A “COMMERCIAL SPEECH” FLOWCHART FOR PUBLIC HEALTH REGULATION

Does the law regulate CONDUCT or SPEECH?

Speech
Is the speech commercial, non-commercial “core” speech, or unprotected speech?

Commercial Speech
Does it regulate content or time, place, or manner?

Non-commercial Core Speech
Example: Tobacco company may not publicly claim in any forum that e-cigarettes are less harmful than conventional cigarettes.

Unprotected Speech
Examples: Inciting illegal activity, true threats.

Does it regulate content or time, place, or manner?

Content
Does it compel or restrict speech?

Restricts Speech
Example: Law prohibiting advertising of alcohol or tobacco products on TV.

Compels Speech
What sort of speech does the law compel?

Time, Place or Manner Regulation
Example: Alcohol may not be sold on Sundays.

Content
Does it compel or restrict speech?

Central Hudson test

Compels Speech
What sort of speech does the law compel?

Statements of Fact
whose truth are uncontroversial.

Examples:
- Required nutritional information on package food
- Health warnings on cigarette packages

Other statements of opinion or controversial factual claims.

Examples:
- Required statement in cigarette ads: “Smoking isn’t cool” (not factual);
- Required warning on labels of foods containing GMOs that GMOs increase risk of cancer (controversial at best)

Expressive
Example: Law prohibiting displays of cigarette packs in store window.

O’Brien test

Not Expressive
Example: Law prohibiting soda servings larger than one quart.

No First Amendment concern

Conduct
Is the conduct expressive?

Expressive

Not Expressive

O’Brien test

No First Amendment concern

Restricts Speech
Example: Law prohibiting advertising of alcohol or tobacco products on TV.

Compels Speech
What sort of speech does the law compel?

Time, place, or manner test

NOTING

No First Amendment concern

Unprotected Speech
Examples: Inciting illegal activity, true threats.

Strict scrutiny

Other

Probably Central Hudson test; possibly strict scrutiny (especially for controversial or misleading claims of fact)
<table>
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<tr>
<th>Type of Speech Regulation &amp; Example</th>
<th>Test Applied by Courts</th>
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Example: Law prohibiting alcohol and tobacco products on TV  
Burden: High hurdle  
Threshold: Is the restricted speech false, deceptive, or advertising illegal activities?  
If yes, restriction is constitutional.  
If no, go on to:  
Prongs:  
1. Is the law justified by a substantial governmental interest?  
2. Does the law directly advance the governmental interest?  
3. Is there a reasonable fit between the goal (the government's interest) and the means chosen to accomplish the goal?  
OR  
4. Does the law restrict the least possible amount of speech necessary to achieve its goal? |
Example: Law requiring nutritional info on packaged food  
Burden: Low hurdle  
Threshold:  
1. Is the relevant speech commercial?  
2. Is the statement strictly factual?  
3. Is the accuracy of the factual disclosure well established (not controversial)?  
If yes, go on to:  
Reasonable relationship test:  
1. Are the required factual disclosures reasonably related to the State's interest in preventing consumer deception?  
2. Is the disclosure requirement not unduly burdensome?  
If no, apply more stringent test. |
| 3. Regulations that affect non-commercial speech | Strict scrutiny:  
1. Is the requirement justified by a compelling (more than "substantial") governmental interest?  
2. Is it the least restrictive means for achieving that interest (vs. a "reasonable fit")?  
Example: Law prohibiting tobacco companies from publicly commenting on relative safety of e-cigarettes in any medium  
Burden: Extremely high hurdle |
| 4. Regulation of time, place, or manner of speech | Time, place, or manner test:  
1. Is the requirement justified without reference to the content of the regulated speech?  
2. Does the requirement serve a significant (can be weaker than "substantial") government interest?  
3. Does the restriction leave open ample alternative channels for the communication of the information?  
Example: Law prohibiting billboards near highway.  
Burden: Moderate hurdle |
Example: Law prohibiting displays of cigarette packs in store windows.  
Burden: Moderate hurdle  
Threshold:  
Is the conduct intended to convey a particular message and is it likely that viewers will understand the message?  
If no, the First Amendment doesn't apply, and the law restriction is constitutional.  
If yes, go on to:  
Prongs:  
1. Does the government have the authority to pass the law?  
2. Does the restriction further a substantial governmental interest?  
3. Is the restriction unrelated to the suppression of free expression?  
4. Is the incidental restriction on First Amendment freedoms no broader than necessary to achieve the government's interest? |