

**COMMERCIAL SPEECH POST-NIFLA v. BECERRA:
LEGITIMATE CHECK ON COMPELLED SPEECH
OR WEAPONIZATION OF THE FIRST AMENDMENT?**

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INTRODUCTION

For decades, the government had a free hand in regulating advertising and there was generally no First Amendment protection for commercial speech. That changed, however, in the mid-1970s, with the Supreme Court’s decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), a case arising from a consumer group’s challenge to a ban on advertising of prescription drug prices by pharmacists. The Supreme Court held that the First Amendment applies to purely commercial speech, regardless of any economic motivation behind the expression.

The Court set forth the standard for commercial speech in *Central Hudson Gas & Electric Corp. v. Public Service Commission of N.Y.*, 447 U.S. 557 (1980). Under *Central Hudson*, the constitutionality of a statute regulating commercial speech is determined by a four-part intermediate scrutiny test: (i) if the regulation restricts speech that concerns lawful activity; (ii) if the regulation’s asserted interest is substantial; (iii) if the regulation directly advances that interest; and (iv) if the regulation is more extensive than necessary to serve that interest. 447 U.S. at 566.

Since 1980, the *Central Hudson* test has been criticized as unpredictable, and many scholars have called for more protection than *Central Hudson* provides. There has been a trend toward increased protection for commercial speech, with calls by commentators to replace the *Central Hudson* intermediate scrutiny test with strict scrutiny or, at least, some form of “heightened scrutiny.” Several justices of the Supreme Court have suggested that they would be open to applying strict scrutiny to commercial speech in at least some contexts. But the Court has not had the opportunity to rule on this, because the regulations it has evaluated have flunked even the *Central Hudson* test.

In *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), the Supreme Court’s most recent commercial speech case, Justice Kennedy, writing for the majority, held that “heightened judicial scrutiny” is warranted whenever a “content-based burden” is imposed on commercial speech.

564 U.S. at 570-71. But even though the Court suggested that some commercial speech justified greater scrutiny than *Central Hudson*, the Court found that the state had not demonstrated that the statute would significantly further its interests, as required by the *Central Hudson* test. *Id.* at 572-73.

In *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), the Supreme Court unanimously struck down a state sign code that treated signs differently based on their content. The majority held that strict scrutiny presumptively applied to content-based regulations of speech and that “[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.” 135 S. Ct. at 2227. Many thought this holding strongly suggested that the Court would apply strict scrutiny to content-based restrictions on commercial speech. But *Reed* was not a commercial speech case, and it did not cite to *Central Hudson*. Still, the holding in *Reed* provides some support for applying strict scrutiny to certain types of commercial speech.

Recently, in *National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361 (2018) [TAB 1], the Supreme Court rejected the notion that “professional speech” is a separate category of speech subject to different rules, clarifying that not all speech arguably incident to a commercial transaction is commercial speech. The Supreme Court narrowed the exceptions for imposing strict scrutiny to content based laws and appeared to reaffirm the holding in *Reed* that strict scrutiny presumptively applies to any content-based regulation of speech. In rejecting the argument that content-based restrictions of “professional speech” are subject to lesser protection, the Court appears to have narrowed the scope of what was previously considered commercial speech.

I. The Basis for Commercial Speech

1. The Evolution of the Commercial Speech Doctrine

- a. Initially, from the founding of this country until 1942, there was no concept of “commercial speech.”
- b. In 1942, the Supreme Court ruled that “commercial speech” did not fall within the ambit of the First Amendment. *Valentine v. Chrestensen*, 316 U.S. 52 (1942).
 - i. In a unanimous ruling, the Court found that any speech used to promote a commercial activity was not protected by the First Amendment. The Court held that it was clear that First Amendment protects political speech, and that it is “equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.” *Id.* at 54.
 - ii. As one law review article put it, “[t]he Supreme Court plucked the commercial speech doctrine out of thin air.”¹ The Court neither cited any authority for its ruling, nor discussed the purposes or values underlying the First Amendment.

¹ Alex Kozinski and Stuart Banner, *Who’s Afraid of Commercial Speech*, 76 Va. L. Rev. 627 (1990). [TAB 7]

- c. For thirty years, speech related to commerce was not protected under the First Amendment.
- d. But in 1976, the Supreme Court established the “commercial speech doctrine” in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).
 - i. The Supreme Court reversed its holding in *Chrestensen*, striking down a Virginia Statute prohibiting pharmacists from advertising drug prices to serve the state interest of “maintaining professionalism of its licensed pharmacists.” The Court held that “[c]ommercial speech’ is not wholly outside the protection of the First and Fourteenth Amendments” and that “the free flow of commercial information is indispensable.” *Id.* at 748, 765.
 - ii. The Court explained that commercial speech was not “wholly undifferentiable from other forms” of speech and that “common sense differences” between commercial speech and other types of speech, such as news reporting or political commentary, that “suggest a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired.” *Id.* at 771, n.24.
 - iii. In its opinion, the Court characterized the Virginia law as highly paternalistic, articulating that “[t]he advertising ban does not directly affect professional standards one way or the other. It affects them only through the reactions it is assumed people will have to the free flow of drug price information.” *Id.* at 769. The Court asserted that “[i]t is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us. Virginia is free to require whatever professional standards it wishes of its pharmacists But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering.” *Id.* at 770.
- e. Since the *Virginia State Board of Pharmacy* decision, the Supreme Court has protected commercial speech to varying degrees, applying several different tests that vary in scope. (See Part II for discussion of specific tests.) These tests have been criticized as being subject to the politics of the presiding judge and being unpredictable in their application.

2. Rationales Underlying Distinct Treatment of Commercial Speech

- a. In a footnote in *Virginia State Board of Pharmacy*, the Supreme Court offered two distinct rationales that “make it less necessary to tolerate inaccurate statements for fear of silencing the speaker” in the context of commercial speech (425 U.S. at 771, n.24):

- i. **Objectivity Rationale:** The Supreme Court articulated that commercial speech is more objective than other forms of speech, as “[t]he truth of commercial speech, for example, may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more than anyone else.” *Id.*

1. Is commercial speech more objective than other forms of speech?

- a. In their law review article on commercial speech, Alex Kozinski and Stuart Banner assert that the objectivity rationale is not entirely persuasive, as “[t]he notion that commercial speech is any more verifiable than noncommercial speech may once have been true, but it ceased to be so when advertising entered the twentieth century.” Kozinski, *supra* note 1, at 635. Specifically, they articulate that it is not necessarily easier to ascertain the truth of claims made in modern advertisements. [TAB 7].
- b. Kozinski and Banner also challenge this rationale because “[o]ther sorts of speech are equally capable of being ascertained as being true or false, but are nevertheless fully protected,” specifically pointing to scientific speech. *Id.*
- c. Additionally, Kozinski and Banner set forth the argument that there is less justification for government interference in the context of commercial speech, as it is more easily debunked by counter speech. *Id.* at 636.

- ii. **Durability Rationale:** The Supreme Court likewise articulated that commercial speech may be distinguished from other forms of speech as it is “more durable than other kinds.” The Court continued 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.” *Id.*

1. Is commercial speech more durable than other forms of speech?

- a. Kozinski and Banner challenge the notion that the speech is durable as a result of the economic interest behind it, asserting that “[t]he claim that economic motives render speech more durable than other motives is based on an empirical assumption, but one for which it is difficult to find much support.” Kozinski, *supra* note 1, at 637.

2. Even if commercial speech were more durable as a function of economic interest, should it necessarily receive less protection? A lot of fully-protected “core” speech — e.g., that published in newspapers, magazines, movies, or books — is equally motivated by a profit motive, but we ignore that in analyzing the level of protection to apply to it. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (“That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment”). Why should it matter in the context of commercial speech?

II. Tests Applied to Commercial Speech

1. The *Central Hudson* Test

- a. In 1980, the Supreme Court articulated what would become the seminal test for the constitutionality of restrictions on commercial speech in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980).
 - i. The Court applied a form of intermediate scrutiny, which involved a four-part test.
 1. As a threshold matter, the Court asserted that commercial speech at a minimum “must concern lawful activity and not be misleading” to warrant protection. *Id.* at 557. “If the communication is neither misleading nor related to unlawful activity, the government’s power is more circumscribed.” *Id.* at 564.
 2. If the speech is not misleading and concerns lawful activity, the government may only regulate if: 1) the state can “assert a substantial interest” that is served by the regulation; 2) the regulation is “designed carefully” to “directly” advance the government interest and 3) the regulation is not “ineffective or remote” in furthering that interest and is not “more extensive than is necessary.” *Id.* at 564, 566.
 - b. The *Central Hudson* test has been criticized as being unpredictable in its application.
 - i. As articulated by Kozinski and Banner, “[u]nless a case has facts very much like those of a prior case, it is nearly impossible to predict the winner.” Kozinski, *supra* note 1, at 631. [TAB 7]

2. The Evolution of Commercial Speech Jurisprudence

- a. In *Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio*, 471 U.S. 626 (1985), the court held that truthful advertisements are protected by the First

Amendment, but the Court declined to apply *Central Hudson* to certain types of compelled commercial speech. Instead, the Court held that “purely factual and uncontroversial” disclosures are permissible if they are “reasonably related to the State’s interest in preventing deception of consumers” provided the requirements are not “unjustified or unduly burdensome.” 471 U.S. at 651.

- b. As time went on, the *Central Hudson* test became more stringently applied to commercial speech (i.e., to make it more speech-protective). Several decisions after *Central Hudson* suggested that at least some Justices of the Court were unconvinced as to the appropriateness of the intermediate scrutiny standard and if the right case presented itself, *Central Hudson* should be overruled in favor of a more exacting test.²
 - i. In *44 Liquormart, Inc. v. Rhode Island*, 517 U.S.484 (1996), Justice Stevens suggested in a plurality opinion that *Central Hudson*’s intermediate scrutiny standard was not appropriate for all commercial speech regulations.
 1. The plurality opinion asserts that *Central Hudson* “identified the serious First Amendment concerns that attend blanket advertising prohibitions that do not protect consumers from commercial harms.” *Id.* at 499.
 2. The plurality opinion also remarked that the *Central Hudson* Court “explained that although the special nature of commercial speech may require less than strict review of its regulation, special concerns arise from ‘regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy,’” and therefore “that ‘special care’ should attend the review of such blanket bans.” *Id.* at 500 (quoting *Central Hudson*, 447 U.S. at 566, n. 9).
 - ii. In *Greater New Orleans Broadcasting Assn., Inc. v. United States*, 527 U.S. 173 (1999), the Court struck down a federal law that banned the advertising of commercial casino gambling under the *Central Hudson* test because “law was “so pierced by exemptions and inconsistencies” that “there was ‘little chance’ that the speech restriction could have directly and materially advanced its aim.” 527 U.S. at 190, 193.
 1. The Supreme Court noted that, “petitioners as well as certain judges, scholars, and *amici curiae* have advocated repudiation of the *Central Hudson* standard and implementation of a more

² See Coleen Klasmeier and Martin H. Redish, *Off-Label Prescription Advertising, the FDA and the First Amendment: A Study in the Values of Commercial Speech Protection*, 37 Am. J.L. & Med. 315, 341 (2011) [TAB 8].

straightforward and stringent test for assessing the validity of governmental restrictions on commercial speech.” *Id.* at 184.

2. But the Court concluded that “there is no need to break new ground. *Central Hudson*, as applied in our more recent commercial speech cases, provides an adequate basis for decision.” *Id.*
- iii. In *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), the Supreme Court interpreted the final prong of the *Central Hudson* test — the “no more extensive than is necessary” requirement — to strike down portions of a Massachusetts law restricting the promotion and advertising of tobacco products.
 1. The Court noted, “Petitioners urge us to reject the *Central Hudson* analysis and apply strict scrutiny. They are not the first litigants to do so. . . . Admittedly, several Members of the Court have expressed doubts about the *Central Hudson* analysis and whether it should apply in particular cases. But here, as in *Greater New Orleans*, we see ‘no need to break new ground. *Central Hudson*, as applied in our more recent commercial speech cases, provides an adequate basis for decision.’” 533 U.S. at 554-55.
 - iv. In *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002), the Court articulated that “several Members of the court have expressed doubts about the *Central Hudson* analysis and whether it should apply in particular cases.” *Id.* at 367–68 (citing to *44 Liquormart Inc.*, 517 U.S. at 501, 510–514, among other cases). Despite this assertion, the Court asserted that there was “no need . . . to break new ground” since “[n]either party ha[d] challenged the appropriateness of applying the *Central Hudson* framework.” *Id.*
- c. More recently, Courts have gradually sought to clarify the application of the intermediate scrutiny standard and has seemingly moved towards applying a more stringent test.
 - i. In *Sorrell v. IMS Health Inc.*, 564 U.S. 553 (2011) [**TAB 2**], the Supreme Court assessed the constitutionality of Vermont’s Prescription Confidentiality law, which prohibited the sale, disclosure, or use of prescriber-identifying information for the purpose of pharmaceutical marketing. The Court held that “heightened judicial scrutiny [wa]s warranted” because the Vermont law banning disclosure of pharmacy records “impose[d] a specific, content-based burden on protected expression.” *Id.* at 565.
 1. The Court further explained that “[s]peech in aid of pharmaceutical marketing . . . is a form of expression protected by the Free Speech Clause of the First Amendment.” *Id.* at 557. The

court continued that “[t]he First Amendment requires heightened scrutiny *whenever* the government creates ‘a regulation of speech because of disagreement with the message it conveys’ . . . Commercial speech is no exception.” *Id.* at 566.

2. The Court found that the Vermont law did not satisfy the heightened scrutiny standard and was struck down.
- d. In *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015) [TAB 3], the Supreme Court struck down a state sign code that treated signs differently based on their content. The Court held that strict scrutiny presumptively applies to content-based regulations of speech. Although not a commercial speech case, the holding in *Reed* provides support for the application of strict scrutiny to commercial speech, which is typically regulated differently based on its content.
1. In its decision, the Court asserted that “[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.” *Id.* at 2227. The Court clarified that “[a] law that is content based on its face is subject to strict scrutiny regardless of the government’s benign motive, content-neutral justification, or lack of ‘animus towards the ideas contained’ in the regulated speech.” *Id.* at 2228. The Court held that all regulations of speech are “presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” *Id.* at 2226.

III. NIFLA and Commercial Speech

1. The NIFLA Decision

- a. In *National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361 (2018) [TAB 1], the Supreme Court held that the abortion disclosure notices required under California’s Reproductive FACT Act likely violate the Free Speech Clause of the First Amendment, applicable to the states through the Fourteenth Amendment. In doing so, the Court ruled for opponents of abortion on free speech grounds, resolving a clash between state efforts to provide women with facts about their medical options and First Amendment rulings that place limits on the government’s ability to compel individuals to say things that conflict with their sincerely-held religious beliefs.
 - i. In a 5-4 decision authored by Justice Thomas, the Court reversed and remanded the Ninth Circuit’s decision that, because the abortion disclosure laws impacted “professional speech,” the proper level of scrutiny to apply was intermediate scrutiny, under which the disclosure law satisfied. The Supreme Court held that both the licensed and unlicensed centers “are likely to succeed on the merits of their claim that

the FACT Act violates the First Amendment.” *Id.* at 2378. The Court remanded the case back to the lower courts for new proceedings in light of the ruling.

1. The Court began by analyzing the notice required for licensed centers. The Court concluded that the required notice was “content based,” because it “alters the content” of the licensed centers’ speech by requiring them to notify pregnant women about the availability of free or low-cost abortions, even though their goal is to persuade women to not have abortions at all. *Id.* at 2371. Justice Thomas explained that laws regulating speech based on content are normally subject to strict scrutiny, the most stringent standard of review.
2. The Court expressly rejected the Ninth Circuit’s holding that “professional speech” triggers a lesser standard of review, noting that the Court has “not recognized ‘professional speech’ as a separate category of speech,” and that, under the Court’s precedents, governments may not “impose content-based restrictions on speech without ‘persuasive evidence . . . of a long (if heretofore unrecognized) tradition’” to that effect. *Id.* at 2372. The Court noted that it has recognized less protection for professional speech in only two circumstances — laws that “require professionals to disclose factual, noncontroversial information in their ‘commercial speech,’”³ and laws regulating professional conduct that incidentally involves speech⁴—neither of which applied here.
 - a. Does lesser protection for commercial speech qualify as a “long tradition” permitting content-based restriction?
 - ii. Justice Kennedy, who also joined Justice Thomas’s majority opinion, filed a concurring opinion joined by Chief Justice Roberts and Justices Alito and Gorsuch. Justice Kennedy warned that the FACT Act “is a paradigmatic example of the serious threat presented when government seeks to impose its own message in the place of individual speech, thought, and expression,” strongly rebuking what he described as the California legislature’s “congratulatory statement” that the FACT Act “was part of California’s legacy of ‘forward thinking.’” *Becerra*, 138 S.Ct. at 2379 (Kennedy, J., concurring).

³ *Id.* at 2365-66 (citing *Zauderer*, 471 U.S. at 651).

⁴ *Id.* at 2366 (citing *Ohralik v. Ohio Bar Assn.*, 436 U.S. 447, 456 (1978) and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 884 (1992) (opinion of O’Connor, Kennedy, and Souter, JJ.)).

- iii. Justice Breyer filed a dissenting opinion joined by Justices Ginsburg, Sotomayor, and Kagan, to state that both the licensed and unlicensed notice requirements would likely pass constitutional muster.
 1. Warning that the constitutional approach of the majority “threatens to create serious problems” because it will result in “considerable litigation over the constitutional validity of much, perhaps most, governmental regulation,” *id.* at 2361, Justice Breyer suggested that the majority approach should be rejected as a new form of “Lochnerism.” *Id.* at 2381. “Ever since this Court departed from the approach it set forth in *Lochner v. New York*, 198 U.S. 45 (1905),” wrote Justice Breyer, “ordinary economic and social legislation has been thought to raise little constitutional concern.” *Id.* The majority’s approach would inappropriately call the validity of almost all governmental regulation into question.

2. Questions Emanating from the *NIFLA* Decision

- a. Is this, as the dissenters suggest the “weaponization of the First Amendment?”
- b. Does *NIFLA* provide a basis for strict scrutiny to be applied to most governmental regulations of speech based on its content?
- c. Does *NIFLA* provide a basis for serious constitutional challenges to significant governmental regulation in other areas?
- d. Does *NIFLA* mark the death-knell of *Central Hudson*?
- e. Does the decision marshal in a new era of Lochnerism?⁵

3. Potential Application of *NIFLA* to Recent Disputes in Commercial Speech

- a. **FDA Graphic Warnings:** In *R.J. Reynolds Tobacco Co. v. U.S. Food and Drug Admin.*, 696 F.3d 1205 (D.C. Cir. 2012) [TAB 4], the D.C. Circuit struck down an FDA regulation which required “graphic image” warning labels on cigarette packages.
 - i. The D.C. Circuit declined to apply the standard set out in by the Supreme Court in *Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio*, 471 U.S. 626 (1985), which held that “‘purely factual and uncontroversial’ disclosures are permissible if they are ‘reasonably related to the State’s interest in preventing deception of consumers’ provided the requirements are not ‘unjustified or unduly burdensome.’” *RJ Reynolds*, 696 F.3d at 1212 (citing to *Zauderer*, 471 U.S. at 651). Although the *Zauderer*

⁵ Compare Robert Post, *Compelled Commercial Speech*, 117 W. Va. L. Rev. 867, 908 (2015) [TAB 9] with Jane R. Bambauer & Derek E. Bambauer, *Information Libertarianism*, 105 Calif. L. Rev. 335 (2017) with [TAB 10].

standard had been applied by the district court, the D.C. Circuit applied intermediate scrutiny instead because the disclosures did “not constitute the type of ‘purely factual and uncontroversial’ information . . . to which the *Zauderer* standard may be applied.” *Id.* at 1216.

- ii. Applying intermediate scrutiny, the court ultimately held that the FDA’s rules did not “pass muster under *Central Hudson*” because the “FDA failed to present any data—much less the substantial evidence required under the APA—showing that enacting their proposed graphic warnings will accomplish the agency’s stated objective of reducing smoking rates.” *Id.* at 1222.

b. **Off-Label Promotion of Pharmaceutical Drugs:** In *United States v. Caronia*, 703 F.3d 149 (2d Cir. 2012) [TAB 5], the Second Circuit overturned the conviction of a pharmaceutical sales representative for off-label promotion of the drug Xyrem. The court held that “the government cannot prosecute pharmaceutical manufacturers and their representatives under the FDCA” for truthful and non-misleading “speech promoting the lawful, off-label use of an FDA-approved drug.” 703 F.3d at 169.

- i. In conducting its analysis, the Second Circuit explicitly recognized *Sorrell*’s holding that content- and speaker-based restrictions are “subject to heightened scrutiny and [are] ‘presumptively invalid.’” 703 F.3d at 163. The *Caronia* court stated, however, that *Sorrell* “did not decide the level of heightened scrutiny to be applied, that is, strict, intermediate, or some other form of heightened scrutiny.” *Id.* at 164. The *Caronia* court then engaged in the traditional *Central Hudson* analysis.
- ii. Although this decision was expected to result in major changes, the FDA subsequently made clear that it did not view *Caronia* as significantly changing the regulatory landscape.
- iii. In *Amarin Pharma, Inc. v. U.S. Food & Drug Admin.*, 119 F.Supp.3d 196 (S.D.N.Y. 2015) [TAB 6], the court held that the First Amendment protected truthful and non-misleading commercial speech about off-label uses of prescription drugs.

c. **E-Cigarettes:**

- i. In May of 2016, the FDA deemed e-cigarettes to be regulated “tobacco products” under the Family Smoking Prevention & Tobacco Control Act of 2009 (the “Tobacco Act”). As a consequence, e-cigarette retailers and manufacturers are prohibited from informing consumers that e-cigarettes are less dangerous than combustible cigarettes.
- ii. Such claims may only be made with the FDA’s approval, after submitting to a lengthy and costly approval process. Otherwise, straightforward

factual claims—even claims that do no more than repeat public statements made by the FDA—are prohibited.

- iii. The Tobacco Act’s provisions about “Modified Risk Tobacco Products” prohibits producers from making commercial statements that “explicitly or implicitly” indicate that a product or its “smoke” “present a lower risk of tobacco-related disease or is less harmful than one or more commercially marketed tobacco products,” or “does not contain or is free of a substance.”
- iv. An expert independent evidence review published by Public Health England (“PHE”) in 2015 concludes that e-cigarettes are significantly less harmful to health than tobacco and have the potential to help smokers quit smoking.⁶ However, e-cigarette manufacturers are prohibited from providing this information to its consumers, absent submitting to the FDA’s lengthy approval process.

⁶ Public Health England, *E-cigarettes: an evidence update* (Aug. 28, 2015), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/733022/E-cigarettes_an_evidence_update_A_report_commissioned_by_Public_Health_England_FINAL.pdf.