reilly*, the Court found that a number of advertising restrictions within 1,000 feet of locations that children and teens frequent such as schools, parks and playgrounds failed the prong four inquiry.²⁶³ The Court found the 1,000-foot rule to be too blunt in a number of respects. With respect to distance, it faulted the State for failing to demonstrate how much speech would be restricted in major metropolitan areas and how the rule would apply outside cities.²⁶⁴ With respect to the restricted media, the Court determined that the State should have tailored the restrictions more carefully to target “particular advertising and promotion practices that appeal to youth” and “highly visible billboards, as opposed to smaller signs.”²⁶⁵ It also found the five-foot sign rule to be too broad, noting that the rule could have been more narrowly tailored to restrict only advertisements visible at the range that particularly “entice children.”²⁶⁶

The requirement that regulators show that they chose the least speech-restrictive policy can be very hard to meet. Although the Court has said that this requirement is not as severe as the “no alternate means” showing in strict scrutiny, it has frequently listed alternatives that are more difficult or costly for regulators.²⁶⁷ Regulators must carefully consider the availability and relative efficacy of regulatory alternatives that are less speech-restrictive than advertising restrictions, and document their lesser efficacy or the prohibitive cost of implementing them to support their prong four showing. If evidence specific to marijuana does not yet exist, regulators should collect evidence that relates to other health-hazard products to support their logical inferences with respect to marijuana.

²⁶¹ *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 371 (2002) (“[I]f the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so.”).

²⁶² *Id.* at 373 (“If the First Amendment means anything, it means that regulating speech must be a last—not first—resort.”).

²⁶³ *Lorillard Tobacco Co.*, 533 U.S. at 566.

²⁶⁴ *Id.* at 562–63.

²⁶⁵ *Id.* at 563.

²⁶⁶ *Id.* at 566.

²⁶⁷ *See* 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996) (listing the alternatives of taxes, direct product regulations and spending tax money to engage in educational campaigns to reduce excess consumption).

2. *Expressive Sales Practices*

Most sales practices involve conduct that is not necessarily attached to an advertising communication and so states may regulate these practices without passing any type of free speech scrutiny.²⁶⁸ The subset of sales practices that form a part of an advertising communication must pass some type of free speech scrutiny.²⁶⁹ These practices contribute to the persuasive effect of the communication and include the many devices that advertisers use to catch the attention of consumers, such as size, colors, lights, graphics, pop-ups and danglers, location within a city, location within a store or on a shelf, and whether access to the product is open or unobstructed.²⁷⁰

The level of review of these types of practices depends upon the government's reason for restricting them, specifically its theory of how the sales practice undermines the public purpose that justifies the regulation. If the government restricts the sales practice because its message influences consumer behavior, which in turn undermines the public purpose, then *Central Hudson* analysis applies.²⁷¹ If the government restricts the sales practice because some aspect of it other than the message influences behavior, which undermines the public purpose, then the lower level expressive conduct test articulated in *United States v. O'Brien*²⁷² applies. In either of these instances, the government's ultimate purpose for regulating the sales practice may be the same. It is the government's theory of the linkage between the sales practice and the public harm that determines the level of scrutiny.

The example of point-of-sale regulations illustrates the distinction. Regulators may impose a number of restrictions on sales practices within retail stores for the purpose of reducing underage marijuana use. One strategy is to require that marijuana products be sold behind the counter or behind locked cabinets, rather than in open shelves or bins accessible to consumers. This rule impacts a sales practice that is part of the persuasive force of the advertising communication, but because the government's reason for regulating the practice is to prevent underage access to the product rather than underage persuasion by the message, the *O'Brien* expressive conduct analysis would apply.²⁷³ By contrast, if a state were to prohibit "power walls" of marijuana displays behind the counter, such as frequently exist for tobacco and alcohol,²⁷⁴ it could not

²⁶⁸ Cain, *supra* note 184, at 231.

²⁶⁹ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 (1980).

²⁷⁰ Lange et al., *supra* note 155, at 880.

²⁷¹ *Cent. Hudson Gas & Elec. Corp.*, 477 U.S. at 564.

²⁷² *United States v. O'Brien*, 391 U.S. 367 (1968).

²⁷³ *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 567 (2001) (applying *O'Brien* scrutiny to a ban on self-service cigarette displays, but noting that an accessible display that contained empty packages could fulfill the seller's speech interests).

²⁷⁴ Lange et al., *supra* note 155, at 889–90 ("Many stores feature 'power walls' of tobacco products, which are large and highly visible shelving units featuring

claim that its reason for restricting the practice was to limit physical access. Instead, its theory of the linkage between the practice and underage behavior would have to be that the message sent by the overwhelming displays persuades minors to use a product that is unhealthy for them. Thus, the power wall regulation would need to survive “heightened” *Central Hudson* scrutiny.

The sales practice distinctions are not obvious, but because the levels of scrutiny vary significantly, it is crucial for regulators to master and apply them prior to crafting regulations. Not only must a regulator identify the ultimate public purpose for restricting an expressive sales practice, but it must also identify carefully the behavior it wants to avoid in order to fulfill its purpose and how the restricted sales practice provokes it. No matter which type of scrutiny applies, a court will analyze the fit between the purpose and the means of restricting a sales practice that is a part of speech. Consequently, regulators should always take care to support their decisions to regulate expressive sales practice with evidence of the harms they provoke, and tailor the restrictions so a court can understand, by looking at the scope of the regulation, how the restriction reduces behaviors provoked by the practice that lead to public harms.

3. *Disclosures and Warnings*

Governments at all levels mandate that sellers disclose certain information to consumers.²⁷⁵ In *Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio*,²⁷⁶ decided soon after *Central Hudson*, the Court rejected the argument that “precisely the same inquiry as determining the validity of the restrictions on advertising content” should apply to determine the constitutionality of disclosure requirements²⁷⁷ because “material

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.”)

²⁷⁵ Entities imposing disclosure requirements include Congress, see, for example, Nutrition Labeling and Education Act of 1990, 21 U.S.C. § 343 (2012); federal agencies, see, for example, 21 C.F.R. §§ 101.1–101.95 (2016) (Food and Drug Administration regulations imposing Food for Human Consumption Labeling Standards); 27 C.F.R. §§ 4.1–4.5 (2016) (Department of the Treasury, Alcohol and Tobacco Tax and Trade Bureau, imposing labeling requirements for wine); 16 C.F.R. §§ 1201.1–1420.1 (2016) (Consumer Product Safety Commission product labeling standards); state legislatures, see, for example, CTR. FOR SCI. IN THE PUB. INTEREST, SHREDDING THE FOOD SAFETY NET i–xvii (2006), <http://www.cspinet.org/new/pdf/shredding.pdf> (reviewing state food safety and labeling laws that proposed action in Congress would preempt); state agencies, see, for example, CAL. FOOD & AGRIC. CODE ANN. § 32912–21 (West 2001) (milk product labeling); CAL. BUS. & PROF. CODE ANN. § 19080–93 (West 2008) (home furnishings labeling); and city councils and agencies, see, for example, S.F., CAL., HEALTH CODE art. 8, § 468.3 (2010) (menu labeling at chain restaurants).

²⁷⁶ *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985).

²⁷⁷ *Id.* at 650.

differences [exist] between disclosure requirements and outright prohibitions on speech.”²⁷⁸ The Court reasoned that “[b]ecause the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, . . . [a seller’s] constitutionally protected interest in not providing any particular factual information in his advertising is minimal” and that “because disclosure requirements trench much more narrowly on an advertiser’s interests than do flat prohibitions on speech, “warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception.”²⁷⁹ While it noted that “unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech,”²⁸⁰ it held that “an advertiser’s rights are adequately protected as long as disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers.”²⁸¹

As noted above, the Court has tightened review of speech restrictions in the decades since its decisions in *Central Hudson* and *Zauderer*.²⁸² Corporate speakers have challenged government-imposed disclosure requirements over and over again, arguing that commercial speech disclosure requirements should be reviewed under the same, rising standard as commercial speech restraints.²⁸³ Fairly recently, the Court confirmed that the *Zauderer* lower level review applies at least when the government imposes a disclosure requirement to prevent consumers from being confused or deceived.²⁸⁴ Some lower courts interpret

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 651.

²⁸⁰ *Dwyer v. Cappell*, 762 F.3d 275, 282–83 (3d Cir. 2014) (a disclosure is unduly burdensome when it is “so lengthy that it ‘effectively rules out’ advertising by the desired means”).

²⁸¹ *Id.* at 282.

²⁸² *See Nat’l Ass’n of Mfrs. v. SEC*, 800 F.3d 518, 524 (D.C. Cir. 2015) (noting “the flux and uncertainty of the First Amendment doctrine of commercial speech”).

²⁸³ The Washington Legal Foundation litigates on behalf of corporate speech rights. As to its interpretations of compelled commercial speech doctrine, see, for example, Sarah Roller & Donnelly McDowell, *Biotech Food Labeling Proposal Raises First Amendment Concerns*, Wash. Legal Found., Legal Opinion Letter 1 (Oct. 19, 2012), http://www.wlf.org/upload/legalstudies/legalopinionletter/10-19-12RollerMcDowell_LegalOpinionLetter.pdf; Sarah Roller & Donnelly McDowell, “FOP” *Food Labeling: The Energy Star® Model Raises First Amendment Concerns*, Wash. Legal Foundation, Working Paper 2, 9 (March 2012), <http://www.wlf.org/upload/legalstudies/workingpaper/RollerMcDowellWPFINAL.pdf>; Charles M. English, *Compelled Speech and The First Amendment: Neutral Fact or Government Opinion?*, Wash. Legal Found., Legal Analysis 1–3 (Jan. 13, 2012), http://www.wlf.org/upload/legalstudies/legalbackgrounder/1-13-12English_LegalBackgrounder.pdf.

²⁸⁴ *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010) (“[The] required disclosures are intended to combat the problem of inherently misleading commercial advertisements—specifically, the promise of debt relief without any reference to the possibility of filing for bankruptcy, which has inherent costs.”).

Zauderer's rational basis review to be limited to instances where governments act for the purpose of preventing consumer deception.²⁸⁵ A greater number of courts interpret *Zauderer's* rational basis review to apply when governments require sellers to disclose information to promote other purposes, including promoting public health.²⁸⁶

Another point of disagreement among the lower courts is whether the *Zauderer* Court's description of the mandate before it as requiring disclosure of only "purely factual and uncontroversial information" about the terms of service offered is a prerequisite to apply *Zauderer* rational basis review or merely an observation that supported the constitutionality of the disclosure requirement at issue in that case.²⁸⁷ Although most courts apply this requirement in some form, courts and judges do not agree on what the standard means.²⁸⁸ Some courts have distinguished

²⁸⁵ *Nat'l Ass'n of Mfrs.*, 800 F.3d at 524 (noting "the flux and uncertainty of the First Amendment doctrine of commercial speech, and the conflict in the circuits regarding the reach of *Zauderer*"); *Mass. Ass'n Private Career Schs. v. Healy*, 159 F. Supp. 3d 173, 197 (D. Mass. 2016) ("*Zauderer* reasonable-basis review is applicable . . . if . . . the speech is potentially misleading.>").

²⁸⁶ *Am. Meat Inst. v. USDA*, 760 F.3d 18, 20 (D.C. Cir. 2014) (*Zauderer* extends beyond disclosures imposed to correct what would otherwise be a misleading advertisement); *Am. Beverage Ass'n v. City & Cty. of San Francisco*, 187 F. Supp. 3d 1123, 1134 (N.D. Cal. 2016) (rejecting the argument that "*Zauderer* is not applicable because *Zauderer* governs only where the governmental interest is the prevention of consumer deception" and finding that "*Zauderer* applies where the government asserts an interest in, e.g., public health and safety"); *CTIA-The Wireless Ass'n v. City of Berkeley*, 139 F. Supp. 3d 1048, 1064–65 (N. D. Cal. 2015) (noting that several circuit courts have rejected that same argument); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001) (applying *Zauderer* to uphold a state statute requiring products to bear labels indicating that they contain mercury and must be disposed of safely); *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 556 (6th Cir. 2012); *N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health*, 556 F.3d 114, 133 n.21 (2d Cir. 2009); *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 310 n.8 (1st Cir. 2005); see also Robert Post, *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Association in United Foods, Zauderer, and Abood*, 40 VAL. U. L. REV. 555, 584 (2006) ("[C]ommercial speech is routinely and pervasively compelled for reasons that have little to do with the prevention of deception."); Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of 44 Liquormart*, 1996 SUP. CT. REV. 123, 125–27 (1996).

²⁸⁷ *Nat'l Ass'n of Mfrs.*, 800 F.3d at 527 (finding the counterargument "persuasive," but seeing "no way to read [circuit precedent] except as holding that . . . *Zauderer* requires the disclosure to be of purely factual and uncontroversial information about the good or service being offered."); *Disc. Tobacco City & Lottery, Inc.*, 674 F.3d at 559 n.8 ("Plaintiffs' argument that *Zauderer* applies to only 'purely factual and noncontroversial' disclosures is unpersuasive."); *Am. Beverage Ass'n*, 187 F. Supp. 3d at 1135 ("Arguably, the Court's reference to 'factual and uncontroversial' was simply a description of what the state's compelled disclosure was; it is not clear whether the Court necessarily held that a compelled disclosure must be factual and uncontroversial before rational review can be applied."); *CTIA*, 139 F. Supp. 3d at 1068 (finding the "factual and uncontroversial" requirement does not apply when the disclosure is clearly identified as mandated by the government).

²⁸⁸ Note, *Repackaging Zauderer*, 130 HARV. L. REV. 972, 984 (2017) ("No consistent understanding of what either 'factual' or 'controversial' means for the purposes of

“factual and uncontroversial”²⁸⁹ disclosures that qualify for *Zauderer* review from compelled disclosures of judgments that they have characterized as “subjective”²⁹⁰ or “ideological.”²⁹¹ Judges on a District of Columbia Circuit Court panel differed as to how to characterize a requirement that companies confirm that their product is not associated with “conflict minerals” mined in the Democratic Republic of Congo and, if they cannot do so, report to the Securities and Exchange Commission and state it on their website that they are not “DRC-conflict-free.”²⁹² Courts have also disagreed as to how to characterize graphic warning labels for cigarette packages mandated by the FDA pursuant to the Tobacco Control Act. The District of Columbia Circuit panel found the “inflammatory images” and other features to be “unabashed attempts to evoke emotion (and perhaps embarrassment)” which, while not “patently false, . . . certainly do not impart purely factual, accurate, or uncontroversial information to consumers.”²⁹³ A Sixth Circuit panel found that the mandated text and graphics met the “factual and uncontroversial” requirement because cigarette use is inherently dangerous, and so tobacco disclosures may “appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive.”²⁹⁴

In sum, government-mandated information disclosure requirements are commonplace, and generally subject to low level review. Marijuana regulators should feel confident requiring sellers to disclose the qualities of their product, proper dosage and use techniques, and adverse impacts on particular consumers; for example, pregnant women or persons driving cars or operating machinery, on the packaging or in advertising.

evaluating compelled commercial disclosures has emerged among commentators or circuit courts that have attempted to flesh out this prong of *Zauderer*’s test.”).

²⁸⁹ *Id.* at 973–74.

²⁹⁰ *Entm’t Software Ass’n v. Blagojevich*, 469 F.3d 651, 652 (7th Cir. 2006) (finding *Zauderer*’s deferential review did not apply because the “18” sticker required for video games, which designated sexually explicit speech went beyond “purely factual disclosures” and communicated “a subjective and highly controversial message”).

²⁹¹ *Nat’l Ass’n of Mfrs.*, 800 F.3d at 530.

²⁹² *Compare id.* (“The label ‘[not] conflict free’ is a metaphor that conveys moral responsibility for the Congo war. It requires an issuer to tell consumers that its products are ethically tainted, even if they only indirectly finance armed groups. An issuer, including an issuer who condemns the atrocities of the Congo war in the strongest terms, may disagree with that assessment of its moral responsibility. . . . By compelling an issuer to confess blood on its hands, the statute interferes with that exercise of the freedom of speech under the First Amendment.”), *with id.* at 532 (Srinivasan, J. dissenting) (“the descriptive phrase ‘not been found to be “DRC conflict free”’ communicates truthful, factual information about a product to investors and consumers”).

²⁹³ *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1217 (D.C. Cir. 2012).

²⁹⁴ *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 527 (6th Cir. 2012) (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 n.24 (1976)).

Regulators should be aware, however, that as they stray into persuasive messaging through warnings or imagery, judicial standards of review become uncertain and the likelihood of a court challenge increases.

4. *Government Speech and Targeted Taxes*

A potent option in the public health regulatory scheme is speech that is issued by the government, explaining the health dangers of products and countering sellers' persuasive advertising. The mandated disclosure analysis, set out above, applies to speech identified by the government but required to be broadcast from the vendors' products or property.²⁹⁵ Although it may be obvious to viewers that the government crafted the communication, the fact that private sellers must publish it invokes some level of Free Speech Clause scrutiny. By contrast, the First Amendment rules that limit the government's choices when it regulates private speakers do not apply when the government speaks for itself.²⁹⁶ As the Court explains, governments must speak to function, and often, to fulfill their functions, must speak selectively, meaning they must choose and advocate points of view.²⁹⁷ Government officials and entities in all branches and at all levels may and do speak persuasively on controversial issues.²⁹⁸ They need not prove that what they say is true,²⁹⁹ or even ensure that messages generated by different departments of the same government are consistent.³⁰⁰ All of this is good news for the government public health mission, which depends for success upon broad authority to present information selectively and persuasively to alter attitudes and behavior about controversial issues.

Government-run counter-speech campaigns aimed at reducing youth smoking have been highly successful.³⁰¹ States and the federal

²⁹⁵ *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 626 (1985).

²⁹⁶ *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009) (“[G]overnment speech is not restricted by the Free Speech Clause.”).

²⁹⁷ *Id.* at 468 (“[I]t is not easy to imagine how government could function if it lacked this freedom [to select the views that it wants to express].”).

²⁹⁸ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877–78 (1992) (governments may persuade women not to choose abortion); Sharon Jayson, *Federally Funded Ad Campaign Holds Up Value of Marriage*, USA TODAY (Feb. 17, 2009), http://usatoday30.usatoday.com/news/health/2009-02-17-marriage-campaign_N.htm.

²⁹⁹ David Leonhardt et al., *Trump's Lies vs. Obama's*, N.Y. TIMES (Dec. 14, 2017), https://www.nytimes.com/interactive/2017/12/14/opinion/sunday/trump-lies-obama-who-is-worse.html?_r=0 (finding that both presidents made “demonstrably and substantially false statements”).

³⁰⁰ *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 578 n.7 (2005) (Souter, J., dissenting) (noting that different federal agencies advocate different positions on the value of beef consumption).

³⁰¹ Derigan Silver & Kelly Fenson-Hood, *More Speech, Not Enforced Silence: Tobacco Advertising Regulations, Counter-Marketing Campaigns and the Government's Interest in Protecting Children's Health*, 1 BERKELEY J. ENTMT & SPORTS L. 1, 16 (2012) (comparing counter-marketing campaigns and concluding that government-run campaigns achieve public health objectives whereas industry-run campaigns do not); Pamela M.

government have run such campaigns, and studies demonstrate their effectiveness.³⁰² Government entities often include counter-speech as one element in a multi-pronged strategy to achieve public health objectives. Communicating effectively, however, requires money. Government agencies charged with pursuing public health and safety goals are chronically underfunded, and must divide what resources they have among many competing objectives.³⁰³ With alcohol and cigarettes, the funds that public health agencies can acquire to spend on speech is only a very small percentage of the funds devoted by the industries to advertising. The same will undoubtedly be true for marijuana.

A variant on counter-speech that addresses the funding dilemma is to tax the product or activity and use the proceeds for persuasive government speech. The combination of the targeted tax and government speech achieves a double effect benefiting public health, reducing demand both through price sensitivity and by means of government advocacy against the product or activity. California's Tobacco Control Program is the Cadillac example of an effective targeted tax/government speech combination. With funds generated by a wholesale cigarette package surtax, the state's Department of Health Services commissioned and promulgated a continuing stream of advertisements designed both to educate the public about the health risks of smoking, and to change consumer attitudes and behavior by "denormalizing" tobacco use.³⁰⁴ The "denormalization" campaign aggressively attempted to attach a stigma not only to cigarettes, but to the companies and individuals who market them.³⁰⁵ Numerous government advertisements explicitly referenced and countered cigarette manufacturers' marketing, labeling it dangerous, deceptive and greed-driven.³⁰⁶ That the government advertising campaign had a continuing and regenerating source of funding independent of the state's general budget was crucial to its success.

A series of court challenges have resulted in decisions that validate the constitutionality of this type of government speech funding

Ling et al., *The Effect of Support for Action Against the Tobacco Industry on Smoking Among Young Adults*, 97 AM. J. PUB. HEALTH 1449, 1449 (2007) ("One strategy that has been found to be useful to decrease smoking among adolescents is 'tobacco industry denormalization.' This includes media campaigns that educate the public about deceptive tobacco industry practices to motivate action against smoking and to increase the relevance of tobacco issues.").

³⁰² Ling et al., *supra* note 301, at 1449 (noting campaigns in California and Florida and by the federal government).

³⁰³ *See id.*

³⁰⁴ *Id.* ("Denormalization" of tobacco use was pioneered by the California Department of Health Services and "includes media campaigns that educate the public about deceptive tobacco industry practices to motivate action against smoking and to increase the relevance of tobacco issues.").

³⁰⁵ *See id.* at 1451-52.

³⁰⁶ CAL. DEP'T OF HEALTH, A MODEL FOR CHANGE: THE CALIFORNIA EXPERIENCE IN TOBACCO CONTROL, SERVICES 3-5 (1998).

mechanism. Tobacco companies challenged the California program, arguing that the government speech doctrine did not shield the program from constitutional scrutiny because the state “us[ed] taxes paid by a specific industry to finance advertising that condemns that very industry.”³⁰⁷ The district court rejected the argument,³⁰⁸ as did the two-judge majority of the court of appeals.³⁰⁹ Shortly after the Ninth Circuit panel filed its opinion, the Supreme Court rejected a similar forced-subsidization of speech claim. In *Johanns v. Livestock Marketing Association*,³¹⁰ beef producers argued that a targeted tax to produce pro-beef advertising with which they disagreed violated their free speech rights. The Court held that where the speech produced with the targeted tax is government speech, meaning the government controls the content of the message, “[c]itizens . . . have no First Amendment right not to fund [it],”³¹¹ even when the tax is targeted at sellers of a particular product and used to fund speech promulgating a particular disputed viewpoint about that product. The one potentially “valid objection” that the Court left open was to targeted taxes used to fund speech that is presented in a way that those who funded it appear to endorse the

³⁰⁷ R.J. Reynolds Tobacco Co. v. Bonta, 272 F. Supp. 2d 1085, 1104 (E.D. Cal. 2003).

³⁰⁸ *Id.* (“[T]he Supreme Court has never suggested that the government speech doctrine applies only to speech funded with general tax revenues. On the contrary, it seems clear that speech by the government is government speech, however funded. That is, given that the tax is lawfully imposed, the money collected becomes the government’s to expend as it sees fit, so long as those expenditures fall within legal limits.”).

³⁰⁹ R.J. Reynolds Tobacco Co. v. Shewry, 423 F.3d 906, 911 (9th Cir. 2005) (“The tobacco companies concede that (1) the imposition of the tax itself is not unconstitutional and (2) the message produced by the government’s advertisements creates no First Amendment problem apart from its method of funding. Rather, they argue for an independent First Amendment violation based on the close nexus between the government advertising and the excise tax that funds it. We reject this argument as unsupported by the Constitution and Supreme Court precedent, and as so unlimited in principle as to threaten a wide range of legitimate government activity.”); *id.* at 932–33 (Trott, J., dissenting) (“[R]eview under any of the available standards reveals that the compelled assessments in this case constitute an exceptional case of government intrusion on the right not to be compelled to finance speech. Indeed, the Act is designed to force one particularly disfavored group to fund speech directly undermining that group’s reputation. Such state action offends the very essence of the First Amendment. . . . Moreover, the State can provide no limiting principle, no logical reason why, if the government is free to tax and speak in this manner against this group, it cannot do so against any other disfavored group or individual. . . . Contrary to the Attorney General’s claim that the democratic process will provide a check on the use of taxes to fund such messages, by removing the burden of the cost of this program from every taxpayer except the ones targeted, this tax becomes the ultimate cheap shot, one not fully subject to the considerations that normally attend the decision to require the public at large to pay for something.”).

³¹⁰ *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 567 (2005).

³¹¹ *Id.* at 562.

government message.³¹² In a decision denying rehearing, the court of appeals again split. The two-judge majority read the *Johanns* decision to “affirm[its] reasoning,” and rejected the tobacco producers’ claim that the advertisements were of a type that fit into the exception noted by the *Johanns* Court, where viewers would attribute the government’s speech to them.³¹³ Despite the dissenting judge’s protests,³¹⁴ this series of decisions validates targeting taxes on sellers of hazardous products to pay for clearly identified government speech aimed at reducing demand for their lawful product.

5. *Limit Tax Deductibility of Advertising Expenses*

Marijuana business expenses are not deductible from federal income taxes.³¹⁵ This is true even though such businesses are, at least technically, required to pay federal taxes, and the federal tax code treats drug businesses differently than other illegal businesses. Drug dealers have not challenged the different treatment in court, and for good reason. The applicability of the First Amendment to state laws that impact marijuana sellers’ speech about transactions that are legal under state law is uncertain. It is clear, however, that the First Amendment does not protect marijuana sellers, who promote transactions that are illegal under federal law, from different treatment by the federal government, even if it is based on the content of their speech.³¹⁶

Many states have the same disallowance of marijuana business expenses in their tax codes. Although constitutional protection from the federal or state constitution applies to marijuana advertising, to the extent that a state makes transactions legal, the states could likely retain the same blanket disallowance of marijuana business expenses consistent with free speech guarantees. The Supreme Court has recognized that governments have broad discretion in crafting tax rules³¹⁷ and are “not required to subsidize First Amendment rights through a tax exemption or tax deduction.”³¹⁸ In *Regan v. Taxation with Representation of Wash.*,³¹⁹ the Court upheld a federal tax deduction for lobbying expenses by veterans’ groups, which was not available to other groups. The Court later

³¹² *Id.* at 565 n.8.

³¹³ *Shewry*, 423 F.3d at 908 (“A reasonable viewer could not believe that these anti-industry ads, expressly identified as ‘Sponsored by the California Department of Health Services,’ were created, produced or approved by the [tobacco industry].”); *id.* at 910 (Trott, J., dissenting) (“There is a world of difference between what was at issue and at stake in *Johanns* and what is on our docket here.”).

³¹⁴ *Id.* at 910 (Trott, J., dissenting) (the Constitution does not permit “coerced speech [that] is deliberately destructive of those forced to pay for it”).

³¹⁵ 26 U.S.C. § 280E (2012).

³¹⁶ *United States v. Williams*, 553 U.S. 285, 297–98 (2008).

³¹⁷ *Leathers v. Medlock*, 499 U.S. 439, 451 (1999) (noting that “in the First Amendment context the[re] is a] strong presumption in favor of duly enacted taxation schemes”).

³¹⁸ *Id.* at 450.

³¹⁹ 461 U.S. 540, 550–51 (1983).

explained the “distinction [as] based on preferential treatment of certain speakers” and not “a distinction based on the content or messages of those groups’ speech.”³²⁰ So long as states maintain a blanket, preexisting denial of tax deductions for business expenses, the different treatment will likely pass constitutional scrutiny because its genesis is obviously and probably the legislature’s dislike of drug dealers and an unwillingness to use tax dollars to support their illegal activities, not with the message of advertising specifically.

Likely, states may also impose a new, blanket deduction for marijuana business expenses, or perhaps even carve out “core” business expenses for allowable deductions while denying deduction for “frills,” which includes advertising. In either of these instances, with the proper record, regulators could demonstrate that their intent was to deny a subsidy to the business, because of the product it sells and the health dangers, rather than to penalize the company particularly. However, targeting marijuana advertising specifically as ineligible for a business expense deduction, when all other expenses are allowed, would likely cross the line into unconstitutional action.³²¹ While the government is not required to subsidize speech, it cannot target speakers for disadvantages, including denial of a subsidy, for the purpose of suppressing the speaker’s message.³²² A law that denied tax deductibility only for marijuana advertising, or even only for advertising of particular disfavored products, would be difficult to explain as anything other than aimed at the messages rather than more broadly aimed at product availability.³²³

³²⁰ *Rosenberger v. Rector Visitors of Univ. of Va.*, 515 U.S. 819, 832 (1995); see also *Leathers*, 499 U.S. at 450 (*Regan* “stands for the proposition that a tax scheme that discriminates among speakers does not implicate the First Amendment unless it discriminates on the basis of ideas.”).

³²¹ But see Shoshana Speiser & Kevin Outterson, *Deductions for Drug Ads? The Constitution Does Not Require Congress to Subsidize Direct-to-Consumer Prescription Drug Advertisements*, 52 SANTA CLARA L. REV. 453, 461 (2012) (arguing that the federal government could constitutionally ban direct-to-consumer advertising, which is exclusively used by pharmaceutical companies).

³²² *Leathers*, 499 U.S. at 453 (“[D]ifferential taxation of speakers, even members of the press, does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing, particular ideas.”); *id.* at 452–53 (a tax exemption may not appear as “a ‘deliberate and calculated device’ to penalize a certain [speaker].”).

³²³ *Id.* at 453 (Taxing cable television providers while not taxing other media entities does not violate the Constitution because “[t]he [government] has chosen simply to exclude or exempt certain media from a generally applicable tax. Nothing about that choice has ever suggested an interest in censoring the expressive activities of [the entities subject to the tax].”).

III. STRATEGIES FOR CREATING EFFECTIVE AND DEFENSIBLE MARIJUANA ADVERTISING AND MARKETING RESTRICTIONS

Regulators must have a clear strategy to be able to regulate comprehensively and effectively, while reducing the possibility of expensive and time-consuming litigation. Regulators who are considering regulations that restrict marijuana advertising should run through the following checklist to guide their decisions and help them structure regulations effectively.

- (a) Identify clear and precise objectives. Reason from specific harms to be avoided back to concrete and particular objectives. Consider subdividing broad objectives. State each objective specifically and separately. For example, proven health harms to users under the age of 21 may lead to a goal of avoiding underage use. Greater health harms, or more likely overuse by high school students, may lead to a goal to prevent high school use. Proven health harms from overuse by adults may lead to the broad goal of preventing overuse. Alternatively, misuse by unsophisticated adult users may lead to a more specific goal of avoiding misuse by “marijuana tourists” or new users. Similarly, evidence showing that combined use of marijuana and alcohol causes adverse health and safety effects³²⁴ may lead to a goal of preventing combined use. More specifically, evidence showing that marijuana and alcohol is the most frequently detected drug combination in car accidents³²⁵ may lead to the targeted goal of preventing combining drugs and driving.
- (b) For each objective, consider regulatory options separately, moving from the least speech-restrictive means to advertising restrictions as a last resort.
- (c) Consider implementing regulations of the product, sales locations, licensing, pricing practices that do not restrict protected speech.
- (d) Consider inserting more speech through carefully crafted government health warning campaigns supported by general tax dollars or taxes targeted at marijuana sellers.
- (e) Consider denying tax deductibility of business expenses, which include advertising; avoid targeted denials at the cannabis industry limited to advertising.
- (f) Consider compelling commercial disclosures rather than restricting advertising.
- (g) Consider implementing regulations of point-of-sale conduct

³²⁴ Am. Ass’n for Clinical Chem., *Any Dose of Alcohol Combined with Cannabis Significantly Increases Levels of THC in Blood*, SCI. DAILY, 852 (May 27, 2015) <https://www.sciencedaily.com/releases/2015/05/150527112728.htm>.

³²⁵ Stanford Chihuri et al., *Interaction of Marijuana and Alcohol on Fatal Motor Vehicle Crash Risk: A Case-Control Study*, INJURY EPIDEMIOLOGY (2017), <https://www.ncbi.nlm.nih.gov/pubmed/28286930>.

that may be expressive, for the purpose of restricting consumer access to the product rather than to the message.

- (h) If implementing regulations that restrict seller messaging because it is persuasive, document the decision-making process to meet the requirements of “heightened” commercial speech review. Specifically, collect evidence that shows that
- (1) the adverse effect identified by the clear and precise objective of the regulation exists;
 - (2) the persuasive messaging restricted by the regulation causes the adverse effect;
 - (3) the entire scheme of regulations confirms the objective to eliminate the adverse effect;
 - (4) the particular restrictions are obviously tailored to restrict speech that causes the adverse effect without restricting “extra” speech that does not obviously cause the adverse effect; and
 - (5) less speech-restrictive alternatives are too expensive, politically not feasible, or would be significantly less effective.

CONCLUSION

Legalization of marijuana presents opportunities and poses dangers, particularly to public health. The task of regulators, in jurisdictions where use is legal, is to craft rules that preserve, and perhaps even promote, legal and healthful access, while excising dangerous practices. When these dangerous practices take the form of communications from product sellers to consumers, federal and state constitutions limit the extent to which regulators may use this means—restricting protected speech—to achieve their legitimate and important purpose of protecting public health. So, on the one hand, regulators must be cautious. On the other hand, they must not be too timid to take lawful steps necessary to protect the public from the physical and fiscal consequences of underage use and adult overuse and abuse. This Article offers a step-by-step guide to assist regulators in navigating the constitutional terrain so that they can make efficient and effective decisions about how to regulate the new marijuana trade to fulfill their missions to protect public health and safety.