

NOTE

TROUBLE WITH NAMES: COMMERCIAL SPEECH AND A NEW APPROACH TO FOOD PRODUCT LABEL REGULATION

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INTRODUCTION

The commonly understood meaning of “skim milk” is “milk from which the cream has been taken.”¹ Mary Lou Wesselhoeft, the owner of a small dairy creamery in Florida, began selling skim milk, the natural dairy product with the cream removed, in 2010.² In 2012, however, Mary Lou received a stop order from the Florida Department of Agriculture and Consumer Services (“DACS”).³ Florida law prohibited the sale of products labeled “milk” that is not Grade “A,” requiring that the Vitamin A content lost in the skimming process be replaced.⁴ DACS asked Mary Lou to add Vitamin A to her skim milk or to stop selling it.⁵ Mary Lou disliked the idea of injecting artificial additives into her dairy products, so she chose to cease selling.⁶ She

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* J.D. Duke University School of Law, 2022; B.A., Binghamton University, 2019. I would like to thank Professor Sarah Baker for her guidance and helpful feedback. I would also like to thank the members of my Scholarly Writing Workshop and the *Duke Journal of Constitutional Law & Public Policy* for their dedication and assistance.

1. *Skim Milk*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/skim%20milk> (Sept. 27, 2021).

2. *Ocheesee Creamery LLC v. Putnam*, 851 F.3d 1228, 1232 (11th Cir. 2017) (holding that a prohibition on the use of the term “skim milk” to describe milk without the required regulatory Vitamin A content violated the First Amendment).

3. *Id.*; see also *Censored in Florida: Creamery Owner Sues to End Labeling Censorship*, INSTITUTE FOR JUSTICE, <https://ij.org/case/florida-skim-milk/> (last visited Oct. 13, 2021) (arguing the stop order was an example of state censorship).

4. *Ocheesee Creamery*, 851 F.3d at 1231.

5. *Id.* at 1232.

6. See *Censored in Florida: Creamery Owner Sues to End Labeling Censorship*, *supra* note 3 (discussing Mary Lou’s “all-natural philosophy” as a reason to refuse injecting Vitamin A into her milk).

attempted to reach an agreement with the State to rename the product, but her attempts failed.⁷ After the discussions over product naming proved unsuccessful, Mary Lou filed a First Amendment lawsuit against the Florida Commissioner of Agriculture.⁸

The Supreme Court has recognized First Amendment protection for “commercial speech” since 1975.⁹ Commercial speech refers to communication aimed at “promoting the sale of commercial services or products.”¹⁰ Commercial speech doctrine seeks to balance advertiser interest in speech, consumer interest in information, and society’s interest that “economic decisions in the aggregate be intelligent and well-informed.”¹¹ Regulations and compulsory disclosures of commercial speech play a part in ensuring consumers are well-informed.¹² For example, mandatory health warnings on cigarette packages fall within the scope of commercial speech.¹³ In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,¹⁴ the Supreme Court set forth a four-part test to determine whether a regulation on commercial speech is valid, focusing on the determination of “whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive

7. See *Ocheese Creamery*, 851 F.3d at 1232. (discussing various proposals by Florida that Mary Lou rejected, such as naming her milk “imitation milk product,” “Non-Grade ‘A’ Milk Product, Natural Milk Vitamins Removed,” and that Florida would not allow her to use “skim milk” in the label).

8. *Id.*; see *Censored in Florida: Creamery Owner Sues to End Labeling Censorship*, *supra* note 3 (describing how Mary Lou joined with the Institute for Justice in its First Amendment suit).

9. See *Bigelow v. Virginia*, 421 U.S. 809 (1975) (holding that First Amendment protection is not lost because the speech is in the form of paid commercial advertising); see also Carl Wiersum, *No Longer Business as Usual: FDA Exceptionalism, Commercial Speech, and the First Amendment*, 73 FOOD AND DRUG L. J. 486, 489 (2018) (discussing the increased protection afforded by commercial speech doctrine and proposing the FDA change its approach to addressing First Amendment concerns to further its regulatory goals).

10. Martin H. Redish, *First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 432 (1971) (discussing restrictions on commercial speech and arguing for the expansion of commercial speech protections).

11. Wiersum, *supra* note 9, at 489.

12. Jonathan H. Adler, *Compelled Commercial Speech and the Consumer Right to Know*, 58 ARIZ. L. REV. 421, 428–29 (2016) (arguing that compelled commercial speech should not be viewed as separate from commercial speech generally and that mandatory disclosures and labeling requirements should be supported by a substantial government interest).

13. Ellen P. Goodman, *Visual Gut Punch: Persuasion, Emotion, and the Constitutional Meaning of Graphic Disclosure*, 99 CORNELL L. REV. 513, 515 (2014) (setting forth an analytical approach to consumer rationality relating to emotional and graphic communications in the realm of commercial speech).

14. 447 U.S. 557 (1980).

than is necessary to serve that interest.”¹⁵ Unfortunately, many cases are not straightforward, and courts have had trouble defining the extent of permissible commercial speech regulations. Currently, there is “flux and uncertainty of the First Amendment doctrine of commercial speech,” as well as conflict between circuits grappling with disclosure requirements.¹⁶

Ocheese Creamery exemplifies the difficulties courts have had with the commercial speech doctrine. Both the Northern District of Florida and the Eleventh Circuit struggled to draw a line determining when commercial speech is inherently misleading,¹⁷ and when a regulation becomes too extensive.¹⁸ Such difficulty and disagreement over commercial speech is not uncommon.¹⁹ Other courts are consistently inconsistent when deciding what food product labels are misleading, what constitutes a governmental interest, what regulations directly advance a governmental interest, and what regulations are too extensive.²⁰

The confusion surrounding the commercial speech doctrine applies to all commercial products, and food labeling is no exception. Lawmakers continue to pass regulations that are unnecessary or nonsensical.²¹ Regulators continue to enforce these regulations, even if

15. *Id.* at 566 (1980) (holding that a regulation prohibiting advertising by a utility company violated the First and Fourteenth Amendments).

16. *Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 524 (D.C. Cir. 2015) (holding that a rule which compelled certain manufacturers and business to disclose that their products were not “DRC conflict free” violated the First Amendment).

17. *See Ocheese Creamery LLC v. Putnam*, 851 F.3d 1228, 1238–39 (11th Cir. 2017) (rejecting the Northern District of Florida’s reasoning that differing from the State’s definition of “skim milk” is inherently misleading).

18. *See id.* at 1233, 1240 (the District Court found that the State’s regulation passed scrutiny, whereas the Eleventh Circuit found that the State failed to show its remedy was “not more extensive than necessary”).

19. *See* Micah L. Berman, *Clarifying Standards for Compelled Commercial Speech*, 50 WASH. U. J. L. & POL’Y 53, 54 (2016) (explaining that disagreements are common because “legal doctrine – and legal scholarship – in this area remains remarkably underdeveloped”).

20. *See Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 74 (2d Cir. 1996) (finding the governmental interest in informing the public about a product’s characteristics insubstantial); *Am. Meat Inst. v. U.S. Dep't of Agric.* 760 F.3d 18, 23–25 (D.C. Cir. 2014) (finding a substantial governmental interest in informing consumers about the characteristics of products they wished to purchase); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (holding a ban on advertising liquor prices violated the First Amendment because the State did not show that the ban adequately advanced its interest in promoting temperance); *44 Liquormart, Inc. v. State of R.I.*, 39 F.3d 5 (1st Cir. 1994) (holding that a ban on advertising liquor prices directly advanced the State’s interest of promoting temperance).

21. *See* Kelsey Piper, *Mississippi Will No Longer Ban Calling Veggie Burgers “Veggie Burgers,”* VOX, (Sep. 6, 2019), <https://www.vox.com/future-perfect/2019/9/6/20853246/mississippi-veggie-burger-ban-laws-plant-based> (discussing a Mississippi law that proscribed using labels

the state interest in doing so is minimal or non-existent.²² There are circuit splits concerning the commercial speech doctrine,²³ and it is unlikely the courts will find a uniform approach to food labeling regulation. Therefore, legislators and regulators should take the lead in imposing and enforcing food labeling regulations more uniformly.

With concern to consumer confusion, this Note proposes that legislators should first look to how terms are understood by consumers rather than by how the State defines them. If there is no common understanding, the government should conduct surveys to determine if there is actual confusion over the term before engaging in enforcement. Outside of consumer confusion, legislators should focus on consumer health when deciding to implement a regulation. They should determine if the food product in question either contributes a harm or reduces a benefit to consumer health. Once this determination is made, legislators should address the issue through a commercial speech restriction or a compelled disclosure. In both cases, they must use public health data to ensure that their regulation advances the interest of protecting health without violating the First Amendment rights of the producer they are targeting. This Note advances this methodology as a means of preventing unnecessary and costly litigation. Further, it may promote more uniformity in how the commercial speech doctrine is applied.

This Note will examine how the government can advance its interests in protecting consumers without violating the First Amendment rights of commercial speakers as outlined by the Court. Part I will view the historic development and purpose of commercial speech. Part II will examine the two methods the government uses to advance its interest in the commercial speech context—restriction and compulsion. Part III will discuss how the government identifies and advances a governmental interest. Part IV will focus on why food product label regulation is important. Part V will propose how regulators and legislators should approach the regulation of food product labels, guided by the prongs of *Central Hudson*.

such as “veggie burgers,” “vegan hot dog,” or “tofu bacon” on vegetarian products).

22. See *Turtle Island Foods SPC v. Soman*, 424 F. Supp. 3d 552 (E.D. Ark. 2019) (the Arkansas bureau of standards litigating to maintain a regulation prohibiting the use of meat-based names on plant-based products even when qualifiers such as “all vegan” are used on the product to notify consumers it is plant-based).

23. See *supra* note 20 and accompanying text for the incongruous analyses of different circuits.

I. HISTORY AND PURPOSE OF COMMERCIAL SPEECH

The First Amendment, applicable to the states through the Fourteenth Amendment,²⁴ protects the freedom of speech.²⁵ This protection includes restricting the government from prohibiting speech based on content in the public discourse.²⁶ Justified by the idea that in a democracy all citizens “have an equal right to influence the content of public opinion, regardless of what they wish to say” the government cannot be the arbiter of which views are legitimate and which are not.²⁷ Until 1975, however, the First Amendment did not apply to commercial speech.²⁸ This changed after the Supreme Court’s decision in *Bigelow v. Virginia*.²⁹

In *Bigelow*, the appellant, Jeffrey C. Bigelow, was a newspaper editor who published an advertisement for an organization in New York that performed abortions.³⁰ At the time of the advertisement’s publication, Virginia law made it a misdemeanor for any publication to encourage or prompt the procuring of an abortion.³¹ Bigelow was convicted for violating the law by publishing the advertisement.³² He appealed, asserting among other claims that the statute violated the First Amendment.³³ His appeal reached the Supreme Court of Virginia, which upheld the conviction because he “lacked a legitimate First Amendment interest”³⁴ given his “activity ‘was of a purely commercial nature.’”³⁵

24. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 267–277 (1964) (holding that the adoption of the Fourteenth Amendment extended the First Amendment beyond the federal government, and to the states, so Alabama could be in violation of its citizen’s freedom of speech and the press).

25. U.S. CONST. amend. I.

26. See Robert Post, *Compelled Commercial Speech*, 117 W. VA. L. REV. 867, 874 (2015) (exploring the connection between public discourse and democracy, and the First Amendment protections that extend to public discourse because of the connection).

27. *Id.* at 875.

28. See Wiersum, *supra* note 9, at 489 (discussing the historical development of commercial speech protections under the First Amendment); see also *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (“the Constitution imposes no . . . restraint on government as respects purely commercial advertising”).

29. See 421 U.S. 809 (1975) (holding that First Amendment protection is not lost because the speech is in the form of paid commercial advertising).

30. *Id.* at 812.

31. *Id.* at 811.

32. *Id.* at 813.

33. *Id.* at 814.

34. *Id.* at 814–15.

35. See *Bigelow v. Virginia*, 421 U.S. 809, 815 (1975) (quoting *Bigelow v. Commonwealth*, 191 S.E.2d 173, 177 (Va. 1972)).

The Supreme Court granted review of Bigelow's case and reversed.³⁶ The Court reasoned that the "commercial aspects" of the advertisement in Bigelow's newspaper did not negate his First Amendment guarantees.³⁷ The existence of such commercial aspects was not a sufficient reason for narrowing the protections afforded to Bigelow by the First Amendment.³⁸ The Court held that the Virginia courts erred in assuming advertising was not entitled to First Amendment protection and that "Bigelow had no legitimate First Amendment interest."³⁹ Additionally, the Court held that the statute at hand did not advance a legitimate state interest.⁴⁰ In its discussion of the State's interests, the Court noted that there had been no claim that "the advertisement was deceptive or fraudulent," or "related to a commodity or service that was then illegal."⁴¹

The Court in *Bigelow* laid the groundwork for the development of the commercial speech doctrine, but it did not give enough guidance for enforcing the right. By recognizing a First Amendment interest in commercial speech, the court afforded protection to those wanting to advertise their goods and services.⁴² Still, the boundaries of this protection were unclear. Under *Bigelow*, the government could regulate commercial speech, so long as the legislation advanced a legitimate governmental interest.⁴³ The opinion did not give guidance as to what constituted a legitimate governmental interest, other than noting that the protection may not apply to advertising that is deceptive or related to a product that is illegal.⁴⁴

The Supreme Court solidified First Amendment protection of commercial speech in another case involving Virginia law.⁴⁵ In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,⁴⁶ a Virginia resident and two nonprofit organizations challenged a code

36. *Id.* at 829.

37. *Id.* at 818.

38. *Id.*

39. *Id.* at 825.

40. *See id.* at 827 (finding that Virginia has a legitimate interest in "maintaining the quality of medical care within its borders," but that there was no claim the advertisement in question affected the quality of Virginia's medical services).

41. *Id.* at 828.

42. *See Bigelow v. Virginia*, 421 U.S. 809, 818 (1975).

43. *See id.* at 827.

44. *See id.* at 828.

45. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (holding commercial information protected by the First Amendment because of the consumer's interest in free flow of information).

46. 425 U.S. 748 (1976).

which made advertising or affirmatively disseminating prescription drug prices “effectively forbidden in the State.”⁴⁷ The Court agreed that “the State has a strong interest in maintaining . . . professionalism” among pharmacists.⁴⁸ The Court disagreed, however, that preventing the advertising of prescription drug prices adequately advanced this interest.⁴⁹

In its opinion, the Court emphasized the importance of the “free flow of commercial information.”⁵⁰ Advertising is the dissemination of information regarding “who is producing and selling what product, for what reason, and at what price.”⁵¹ In an economy where the allocation of resources will be made through numerous private decisions “it is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed.”⁵² Nondeceptive advertising generally assists in informing the public.⁵³ Therefore, “the free flow of commercial information is indispensable”⁵⁴ and the Court concluded that commercial speech is protected.⁵⁵ Though that is not to say commercial speech cannot be regulated. The Court held that untruthful, misleading, and illegal speech is not protected.⁵⁶ Furthermore, the Court held that the State can ensure “that the stream of commercial information flow cleanly as well as freely.”⁵⁷

The *Virginia State Board of Pharmacy* opinion gave a concise rationale for commercial speech. Informed economic decisions are made more efficient when more information is available.⁵⁸ Additionally, the opinion set the outer limits for commercial speech protection—untruthful, misleading, and illegal speech is not protected.⁵⁹ The Court also recognized a legitimate state interest in upholding the standards of

47. *Id.* at 752–53.

48. *Id.* at 766.

49. *See id.* at 768. (disputing the harms connected to advertising and instead finding that regulations in the pharmacy field protect professionalism and undermine the justifications for the advertising ban).

50. *Id.* at 764.

51. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976).

52. *Id.*

53. *See id.* (describing the benefits that advertising can bring by informing the public).

54. *Id.*

55. *Id.* at 770.

56. *See id.* at 771–72 (explaining that commercial speech protections have limits).

57. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 (1976).

58. *See id.* at 765.

59. *See id.* at 771–72.

a profession, although it struck down a law that did not adequately advance that interest.⁶⁰ Finding the balance between ensuring the free flow of commercial information and advancing a governmental interest remained unclear. The Court did not explain what governmental interests are considered legitimate or what regulations are permissible to advance those interests.

These first cases recognizing the commercial speech doctrine demonstrate that commercial speech differs from other speech because it is intended to “facilitate transactions in the marketplace” rather than influence public opinion.⁶¹ In theory, a consumer with limited resources will be able to achieve a higher degree of material satisfaction if she is more informed about the economic choices in front of her.⁶² Advertising and labeling promote this goal by familiarizing consumers with products.⁶³ Such familiarity “serves to enhance market efficiency and maximize consumer welfare.”⁶⁴

There may be other reasons for protecting commercial speech that extend past pure economics. Many consumers choose products due to political or ethical motives.⁶⁵ And in fact, “the most famous advertising campaigns are also contributions to the tropes of public culture.”⁶⁶ Still, the predominant value of commercial speech is that it circulates information about products to the public.⁶⁷ Thus, “if the content of commercial speech is inconsistent with this function, the speech fails to serve its constitutional purpose” and may not be protected.⁶⁸ When commercial speech is consistent with its function, courts afford protection.⁶⁹

60. *See id.* at 776, 773.

61. *Post*, *supra* note 26, at 874.

62. *See* Redish, *supra* note 10, at 433 (explaining that commercial advertisement can provide consumers with more information about products, and that such additional information will likely lead to an increase in satisfaction with products they do buy).

63. *Id.*

64. Adler, *supra* note 12, at 429.

65. *Id.* at 430.

66. Jack M. Balkin, *Cultural Democracy and the First Amendment*, 110 *N.W. U.L. REV.* 1053, 1081 (2016) (arguing that protection of free expression is important to cultural democracy within the increasing system of telecommunications).

67. *See Post*, *supra* note 26, at 875 (stating the value of commercial speech comes from commercial speech’s “education of those who participate in the public discourse”).

68. *Id.*

69. *See* Wiersum, *supra* note 9, at 497 (discussing a theme from commercial speech cases, where the court affords protection in order to prevent the government from “restricting consumer’s access to information”).

II. GOVERNMENTAL REGULATION: RESTRICTIONS AND COMPULSIONS

When the government identifies commercial speech to regulate, it can approach regulation in two ways—first, by restricting the speech, or second, by compelling additional speech. In general, the First Amendment protects individuals from both speech restrictions and speech compulsions.⁷⁰ Freedom of speech grants a speaker the right to say what they want, as well as refrain from saying what they do *not* want.⁷¹ There is no such symmetry of protection between restriction and compulsion for commercial speech.⁷²

A. *Intermediate Scrutiny for Restrictions on Commercial Speech*

The Constitution affords lesser protection to commercial speech than other expression.⁷³ For example, laws banning certain viewpoints are “presumptively unconstitutional and subject to strict scrutiny.”⁷⁴ This type of regulation alters public discourse by censoring opinion and is considered nondemocratic.⁷⁵ Comparatively, censoring commercial speech does not alter the public discourse.⁷⁶ The First Amendment’s protection of commercial speech is based in its informational function; the speech is valuable because it conveys a message about a commercial product to consumers.⁷⁷ Because commercial speech informs the public, as opposed to altering the public discourse, the constitutionality of state regulation is less strict than for other forms of expression.⁷⁸ As such, the

70. See Post, *supra* note 26, at 876 (analogizing the protections on speech protections to forced speech within the public discourse).

71. See *id.* at 875–76 (“Compelled public discourse undermines democratic legitimation in the same way, and to the same extent, as do restrictions on public discourse.”).

72. See *id.* at 877 (“[T]his symmetry does not exist within the domain of commercial speech.”).

73. See 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, 558–59 (2006) (discussing the confusion around commercial speech and the jurisprudential move away from the interest of circulating information toward the interest of commercial speakers to speak or to associate).

74. David L. Hudson Jr., *Content Based*, THE FIRST AMENDMENT ENCYCLOPEDIA, (2009) <https://www.mtsu.edu/first-amendment/article/935/content-based>.

75. See Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 14 (2000) (arguing that it is a “necessary condition for democratic legitimacy” to have access to the public discourse, and censorship of viewpoints inhibits such access).

76. See *id.* (describing commercial speech as instead “audience oriented”).

77. Wiersum, *supra* note 9, at 489 (listing “information conveyed by the speech” as one of the competing interests when dealing with commercial speech).

78. See Post, *supra* note 26, at 876 (linking the permissive “content discrimination” in commercial speech to its distance from the public discourse).

state's technique in regulating commercial speech must be in proportion to a substantial governmental interest.⁷⁹ Such regulatory techniques must also be carefully designed to achieve the State's goals.⁸⁰ This means that the state can only regulate speech which poses a danger to its asserted interest, and it can only completely prohibit speech when no narrower restrictions would serve its interest well.⁸¹

The controlling case for restrictions on commercial speech is *Central Hudson Gas & Electric Corp. v. Public Service Commission*.⁸² In *Central Hudson*, the Court faced the issue of whether a New York regulation banning promotional advertising by an electrical utility company violated the First and Fourteenth Amendments.⁸³ The New York Court of Appeals upheld the regulation, finding the advertising provided "little value in 'the noncompetitive market in which utility companies operate.'"⁸⁴ Further, the advertising ban served the State's interests of conserving energy and maintaining lower electricity prices for consumers.⁸⁵ The Supreme Court agreed that New York's concerns with energy conservation and electricity rates constituted substantial interests.⁸⁶ It held, however, that the advertising ban went too far.⁸⁷

The Supreme Court set forth a test for commercial speech restrictions.⁸⁸ This test has four prongs: (1) the expression must be protected by the First Amendment, meaning it concerns lawful activity and is not misleading; (2) the government's asserted interest must be substantial; (3) the regulation must directly advance the asserted interest; and (4) the regulation may not be "more extensive than necessary to serve the interest."⁸⁹ Although New York's regulation

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

80. *Id.* at 564.

81. *See id.* at 565 (describing how the First Amendment requires governmental restrictions on speech be "narrowly tailored").

82. *See Commercial Speech – Compelled Disclosures – D.C. Circuit Applies Less Stringent Test to Compelled Disclosures – American Meat Institute v. USDA*, 760 F.3d 18 (D.C. Cir. 2014) (*en banc*), 128 Harv. L. Rev. 1526, 1526 (2015) (discussing how *Central Hudson* created an intermediate scrutiny requirement for commercial speech restrictions).

83. *Cent. Hudson*, 447 U.S. at 558.

84. *Id.* at 561 (quoting *Consolidated Edison Co. v. Public Service Comm'n*, 390 N.E.2d 749, 757 (N.Y. 1979)).

85. *Id.* at 559–60 (New York electricity rates were not based on marginal cost at the time. If the advertising resulted in more electricity consumption, production expenses would increase. This increase would be subsidized by all consumers through generally higher rates).

86. *Id.* at 568–69.

87. *See id.* at 569–70 (finding that the order was "more extensive than necessary" as it "suppresses speech that in no way impairs the State's interest").

88. *Id.* at 566.

89. *Id.*

directly advanced a substantial governmental interest, the State failed to show that a more limited speech regulation would not advance its interest.⁹⁰ Therefore, New York’s complete suppression of the advertising violated the First Amendment.⁹¹

This test solidifies the rationale the Court set forth in *Virginia Board of Pharmacy*—that commercial speech ought to be protected when it leads to “intelligent and well informed” consumer decisions.⁹² The first prong of the test also recognizes that commercial speech merits lesser protection than other forms of speech.⁹³ Outside of the commercial speech context, for example, false speech is generally protected.⁹⁴ The Court’s test for restricting commercial speech is reasonable on its face, though it has limited effects on commercial food product labeling. Food products in the U.S. are available to customers after approval from the FDA.⁹⁵ This approval means that food product labels generally do not relate to unlawful activity. Therefore, although restrictions following *Central Hudson* may apply to misleading food product labels, more commonly regulation is brought through “compelled commercial speech.”⁹⁶

B. Rational Basis Scrutiny for Compelled Commercial Speech

Compelled commercial speech generally refers to mandatory disclosures in advertisements, on products, or elsewhere.⁹⁷ Although the First Amendment normally protects individuals against governmentally compelled expression,⁹⁸ this protection is weaker for

90. *Id.* at 570.

91. *Id.* at 571–72.

92. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976).

93. *See Post, supra* note 26, at 874 (distinguishing the protections given to commercial speech from other types of speech due to commercial speech’s distance from the public forum).

94. *See generally* *United States v. Alvarez*, 567 U.S. 709 (2012) (striking down the Stolen Valor Act which prohibited making false claims about receipt of military decorations and saying “[t]he remedy for speech that is false is speech that is true”).

95. *See How to Start a Food Business*, U.S. FOOD AND DRUG ADMINISTRATION, <https://www.fda.gov/food/food-industry/how-start-food-business#subject> (May 13, 2021) (“FDA regulates all foods and food ingredients introduced into or offered for sale in interstate commerce. . .”).

96. *See Berman, supra* note 19, at 59 (equating the “more relaxed” standard for commercial speech as akin to rational basis review).

97. *Id.* at 55–56 (quoting Ellen P. Goodman, *Visual Gut Punch: Persuasion, Emotion, and the Constitutional Meaning of Graphic Disclosure*, 99 CORNELL L. REV. 513, 515 (2014)).

98. *See* Dayna B. Royal, *Resolving the Compelled-Commercial-Speech Conundrum*, 19 VA. J. SOC. POL’Y & L. 205, 208 (2011) (“[T]he government will face high hurdles before it may compel speakers to engage in certain types of expression. . . as the First Amendment grants a right against compelled expression.”).

commercial speech.⁹⁹ Governments “frequently require the disclosure of potentially relevant information about goods or services offered for sale.”¹⁰⁰ Examples of such potentially relevant information include toxic chemical disclosures, nutritional labels, and cigarette warnings.¹⁰¹ The government’s power to compel disclosures of information about goods or services “is substantial, but it is not without limits.”¹⁰² As it stands, “legal doctrine—and legal scholarship—in this area remains remarkably underdeveloped.”¹⁰³ The leading case on compelled commercial speech is *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*.¹⁰⁴

The appellant in *Zauderer* advertised legal services to women who had suffered injuries resulting from the use of a contraceptive device.¹⁰⁵ His advertisement violated a disciplinary rule requiring disclosure of how legal costs would be handled if a client’s claim was unsuccessful.¹⁰⁶ The appellant contended that a *Central Hudson* analysis should be applied to the rule; the State must show that his advertisement was false or deceptive, or that the rule serves a “substantial governmental interest other than preventing deception.”¹⁰⁷ He also argued that the State was required to show that the rule requiring disclosure directly advanced a relevant interest, and constituted “the least restrictive means of doing so.”¹⁰⁸ The Supreme Court declined to apply *Central Hudson*.¹⁰⁹

The Court stated that there are “material differences between disclosure requirements and outright prohibitions on speech”—reasoning that First Amendment protection of commercial speech is based on the value of the information to consumers that commercial speech provides.¹¹⁰ So the appellant’s interest “in *not* providing any

99. See Jennifer M. Keighly, *Can You Handle the Truth? Compelled Commercial Speech and the First Amendment*, 15 U. PA. J. CONST. L. 539, 546 (2012) (“*Zauderer* reduces the level of scrutiny for compulsory factual disclosure laws targeting commercial speech.”).

100. Adler, *supra* note 12, at 424.

101. Goodman, *supra* note 13, at 515.

102. Adler, *supra* note 12, at 423.

103. Berman, *supra* note 19, at 54.

104. See 471 U.S. 626 (1985) (holding that commercial speech is entitled to First Amendment protections, but less protection than given to noncommercial speech).

105. *Id.* at 630.

106. *Id.* at 633.

107. *Id.* at 650.

108. *Id.*

109. See *id.* (distinguishing between “disclosure requirements and outright prohibitions on speech” to justify declining to apply the *Central Hudson* test).

110. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 650-

particular factual information. . . is minimal.”¹¹¹ As such, disclosure requirements interfere “much more narrowly on an advertiser’s interests than do flat prohibitions on speech.”¹¹² Ohio had not attempted to prevent information from being conveyed to the public, instead it only required additional “factual and uncontroversial information” be conveyed.¹¹³ The Court went on to say that this does not mean disclosure requirements may never violate an advertiser’s First Amendment rights,¹¹⁴ and that “unjustified or unduly burdensome disclosure requirements might offend the First Amendment.”¹¹⁵

The Court’s ruling in *Zauderer* exemplifies the asymmetrical treatment of commercial speech restrictions and compulsions. The rationale for protecting commercial speech is that providing more information to consumers will aid their economic decisions.¹¹⁶ Regulations forcing producers to speak does not contradict this rationale, whereas regulations restricting speech may.¹¹⁷ And in fact, compelling commercial speech can provide more information to the consuming public and so may actually advance the purpose of commercial speech.¹¹⁸

III. IDENTIFYING AND ADVANCING A SUBSTANTIAL GOVERNMENTAL INTEREST.

The scope of governmental interests in regulating commercial speech which may satisfy the *Central Hudson* test is unclear. Under *Central Hudson*, commercial speech is not protected if it concerns unlawful activity.¹¹⁹ Advertisements promoting the commission of a crime, such as the sale of illicit drugs, can be prohibited by the government. Similarly, there is no protection for commercial speech that is misleading—*Zauderer* holds that there is a governmental

51 (1985).

111. *Id.* at 651.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985).

116. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976) (“So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.”).

117. *Post, supra* note 26, at 877.

118. *Id.*

119. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980).

interest in “preventing deception.”¹²⁰ But what governmental interests apply to lawful, non-deceptive activity?

A. Identifying a Substantial Governmental Interest

The government has a clear interest in protecting the health of its citizens.¹²¹ For this reason, “toxic chemical disclosures . . . and cigarette warnings” are permissible regulations.¹²² Similarly, requiring disclosure of the number of calories in a meal is useful for meeting the interest of combating obesity.¹²³ Nutritional labels are a ubiquitous medium for informing consumers about the product they buy, and clearly advance a governmental interest of protecting health. Other types of product labeling have also been found to advance a governmental interest.¹²⁴

In *American Meat Institute v. U.S. Department of Agriculture*,¹²⁵ the Court of Appeals for the District of Columbia upheld a federal statute requiring country-of-origin labels on some meat products.¹²⁶ The asserted governmental interest for requiring these labels was to enable consumers to make informed choices on the products they purchase.¹²⁷ In particular, the government wanted consumers to know whether there was “United States supervision of the entire production process for health and hygiene.”¹²⁸ Although the American Meat Institute argued this governmental interest was inadequate to support compelling the disclosure, the Court found the interest substantial.¹²⁹ Similarly, a Vermont statute requiring manufacturers to inform consumers their products contained mercury was upheld because the government has an interest in protecting human health from mercury poisoning.¹³⁰ Outside of health concerns, courts have found other interests, such as privacy and protecting consumers from fraud,

120. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985).

121. *See Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001) (holding that a statute compelling certain manufacturers to disclose that their product contained mercury did not violate the First Amendment).

122. *Goodman*, *supra* note 13, at 515.

123. *See N.Y. State Rest. Ass’n v. N.Y.C. Bd. of Health*, 556 F.3d 114, 134 (2d Cir. 2009) (upholding a New York City regulation requiring the disclosure of the caloric content of meals).

124. *See Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18, 23 (D.C. Cir. 2014) (en banc) (upholding a country-of-origin labeling rule for certain commodities).

125. 760 F.3d 18, 23 (D.C. Cir. 2014).

126. *Id.* at 27.

127. *Id.* at 23–24.

128. *Id.* at 24.

129. *Id.* at 23.

130. *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 115–16 (2d Cir. 2001).

substantial as well.¹³¹

In *Board of Trustees of State University of New York v. Fox*,¹³² the Supreme Court dealt with a regulation prohibiting commercial advertising on school property.¹³³ Several interests were asserted in support of this regulation: “promoting an educational rather than commercial atmosphere on SUNY campuses, promoting safety and security, preventing commercial exploitation of students, and preserving residential tranquility.”¹³⁴ The Supreme Court found these interests substantial.¹³⁵

B. Advancing a Substantial Governmental Interest

Once the government has asserted its interest in a commercial speech case, it has the burden of justifying its regulation.¹³⁶ To satisfy this burden for a restriction of speech, the government “must demonstrate that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree.”¹³⁷ There is a lesser burden for compelled commercial speech, as “the First Amendment interests implicated by disclosure requirements are substantially *weaker* than those at stake when speech is actually suppressed.”¹³⁸ For example, disclosure requirements to prevent deception must reasonably relate to that goal.¹³⁹ For both restriction and disclosure requirements, the government must show that its regulations are narrowly tailored.¹⁴⁰ While this may seem straightforward, in practice, it is not.

131. See *Edenfield v. Fane*, 507 U.S. 761, 769 (1993) (disallowing a Florida ban on in-person solicitation by certified public accountants for violating the First Amendment, while finding substantial state interests in protecting consumers from fraud or overreaching by CPAs as well as protecting the privacy of potential clients).

132. 492 U.S. 469 (1989).

133. See *id.* at 471–73 (reversing an appellate court’s decision which held that a public university must use the least restrictive means in prohibiting commercial advertising on campus).

134. *Id.* at 475.

135. *Id.*

136. *Id.* at 770.

137. *Id.* at 770–71.

138. *Zauderer v. Disciplinary Couns. of Sup. Ct. of Ohio*, 471 U.S. 626, 651 n.14 (1985) (emphasis added).

139. *Id.* at 651.

140. *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18, 25 (D.C. Cir. 2014) (en banc) (noting that compelled disclosures must pass narrow tailoring only if they advance an interest outside of *Central Hudson’s* first prong, though disclosures meant to prevent deception must only pass a reasonable relation test); see also *id.* at 651 (“We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech.”).

In 2010, Congress adopted Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.¹⁴¹ This section required firms to investigate and disclose the origins of minerals they were using.¹⁴² Reporting companies were required to disclose whether they used conflict minerals on their websites and in reports to the SEC.¹⁴³ The SEC's interest under the statute was to alleviate the crisis in the Democratic Republic of Congo.¹⁴⁴ Although the SEC attempted to achieve this goal by compelling disclosures, the Appellate Court for the District of Columbia found that the regulation was outside the bounds of commercial speech.¹⁴⁵ This requirement "compelled disclosures that are unconnected to advertising or product labeling at the point of sale," and so *Zauderer* did not apply.¹⁴⁶ The court went further, saying even if *Zauderer* applied, the government would not have met its burden.¹⁴⁷ The argument that having reporting companies disclose whether their minerals were conflict free would reduce the humanitarian crisis in the DRC was "entirely unproven and rest[ed] on pure speculation."¹⁴⁸ The court's ruling demonstrates that in regulating commercial speech, the government's task is beyond simply identifying an interest. The government must demonstrate how its regulation relates to and advances its named interest in connection with the labeling or advertising of a product.

The Supreme Court has also ruled speech restrictions do not automatically pass muster just because they target speech pertaining to "vice" activities.¹⁴⁹ In *44 Liquormart, Inc. v. Rhode Island*,¹⁵⁰ the Court struck down a statute prohibiting advertisements of the price of alcoholic beverages.¹⁵¹ Rhode Island argued that the restriction would significantly advance its interest in promoting "temperance," which the

141. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1502(a), 124 Stat. 1376 (2010) (codified as amended in scattered sections of 12 and 15 U.S.C.).

142. See *Nat'l Ass'n of Mfrs. v. S.E.C.*, 748 F.3d 359, 363 (D.C. Cir. 2014) (holding that a rule requiring issuers to post on their website whether their products were "DRC conflict free" violated the First Amendment).

143. *Nat'l Ass'n of Mfrs. v. S.E.C.*, 800 F.3d 518, 522 (D.C. Cir. 2015).

144. *Id.* at 524.

145. *Id.*

146. *Id.* at 522, 524.

147. *Id.*

148. *Id.* at 525.

149. See *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 513–14 (1996) (holding that Rhode Island's statute banning the advertising of prices for alcoholic beverages violated the First Amendment).

150. 517 U.S. 484 (1996).

151. *Id.* at 489.

Court took to mean reducing alcohol consumption.¹⁵² Rhode Island failed to produce any evidentiary support that banning alcohol price advertising would advance this interest.¹⁵³ Further, there was no evidence that without the ban alcohol consumption would significantly increase; to conclude so would be the type of “speculation or conjecture” that does not warrant upholding a restriction.¹⁵⁴ The Court went further, saying the State’s argument that speech restrictions targeting “vice” activities should be upheld was “unpersuasive.”¹⁵⁵ A state legislature could potentially label any product that poses some threat to public health or morals as a “vice.”¹⁵⁶ Accepting this argument would “allow[] state legislatures to justify censorship by the simple expedient of placing the ‘vice’ label on selected lawful activities.”¹⁵⁷ This reasoning is similar to that used in *Ocheesee Creamery*—allowing the state to define terms and then regulate speech in conflict with those definitions would permit the state to regulate speech without restraint.¹⁵⁸ Such a regulatory scheme would eviscerate the protections afforded by commercial speech.

The clear link between food consumption and consumer health does not mean that all product labels meet a substantial governmental interest. For example, in *International Dairy Foods Ass’n v. Amestoy*,¹⁵⁹ the Second Circuit reversed a district court’s decision to deny a preliminary injunction against a statute which required dairy producers to identify products derived from cows “treated with a synthetic growth hormone.”¹⁶⁰ The FDA had already “concluded that [the hormone] has no appreciable effect on the composition of milk produced by treated cows, and that there are no human safety or health concerns.”¹⁶¹ Instead of an interest in protecting health, Vermont argued the statute advanced a “strong consumer interest and the public’s ‘right to know.’”¹⁶² The Second Circuit disagreed, saying the desire to know which products were treated with synthetic hormones “is insufficient to

152. *Id.* at 504.

153. *Id.* at 505.

154. *Id.* at 507.

155. *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 513 (1996)

156. *Id.* at 514.

157. *Id.*

158. *See* *Ocheesee Creamery LLC v. Putnam*, 851 F.3d 1228, 1240 (11th Cir. 2017) (“[T]he State was unable to show that forbidding the Creamery from using the term ‘skim milk’ was reasonable, and not more extensive than necessary to serve its interest.”).

159. 92 F.3d 67 (2d Cir. 1996).

160. *Id.* at 69.

161. *Id.* at 73.

162. *Id.* (quoting *Int’l Dairy Foods v. Amestoy*, 898 F. Supp 246, 249 (D. Vt. 1995)).

permit the State . . . to compel the dairy manufacturers to speak against their will.”¹⁶³

IV. FOOD PRODUCT LABELING

Legislators are in the best position to enact a more coherent scheme for food product label regulation. Regulating food safety is important, and “governments have played a role in maintaining the integrity of their countries’ food supply for thousands of years, from Roman statutes targeting the adulteration of food through the English assizes of 1266.”¹⁶⁴ In the United States, even after a food product meets FDA standards, the government can continue to regulate it through commercial speech restrictions and disclosures.¹⁶⁵ Commercial speech “represents an accommodation between the right to speak and hear expression about goods and services and the right of government to regulate the sales of such goods and services.”¹⁶⁶ Currently, courts inconsistently apply the commercial speech doctrine. Likewise, commentators disagree about commercial speech’s desirability and efficacy. Some believe that “[i]n recent years . . . governments have imposed broader disclosure requirements.”¹⁶⁷ Others think that “restrictions on commercial speech are currently subject to a de facto strict scrutiny applied under the *Central Hudson* name.”¹⁶⁸

For food labeling regulations, the uncertainty and inconsistency of court rulings often leads to needless litigation. Florida’s regulation on Vitamin A content in skim milk caused Mary Lou Wesselhoeft to cease selling her product for five years.¹⁶⁹ For three of those years, she was involved in a legal battle.¹⁷⁰ Furthermore, in 2019, Mississippi passed a law prohibiting plant-based products from being labeled meat or meat food products.¹⁷¹ This law prevented labels such as “veggie burgers,” “vegan hot dog,” or “tofu bacon.”¹⁷² A similar law passed in Arkansas,

163. *Id.* at 74.

164. Wiersum, *supra* note 9, at 486.

165. *See* *Ocheese Creamery LLC v. Putnam*, 851 F.3d 1228, 1232 (11th Cir. 2017).

166. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 499 (1996) (emphasis omitted) (quoting LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 12–15 (2d ed. 1988)).

167. Adler, *supra* note 12, at 424.

168. Wiersum, *supra* note 9, at 488.

169. *Ocheese Creamery LLC v. Putnam*, 851 F.3d 1228, 1231 (11th Cir. 2017).

170. *Censored in Florida: Creamery Owner Sues to End Labeling Censorship*, INSTITUTE FOR JUSTICE, <https://ij.org/case/florida-skim-milk/> (last visited Oct. 17, 2021).

171. “Veggie Burger” Labeling Ban Presents Meaty First Amendment Case, IN A CROWDED THEATER, (July 18, 2019), <https://inacrowdedtheater.com/2019/07/18/veggie-burger-labeling-ban-presents-meaty-first-amendment-case/>.

172. Kelsey Piper, *Mississippi Will No Longer Ban Calling Veggie Burgers “Veggie Burgers,”*

known as Act 501, required plant-based food manufacturers to change their labeling of meatless burgers and sausages to other labels, such as “savory plant-based protein” or “veggie tubes.”¹⁷³ Arguably, a term like “veggie burger” is more descriptive than “savory plant-based protein.” One might hope legislatures would therefore worry about potential consumer confusion before drafting such statutes. Instead, lawsuits were filed in Mississippi and Arkansas to challenge these statutes.¹⁷⁴

Mississippi withdrew its regulations and proposed new ones which allow plant-based food producers to continue selling with labels that qualify their products with terms such as “meatless,” or “vegetarian.”¹⁷⁵ Arkansas, however, chose to litigate the matter and subsequently lost a preliminary injunction.¹⁷⁶ Arkansas’s purported interest in its law was to protect consumers from being confused or misled.¹⁷⁷ The judge for the Eastern District of Arkansas did not buy the argument that the statute would prevent consumer confusion. Under the State’s logic, “a reasonable consumer might also believe that veggie bacon contains pork, that flourless chocolate contains flour, or that e-books are made out of paper.”¹⁷⁸ The Eastern District of Arkansas seems to think the State’s law is preempted by consumer common sense.¹⁷⁹ The opinion demonstrates that some type of reform is needed in how commercial speech for food labels is regulated. Without reform, needless resources will be wasted regulating labels that are not unlawful, misleading, or harmful to consumers.

VOX, (Sep. 6, 2019), <https://www.vox.com/future-perfect/2019/9/6/20853246/mississippi-veggie-burger-ban-laws-plant-based>

173. Beth Mole, *Judge Serves Up Sizzling Rebuke of Arkansas’ Anti-Veggie-Meat Labeling Law*, ARSTECHNICA (Dec. 12, 2019), <https://arstechnica.com/science/2019/12/judge-serves-up-sizzling-rebuke-of-arkansas-anti-veggie-meat-labeling-law/#:~:text=A%20federal%20judge%20on%20Tuesday,each%20individual%20label%20in%20violation.>

174. *See* Complaint for Declaratory and Injunctive Relief, *Upton’s Nats. Co. v. Bryant*, No. 3:19-cv-462-HTW-LRA (S.D. Miss. 2019) (seeking a preliminary injunction and declaratory judgment against the act); *See also* *Turtle Island Foods SPC v. Soman*, 424 F. Supp. 3d 552, 570 (E.D. Ark. 2019) (granting a preliminary injunction against an act regulating the labeling of plant-based foods for violating the First Amendment).

175. Piper, *Mississippi Will No Longer Ban Calling Veggie Burgers “Veggie Burgers.”*

176. Mole, *Judge Serves Up Sizzling Rebuke of Arkansas’ Anti-Veggie-Meat Labeling Law*.

177. *Turtle Island*, 424 F. Supp. 3d at 563.

178. *Id.* at 574 (quoting *Ang v. Whitewave Foods Co.*, No. 13-cv-1953, 2013 WL 6492353, at *4 (N.D. Cal. Dec. 10, 2013)).

179. *See id.*

V. CLARIFYING CENTRAL HUDSON TOWARDS MORE REASONABLE REGULATION FOR FOOD PRODUCT LABELING

Change in food labeling regulations should come from legislators and regulators, not the courts.¹⁸⁰ As mentioned, courts vary in how they interpret the commercial speech doctrine.¹⁸¹ Moreover, litigation is timely and expensive. Resources can be used more efficiently if litigation is avoided, especially, as the Eastern District of Arkansas seems to believe, if the matter is common sense. To prevent commercial speech issues from reaching the courts, legislators and regulators should make changes to how they approach food labeling regulations. A way to enact change is to re-evaluate how the prongs of *Central Hudson* should be applied to food labels when writing or enforcing commercial speech regulations.

A. Unlawful and Misleading

The first part of the *Central Hudson* test is easily applied to food labels. *Central Hudson* does not afford First Amendment protection to commercial speech that is misleading or related to unlawful activity.¹⁸² Food products sold in the United States are subject to regulation. The “FDA regulates all foods and food ingredients introduced into or offered for sale in interstate commerce, with the exception of meat, poultry, and certain processed egg products regulated by the U.S. Department of Agriculture.”¹⁸³ Further, retail food establishments, such as restaurants, food trucks and grocery stores, are regulated by state and local governments.¹⁸⁴ Thus, the focus of *Central Hudson*’s first prong need not be placed on whether labels placed on food products apply to lawful activity. The government should instead focus on whether the labels are misleading.

The government should not defer to its own definitions when deciding if a food label is misleading. The government can, and does, define the permissible meaning of terms regarding food. Federal regulations define terms such as “fresh,” “natural flavor,” and

180. Legislators and regulators are in a position to enact and enforce regulation in a reasonable manner which will likely lead to a more economic use of resources.

181. *Nat’l Ass’n of Mfrs. v. S.E.C.*, 800 F.3d 518, 524 (D.C. Cir. 2015).

182. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. at 566.

183. *How to Start a Food Business*, U.S. FOOD AND DRUG ADMINISTRATION, <https://www.fda.gov/food/food-industry/how-start-food-business#subject> (last visited Oct. 17, 2021).

184. *Id.*

“organic.”¹⁸⁵ These definitions, however, should not be dispositive.¹⁸⁶ In fact, a judge has described the federal food labelling guidelines as “complex.”¹⁸⁷ Moreover, “there is ‘no extrinsic evidence that the perceptions of ordinary consumers align with these various labeling standards.’”¹⁸⁸

Regulators should look to the colloquially understood meaning of words before resorting to the government’s definitions. The *Ocheesee* litigation was prompted by DACS enforcing a law based on Florida’s definition of “skim milk.”¹⁸⁹ The litigation could have been avoided if DACS based its decision to bring enforcement on how consumers understand skim milk rather than how the statute defined it. People do not commonly believe that “veggie burgers” contain meat, just as they do not believe “e-books are made out of paper.”¹⁹⁰ Additionally, some industries already self-police their product naming.

The American Bourbon Association lists specific requirements that must be met for whiskey to be considered “bourbon.” Among them are that the liquor product is distilled at no higher than 160 proof, is made from a minimum of fifty one percent corn, rye, wheat and malted barley, and is aged in charred oak barrels.¹⁹¹ The Alcohol and Tobacco Tax and Trade Bureau’s regulations regarding distilled spirits codifies these requirements in its identification of “bourbon whiskey.”¹⁹² Regulating bourbon is thus different than the regulation of skim milk in Mary Lou’s case. If someone labels a product “bourbon” without meeting the

185. Adler, *supra* note 12, at 438 –39 (citing 12 C.F.R. § 101.95(a) (2015); 21 C.F.R. § 101.22(a)(3) (2015); 7 C.F.R. § 205.301 (2015)).

186. See *Ocheesee Creamery LLC v. Putnam*, 851 F.3d 1228, 1238 –39 (11th Cir. 2017) (reasoning that differing from the State’s definition of “skim milk” is inherently misleading).

187. *Wynn v. Topco Assocs., LLC*, No. 19-CV-11104 (RA), 2021 U.S. Dist. LEXIS 9714, at *9 (S.D.N.Y. Jan. 19, 2021) (dismissing a class action suit claiming that the use of “Vanilla” in “Vanilla Almondmilk” misleads consumers because reasonable consumers would expect the flavoring to come from real vanilla).

188. *Id.* (quoting *N. Am. Olive Oil Ass’n v. Kangadis Food Inc.*, 962 F. Supp. 2d 514, 519 (S.D.N.Y. 2013)).

189. See *Ocheesee Creamery LLC v. Putnam*, 851 F.3d 1228, 1232 (11th Cir. 2017) (“[T]he Creamery filed its complaint . . . contending the State’s refusal to allow it to call its product “skim milk” amounted to censorship in violation of the First Amendment.”).

190. *Turtle Island Foods SPC v. Soman*, 424 F. Supp. 3d 552, 574 (E.D. Ark. 2019) (quoting *Ang v. Whitewave Foods Co.*, No. 13-cv-1953, 2013 WL 6492353, at *4 (N.D. Cal. Dec. 10, 2013)).

191. *What is Bourbon*, AMERICAN BOURBON ASSOCIATION, <https://americanbourbonassociation.com/bourbon-what-is>.

192. 27 CFR § 5.22(b)(1)(i) (2018) (defining “bourbon whisky” as “whisky produced at not exceeding 160° proof from a fermented mash of not less than 51 percent corn, rye, wheat, malted barley, or malted rye grain, respectively, and stored at not more than 125° proof in charred new oak containers”).

standards, regulators could file an injunction to halt the labeling. Such enforcement would be justified not because the product fails to meet the government's definition, but because consumers have independent expectations about bourbon. To label the product "bourbon" without meeting these expectations would therefore be misleading, because the product would differ from the colloquial understanding of what "bourbon" is.

Colloquial understandings, however, may not always be clear. If the government believes a term is misleading, it can conduct surveys to determine how consumers understand the term. In the *Ocheesee* litigation, the State conducted such a study which produced "no evidence that consumers expected anything other than skim milk when they read those words on the Creamery's bottles."¹⁹³ Florida and Mary Lou would have been better served if the study was conducted before litigation commenced. Thus, to promote efficiency, regulators should test consumer understanding of food labels before they decide to enforce a regulation.¹⁹⁴ Regulators could test consumer understanding of food labels using questionnaires or surveys such as the one conducted during the *Ocheesee* litigation. These surveys would better help the government understand if a food product label misleads consumers or differs from their expectations. Regulators should proceed with enforcement only if the number of consumers misled passes a certain threshold.¹⁹⁵

B. Governmental Interest: Differentiating Harms and Benefits

As protecting consumers from deception is a strong governmental interest, so too is maintaining the health of citizens. It is difficult to navigate when and how regulating food labels meets this interest. In regulating a food label, the pertinent question legislators and regulators should ask is how consumption of that particular food product effects consumer health. An important distinction should be made as to whether consumption, and the expectations along with consumption, lead to harms or benefits.

"Harm" is a vague word that is difficult to pin down. For the purposes of this Note, "harm" means "physical damage."¹⁹⁶ Using this

193. *Ocheesee Creamery*, 851 F.3d at 1239.

194. Testing consumer understanding of food product labels to see if they are confusing is likely to be less expensive than pursuing litigation.

195. It is beyond the scope of this Note to determine where this threshold should lie.

196. See *Harm*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/harm>

definition, a food product can be described as harmful if its consumption leads to, or has the potential to lead to, the physical damage of health. A substantial governmental interest exists where the government wishes to reduce or prevent harms from occurring. A “benefit” is “something that produces good or helpful results or effects or that promotes well-being.”¹⁹⁷ For food products, determining harms and benefits may appear tricky at first glance because harms and benefits are often intertwined and opposite. For example, consuming broccoli has been found to “lower[] the risk of cardiovascular disease by reducing the total amount of cholesterol in the body.”¹⁹⁸ Consuming broccoli is therefore beneficial to health in that it reduces the chance of harm. In the realm of commercial speech, the government should focus on addressing food labels for harmful products rather than for products which lack benefits.

Obesity may be used to exemplify this point. Obesity increases the risk for serious health conditions such a stroke, heart disease, diabetes, cancer, and death.¹⁹⁹ These conditions damage health, and so obesity may be characterized as a harm. Accordingly, the Second Circuit in *New York State Restaurant Ass’n v. New York City Board Of Health*,²⁰⁰ found that New York City had an interest in preventing obesity.²⁰¹ Legislators and regulators should distinguish between preventing harms, such as those caused by obesity, and losing benefits when regulating food labels. Consuming meals without knowing their caloric content may contribute to a harm, whereas consuming milk without Vitamin A may not.

Consuming Vitamin A confers several health benefits, such as regulating cell growth and supporting eye health.²⁰² Vitamin A is found in a variety of food products including tomatoes, cantaloupe, spinach,

(last visited Oct. 17, 2021) (defining harm as “physical or mental damage”).

197. *Benefit*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/benefit> (last visited Oct. 17, 2021).

198. Nicola Shubrook, *Top Five Health Benefits of Broccoli*, BBC (citing Talwinder Singh Kahlon et al., *Steam Cooking Significantly Improves in vitro Bile Acid Binding of Collard Greens, Kale, Mustard Greens, Broccoli, Green Bell Pepper, and Cabbage*, 28 NUTRITIONAL RESEARCH no. 6, 2008, at 151), <https://www.bbcgoodfood.com/howto/guide/health-benefits-broccoli#:~:text=Broccoli%20is%20a%20good%20source,B%20vitamins%20including%20folic%20acid> (last visited Oct. 19, 2021).

199. *The Health Effects of Overweight & Obesity*, CENTER FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/healthyweight/effects/index.html> (last visited Oct. 19, 2021).

200. 556 F.3d 114 (2d Cir. 2009).

201. *See Id.* at 134–35.

202. *Vitamin A*, HARVARD T.H. CHAN SCHOOL OF PUBLIC HEALTH, <https://www.hsph.harvard.edu/nutritionsource/vitamin-a/> (last visited Oct. 19, 2021).

kale, pumpkin, and milk.²⁰³ Milk containing Vitamin A therefore confers some benefits to consumers. The process of skimming milk removes most of the milk's Vitamin A content unless replaced by an additive.²⁰⁴ Thus, skim milk with no additives potentially deprives consumers of some potential benefits. It cannot be said, however, that removing the Vitamin A from milk harms consumers in any way similar to the harms of obesity.²⁰⁵ Certainly, there are risks associated with Vitamin A deficiency, such as susceptibility to infections and infertility.²⁰⁶ Such risks are unlikely to manifest, however, as "Vitamin A deficiency is rare in Western countries."²⁰⁷ Further, it is unlikely that consumers rely on milk to meet their daily Vitamin A intake.

Of course, a different conclusion would be reached if there was evidence that the public depended on milk for the majority of its Vitamin A consumption. In that case, removing the Vitamin A from milk could potentially lead to the harms associated with Vitamin A deficiency. In this scenario, instead of a lack of benefit, there would be harm from not including additives when selling skim milk to the public. The government would then have a higher interest in regulating the labels for skim milk. If the government had such concerns, legislators could conduct surveys similar to those mentioned above to understand how the public consumes food products. If such a survey found consumers rely on skim milk for their Vitamin A intake, the government would have a substantial interest in regulating skim milk labeling. Legislators would then be justified in passing commercial speech regulation for skim milk labels such as compelling those without Vitamin A to use the label "imitation milk product."²⁰⁸ As it stands, however, removing Vitamin A from skim milk and not replacing it with artificial additives poses no serious danger to public health. Further, if an individual is concerned about her personal vitamin consumption, she can still look at the nutrition facts on the skim milk.²⁰⁹

203. *Id.*

204. *Ocheesee Creamery LLC v. Putnam*, 851 F.3d 1228, 1231 (11th Cir. 2017).

205. National Institute of Health, *Vitamin A: Fact Sheet for Health Professionals*, <https://ods.od.nih.gov/factsheets/VitaminA-Consumer/>.

206. *Vitamin A*, *supra* note 202.

207. *Id.*

208. *See Ocheesee Creamery*, 851 F.3d at 1232 ("imitation milk product" was one label Florida suggested Mary Lou use).

209. Jayachandran N. Variyama, *Do Nutritional Labels Improve Dietary Outcomes?*, 17 HEALTH ECON. 695 (2008) (examining how mandatory nutrition labels impacts consumer diets).

C. Advancing the Interest through Restricting or Compelling Speech

Once policymakers have identified a harm related to food labels, they must decide how to advance that governmental interest. An important consideration is whether the interest should be advanced through a speech restriction or a compelled disclosure. The commercial speech doctrine imposes intermediate scrutiny for restrictions of speech under *Central Hudson*. There is a lesser standard for compelled commercial speech under *Zauderer*. In making their decision, legislators should keep in mind that the main purpose of commercial speech is “the free flow of commercial information.”²¹⁰ Legislation that runs counter to this purpose will likely not pass scrutiny if it is litigated in a court. Compelling commercial speech is therefore preferable to restricting it. Regulations which compel a speaker to disgorge more information to the public not only align with the purpose of commercial speech, but also “may even enhance it.”²¹¹ Conversely, restricting commercial speech lessens the information available for consumers to make economic decisions. Legislators therefore should enact commercial speech restrictions more sparingly than speech compulsions.

After deciding whether to enact a commercial speech restriction or compelled disclosure, legislators should ensure that their choice of regulation will not be overturned by the courts. Policymakers should consider that the government has the burden of justifying its regulation and “must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.”²¹² Further, the government cannot rely on “speculation and conjecture” when implementing a restriction on speech.²¹³ Therefore, it should evaluate data on the harms and benefits of the food products it is labeling and identify how its regulation will advance that interest.

Under the theory advanced in this Note, legislators have more leeway to advance regulations for food products that contribute to a harm. An asserted interest in preventing allergic reactions is more likely to be substantial than an asserted interest in increasing Vitamin A consumption. Using *New York Restaurant Ass’n* as an example again,

210. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 764 (1976).

211. Post, *supra* note 26, at 877.

212. *Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993).

213. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996).

New York City's stated interest was combating obesity.²¹⁴ The City provided the Court with studies outlining the harms to health associated with obesity.²¹⁵ Moreover, the City identified that obesity is linked to excess calorie consumption and provided studies showing that giving consumers calorie information allows for healthier decisions which may reduce obesity levels.²¹⁶ New York City did not rely on speculation, but rather on data. In doing so, its regulation was upheld. Because the government was concerned with a harm, it likely could have chosen to restrict speech rather than compel it. An informative example of how such a restriction would work comes from Ireland.

In September 2020, Ireland's Supreme Court ruled that the food chain Subway could not describe its bread as "bread."²¹⁷ An Irish statute defining bread prohibited bread from having sugar, fat, and bread improver content over two percent the weight of flour.²¹⁸ In Subway's recipe, the sugar weighed ten percent the weight of flour.²¹⁹ This speech restriction makes sense using harm as a guide in the commercial speech analysis. Normally, the government should not exclusively look to its own definition when considering regulations on the commercial speech of food labels. If, however, not adhering to the definition would increase the risk of a harm, then it is acceptable to use that definition in regulating the commercial speech. The same does not apply to a food label case dealing with benefits.

In *Ocheesee*, the lack of Vitamin A in Mary Lou's skim milk was the only health concern at issue. The State's interest in its regulation was the milk's lack of health benefits due to skimming, and not any potential harm. This interest is not substantial, and so it did not merit the restriction Florida imposed. Florida may have been concerned with a discrepancy of benefits between milk containing additives and milk without additives. The State may have wanted consumers to know that Mary Lou's skim milk contained less Vitamin A than skim milk from other sources. If this was the case, Florida would have been better suited compelling Mary Lou to disclose the lack of Vitamin A on her

214. N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health, 556 F.3d 114, 134–35 (2d Cir. 2009).

215. *Id.*

216. *See id.* at 134-36 (“[T]he obesity epidemic is mainly due to excess calorie consumption . . . consumers’ distorted perceptions about how many calories food contained led to unhealthy food choices.”).

217. Reese Oxner, *For Subway, A Ruling Not So Sweet. Irish Court Says Its Bread Isn't Bread*, NPR (Oct. 1, 2020), <https://www.npr.org/2020/10/01/919189045/for-subway-a-ruling-not-so-sweet-irish-court-says-its-bread-isnt-bread>.

218. *Id.*

219. *Id.*

product label rather than pursuing a speech restriction. This course of action would be preferable to a restriction, as there would be more information available to consumers. Additionally, the State likely would have been able to show a link between its interest and a disclosure requirement. If a food product has no potential health harms or lack of benefits, however, policymakers and regulators should not attempt commercial speech regulation.

Legislators and regulators can save resources by not attempting to regulate food products which do not pose any potential health effects. In *International Dairy*, the State attempted to compel dairy farmers to disclose whether their products had been treated with synthetic growth hormone.²²⁰ The FDA had already concluded that there were no human safety or health concerns from the food products procured by the treated cows.²²¹ There was no discernable potential harm from the product, nor was there any lack of benefit or other types of benefit discrepancy. The protections afforded by commercial speech prohibit the government from compelling producers to speak against their will without a legitimate interest.²²² Consumer curiosity alone is not enough to permit a forced disclosure.²²³ Nor should it be.

Beyond simply correcting deception, policymakers should only advance commercial speech regulations on food labels if those regulations pertain to public health. Food products relate to public health through potential harm, or through potential lack of benefit. For mitigating harms, the State has a substantial interest. And so, legislatures will have leeway to pursue either commercial speech restrictions, or compelled disclosures. There is a lesser health interest in lack of benefit cases, and so legislatures may only pursue compelled disclosures. Once legislatures have decided on a restriction or compulsion, they must use data to ensure that their policy effectively advances their interest.

CONCLUSION

Commercial speech is afforded lesser First Amendment protection than other speech. Protections around commercial speech are still

220. *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 69 (2d Cir. 1996).

221. *Id.* at 73.

222. *See id.* at 74 (“Although the Court is sympathetic to the Vermont consumers who wish to know which products may derive from rBST-treated herds, their desire is insufficient to permit the State of Vermont to compel the dairy manufacturers to speak against their will.”).

223. *Id.*

valuable in that they promote the free flow of commercial information allowing consumers to allocate their resources efficiently. Since its inception in 1975, the doctrine of commercial speech has caused confusion. There is disagreement about what constitutes misleading speech, what a substantial governmental interest is, and what directly advancing an interest entails.

Legislators and regulators are in the best position to clear up the commercial speech doctrine. By adhering closely to the prongs of *Central Hudson*, and focusing on harms, legislators can enact regulations that will not be struck down by courts. Similarly, by using surveys to discern consumer confusion and by identifying substantial governmental interests, regulators can better identify which cases will be successful if they decide to pursue regulating a food product label. These changes will reduce needless litigation, thereby promoting more efficient use of government resources.