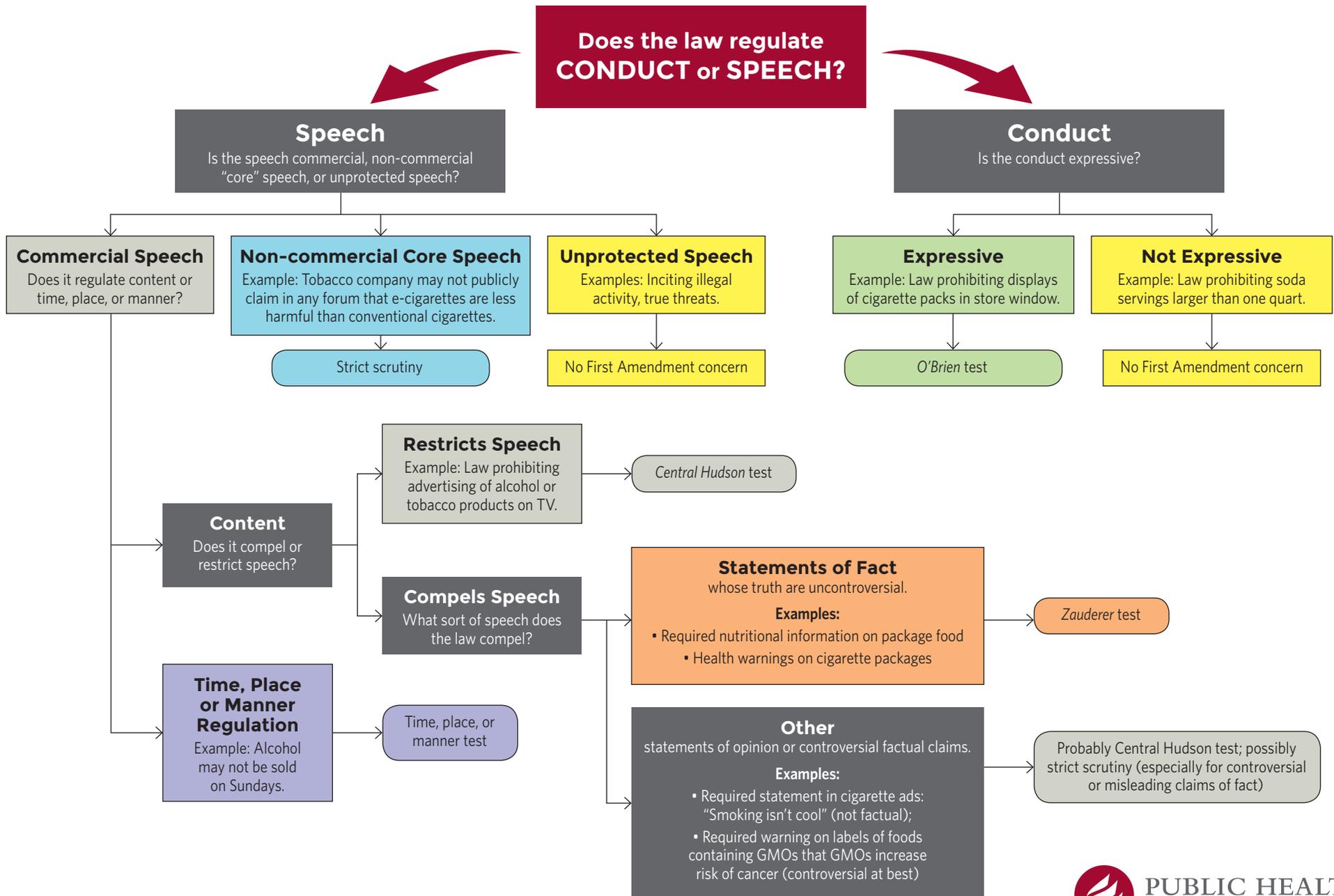


A “COMMERCIAL SPEECH” FLOWCHART FOR PUBLIC HEALTH REGULATION



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

TYPE OF SPEECH REGULATION & EXAMPLE	TEST APPLIED BY COURTS	
<p>1. Restriction on commercial speech</p> <p>Example: 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 yes, restriction is constitutional.</p>	<p>If no, go on to:</p> <p>Prongs:</p> <ol style="list-style-type: none"> 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? <p>OR</p> <ol style="list-style-type: none"> 4. Does the law restrict the least possible amount of speech necessary to achieve its goal?
<p>2. Compelled factual disclosures accompanying commercial speech</p> <p>Example: 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"> 1. Is the relevant speech commercial? 2. Is the statement strictly factual? 3. Is the accuracy of the factual disclosure well established (not controversial)? 	<p>If no, apply more stringent test.</p> <p>If yes, go on to:</p> <p>Reasonable relationship test:</p> <ol style="list-style-type: none"> 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?
<p>3. Regulations that affect non-commercial speech</p> <p>Example: 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>Strict scrutiny:</p> <ol style="list-style-type: none"> 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”)? 	
<p>4. Regulation of time, place, or manner of speech</p> <p>Example: Law prohibiting billboards near highway.</p> <p><i>Burden: Moderate hurdle</i></p>	<p>Time, place, or manner test:</p> <ol style="list-style-type: none"> 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? 	
<p>5. Regulation of expressive conduct</p> <p>Example: 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 no, the First Amendment doesn’t apply, and the law restriction is constitutional.</p>	<p>If yes, go on to:</p> <p>Prongs:</p> <ol style="list-style-type: none"> 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?