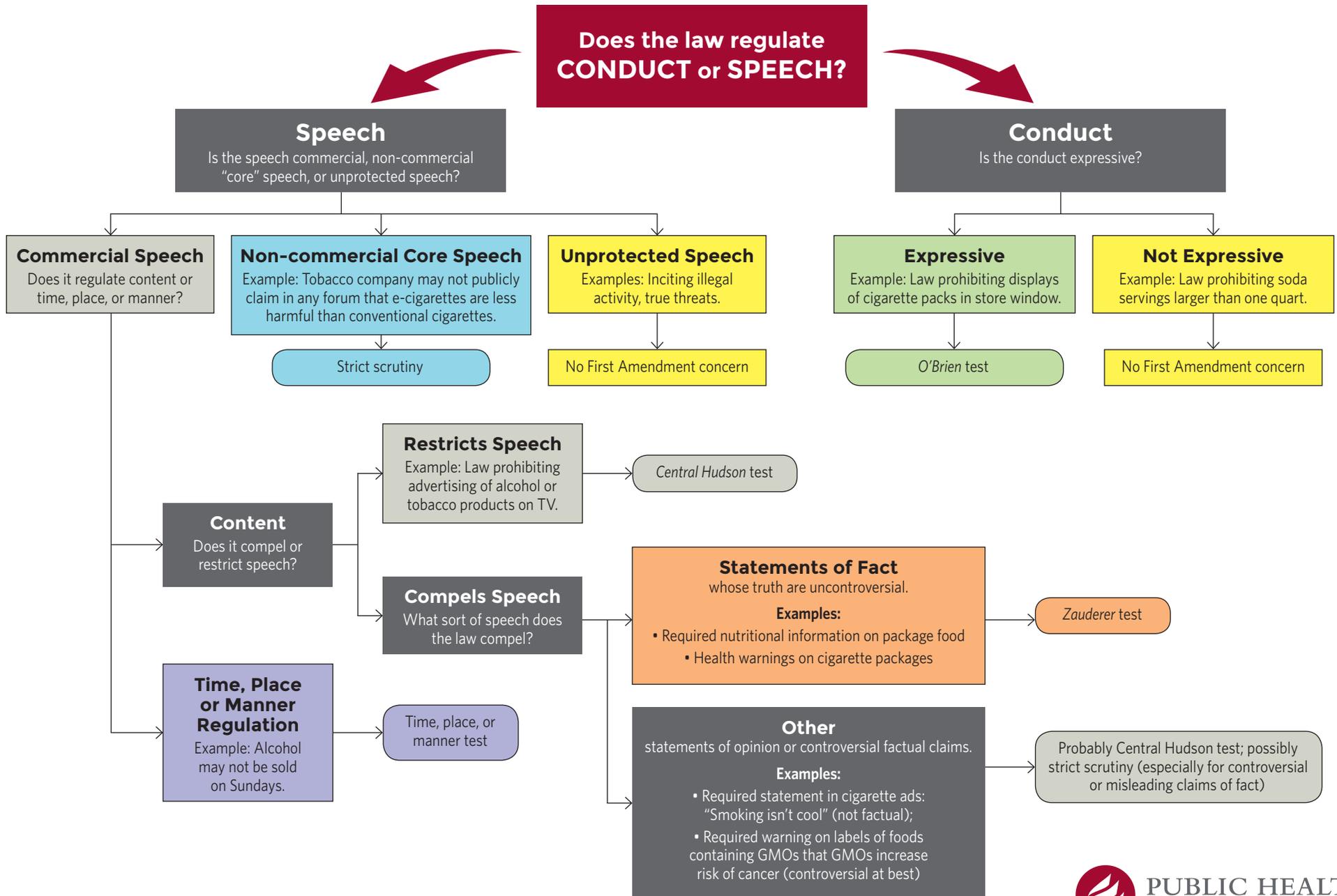


# A “COMMERCIAL SPEECH” FLOWCHART FOR PUBLIC HEALTH REGULATION



# TYPES OF LAWS REGULATING PUBLIC HEALTH MARKETING AND THE “COMMERCIAL SPEECH” TESTS APPLIED

TYPE OF SPEECH REGULATION & EXAMPLE	TEST APPLIED BY COURTS	
<p><b>1. Restriction on commercial speech</b></p> <p><b>Example:</b> Law prohibiting alcohol and tobacco products on TV</p> <p><i>Burden: High hurdle</i></p>	<p><i>Central Hudson Gas v. Public Services Commission, 447 U.S. 557 (1980).</i></p> <p>Threshold: Is the restricted speech false, deceptive, or advertising illegal activities?</p> <p>If <b>yes</b>, restriction is constitutional.</p>	<p>If <b>no</b>, go on to:</p> <p>Prongs:</p> <ol style="list-style-type: none"> <li>1. Is the law justified by a substantial governmental interest?</li> <li>2. Does the law directly advance the governmental interest?</li> <li>3. Is there a reasonable fit between the goal (the government’s interest) and the means chosen to accomplish the goal?</li> </ol> <p>OR</p> <ol style="list-style-type: none"> <li>4. Does the law restrict the least possible amount of speech necessary to achieve its goal?</li> </ol>
<p><b>2. Compelled factual disclosures accompanying commercial speech</b></p> <p><b>Example:</b> Law requiring nutritional info on packaged food</p> <p><i>Burden: Low hurdle</i></p>	<p><i>Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985).</i></p> <p>Threshold:</p> <ol style="list-style-type: none"> <li>1. Is the relevant speech commercial?</li> <li>2. Is the statement strictly factual?</li> <li>3. Is the accuracy of the factual disclosure well established (not controversial)?</li> </ol>	<p>If <b>no</b>, apply more stringent test.</p> <p>If <b>yes</b>, go on to:</p> <p>Reasonable relationship test:</p> <ol style="list-style-type: none"> <li>1. Are the required factual disclosures reasonably related to the State’s interest in preventing consumer deception?</li> <li>2. Is the disclosure requirement not unduly burdensome?</li> </ol>
<p><b>3. Regulations that affect non-commercial speech</b></p> <p><b>Example:</b> Law prohibiting tobacco companies from publicly commenting on relative safety of e-cigarettes in any medium</p> <p><i>Burden: Extremely high hurdle</i></p>	<p><b>Strict scrutiny:</b></p> <ol style="list-style-type: none"> <li>1. Is the requirement justified by a compelling (more than “substantial”) governmental interest?</li> <li>2. Is it the least restrictive means for achieving that interest (vs. a “reasonable fit”)?</li> </ol>	
<p><b>4. Regulation of time, place, or manner of speech</b></p> <p><b>Example:</b> Law prohibiting billboards near highway.</p> <p><i>Burden: Moderate hurdle</i></p>	<p><b>Time, place, or manner test:</b></p> <ol style="list-style-type: none"> <li>1. Is the requirement justified without reference to the content of the regulated speech?</li> <li>2. Does the requirement serve a significant (can be weaker than “substantial”) government interest?</li> <li>3. Does the restriction leave open ample alternative channels for the communication of the information?</li> </ol>	
<p><b>5. Regulation of expressive conduct</b></p> <p><b>Example:</b> Law prohibiting displays of cigarette packs in store windows.</p> <p><i>Burden: Moderate hurdle</i></p>	<p><i>United States v. O’Brien, 391 U.S. 367 (1968).</i></p> <p>Threshold: Is the conduct intended to convey a particular message and is it likely that viewers will understand the message?</p> <p>If <b>no</b>, the First Amendment doesn’t apply, and the law restriction is constitutional.</p>	<p>If <b>yes</b>, go on to:</p> <p>Prongs:</p> <ol style="list-style-type: none"> <li>1. Does the government have the authority to pass the law?</li> <li>2. Does the restriction further a substantial governmental interest?</li> <li>3. Is the restriction unrelated to the suppression of free expression?</li> <li>4. Is the incidental restriction on First Amendment freedoms no broader than necessary to achieve the government’s interest?</li> </ol>