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The Butt Stops Here: The Tobacco Control Act's Anti-Smoking Regulations Run Afoul of the First Amendment

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THE BUTT STOPS HERE: THE TOBACCO CONTROL ACT'S ANTI-SMOKING REGULATIONS RUN AFOUL OF THE FIRST AMENDMENT

Danielle Weatherby & Terri R. Day***

I. INTRODUCTION

Picture this: the upper body of an anonymous man, cigarette in hand, mouth parted in shame, as he exhales the ominous white smoke of his relentless habit through the black tracheotomy in the

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small of his neck.[1] Or perhaps, visualize: a healthy, pink, life-sustaining lung alongside a brown, disease-riddled lung, overgrown with foreign green and yellow tissue.[2] Try to envision: lips pulled back to reveal a crooked, rotting set of stained teeth, or what is left of them, with a crimson, flesh-eating wound, relentlessly devouring the raw skin surrounding it.[3] Finally, imagine: a lifeless, naked cadaver atop a crisp, white sheet, the dual cavities of his chest fastened together with a vertical row of staples, hiding the internal chaos left behind by the autopsy.[4]

Did the foregoing narratives elicit a visceral response? Did the written descriptions alone incite feelings of unease, anxiety, and trepidation? If so, imagine the intensity of the response one might experience at the sight of the actual graphic images themselves.

This October,[5] every consumer who purchases a pack of cigarettes will be forced to view these and five other graphic images, along with prominent new textual warnings, including the capitalized "1-800-QUIT-NOW," the toll free phone number to a smoking cessation hotline.[6] Pursuant to a major component of the 2009 Family Smoking Prevention and Tobacco Control Act ("Tobacco Control Act" or "Act"),[7] the most comprehensive and aggressive tobacco[8]

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[1] *WARNING: Cigarettes Are Addictive., 1A*, FLICKR, http://www.flickr.com/photos/fdaphotos/5852903499/in/set-72157626881459565 (last visited Jan. 28, 2012); *see also Cigarette Health Warning Images*, FLICKR, http://www.flickr.com/photos/fdaphotos/sets/72157626881459565/with/5852903145 (last visited Jan. 28, 2012) (displaying the actual images released by the FDA for publication on all cigarette and tobacco packages this fall).

[2] *WARNING: Cigarettes Cause Fatal Lung Disease., 3A*, FLICKR, http://www.flickr.com/photos/fdaphotos/5853455792/in/set-72157626881459565 (last visited Jan. 28, 2012).

[3] *WARNING: Cigarettes Cause Cancer., 4A*, FLICKR, http://www.flickr.com/photos/fdaphotos/5852902737/in/set-72157626881459565 (last visited Jan. 28, 2012)

[4] *WARNING: Smoking Can Kill You., 7A*, FLICKR, http://www.flickr.com/photos/fdaphotos/5852902367/in/set-72157626881459565 (last visited Jan. 28, 2012)

[5] Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009) ("the Act"). A fifteen-month stay of the FDA's enforcement of this provision had been issued by the U.S. District Court for the District of Columbia, pending the outcome of the litigation on its merits. *See* R.J. Reynolds Tobacco Co. v. FDA, 823 F. Supp. 2d 36, 39, 53 (D.D.C. 2011) [hereinafter *R.J. Reynolds I*], *vacated*, 696 F.3d 1205, 1223 (D.C. Cir. 2012). Subsequently, pursuant to the Administrative Procedure Act's process for "'set[ting] aside [an] agency['s] action,'" on appeal, the Court of Appeals for the District of Columbia vacated the Act's graphic images requirement and remanded the rule-making functions to the FDA. R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1222 (D.C. Cir. 2012) [hereinafter *R.J. Reynolds III*] (quoting 5 U.S.C. § 706(2) (2006)). In doing so, the Court of Appeals' decision also vacated the injunction issued by the district court. *Id*

[6] *See R.J. Reynolds III*, 696 F.3d at 1222.

[7] 15 U.S.C. § 1333 (2006).

legislation to date, every cigarette package must soon bear one of nine color graphic images depicting the negative health consequences of smoking.[9]

These nine graphic images, released by the Food and Drug Administration ("FDA") for publication on all cigarette packages this fall, were designed specifically with the intent to shock the consumer and change his or her habits.[10] They express a subjective point of view and convey a strong message, beyond the purely factual information historically printed on tobacco and cigarette packaging.[11]

Indeed, the message communicated through these highly graphic and disturbing images—namely, if you smoke, you *will* suffer the consequences depicted in these images—carry with them a high "fear appeal,"[12] a factor that the government hopes will impact consumer decision-making.[13] In fact, studies indicate that visual stimuli with emotional imagery, such as these, create certain intensified physiological responses, including an elevated heart rate, a greater propensity for the "[s]tartle [r]eflex and the [e]yeblink,"[14] and the amplification of skin conductance.[15] These

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[8] Throughout this article, the authors use the terms "cigarettes" and "tobacco products" jointly, often interchangeably. This article focuses on the Tobacco Control Act's graphic images provision, requiring that graphic images of the negative health consequences of smoking be published on all cigarette packages. While many of the labeling requirements that control cigarette packaging apply equally to other tobacco products, the authors in no way intend to imply that the graphic images mandate, which is the center of their discussion, applies equally to any other tobacco product besides cigarettes.

[9] 15 U.S.C. § 1333(d). Pursuant to the Act, the new graphic images, along with their accompanying required textual warnings, must be included on all cigarette packages manufactured on or after September 22, 2012 and all cigarette packages introduced into commerce on or after October 22, 2012. *Id.*

[10] *See FDA Unveils New Cigarette Health Warnings*, U.S. FOOD & DRUG ADMIN., http://www.fda.gov/ForConsumers/ConsumerUpdates/ucm259624.htm (last visited Jan. 28, 2012).

[11] *See generally id.* (describing the "illustrations and photos" required by the 2009 Family Smoking Prevention and Tobacco Control Act to appear on every cigarette pack, carton and advertisement). *See also* Rudy James, *Cigarette Advertising*, TIME (June 15, 2009), http://www.time.com/time/magazine/article/0,9171,1905530,00.html.

[12] Kent Sepkowitz, *Could Graphic New Anti-Smoking Ads Do More Harm?*, THE DAILY BEAST (Mar. 16, 2012, 4:45 AM), http://www.thedailybeast.com/articles/2012/03/16/could-graphic-new-anti-smoking-ads-do-more-harm.html (internal quotation marks omitted).

[13] *See generally FDA Unveils New Cigarette Health Warnings*, *supra* note 10 ("These labels are frank, honest and powerful depictions of the health risks of smoking and they will help encourage smokers to quit, and prevent children from smoking . . . .").

[14] *See* Peter J. Lang et al., *Emotion, Attention, and the Startle Reflex*, 97 PSYCHOL. REV. 377, 377 (1990). The startle blink response is a brainstem reflex that protects the eye and facilitates escape from sudden stimuli. *See id* at 377, 389. "[T]he vigor of the startle reflex varies systematically with an organ's emotional state." *Id* at 377.

[15] *See* Edward Bernat et al., *Effects of Picture Content and Intensity on Affective*

physiological changes are a natural response to the emotions manifested in the pictures.[16] The pain, hopelessness, and desperation on the faces and images portrayed in color trigger an emotional response, driving thoughts, feelings, and ultimately, human behavior.[17]

Unlike the health disclaimers currently published on all cigarette packages, the Tobacco Control Act's graphic images communicate a subjective and highly controversial message, eliciting a physiological and emotional response in the viewer.[18] According to Congress,[19] these images may ultimately drive long-term smokers to quit and decrease the incidence of first-time tobacco use, especially among adolescents.[20] But, while the asserted interest is certainly substantial, and perhaps compelling,[21] the government cannot achieve this interest by requiring tobacco companies to adopt and express its subjective message, which constitutes strong anti-smoking advocacy, especially where less restrictive alternatives exist.[22] The Act's graphic images mandate tramples on the First Amendment, which generally tolerates compelled commercial speech only where the speech is factual and non-subjective.[23]

Part II of this article will present a brief chronicle of federal tobacco legislation, paying particular attention to the historical

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Physiological Response, 43 PSYCHOPHYSIOLOGY 93 (2006); *see also* FREDERIC H. MARTINI & EDWIN F. BARTHOLOMEW, ESSENTIALS OF ANATOMY & PHYSIOLOGY (3d ed. 2003); Takahiro Osumi & Hideki Ohira, *The Positive Side of Psychopathy: Emotional Detachment in Psychopathy and Rational Decision Making in the Ultimatum Game*, 49 PERSONALITY & INDIVIDUAL DIFFERENCES 451, 452, 454 (2010). Skin conductance response measures the electrical conductance of the skin—which varies with its moisture level—produced by the sweat glands, which are controlled by the sympathetic nervous system. *See id.* Skin conductance is often used as an indication of psychological or physiological arousal. *See id.*

[16] *See* Bernat et al., *supra* note 15, at 93.

[17] *See, e.g.*, Andrew K. Woods, *A Behavioral Approach to Human Rights*, 51 HARV. INT'L L.J. 51, 65 (2010) (explaining how advertisements, through the use of developing implicit attitudes, can trigger an emotional response which produces a desired behavior).

[18] *See* Bernat et al., *supra* note 15, at 93.

[19] Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009).

[20] *See id.* § 2 ("[The regulations] directly and materially advance the Federal Government's substantial interest in reducing the number of children and adolescents who use cigarettes and smokeless tobacco and in preventing the life-threatening health consequences associated with tobacco use.").

[21] Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 564 (2001) (declining to uphold tobacco advertising regulations despite substantial and compelling interests of preventing adolescent tobacco use).

[22] *See id.* at 582.

[23] *See* Entm't Software Ass'n v. Blagojevich, 469 F.3d 641, 652 (7th Cir. 2006) (holding that a compelled video game label deeming the product sexually explicit constituted subjective, opinion-based speech).

evolution of the size, scope, and impact of required warning labels on cigarettes and other tobacco products. Part III will outline the current state of the law and the government's most recent effort to up the ante with respect to the cigarette package-labeling requirement. Percolating their way through the federal courts are two cases, which present inapposite analyses of the Tobacco Control Act's graphic images mandate.[24] Since the graphic images labeling requirement presents novel First Amendment issues, and there is currently a split among the circuits, this case may ultimately reach the Supreme Court.[25] Therefore, this Part will also highlight the competing arguments on both sides of the issue that may be germane, if and when the Supreme Court grants certiorari to decide the constitutionality of the graphic images.

Part IV of this article will discuss the First Amendment jurisprudence that impacts the constitutionality of the Tobacco Control Act's graphic images mandate. In light of the recent Supreme Court decision on the Affordable Care Act where Congress attempted to effectuate a policy objective under the guise of the Commerce Clause, this Part will also comment on the way in which Congress improperly relies on its Commerce Clause powers to justify the Tobacco Control Act's graphic images mandate.[26] Congress' reliance on its Commerce Clause powers to control behavior and express its own anti-smoking message ultimately exceeds the bounds of the commercial speech doctrine. Bootstrapping speech regulations, which offend the First Amendment, to its Commerce Clause powers is an inappropriate way for the government to attack the harms caused by smoking. Indeed, the use of speech regulations to dissuade unhealthy behavior could lead down a slippery slope,[27] where required graphic images appear on a wide range of consumer products in an attempt

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[24] Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509 (6th Cir. 2012); R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205 (D.C. Cir. Aug. 2012).

[25] Michelle Olsen, *Circuit Split Watch: A Divide Over Graphic Tobacco Warnings*, NAT'L L. J. (Apr. 2, 2012), www.law.com/jsp/nlj/PubArticleSCI.jsp?id=1202547689809.

[26] Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2585–91 (2012). For a discussion regarding the use of the Commerce Clause as a guise to effectuate a policy objective underlying the Tobacco Control Act, see *infra* notes 289–96 and accompanying text.

[27] *See* Debra Cassens Weiss, *Lawyers Who Sued Big Tobacco Companies Take on Food Companies*, A.B.A. J. (Aug. 20, 2012, 6:54 AM), http://www.abajournal.com/mobile/article/lawyers_who_sued_big_tobacco_take_on_food_companies/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email (discussing the flurry of recent litigation over the "deceptive" labeling of food products and the FDA's recent efforts to target major food companies and their allegedly misleading labeling practices).

to change Americans' unhealthy habits.

In conclusion, this article posits that the graphic images mandate of the Tobacco Control Act cannot pass constitutional muster. Exceeding the commercial speech doctrine that governs the current labeling requirements for tobacco and cigarette packages, the Tobacco Control Act's graphic images mandate runs afoul of long-standing First Amendment jurisprudence, which guarantees the freedom not only to "speak freely" but also "to refrain from speaking at all."[28] Despite its worthwhile goal of changing unhealthy behavior, government cannot compel private entities to adopt and express a subjective, viewpoint-based message, even when there is a compelling government interest at stake.[29] In order for this speech regulation to be upheld, the government would have to show not only a compelling interest, but also that the graphic images mandate is the least restrictive means of achieving that interest.[30] Where so many other less restrictive means of regulating cigarettes and tobacco products are available, the graphic images mandate will not withstand judicial scrutiny.[31]

Finally, these graphic images are "a primitive but effective way of communicating ideas. . . . a short cut from mind to mind."[32] The First Amendment shields "the sphere of intellect" from government intrusion.[33] Tobacco companies are no less deserving of protection from compelled speech in the form of symbols employed to change ideas and regulate behavior than other persons or entities. The fact that the government's compelled speech targets commercial products and supports a worthy goal does not override the important and fundamental free speech rights that are at stake.[34]

II. A CHRONICLE OF TOBACCO LEGISLATION: THE SLIPPERY SLOPE OF LEGISLATION REQUIRING HEALTH DISCLAIMERS ON CIGARETTE PACKAGING

The days of dapper men in three-piece suits sipping martinis in a

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[28] Wooley v. Maynard, 430 U.S. 705, 714 (1977).

[29] *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 564 (2001); *see also* Entm't Software Ass'n v. Blagojevich, 469 F.3d 641, 652 (7th Cir. 2006).

[30] *See Lorillard*, 533 U.S. at 582.

[31] *Id.*

[32] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943).

[33] *Id.* at 642.

[34] *See generally* Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 2 (2000) (arguing that commercial speech is protected under the First Amendment because of its informational value to the public).

swank, smoke-filled nightclub are long gone.[35] Despite the widely popular influence of hit shows like *Mad Men*, which glamorize smoking,[36] the national anti-smoking campaign is in full swing, with the government holding the reigns as ringleader.[37] However, the requirement that tobacco and cigarette companies publish health warnings on their packaging is a relatively new legal phenomenon.[38]

It was not until 1962 when "the Surgeon General of the Public Health Service appointed an advisory committee ("the Committee") to study all published literature bearing on the relationship of smoking to health."[39] Ultimately, the Committee "studied the problem for 18 months."[40] In 1964, based on the Committee's findings, the then-Surgeon General Luther Terry issued a report on smoking, linking tobacco use to multiple fatal diseases, such as lung cancer and heart disease.[41] In response, "the Federal Trade Commission issued a notice of proposed rulemaking, proposing the establishment of a trade regulation rule under which the labeling and advertising of cigarettes would be required to contain a warning of health hazards involved in cigarette smoking."[42] Subsequently, after several proposed variations of the final bill,[43] in 1965,

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[35] Jeff Little, *Smoke*, REWIND THE FIFTIES, http://www.loti.com/smoke.htm (last visited Jan. 28, 2013) (listing the ways in which smoking was "in vogue" in the 1950s and 1960s, including the fact that "[b]oth Dick Van Dyke and Mary Tyler Moore smoked Kent Cigarettes in commercials on The Dick Van Dyke Show" and that John Wayne, the legendary Hollywood icon, appeared in a Camel commercial in 1952).

[36] Cristine Russell, *Of Mad Men, Crusaders and Cigarettes*, ATLANTIC (Oct. 16, 2010), http://www.theatlantic.com/national/archive/2010/10/of-mad-men-crusaders-and-cigarettes/64676.

[37] *See* Join Together Staff, *U.S. Government Unveils Nationwide Anti-Smoking Campaign*, DRUGFREE.ORG (March 15, 2012), http://www.drugfree.org/join-together/prevention/u-s-government-unveils-nationwide-anti-smoking-campaign (describing the government's efforts to alarm the public with its $54 million advertising campaign featuring commercials with former smokers who will discuss the negative health consequences of smoking).

[38] Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, § 4, 79 Stat. 282, 283 (1965) (codified at 15 U.S.C. § 1333 (2006)).

[39] H.R. REP. NO. 89-449 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2350, 2351.

[40] *Id.*

[41] U.S. DEP'T OF HEALTH, EDUC., & WELFARE, ADVISORY COMM. TO THE SURGEON GEN. OF THE PUB. HEALTH SERV., PUB. NO. 1103, SMOKING AND HEALTH (1964). The 1964 Report had a profound impact on public attitudes and policy. A Gallup Survey conducted in 1958 found that only forty-four percent of Americans believed smoking caused lung cancer, while seventy percent believed so by 1969. *See* David W. Moore, *Americans Agree with Philip Morris: Smoking is Harmful*, GALLUP NEWS SERVICE (Oct. 14, 1999), http://www.gallup.com/poll/3538/Americans-Agree-Philip-Morris-Smoking-Harmful.aspx.

[42] H.R. REP. NO. 89-449.

[43] H.R. REP. NO. 89-586 (1965) (Conf. Rep.), *reprinted in* 1965 U.S.C.C.A.N. 2367. The final bill, a House amendment to the Senate bill, superseded that bill, which provided more extensive regulations and heftier fines for noncompliance. *Id.* In addition to containing a

Congress passed the Federal Cigarette Labeling and Advertising Act ("Cigarette Labeling and Advertising Act"),[44] the first piece of legislation to introduce required warning labels on tobacco products.[45] The stated purpose of the Act was to "adequately inform[] [the public] that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes."[46] The Cigarette Labeling and Advertising Act required the labeling of all cigarette packages with the statement: "Caution: Cigarette Smoking May Be Hazardous to Your Health."[47] Any violation of the labeling requirement would be punishable as a misdemeanor subject to a fine of not more than ten thousand dollars.[48] Significantly, the Cigarette Labeling and Advertising Act expressly preempted any other laws requiring the publication of cautionary statements on cigarette packages.[49]

In considering the adoption of the first major piece of legislation with compulsory cigarette labeling, Congress made several important findings regarding the impact of prior publicly disseminated health warnings.[50] In light of the fact that much of the public had recently been informed of the health risks associated with smoking, Congress, in crafting the final law, balanced the interests of safeguarding the individual freedom of choice (the right to choose to smoke or not to smoke) against the goal of disseminating "a fair and factual cautionary statement on every cigarette package."[51] Sensitive to this difficult balancing act, Congress concluded that the required warning should be "factual," "succinct," and "short and direct, and should not be weakened in its

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different definition for the term "cigarette," the Senate bill required that the health warning be displayed on the front or back panel of every cigarette package (the final bill required that the health warning be placed in a "conspicuous place"), compelled the Federal Trade Commission to publish a report on unfair or deceptive acts in the advertising of cigarettes, and provided a fine of not more than $100,000 for any person's failure to comply with the labeling mandate. *Id.*

[44] Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, § 4, 79 Stat. 282, 283 (1965) (codified at 15 U.S.C. §§ 1331–41 (2006)).

[45] *See id.* § 4.

[46] *See id.* § 2.

[47] *See id.* § 4.

[48] *Id.* § 6.

[49] *Id.* § 5(b).

[50] H.R. REP. NO. 89-449 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2350, 2352. Specifically, Congress found that: (1) due to the publication of 350,000 copies of the Surgeon General's 1964 report on smoking and the development of public education programming which alerted the public to the health risks associated with smoking, as of January 11, 1965, "nearly one out of four adult men ha[d] given up cigarettes"; and, similarly, (2) many persons had become aware of the health risks associated with smoking. *Id.*

[51] *Id.*

impact by any qualifying adjectives, such as 'excessive,' 'continual,' or 'habitual.'"[52]

Piggybacking on this recent effort[53] to inform the public, in 1970, President Richard Nixon signed the Public Health Cigarette Smoking Act of 1969 ("Public Health Cigarette Smoking Act").[54] The Public Health Cigarette Smoking Act banned cigarette advertising[55] "on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission" and strengthened the required warning on all cigarette packages.[56] The stated purpose of the bill was to "provide adequate warning to the public of the hazards of cigarette smoking through strengthened cautionary labeling . . . and to prohibit . . . all television and radio broadcasting of cigarette advertisements."[57]

The Public Health Cigarette Smoking Act's updated admonition read: "Warning: The Surgeon General has determined that cigarette smoking is dangerous to your health."[58] Congress considered

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[52] *Id.*

[53] In 1969, more than ninety members from the House of Representative introduced or cosponsored cigarette labeling and advertising bills. H.R. REP. NO. 98-805, at 9 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3718, 3722. Each of these bills included wide-ranging approaches to the following general areas of regulation: (1) requiring stronger warning and labeling requirements with the inclusion of tar and nicotine labels on packages; (2) "prohibiti[ng] or regulati[ng] . . . broadcast cigarette advertising"; and (3) "includi[ng] tar and nicotine levels on packages and in advertising . . . ." *Id.*

[54] *See generally* Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (1970) ("To extend public health protection with respect to cigarette smoking and for other purposes."). The Cigarette Smoking Act followed another official report from the United States Surgeon General, which linked cigarette smoking to low birth weight. *See* U.S. DEP'T OF HEALTH, EDUC., & WELFARE, PUB. HEALTH SERV. PUB. NO. 1696-2, THE HEALTH CONSEQUENCES OF SMOKING: 1969 SUPPLEMENT TO THE 1967 PUBLIC HEALTH SERVICE REVIEW (1969), *available at* profiles.nlm.nih.gov/NN/B/B/L/H.

[55] Initially, the ban of cigarette advertisements on television and radio became a source of criticism for First Amendment advocates and was challenged as an unconstitutional ban on commercial speech. *See, e.g.*, Capital Broad. Co. v. Mitchell, 333 F. Supp. 582, 583, 585–86 (D.D.C. 1971) (emphasizing the uniquely pervasive nature of broadcast media and its potential to influence young people, the three-judge panel rejected the broadcasters complaint seeking to enjoin enforcement of the Public Health Cigarette Smoking Act's prohibition on cigarette advertising). The authors recognize that different First Amendment principles govern restrictions of speech in the context of broadcast television and radio. *See* FCC v. Pacifica Found., 438 U.S. 726, 750 (1978); Terri R. Day & Danielle Weatherby, *Bleeeeep! The Regulation of Indecency, Isolated Nudity, and Fleeting Expletives in Broadcast Media: An Uncertain Future for* Pacifica v. FCC, 3 CHAR. L. REV. 469, 473 (2012). "The last televised cigarette ad ran at 11:50 p.m. during *The Johnny Carson Show* on January 1, 1971." *April 1, 1970: Nixon Signs Legislation Banning Cigarette Ads on TV and Radio*, HISTORY.COM, http://www.history.com/this-day-in-history/nixon-signs-legislation-banning-cigarette-ads-on-tv-and-radio (last visited Jan. 28, 2012).

[56] *See* §§ 2, 6, 84 Stat. at 87, 89.

[57] S. REP. NO. 91-566 (1969), *reprinted in* 1970 U.S.C.C.A.N. 2652, 2652.

[58] § 4, 84 Stat. at 88.

lengthier warning statements with more specific information,[59] but ultimately rejected the other variations because the final warning was "both scientifically accurate, and sufficiently short and pointed to constitute an effective warning."[60]

More than a decade passed before Congress revisited the need for additional legislation in response to the national smoking epidemic.[61] In 1983, as part of a comprehensive law regulating the research, information dissemination, and prevention of cigarette and tobacco products, it passed the Alcohol and Drug Abuse Amendments of 1983 ("Drug Abuse Amendments").[62] Among other things, the Drug Abuse Amendments required the Department of Health and Human Services to submit to Congress a drug and tobacco report every three years including recommendations for legislative and administrative action.[63]

Despite the fact that the rate of smokers in America had consistently been on the decline,[64] Congress passed yet another piece of legislation, regulating the sale of tobacco products in 1984.[65]

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[59] S. REP. NO. 91-566. Based on its annual report, created pursuant to section 5(d)(2) of the Federal Cigarette Labeling and Advertising Act, the Federal Trade Commission recommended that the warning read: "Warning: Cigarette smoking is dangerous to health and may cause death from cancer, coronary heart disease, chronic bronchitis, pulmonary emphysema and other diseases." *Id.* Another contemplated alternative read: "Warning: the Surgeon General has Determined That Cigarette Smoking Is Dangerous to Your Health and May Cause Lung Cancer or Other Diseases." CONF. REP. NO. 91-897 (1970), *reprinted in* 1970 U.S.C.C.A.N. 2676, 2677.

[60] S. REP. NO. 91-566.

[61] H.R. REP. NO. 98-805 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3718, 3724. During this time, the Government did not altogether abandon its efforts to regulate cigarette packaging and smoking consumption. *Id.* In fact, there were several efforts by the Federal Trade Commission ("FCC" or the "Commission") to strengthen the required warning on cigarette packages and regulate tobacco consumption in other ways. *Id.* In July of 1977, the Commission recommended that the required warning label on all cigarette packages read either: "'Warning: Cigarette Smoking is Dangerous to Health and May Cause Death from Cancer, Coronary Heart Disease, Chronic Bronchitis, Pulmonary Emphysema, and Other Diseases,' or 'Warning: Cigarette Smoking is a Major Health Hazard and May Result in Your Death.'" *Id.* In 1981, in its report on its investigation into cigarette advertising, the Commission recommended that the government allocate additional funding to educate the public with respect to the negative health consequences of smoking through public service announcements and change the shape and increase the size of the current warning, and replace the current warning with a rotational warning. *Id.*

[62] *See* Alcohol and Drug Abuse Amendments of 1983, Pub. L. No. 98-24, 97 Stat. 175 (1983).

[63] *Id.* § 7.

[64] Lydia Saad, *U.S. Smoking Rate Still Coming Down*, GALLUP.COM (July 24, 2008), http://www.gallup.com/poll/109048/us-smoking-rate-still-coming-down.aspx. "Self-reported adult smoking peaked in 1954 at 45%, and remained at 40% or more through the early 1970s, but has since gradually declined. The average rate of smoking across the decades fell from 40% in the 1970s to 32% in the 1980s, 26% in the 1990s, and 24% since 2000." *Id.*

[65] *See* Comprehensive Smoking Education Act, Pub. L. No. 98-474, 98 Stat. 2200 (1984).

After several days of hearings spanning two Congressional sessions,[66] Congress approved the Comprehensive Smoking Education Act of 1984 ("Smoking Education Act"),[67] which amended the Federal Cigarette Labeling and Advertising Act[68] and modified the required warning labels for all cigarette packages yet again.[69] The required warnings[70] would appear in the place they were previously located—usually on the side panel—with the phrase "SURGEON GENERAL'S WARNING" in all capitalized letters.[71] Finally, the Federal Trade Commission was empowered with the authority to oversee the cigarette companies' compliance with the updated labeling requirements.[72]

Two years later, Congress passed the Comprehensive Smokeless Tobacco Health Education Act of 1986 ("Smokeless Tobacco Act").[73] The Smokeless Tobacco Act extended the existing tobacco restrictions, including labeling requirements, to smokeless tobacco products.[74] Specifically, the Smokeless Tobacco Act required smokeless tobacco products to bear one of three warning labels,[75]

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[66] H.R. REP. NO. 98-805, at 6 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3718, 3719.

[67] Comprehensive Smoking Education Act § 1, 98 Stat. at 2200.

[68] *Id.* Among other things, the Comprehensive Smoking Education Act of 1984 created new research and reporting requirements for the Secretary of Health and Human Services on the health effects of cigarette smoking, and formed an Interagency Committee on Smoking and Health. *See id.* § 3.

[69] *Id.* § 4. The Smoking Education Act required cigarette manufacturers and distributors to display on a quarterly rotating basis the following four health warnings on all cigarette packages: "SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, and May Complicate Pregnancy," "SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks to Your Health," "SURGEON GENERAL'S WARNING: Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, and Low Birth Weight," and "SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide." *Id.* § 4(a)(1).

[70] *Id.* In addition to the required warning labels, the Comprehensive Smoking Education Act forbade the advertising of cigarettes where the advertisement did not also bear one of the four Surgeon General's warnings printed on cigarette packages. *See id.* For cigarette advertisements on outdoor billboards, the billboard also had to bear one of the following four similar, but slightly abbreviated, warnings: "SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, and Emphysema," "SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Health Risks," "SURGEON GENERAL'S WARNING: Pregnant Women Who Smoke Risk Fetal Injury And Premature Birth," and "SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide." *Id.* § 4(a)(3).

[71] *See id.* § 4(b)(2).

[72] *Id.* § 4(c).

[73] Comprehensive Smokeless Tobacco Health Education Act of 1986, Pub. L. No. 99-252, 100 Stat. 30 (1984).

[74] Comprehensive Smokeless Tobacco Health Education Act of 1986 § 3(a)(1). The statute defines "smokeless tobacco" as "any finely cut, ground, powdered, or leaf tobacco that is intended to be placed in the oral cavity." *Id.* § 9(1).

[75] *Id.* § 3(a)(1). The permitted labels included: "WARNING: THIS PRODUCT MAY

banned the advertisement of smokeless tobacco products on television and radio,[76] and directed that all manufacturers, packagers, or importers of smokeless tobacco products report to the Secretary of Health and Human Services a list of ingredients in their products.[77] The stated purpose of the Smokeless Tobacco Act was "to facilitate a national public education and research effort to make our citizens more aware of the health consequences of using smokeless tobacco."[78] From this point forward, legislation requiring warning labels for cigarette products generally requires warning labels for smokeless tobacco products as well.[79]

Several years later came the passing of the Alcohol, Drug Abuse, and Mental Health Administration Reorganization Act of 1992 ("Alcohol, Drug Abuse Act").[80] Section 1926 of the Alcohol, Drug Abuse Act, familiarly known as the "Synar Amendment,"[81] was aimed at reducing the availability of tobacco products to youth.[82] It created special funding incentives for states that had laws restricting the sale of tobacco products to individuals under the age of eighteen.[83]

Subsequent to the passing of the Synar Amendment, it was reported:

> States have universally adopted youth access restrictions . . . and most states have made considerable progress in achieving the goal of reducing retailer violation rates in random inspections to 20 percent or less. In 2008, the national average retailer violation rate (tobacco sales to minors) was 9.9 percent. This was the lowest retailer

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CAUSE MOUTH CANCER"; "WARNING: THIS PRODUCT MAY CAUSE GUM DISEASE AND TOOTH LOSS"; and "WARNING: THIS PRODUCT IS NOT A SAFE ALTERNATIVE TO CIGARETTES." *Id.*

[76] *Id.* § 3(f).

[77] *See id.* § 4.

[78] S. REP. NO. 99-209, at 3, 13 (1986), *reprinted in* 1986 U.S.C.C.A.N. at 7, 12 ("The smokeless tobacco industry, once almost the forgotten factor in tobacco production and sales, has staged a resurgence in recent years. Estimated from the National Institutes of Health indicate that some 22 million Americans currently use smokeless tobacco products regularly . . . . The apparent popularity of smokeless tobacco among our children and youth make such legislative action particularly crucial.").

[79] *See* Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 204(b). 123 Stat. 1776 (2009).

[80] ADAMHA Reorganization Act, Pub. L. 102-321, 106 Stat. 323 (1992).

[81] *See Synar Program Factsheet*, SAMSHA.GOV, http://www.samhsa.gov/prevention/synarFactsheet.aspx (last updated Jan. 14, 2011). This provision was named for its sponsor, Oklahoma Congressman Mike Synar. *Id.*

[82] *See* ADAMHA Reorganization Act § 1926(a)(1), 106 Stat. at 394.

[83] *Id.* § 1926(b)–(c).

violation rate in Synar's 12-year history.[84]

These statistics undoubtedly show that there are ways to achieve the restriction of tobacco sales to minors, short of trampling upon First Amendment rights.

In 1996, the United States Food and Drug Administration ("FDA") asserted its authority over tobacco products and issued the "FDA Rule," intending to prevent and reduce tobacco use by children.[85] Among other things, the FDA Rule expressed the FDA's intent to regulate all tobacco and smokeless tobacco products and made recommendations for additional and more rigorous regulations.[86] Shortly after the FDA Rule was issued in 1996, several tobacco companies sued, contesting the FDA's authority to regulate tobacco products.[87]

In the 2000 Supreme Court case, *FDA v. Brown & Williamson Tobacco Corp.*, the high Court ruled that Congress had not given the FDA authority over tobacco and tobacco marketing.[88] In interpreting the law that did expressly grant the FDA regulation and enforcement power over certain categories, the Court explained that:

> Congress has clearly precluded the FDA from asserting jurisdiction to regulate tobacco products. Such authority is inconsistent with the intent that Congress has expressed in the FDCA's [Food, Drug, and Cosmetic Act's] overall regulatory scheme and in the tobacco-specific legislation that it has enacted subsequent to the FDCA. In light of this clear

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[84] Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 75 Fed. Reg. 13,225, 13,227 (Mar. 19, 2010) (to be codified at 21 C.F.R. pt. 1140) (citing J.R. DiFranza & G.F. Dussault, *The Federal Initiative to Halt the Sale of Tobacco to Children—the Synar Amendment, 1992–2000: Lessons Learned*, 14 TOBACCO CONTROL 93, 93–98 (2005); NIH State-of-the-Science Conference on Tobacco Use: Prevention, Cessation and Control at Bethesda, Maryland (June 12–14, 2006), *available at* http://consensus.nih.gov/2006/tobacco.htm (last visited Jan. 28, 2012); *FFY 2008 Annual Synar Reports: Youth Tobacco Sales*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., http://prevention.samhsa.gov/tobacco/synarreportfy2008.pdf).

[85] Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396, 44,396 (Aug. 28, 1996) (to be codified at 21 C.F.R. pts. 801, 803–04, 807, 820, 897). "[D]etermin[ing] that cigarettes and smokeless tobacco are intended to affect the structure or function of the body, within the meaning of the act's definitions of 'drug' and 'device,'" the FDA asserted its authority over tobacco products pursuant to the FDC Act's "device" authorities. *See id.* at 44,397.

[86] *See id.* at 44,399. The FDA's proposed regulations included prohibiting non-face-to-face sales of tobacco products, banning outdoor advertising of tobacco products near schools or playgrounds, imposing more stringent advertising regulations, and prohibiting brand name sponsorships. *See id.*

[87] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 127–30 (2000).

[88] *Id.* at 126.

intent, the FDA's assertion of jurisdiction is impermissible.[89]

As a result of the Court's ruling, without express statutory authority, neither the FDA nor any other regulatory agency was empowered to exercise jurisdiction over tobacco products.[90]

III. THE TOBACCO CONTROL ACT'S GRAPHIC IMAGES MANDATE AND THE FIRST AMENDMENT DIVIDE

In response to the Court's ruling in *Brown*, Congress was forced to provide explicit authority to the FDA to regulate tobacco.[91] In 2009, this was accomplished when President Obama signed into law the Family Smoking Prevention and Tobacco Control Act.[92] The stated purpose of the Act is to grant the FDA the authority to regulate tobacco products in order to "address issues of particular concern to public health officials, especially the use of tobacco by young people and dependence on tobacco."[93] In addition, the Act seeks "to promote cessation [of tobacco use] to reduce disease risk and the social costs associated with tobacco-related diseases."[94]

In promulgating the Act, Congress made the following important legislative findings (the "Legislative Findings"): (1) that "[t]he use of tobacco products by the Nation's children is a pediatric disease of considerable proportions that results in new generations of tobacco-dependent children and adults";[95] (2) that "[v]irtually all new users of tobacco products are under the minimum legal age to purchase such products";[96] (3) that "[b]ecause past efforts to restrict advertising and marketing of tobacco products have failed adequately to curb tobacco use by adolescents, comprehensive restrictions on the sale, promotion, and distribution of such products are needed";[97] and (4) that "[c]hildren are more influenced by tobacco marketing than adults: more than 80 percent of youth smoke three heavily marketed brands, while only 54 percent of adults, 26 and older, smoke these same brands."[98] Of particular significance are the findings Congress made with respect to the

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[89] *Id.*

[90] *Id.* at 155–56.

[91] Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009).

[92] *Id.*

[93] *Id.* § 3(2).

[94] *Id.* § 3(9).

[95] *Id.* § 2(1).

[96] *Id.* § 2(4).

[97] *Id.* § 2(6).

[98] *Id.* § 2(23).

legality of the Act's final regulations.[99]

The Tobacco Control Act introduced numerous provisions that implicate the First Amendment.[100] The focus of this article is section 201 of the Act, the graphic images mandate.[101] Section 201 imposes the obligation on cigarette manufacturers, distributors, and salespersons to publish on each cigarette package a "required warning," consisting of one of the nine new textual warning statements,[102] a corresponding color graphic depicting the negative health consequences of smoking,[103] and a toll-free phone number to a smoking cessation hotline.[104] The nine textual warnings must be rotated quarterly in alternating sequence.[105] Each required warning must be located "in the upper portion of the front and rear panels of the package, directly on the package underneath the cellophane or other clear wrapping."[106] In addition, the warning must "comprise the top 50[107] percent of the front and rear panels of the package," and must "be in conspicuous and legible 17-point type."[108] The text must be either "black on a white background, or white on a black background, in a manner that contrasts, by typography, layout, or color, with all other printed material on the package."[109] Finally, the Act empowered the Secretary of Health and Human Services to issue, within twenty-four months of the Act's effective date, regulations providing for the color graphic images of the negative health consequences of smoking.[110]

It is with this requirement—that the textual warnings accompany

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[99] *Id.* § 2(30)–(32). Discussed in more depth *infra* Part A–B.

[100] *Id.* §§ 102(a)(g), 201–06. Included among these provisions are the extension of the ban on broadcast advertising to modified risk tobacco products and restrictions on the distribution of samples of cigarette and modified risk tobacco products. *Id.*

[101] *Id.* § 201(a).

[102] *Id.* The textual warnings must read: "WARNING: Cigarettes are addictive"; "WARNING: Tobacco smoke can harm your children"; "WARNING: Cigarettes cause fatal lung disease"; "WARNING: Cigarettes cause cancer"; "WARNING: Cigarettes cause strokes and heart disease"; "WARNING: Smoking during pregnancy can harm your baby"; "WARNING: Smoking can kill you"; "WARNING: Tobacco smoke causes fatal lung disease in nonsmokers"; or "WARNING: Quitting smoking now greatly reduces serious risks to your health." *Id.*

[103] *Id.*

[104] Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628, 36,681 (Jun. 22, 2011) (to be codified at 21 C.F.R. pt. 1141.16).

[105] § 201(a), 123 Stat. at 1844.

[106] *Id.*

[107] *Id.* Where the text of the label occupies more than seventy percent of the top of the package, the text may be smaller, as long as it occupies at least sixty percent of the area. *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.*

one of nine disturbing graphic images depicting the negative health consequences of smoking—that tobacco companies and First Amendment advocates take issue.[111] Currently percolating their way through the courts are two federal cases in which the tobacco companies challenged the Tobacco Control Act's graphic images mandate.[112] The cases yielded opposite results out of two circuit courts of appeals, and it is likely that the split in opinion will ultimately lead to review by the U.S. Supreme Court.[113]

A. Discount Tobacco City & Lottery v. United States[114]

In *Discount Tobacco City & Lottery v. United States ("Discount Tobacco")*, the Sixth Circuit Court of Appeals reviewed the Western District of Kentucky's decision,[115] granting partial summary judgment[116] to the United States and holding that the Tobacco Control Act's graphic images mandate comports with the First Amendment.[117] The Sixth Circuit issued two decisions, one authored by Judge Clay and another authored by Judge Stranch.[118] Both opinions represent the majority views, with Judge Clay's opinion dissenting on the Tobacco Control Act's required use of color

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[111] *See* R.J. Reynolds Tobacco Co. v. FDA, 845 F. Supp. 2d 266 (D.D.C. 2012) [hereinafter *R.J. Reynolds II*] *aff'ing* 696 F.3d 1205 (D.C. Cir. 2012); Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 520 (6th Cir. 2012) (Clay, J., concurring).

[112] *R.J. Reynolds III*, 696 F.3d at 1207; *Disc. Tobacco*, 674 F.3d at 520 (Clay, J., concurring).

[113] Olsen, *supra* note 25.

[114] *Disc. Tobacco*, 674 F.3d at 509.

[115] Cmwth. Brands, Inc. v. United States, 678 F. Supp. 2d 512 (D. Ky. 2010) *aff'd in part, rev'd in part sub nom.* Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 520 (6th Cir. 2012).

[116] *Cmwth. Brands*, 678 F. Supp. 2d at 519. The Western District of Kentucky also granted partial summary judgment on the plaintiff tobacco companies' claims that the Tobacco Control Act's ban on the use of images on product packages, brand symbols, and color on advertising and labels violated their commercial free speech. *See id.* at 525. In explaining its holding, the District Court stated:

> Because Congress could have exempted large categories of innocuous images and colors—e.g., images that teach adult consumers how to use novel tobacco products, images that merely identify products and producers, and colors that communicate information about the nature of a product, at least where such colors and images have no special appeal to youth—the Act's "blanket ban" on all uses of color and images in tobacco labels and advertising has a "uniformly broad sweep . . . [that] demonstrates a lack of tailoring."

Id. at 525–26 (citing Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 563 (2001)).

[117] *Cmwth. Brands*, 678 F. Supp. 2d at 532 ("The Court does not believe that the addition of a graphic image will alter the substance of [the required warnings], at least as a general rule . . . [and] that the warning requirement is sufficiently tailored to advance the government's substantial interest under *Central Hudson*.").

[118] *Disc. Tobacco*, 674 F.3d at 509.

graphic images.[119]

With respect to the graphic images, Judge Clay and Judge Stranch initially disagreed about the nature of plaintiffs' challenge. Judge Clay characterized the First Amendment claim as one articulating both facial and as-applied challenges,[120] while Judge Stranch and the majority limited their review to the face[121] of the Act.[122] This distinction[123] is important because the majority's analysis was limited to whether the graphic images required by the Act *can* convey purely factual information, not whether they actually do.[124]

In considering whether the graphic images mandate[125] passed constitutional muster, both opinions began with an analysis of the applicable standard of review.[126] With respect to the textual warnings, both the majority and Judge Clay concluded that, "when viewed in isolation, [they] express [n]either completely 'subjective' [n]or 'highly controversial' messages."[127]

Notably, Judge Clay's dissent agreed with plaintiffs that the graphic images were subjective.[128] Nevertheless, in rejecting plaintiffs' insistence upon the application of strict scrutiny, both the majority and Judge Clay distinguished cases in other contexts

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[119] *Id.* at 527 (Clay, J., dissenting); *id.* at 551 (Stranch, J., majority opinion).

[120] *Id.* at 527 (Clay, J., dissenting).

[121] *See id.* at 552 (Stranch, J., majority opinion). Notably, the majority points out that the specific images chosen by the FDA were not available to the District Court for its review when it issued its decision in January 2010. *Id.* at 553. Indeed, the FDA began its rulemaking in November 2010 and submitted for public comment thirty-six proposed graphic images. *Id.* at 552–53. It was not until the final rule was published in June 2011 that the nine graphic images were published by the FDA. *Id.* (citing Required Warnings for Cigarette Packages and Advertisements, 75 Fed. Reg. 36628-01 (June 22, 2012) (to be codified at 21 C.F.R. pt. 1141).

[122] *See id.* at 552. The majority explained: "[O]ur concern is not the specific images the FDA chose—those are under review elsewhere—but rather whether Plaintiffs can show that 'no set of circumstances exists under which [the statute] would be valid, or that the statute lacks any plainly legitimate sweep.'" *Id.* at 558–59 (citing United States v. Stevens, 130 S. Ct. 1577, 1587 (2010)).

[123] The majority cites to *Washington v. R.J. Reynolds Tobacco Co.*, as an indication that plaintiffs have pursued an as-applied challenge in another court. *Id.* at 548 (citing Washington v. R.J. Reynolds Tobacco Co., 211 P.3d 448, 450 n.10 (Wash. Ct. App. 2009)).

[124] *Id* at 559 (analogizing the graphic images to pictures or drawings that appear in medical textbooks and explaining that images can convey "valuable factual information").

[125] *Id.* at 520 (Clay, J., concurring) (noting the *Discount Tobacco* plaintiffs challenged only the size and location of the textual warnings, not their actual content.).

[126] *Id.* at 525–27; *id.* at 554–59 (Stranch, J., majority opinion).

[127] *Id.* at 525–26 (Clay, J., concurring).

[128] *See id.* at 526 ("[T]here can be no doubt that the FDA's choice of visual images is subjective, and that graphic, full-color images, because of the inherently persuasive character of the visual medium, cannot be presumed neutral.").

which strict scrutiny was applied.[129] Both Judge Stranch and Judge Clay purported to apply the principles set forth in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, which articulated a rational basis standard of review that applies to factual, non-subjective compelled commercial disclosures.[130] This is where their decisions diverge.[131]

The majority opinion contemplated whether "there is a rational connection between the warnings' purpose and the means used to achieve that purpose."[132] It mused on the ineffectiveness of the current warnings and the government's interest in preventing consumer deception.[133] Significantly, the majority rejected plaintiffs' argument that the graphic warnings would not reduce tobacco use.[134] The Court reasoned that even if plaintiffs were correct that the graphic warnings would not reduce tobacco use, such a finding was irrelevant.[135] Instead, what mattered was "not how many consumers ultimately choose to buy tobacco products, but that the warnings effectively communicate the associated health risks so that consumers possess accurate, factual information when deciding whether to buy tobacco products."[136] Ultimately, the majority concluded that the required pictorial warnings did not violate the tobacco companies' freedom of expression.[137] The Court reasoned that, "[i]nstead, the labels serve as disclaimers to the public regarding the incontestable health consequences of using tobacco."[138]

In a lengthy and well-reasoned dissent, Judge Clay reached an opposite conclusion.[139] His opinion highlighted the unprecedented

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[129] *See id.* at 526–27 (distinguishing the Act's graphic images from required warning labels on violent and sexually explicit video games, where those restrictions also limited affirmative speech in the form of sales restrictions and controlled speech that arose in the context of art and literature (citing Brown v. Entm't Merch. Ass'n, 131 S. Ct. 2729, 2738 (2011); Entm't Software Ass'n v. Blagojevich, 469 F.3d 641, 652 (7th Cir. 2006)).

[130] *See Disc. Tobacco*, 674 F.3d at 551 (Clay J., concurring) (citing Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 650–51 (1985)); *Disc. Tobacco*, 674 F.3d at 555–56 (Stranch, J., majority opinion) (citing *Zauderer*, 471 U.S. at 650–51).

[132] *Disc. Tobacco*, 674 F.3d at 551–52 (detailing the differences between the two opinions).

[132] *Id.* at 561.

[133] *Id.* at 556, 562–63.

[134] *Id.* at 567.

[135] *Id.*

[136] *Id.*

[137] *Id.* at 551; *see also id.* at 531 (Clay, J., dissenting) (dissent's description of the majority opinion).

[138] *Id.* at 527.

[139] *Id.* at 527–31.

nature of the graphic images,[140] pointing out that the requirement imposed by the Act is unparalleled to any other disclosure mandate.[141] In drawing a comparison to the extensive required textual warnings on prescription drug labels, Judge Clay explained that, unlike the Act's color graphic images, those warnings "present purely factual information, with no subjective component."[142]

In accepting the government's assertion that "an information deficit still exists among potential tobacco consumers," Judge Clay determined that the government failed to show that the Act's required color graphics were a reasonably tailored response to ameliorate that harm.[143] Citing the government's own admission that the "color graphic warning labels are intended to create a visceral reaction in the consumer, in order to make a consumer less emotionally likely to use or purchase a tobacco product,"[144] the dissent emphasized the highly subjective and emotion-evoking nature of the images.[145] Applying these principles to the admittedly low confines of *Zauderer*, Judge Clay opined that:

> [w]hile it is permissible for the government to require a product manufacturer to provide truthful information, even if perhaps frightening, to the public in an effort to warn it of potential harms, it is less clearly permissible for the government to simply frighten consumers or to otherwise attempt to flagrantly manipulate the emotions of consumers as it seeks to do here.[146]

Ultimately, Judge Clay concluded that "the requirements of the Constitution firmly tip[] the balance towards disqualifying a government regulatory requirement that abridges the right of citizens to engage in free speech."[147]

Notably, the majority criticized Judge Clay's application of what it characterized as the "wrong test."[148] Judge Stranch and the majority maintained that Judge Clay erred in his analysis when he evaluated the warnings under the *Central Hudson* test for

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[140] *Id.* at 528.

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *Id.* at 528 (citing Ellen Peters, et al., *The Impact and Acceptability of Canadian-style Cigarette Warning Labels Among U.S. Smokers and Nonsmokers*, 9 NICOTINE & TOBACCO RESEARCH 4, 474 (2007) (internal citations omitted)).

[145] *Disc. Tobacco*, 674 F.3d at 529.

[146] *Id.*

[147] *Id.* at 530.

[148] *Id.* at 568 (Stranch, J., majority opinion).

commercial speech.[149] Instead, the majority claimed that *Zauderer's* rational basis test applied because the Tobacco Control Act's graphic images constitute required disclosures, not affirmative speech.[150]

B. R.J. Reynolds Tobacco Co. v. U.S. Food and Drug Administration[151]

Many of the same plaintiffs[152] in the *Discount Tobacco* case also asserted claims[153] against the government in the District Court for the District of Columbia, seeking judicial review of the actual images[154] selected by the FDA. In *R.J. Reynolds Co. v. U.S. Food and Drug Administration ("R.J. Reynolds")*, five tobacco companies alleged that the Tobacco Control Act's graphic images mandate violated their "'autonomy to choose the content of [their] own message'" under the First Amendment.[155]

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[149] *Disc. Tobacco*, 674 F.3d at 568; Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557 (1980).

[150] *Disc. Tobacco*, 674 F.3d at 568 ("[T]he required warnings need not be a reasonably tailored solution that materially advances the stated interest; they need only be reasonably related to the government's interest in preventing consumer deception." (citing Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985))).

[151] *R.J. Reynolds I*, 823 F. Supp. 2d 36 (D.D.C. 2011), *vacated*, 696 F.3d 1205 (D.C. Cir. 2012).

[152] The plaintiffs in the *R.J. Reynolds* case are R.J. Reynolds Tobacco Company, Lorillard Tobacco Company, Commonwealth Brands, Inc., Liggett Group LLC, and Santa Fe Natural Tobacco Company, Inc. *Id.* R.J. Reynolds Tobacco Company, Lorillard Tobacco Company, and Commonwealth Brands, Inc. joined National Tobacco Company, L.P. and American Snuff Company, LLC, a.k.a. Conwood Company, LLC in the *Discount Tobacco* case. *See Disc. Tobacco*, 674 F.3d at 509.

[153] *R.J. Reynolds II*, 845 F. Supp. 2d at 268. Plaintiffs assert claims under both the First Amendment and the Administrative Procedure Act. *See id.*; *R.J. Reynolds III*, 696 F.3d 1205, 1207. The parties agreed to waive a decision on the merits of the APA claim, since a favorable holding on plaintiffs' First Amendment claim would dictate a favorable finding under the APA. *See generally R.J. Reynolds III*, 696 F.3d at 1208 n.1 ("Because we hold the graphic warnings violate the *First Amendment*, we do not reach the Companies' APA claims."). Although this article focuses on the First Amendment, there are cases dealing with the commercial speech doctrine that apply lower levels of scrutiny than rational basis when reviewing such restrictions within the framework of the Administrative Procedure Act. *See* discussion *infra* Part IV.

[154] The *R.J. Reynolds* Court reiterated the fundamental difference between the facts before it and those before the District of Kentucky (and upon review, the Sixth Circuit Court of Appeals) in the *Discount Tobacco* case. *R.J. Reynolds I*, 823 F. Supp. 2d 36, 44, (D.D.C. 2011), *vacated*, 696 F.3d 1205 (D.C. Cir. 2012). Reminding the parties that the instant case turns on facts that were not available at the time of *Discount Tobacco*, the Court explained that the *Discount Tobacco* "plaintiffs . . . made a facial challenge to the constitutionality of graphic warnings in general—but unlike plaintiffs in *this* case, they were incapable of challenging any of the nine graphic warnings the FDA ultimately selected." *Id.*

[155] *R.J. Reynolds II*, 845 F. Supp. 2d at 272. Plaintiffs initially moved for a preliminary injunction in the District Court, seeking a fifteen-month stay of the FDA's enforcement of the

On the merits, the D.C. District Court and, subsequently, the Court of Appeals for the D.C. Circuit found that the graphic images mandate violated the First Amendment.[156] While both courts reached the same conclusion about the constitutionality of the Act's graphic images, they applied different levels of scrutiny.[157] Initially, both courts rejected the same argument advanced by the government in the *Discount Tobacco* case—namely, that rational basis review was appropriate because the graphic images constituted purely factual, compelled disclaimers.[158] However, the D.C. District Court reasoned that the graphic images did not fall within the ambit of the "commercial speech doctrine," which dictates that "intermediate scrutiny" applies to commercial speech regulations.[159] Applying strict scrutiny, the D.C. District Court held that the graphic images mandate was not the least restrictive means of achieving the government's "dubious" asserted interest of "conveying to consumers generally, and adolescents in particular, the devastating consequences of smoking and nicotine addiction[.]"[160]

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graphic images mandate until after the Court decided the merits of their claims. *R.J. Reynolds I*, 823 F. Supp. 2d at 42. Granting their request for injunctive relief on November 7, 2011, the Court held that plaintiffs would suffer irreparable harm if the injunction were not granted and had a high likelihood of success on the merits, highlighting the "presumptively unconstitutional" nature of the compelled speech at issue. *Id.* at 45. The District Court also emphasized the need to preserve the *status quo* until it could evaluate the constitutionality of the at-issue compelled speech and recognized that the Plaintiffs had no other forms of relief (i.e., they could not recoup attorneys' fees or other financial expenses from the Government). *Id.* at 53. The Court of Appeals' decision, which affirmed the District Court's holding that the graphic images mandate was unconstitutional, effectively vacated that injunction. *R.J. Reynolds III*, 696 F.3d 1205, 1222.

156 *R.J. Reynolds II*, 845 F. Supp. 2d at 277; *see R.J. Reynolds III*, 696 F.3d 1205, 1222.

157 *R.J. Reynolds II*, 845 F. Supp. 2d at 274; *R.J. Reynolds III*, 696 F.3d 1205, 1217.

158 *R.J. Reynolds II*, 845 F. Supp. 2d 266, 272; *R.J. Reynolds III*, 696 F.3d 1205, 1217.

159 *R.J. Reynolds II*, 845 F. Supp. 2d at 274. In rejecting the application of intermediate scrutiny, the District Court highlighted the "subjective and highly controversial" message conveyed by the images and compared them to the four-square inch sticker indicating "18" that was the subject of a compelled speech challenge in a Seventh Circuit case brought by retailers of sexually explicit video games. *Id.* (citing Entm't Software Ass'n v. Blagojevich, 469 F.3d 641, 652 (7th Cir. 2006)). The Seventh Circuit reasoned that the determination of what was "sexually explicit" was "opinion-based," and therefore, the required stickers indicating that the video game was sexually explicit conveyed a subjective message. *Id.* The District Court mirrored this logic and found that the graphic images are a "more subjective vision of the horrors of tobacco addiction." *Id.*

160 *Id.* (internal quotations marks omitted). The District Court admonished that "the Government's *actual* purpose is not to inform or educate, but rather to advocate a change in behavior--specifically to encourage smoking cessation and to discourage potential new smokers from starting." *Id.* at 275 (citing INST. OF MED., ENDING THE TOBACCO PROBLEM: A BLUEPRINT FOR THE NATION (Richard J. Bonnie et al. eds., 2007) ("It is time to state unequivocally that the primary objective of tobacco regulation is not to promote informed choice but rather to discourage consumption of tobacco products, especially by children and

Disagreeing with the D.C. District Court, the Court of Appeals for the D.C. Circuit applied intermediate scrutiny.[161] Citing one of its own recent opinions as precedent for the application of this lower standard of review to compelled commercial speech disclosures, the Circuit Court focused its inquiry on whether the government had "affirmatively demonstrate[d] [that] its means are narrowly tailored to achieve a substantial government goal."[162] The D.C. Circuit Court of Appeals accepted, *arguendo*, that the government's interest in promoting smoking cessation was substantial,[163] and turned to whether the graphic images requirement directly advanced this interest.[164] In doing so, the court was not persuaded by the government's contention that the use of large graphic warnings was effective for reducing smoking, and placed great emphasis on the lack of evidence showing a direct causation between the use of graphic images and the cessation of smoking.[165] In fact, the Court of Appeals explained that the studies advanced by the government were speculative, at best, and characterized the social science as "questionable."[166] Admonishing the FDA for its attempt at compensating for its lack of evidence, the court concluded that the "FDA cannot get around the First Amendment by pleading

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youths, as a means of reducing tobacco-related death and disease."); Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628, 36,663 (Jun. 22, 2011) (to be codified at 21 C.F.R. pt. 1141). (stating that the purpose of the graphic warnings is to "discourage nonsmokers . . . from initiating cigarette use and to encourage current smokers to consider cessation"); Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 3(9), 123 Stat. 1776 (2009) ("[The Act seeks] to promote cessation to reduce disease risk and the social costs associated with tobacco-related diseases.").

In finding that the graphic images mandate was not the least restrictive means of achieving the Government's purported interest, the District the Court placed significant emphasis on the fact that the graphic images would occupy fifty percent of the cigarette package. *See R.J. Reynolds I*, 823 F. Supp. 2d at 48. Indeed, the Court dubbed the mandate a "mini-billboard" for the Government's "obvious anti-smoking agenda." *See id.* This argument is also germane to the manufacturer's Fifth Amendment challenge. In essence, the tobacco companies contend that a required graphic which occupies fifty percent of the package "confiscates" their property in violation of the Fifth Amendment. *See generally id.* at 43 ("Plaintiffs do, however, oppose the placement of textual warnings which 'confiscate' the front and back portions of cigarette packaging.").

161 *R.J. Reynolds III*, 696 F.3d 1205, 1217. .

162 *Id.* at 1234 (citing United States v. Philip Morris USA Inc., 566 F.3d 1095, 1143 (D.C. Cir. 2009)).

163 *R.J. Reynolds III*, 696 F.3d 1205, 1218.

164 *Id.*

165 *Id.* at 1221.

166 *Id.* at 1220–21 ("[The FDA presented only] two studies directly evaluating the impact of graphic warnings on actual smoking rates, and neither set of data shows that the graphic warnings will 'directly' advance its interest in reducing smoking rates 'to a material degree.'" (citing Rubin v. Coors Brewing Co., 514 U.S. 476, 487 (1995))).

incompetence or futility" with respect to the studies.[167] Ultimately, the Court of Appeals held that the graphic images could not pass constitutional muster.[168]

IV. GRAPHIC IMAGES AS COMPELLED, VIEWPOINT-DISCRIMINATORY SPEECH

The graphic images required under the Act raise unique questions about the boundaries of the commercial speech doctrine and the use of speech regulations to influence consumer behavior. It is indisputable that the government's attempt to stem the tide of adolescent smoking and to promote a "stop smoking" message are eminently worthy goals; however, the government cannot "conscript[] [tobacco manufacturers] into an anti-smoking brigade."[169] These graphic images bear no resemblance to the usual type of factual and informative statements, which government can require as consumer warning labels on manufacturers' products.[170] Failing to limit its regulations to the type of product warnings permissible under the commercial speech doctrine, the prescribed graphic images invade core First Amendment values. Private actors cannot be commandeered to advocate the government's message.[171] In the sphere of ideas and intellect, government cannot "compel [one] to utter what is not in his mind."[172]

Despite its language, the First Amendment's free speech guarantee is not absolute.[173] Even the framers were unsure of its meaning. For example, Benjamin Franklin and Alexander Hamilton acknowledged that no one could define the limits of the Free Speech Clause with any accuracy.[174] Their words evince this

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[167] *Id.* at 1221.

[168] *Id.*

[169] *R.J. Reynolds I*, 823 F. Supp. 2d 36, 49 (D.D.C. 2011), *vacated*, 696 F.3d 1205 (D.C. Cir. 2012).

[170] *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985).

[171] Laurence H. Tribe, *Disentangling Symmetries: Speech, Association, Parenthood*, 28 PEPP. L. REV. 641, 645 (2001) ("[Compelled speech cases involve] a right not to be used or commandeered to do the state's ideological bidding by having to mouth, convey, embody, or sponsor a message, especially the state's message, with one's voice or body or resources.").

[172] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 634 (1943) (requiring public school students to salute and pledge the flag is compelled speech in violation of the First Amendment's Free Exercise and Free Speech Clauses).

[173] *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech.").

[174] *See* Michael I. Meyerson, *The Neglected History of the Prior Restraint Doctrine: Rediscovering the Link Between the First Amendment and the Separation of Powers*, 34 IND. L. REV. 295, 320 (2001).

lack of clarity, even at the time of the drafting and adoption of the First Amendment. Benjamin Franklin opined: "Few of us, I believe, have distinct ideas of its nature and extent [sic]."[175] Adding to this sentiment, Alexander Hamilton questioned: "Who can give it any definition which would not leave the utmost latitude for evasion?"[176]

A. The Commercial Speech Doctrine

As it was for our founding fathers, modern day scholars and jurists continue to debate the contours of the First Amendment. The ever-changing Supreme Court First Amendment jurisprudence spans almost a century.[177] Nearly seventy years ago, the Court articulated its categorical speech doctrine, which was the nascent beginning of the tiered free speech analysis.[178] "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem."[179] Although commercial advertising was not included in *Chaplinsky v. New Hampshire*, the seminal case establishing the categorical approach, shortly afterwards, the Court added commercial advertising to the list of speech outside the protective umbrella of the First Amendment.[180]

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[175] *Id.*

[176] *Id.*

[177] The beginning of the Court's evolving First Amendment jurisprudence focused on speech that criticized government policies or public officials. *See, e.g.*, Schenck v. United States, 249 U.S. 47 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Debs v. United States, 249 U.S. 211, 215 (1919) (upholding criminal convictions for individuals speaking against the government's involvement in World War I).

[178] Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

[179] *Id.* at 572 (upholding conviction for "fighting words" and articulating categories of speech—"the lewd and obscene, the profane, the libelous, and the insulting or 'fighting words' . . . [which] are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."). *But see* United States v. Stevens, 130 S. Ct. 1577 (2010) (holding animal cruelty statute is overbroad and declining to recognize a new category of unprotected speech for "crush videos."); Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2738 (2011) (striking down a statute restricting the access and sale of violent video games to minors and declining to recognize a new category of unprotected speech for violent material available to children). Chief Justice Roberts criticized the efforts of the government to carve out new categories of unprotected speech:

> When we have identified categories of speech as fully outside the protection of the First Amendment, it has not been on the basis of a simple cost-benefit analysis . . . [o]ur decisions . . . cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment.

Stevens, 130 S. Ct. at 1586.

[180] *See* Valentine v. Chrestensen, 316 U.S. 52, 54–55 (1942) (holding that advertising material distributed on the street could be restricted, but acknowledging that non-commercial material would be treated differently); *see also* Breard v. Alexandria, 341 U.S. 622, 644–45

As such, commercial advertising constituted unprotected speech.[181] However, the Court distinguished commercial advertising from "editorial advertisements" for First Amendment purposes.[182] In *New York Times v. Sullivan*, the Court declined to treat paid political advertisements as unprotected commercial expression.[183] Following *New York Times*, the Court gave less deference to government imposed commercial restrictions related to material that "did more than simply propose a commercial transaction . . . [but] contained factual material of clear 'public interest.'"[184]

By the mid-1970's, the Court recognized that some commercial speech constituted important information, which the public had a right to know.[185] The Court adopted a consumer friendly position, favoring dissemination over keeping consumers "in the dark," especially when the information included the price or other truthful facts about goods and services.[186] In fact, the Court emphasized that the First Amendment encompasses not only the speaker's right to convey a message (including the right not to be associated with a message), but also the listener's right to receive information.[187] As such, commercial speech restrictions cannot be supported by a paternalistic notion that consumers may be confused by truthful

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(1951) (upholding ban on door-to-door solicitation of magazine subscriptions), *abrogated by* Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980).

[181] *Breard*, 341 U.S. at 644–45.

[182] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 266 (1964).

[183] *See id.* at 256–57, 279–80 (holding that, despite some factually incorrect statements, a paid political advertisement, critical of government conduct toward the civil rights movement and its leader, Martin Luther King, Jr., was subject to a new constitutional standard for defamation claims brought by public officials).

[184] Bigelow v. Virginia, 421 U.S. 809, 822 (1975) (reversing conviction for individual who advertised the future availability of legal abortions in New York); *see also* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66 (1983) (holding that pamphlets discussing contraceptives were not deemed commercial speech by the fact they mentioned specific products and proposed a commercial transaction).

[185] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 762 (1976) (striking down a rule of professional responsibility applied to pharmacists banning the dissemination of information on the price of prescription drugs). The Court stated: "As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Id.* at 763.

[186] *Id.*; *see also* Bates v. State Bar of Ariz., 433 U.S. 350, 379 (1977) (striking down rules of professional responsibility applied to lawyers banning a newspaper advertisement stating the price of routine legal services); Linmark Assocs. v. Twp. of Willingboro, 431 U.S. 85, 88, 97 (1977) (invalidating ordinance banning "For Sale" or "Sold" signs on all but model homes in an attempt to stop "panic selling" and "white flight"); Carey v. Population Servs. Int'l, 431 U.S. 678, 701–02 (1977) (invalidating a ban on contraceptive advertisements).

[187] *Va. State Bd. of Pharmacy*, 425 U.S. at 756–57.

and non-deceptive information.[188]

As the commercial speech doctrine evolved, the Court defined commercial speech as information that proposes a commercial transaction[189] and can be regulated under a less exacting standard than strict scrutiny. In *Central Hudson Gas v. Public Service Commission of New York*, the Court articulated its four-part analysis for determining whether commercial speech restrictions violate the First Amendment.[190] Remaining the precedential commercial speech test, the *Central Hudson* analysis requires the following inquiries: Does the regulated expression: 1) concern lawful and not misleading information; 2) is the governmental interest substantial; 3) does the regulation directly advance the governmental interest; and 4) could the governmental interest be served as well by a more limited restriction on commercial speech?[191] This standard of review applies when government regulations place *restrictions* on commercial speech; however, the Supreme Court has adopted a different standard when the commercial speech regulation requires *disclosure*.[192]

In *Zauderer v. Office of Disciplinary Counsel*, the Court considered whether an attorney-advertising rule requiring disclosure about the client's responsibility to pay court costs was subject to the *Central Hudson* commercial speech test.[193] Making a distinction between "flat prohibitions" and compelled disclosures in the commercial speech context, the Court opined that the "constitutionally protected interest in *not* providing any particular

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[188] *Id.* at 773 (rejecting the government's position that advertising the price of prescription medications would confuse consumers and lead to an increased use of prescription drugs).

[189] Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 637 (1985). Further, the *Central Hudson* analysis cannot be avoided by "link[ing] a product to a current public debate." *Id.* at 637 n.7 (citing Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 563 n.5 (1980)).

[190] *Cent. Hudson*, 447 U.S. at 563–67 (1980) (invalidating ban on promotional advertising related to the use of electricity and adopting a four-part test for commercial speech, which is akin to an intermediate level of scrutiny—less than strict scrutiny but more demanding than rational basis).

[191] *Id.* (stating that if the regulated material concerns unlawful activity or is deceptive, the government may regulate the speech without violating the First Amendment). If the government satisfies both the second and third prong of the test, but fails to satisfy the fourth prong, the speech restriction is too excessive and does not pass constitutional muster. *See* Friedman v. Rogers, 440 U.S. 1, 15 (1979) (finding that false, deceptive, or misleading material may be regulated without offending the First Amendment); Pittsburgh Press Co. v. Pittsburgh Human Relations Comm'n, 413 U.S. 376, 391 (1973) (stating that speech proposing an illegal transaction may be banned).

[192] *Zauderer*, 471 U.S. at 650–53.

[193] *Id.* at 629, 637–38.

factual information in . . . advertising is minimal."[194]

Throughout the development of the commercial speech doctrine, the Court's protection of such speech has waxed and waned. Some of the arguments that justify the varying levels of scrutiny applied to commercial speech at different periods of time concern the connection between its economic motive and core First Amendment values.[195] Although some Justices have opined that commercial speech should receive the highest level of protection,[196] there is concern that such a rule would dilute the value of political speech.[197] Often, a focus on its purpose to generate profits leads to a belief that commercial speech is more resilient to government regulation and less likely to be chilled.[198] Further, the economic motive associated with the dissemination of commercial speech is unconnected to self-expression or to the marketplace of ideas that contribute to an informed electorate.[199]

However, the modern day commercial speech doctrine focuses on the value in providing truthful and non-deceptive information to aid consumers' decision-making.[200] The *Zauderer* Court justified a departure from the *Central Hudson* test to commercial disclosures based on the notion that such "warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception."[201] Therefore, instead of the

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[194] *Id.* at 628.

[195] *See* William P. Marshall, *The Dilution of the First Amendment and the Equality of Ideas*, 38 CASE W. RES. L. REV. 566, 568–69 (1988).

[196] *See, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 518 (1996) (Thomas, J., concurring). Justice Thomas consistently asserts that commercial speech should receive the same protection as noncommercial speech.

> [T]he government's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace, the balancing test adopted in *Central Hudson* . . . should not be applied . . . such an 'interest' is per se illegitimate and can no more justify regulation of 'commercial' speech than it can justify regulation of 'noncommercial' speech.'"

Id.

[197] *See Marshall, supra* note 195, at 570.

[198] *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 780–81 (1976) (Stewart, J., concurring) (discussing that government regulation of false or misleading commercial information will not chill accurate commercial expression). *But see* Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 633 (1982) (disagreeing with the notion that commercial speech is hardier because of the profit motive).

[199] *See* C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 16–17 (1976). *But see infra* note 232.

[200] *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 641, 647 (1985).

[201] *Id.* at 651 (quoting *In re* R.M.J., 455 U.S. 191, 201 (1982)); *see also* Milavetz, Gallop & Milavetz, P.A. v. United States, 130 S. Ct. 1324, 1329, 1340, 1341 (2010) (reaffirming application of the *Zauderer* standard to disclosure requirements that apply to attorneys, who meet statutory definition of debt relief agencies under Bankruptcy Abuse Prevention and

heightened standard of intermediate scrutiny, compelled commercial disclosures of "purely factual and uncontroversial information" are consistent with First Amendment principles "as long as [they] are reasonably related to the State's interest in preventing deception of consumers" and are not "unjustified or unduly burdensome."[202]

With respect to the challenged graphic images required by the Act, the level of scrutiny applied to the government's compelled disclosure is critical to its constitutionality.[203] The challengers assert that the *Zauderer* rational basis standard does not apply for two reasons.[204] First, the graphic images are neither completely factual nor uncontroversial.[205] Second, the disclosure requirement is both unjustified and unduly burdensome.[206] Failing to satisfy the *Zauderer* standard for applying rational basis to compelled commercial disclosures, the tobacco companies argue that strict scrutiny should apply.[207] Alternatively, if the Court were to reject the application of strict scrutiny, the challengers would have to argue that the government cannot justify the images under the *Central Hudson* test.[208]

B. Compelled Commercial Speech

1. *Zauderer*—Rational Basis Standard of Judicial Review

As stated, the *Zauderer* standard, applicable to compelled commercial disclosures, sets a relatively low hurdle for the government to satisfy; but, its application is neither automatic nor unconditional.[209] For this low standard to apply, the required disclosures must be factual and uncontroversial.[210] Further, even if factual and uncontroversial, compelled disclosures may still violate the First Amendment if they are either unjustified or unduly burdensome.[211] This standard should not apply, in the first

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Consumer Protection Act).

202 *Zauderer*, 471 U.S. at 651.

203 *See, e.g.*, *R.J. Reynolds II*, 845 F. Supp. 2d 266, 272 (D.D.C. 2012) (addressing the level of scrutiny applicable to the graphic-image mandate).

204 *Id.*

205 *Id.*

206 *Id.*

207 *Id.* at 271, 274.

208 *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 641, 647 (1985).

209 *Id.* at 651.

210 *Id.*

211 *Id.*

instance, if the disclosures are not necessary to dispel "the possibility of consumer confusion or deception."[212]

The graphic images, like other symbols, convey a message. Although they are not speech in the usual sense of written or spoken words, they are a form of expression. Images, like words, can serve "a dual communicative function."[213] In fact, the government concedes that the graphic images were chosen as much for their "emotive" force as for their "cognitive" force.[214] Considering that emotions are highly individualized and subjective, the government's intended response to these images negates a conclusion that they are factual and necessary to avoid confusion or deception. The intended shock value[215] elicits "inexpressible emotions"[216] not information capable of "precise, detached explication."[217]

Further, while there may be little controversy that there are health risks associated with smoking, the intended messages conveyed by the graphic images are controversial. Not everyone who smokes will end up with a tracheotomy, diseased lungs, rotted teeth, or any other malady suggested by the graphic images.[218] There is uncontroverted scientific evidence that smoking *may* cause the "parade of horribles" depicted by the graphic images, but it is not a medical certainty.[219] In fact, as the District of Columbia court pointed out in *R.J. Reynolds*, some of the graphic images are

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[212] *Id.* (quoting *In re* R.M.J., 455 U.S. 191, 201 (1982)).

[213] Cohen v. California, 403 U.S. 15, 26 (1971).

[214] In its agency findings, the FDA explained that "the use of health warnings with 'frightening' or 'disturbing' tonal qualities appears effective" in conveying "the harm and danger that tobacco use causes, eliciting an immediate impact." Required Warnings for Cigarette Packages and Advertisements, 75 Fed. Reg. 69,524-01, 69,534–35 (proposed Nov. 12, 2010) (citation omitted); *see also Cohen*, 403 U.S. at 26 (discussing the dual function of words, serving as both an emotive and cognitive force).

[215] *Cohen*, 403 U.S. at 26 (discussing that words "convey[] not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well.").

[216] *Id.*; *see also* R.J. Reynolds Tobacco Co. v. FDA, 2012 WL 3632003, at *2 (D.C. Cir. Aug. 24, 2012) (explaining that, in consumer studies designed to help the FDA with the image selection process, the control group was asked whether the graphic images "were 'salient,' which FDA defined in part as causing viewers to feel 'depressed,' 'discouraged,' or 'afraid.'") (citing Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628, 36,638 (June 22, 2011)).

[217] *Cohen*, 403 U.S. at 26.

[218] *See R.J. Reynolds II*, 845 F. Supp. 2d 266, 273 n.13 (D.D.C. 2012) ("[T]he Government's contention that [the] images are purely factual and uncontroversial [is without merit]. After reciting an account of a 117-year-old woman who smoked her entire adult life, plaintiffs asked rhetorically: '[w]ould it be purely factual and uncontroversial if we were to take a picture of one of these people [like the lifelong smoker], put [her] on our advertisements, and say 115 years old and still smoking?' Of course not!").

[219] Cole v. Richardson, 405 U.S. 676, 686 (1972).

cartoons, and others have been digitally altered.[220] This technological manipulation supports the conclusion that the images are *per se* not factual and are in no way a medical certainty.

Compelled disclosures subject to the rational basis standard articulated in *Zauderer* do not apply to subjective messages that convey uncertain outcomes.[221] The graphic images are neither factual nor uncontroversial. Further, their highly subjective nature and appeal to emotional responses do not further the interest of preventing deception of consumers.[222]

A failure to establish that the graphic images are factual and uncontroversial distinguishes these compelled disclosures from those permitted in *Zauderer* under the low threshold of rational basis scrutiny.[223] Further, the justification put forth by the government for mandating these images is suspect.[224] The government contends that previous warnings are inadequate and have not been successful at curbing teen smoking and adult abstinence.[225] To compensate for the ineffectiveness of prior warnings, the government has created these images purportedly to provide more education and information.[226]

Justifying the images as necessary to inform and educate is disingenuous. The congressional findings evince an ulterior motive, which is advocacy of the government's "stop smoking" message.[227] In fact, the required "1-800-QUIT-NOW" number,[228] as well as the government's admissions during oral arguments,[229] are further proof that the real motive for the images is a "call to action" rather

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[220] *R.J. Reynolds I*, 823 F. Supp. 2d 36, 41 n.8 (D.D.C. 2011), *vacated*, *R.J. Reynolds III*, 696 F.3d 1205 (D.C. Cir. 2012).

[221] *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 657 n.2 (1985) (Brennan, J., concurring).

[222] *See id.* at 628, 648–49 ("An advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers."); *accord* Milavetz, Gallop & Milavetz, P.A. v. United States, 130 S. Ct. 1324, 1339–40 (2010) (discussing the minimal First Amendment effect on advertisers from required disclosures that meet the *Zauderer* requirements for application of rational basis standard of judicial review).

[223] *R.J. Reynolds II*, 845 F. Supp. 2d at 272.

[224] *R.J. Reynolds I*, 823 F. Supp. 2d at 47 (doubting the government's stated purposes, to provide information and education, for the compelled graphic images).

[225] *See id.* at 51.

[226] *Id.* at 47.

[227] *See id.* at 47–48; *R.J. Reynolds II*, 845 F. Supp. 2d at 272–73.

[228] *R.J. Reynolds II*, 845 F. Supp. 2d at 273.

[229] *Id.* at 272–73 (noting that the Institute of Medicine report, "an authority chiefly relied upon by the Government–very frankly acknowledges" that the graphic images "were crafted to evoke a strong emotional response calculated to provoke the viewer to quit or never start smoking." (citing INST. OF MED., *supra* note 160)).

than to provide factual, educational information.

The "nuclear arms race"[230] approach to cigarette warnings is unlikely to produce the desired effect. In fact, the government's own studies indicate that the new warning labels will result in less than a one percent reduction in smoking.[231] Further, in targeting potential teen smokers, the government failed to consider the immaturity of adolescents and their impulsive nature, which includes an emotional blind spot to consequences.[232] Research, considered in another legal context, shows that adolescent brains are not fully formed.[233] This scientific fact makes adolescents impervious to understanding the long-term consequences of their behavior, even upon viewing graphic images that were designed to "scare them straight."[234]

A final consideration under the *Zauderer* standard is the burden placed on the manufacturer.[235] If the required disclosure is unduly burdensome, then it is not constitutionally permissible.[236] The tobacco company R.J. Reynolds Tobacco Co. estimated the aggregated cost of compliance at around $20 million.[237]

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[230] As the danger of health risks and the cost of medical care increase, the government is increasing the content, potency, and size of its mandated anti-smoking warnings, much like the mindset of public officials during the nuclear arms race with the former Soviet Union during the Cold War.

[231] *See R.J. Reynolds I*, 823 F. Supp. 2d at 41 n.10 (citing the fact that "the FDA's estimated reduction in U.S. smoking rates decreased from .212% in the Proposed Rule to .088 % in the Final Rule"). *Compare* Required Warning for Cigarette Packages and Advertisements; Proposed Rule, 75 Fed. Reg. 69,524, 69,543 (proposed Nov. 12, 2010) (to be codified at 21 C.F.R. pt. 1141), *with* Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628, 36,724 (June 22, 2011) (to be codified at 31 C.F.R. pt. 1141). *See also R.J. Reynolds I*, 823 F. Supp. 2d at 41 n.10 (explaining further the "FDA's estimate of a 0.088 percentage point reduction in the U.S. smoking rate")).

[232] *See* L.P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCIENCE AND BIOBEHAVIORAL REVS. 417, 446 (2000) (reviewing the biological changes in the brain during adolescence and their correspondence to an adolescent's propensity to engage in irresponsible behavior, such as drug and tobacco use).

[233] *See* Graham v. Florida, 130 S. Ct. 2011, 2026 (2010) (citations omitted); *see also* Roper v. Simmons, 543 U.S. 551, 569 (2005) (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993) (acknowledging that scientific and sociological studies confirm, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young . . . [which] often result in impetuous and ill-considered actions and decisions.")).

[234] *Scared Straight* is a 1978 documentary directed by Arnold Shapiro about juvenile delinquency. *Scared Straight! (1978)*, N.Y. TIMES, http://movies.nytimes.com/movie/43074/Scared-Straight-/details (last visited Jan. 28, 2013). The term has become commonplace in referring to programs and methods aimed at correcting adolescent delinquent behavior. Linda S. Beres & Thomas D. Griffith, *Habitual Offender Statutes and Criminal Deterrence*, 34 CONN. L. REV. 55, 62 (2001).

[235] *R.J. Reynolds I*, 823 F. Supp. 2d at 45.

[236] *Id.*

[237] *Id.* at 50.

Additionally, there is an estimated 4000 hours[238] of expanded employee time needed to modify R.J. Reynolds' 480 distinct package designs.[239] In considering the manufacturers' motion for injunctive relief, the D.C. District Court considered these costs to be substantial, and sufficient to show irreparable harm, and granted the motion.[240]

In addition to *Zauderer*, other cases have applied a rational basis standard of review to regulations that affect commercial speech. For instance, when an economic regulation "has a modest impact upon a firm's ability to shape a commercial message," the Court has applied rational basis review despite the First Amendment implications.[241] Recognizing that "ordinary economic regulatory programs" often have an indirect effect on commercial speech, the Court, nevertheless, has declined "to apply a 'heightened' First Amendment standard of review."[242] The rationale for applying a non-speech analysis to these economic regulations, even though commercial speech rights are implicated, is to avoid judicial second-guessing of legislative judgments in effectuating policy objectives.[243]

Furthermore, the economic regulations to which the Court applied rational basis review, despite their impact on commercial speech, "neither forbid[] nor require[] anyone to say anything, to engage in any form of symbolic speech, or to endorse any particular point of view, whether ideological or related to the sale of a product."[244] Additionally, in those cases, the challenged statutory requirements "form[ed] part of a traditional, comprehensive regulatory regime."[245] The Act's graphic images provision is

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[238] *Id.* at 50 n.30.

[239] *Id.* at 50 n.29.

[240] *Id.* at 49–50 (discussing the factors to be balanced by the court when considering a motion for injunctive relief).

[241] Sorrell v. IMS Health, Inc., 131 S. Ct. 2653, 2673, 2675 (2011) (Breyer, J., dissenting) (disagreeing that Vermont statute prohibiting information about doctors' prescribing practices to sales persons employed by pharmaceutical manufacturers should be scrutinized under First Amendment analysis).

[242] *Id.* at 2675.

[243] *Id.* (discussing the reason for rational basis review of economic regulations that indirectly affect commercial speech: to avoid "transfer[ring] from legislatures to judges the primary power to weigh ends and to choose means, threatening to distort or undermine legitimate legislative objectives.").

[244] *See id.* at 2673, 2675 (declining to apply First Amendment analysis "to federal agricultural commodity marketing regulations that required growers of fruit to make compulsory contributions to pay for collective advertising." (citing Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 469–70 (1997))).

[245] *Sorrell*, 131 S. Ct. at 2676 (Breyer, J., dissenting). *But see id.* at 2675 (reviewing under greater scrutiny than rational basis "where compelled speech was not 'ancillary to a more comprehensive program restricting marketing autonomy.'" (quoting United States v. United

distinguishable from those challenged regulations which the Court reviewed under the rational basis standard applicable to economic regulations.[246]

Although the federal government has a history of regulating the tobacco industry and the ways in which tobacco products are marketed and sold, the Tobacco Control Act's graphic images mandate departs from Congress's long-standing, traditional scheme of requiring factual, informative label warnings and disclosures.[247] The mandate has a direct and substantial impact on the tobacco manufacturers' commercial speech, unlike the indirect speech effects of the economic regulations upheld under rational basis review. The graphic images requirement is more than an economic regulation that has an incidental effect on commercial speech; therefore, application of rational basis review is not supported by the Court's precedents.

The *Zauderer* exception to the *Central Hudson* intermediate scrutiny standard has its detractors. Justice Thomas continues to support the proposition that there is no "'constitutional significance' to the difference between regulations that compel protected speech and regulations that restrict it."[248] As suggested by Justice Thomas and others, strict scrutiny should apply to commercial speech regulations, whether they prohibit or compel speech.[249] Indeed, this is the position of the tobacco manufacturers challenging the graphic images mandate and the position taken by the D.C. District Court in *R.J. Reynolds Tobacco Co. v. FDA*.[250]

Foods, Inc., 533 U.S. 405, 411 (2001))).

[246] *See R.J. Reynolds III*, 696 F.3d 1205, 1225–26 (D.C. Cir. 2012).

[247] *Compare* discussion *supra* Part II (detailing the historical tobacco regulations), *with supra* notes 100–10 (describing the new requirements of the Tobacco Control Act).

[248] Milavetz, Gallop & Milavetz, P.A. v. United States, 130 S. Ct. 1324, 1343 (2010) (Thomas, J., concurring); *see also id.* (suggesting that the Court should "re-examine *Zauderer* and its progeny . . . to determine whether these precedents provide sufficient First Amendment protection against government-mandated disclosures."). Justice Thomas cites to a string of cases in which he and Justice Souter have rejected the *Zauderer* notion that compelling speech disclosures is any less offensive to First Amendment principles than prohibitions against commercial speech. *Id.* Further, Justices Thomas and Souter have expressed the view that commercial speech should receive the same level of judicial scrutiny as noncommercial speech. *Id.* (arguing "that compelling cognizable speech officially is just as suspect as suppressing it, and is typically subject to the same level of scrutiny.") (quoting *Glickman*, 521 U.S. at 480–81 (Souter, J., dissenting)); *see also* Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 796–97 (1988); *United Foods*, 533 U.S. at 418–19 (Thomas, J., concurring).

[249] *See United Foods*, 533 U.S. at 418–19 (Thomas, J., concurring).

[250] *See supra* Part III.B.

2. Strict Scrutiny Review

In the case of compelled commercial speech disclosures, when *Zauderer* does not apply, the Court has not directly addressed whether the default standard is the one articulated in *Central Hudson* for commercial speech or strict scrutiny. However, in reviewing a content-based, viewpoint discriminatory commercial speech restriction, the Court declined to apply rational basis and determined that "the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied."[251] Similar to the restrictions struck down in *Sorrell v. IMS Health Inc.*, which prohibited the sale of doctor-prescribing information to pharmaceutical salespersons,[252] the graphic images mandate is a content-based, viewpoint discriminatory speech regulation. It applies only to tobacco manufacturers, and it is intended to elicit an adverse reaction to smoking.

Usually, strict scrutiny applies to content-based and viewpoint discriminatory speech restrictions.[253] The commercial context of the graphic images mandate should not alter the long-standing First Amendment jurisprudence requiring the highest level of judicial review to speech regulations that target the subject matter, the identity of the speaker, and the viewpoint of the message.[254] Therefore, if presented with these issues, the Supreme Court should follow the D.C. District Court's rationale for applying strict scrutiny,[255] requiring the government to show that the images are necessary to serve a compelling interest and that there are no less speech-restrictive means to achieve the legislative objective.[256] Applying strict scrutiny, the D.C. District held that the graphic

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[251] Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2667 (2011).

[252] *Id.* at 2659.

[253] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995) (striking down a university funding policy to student organization because the policy "discriminate[d] against speech on the basis of its viewpoint."); R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992) (invalidating a race-biased criminal statute as a viewpoint-based speech restriction subject to strict scrutiny); *see also* Ashcroft v. ACLU, 535 U.S. 564, 573 (2002) ("As a general matter, the *First Amendment* means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

[254] *Id.*

[255] *See R.J. Reynolds I*, 823 F. Supp. 2d 36, 47 (D.D.C. 2011) (granting injunctive relief to tobacco companies challenging the graphic images provision of the Tobacco Control Act), *vacated*, R.J. Reynolds III, 696 F.3d 1205 (D.C. Cir. 2012). However, the circuit court of appeals rejected the application of strict scrutiny. *See R.J. Reynolds III*, 696 F.3d at 1217–20 (D.C. Cir. 2012).

[256] *See R.J. Reynolds I*, 823 F. Supp. 2d at 47.

images mandate did not pass constitutional muster.[257] The highly subjective nature of the graphic images' message convinced the D.C. District Court that the compelled disclosure provision did not fall within the commercial speech doctrine, which is normally reserved for truthful and non-misleading factual information about a consumer product.[258]

Indeed, one of the rationales for subjecting commercial speech to a lower standard of judicial review is to promote "unbiased information" to consumers.[259] Both the *Central Hudson* intermediate scrutiny and the *Zauderer* rational basis standard for compelled disclosures are appropriate when the proscribed or compelled information is factual and provides a "fair balance" of information to consumers.[260] The graphic images compelled by the Tobacco Control Act do not constitute "unbiased information" contributing to a "fair balance" of information demanded by the commercial speech doctrine.[261] As such, to apply anything less than strict scrutiny to these images, which are content-based and viewpoint discriminatory, is contrary to well-settled First Amendment precedent.

Especially in the context of compelled speech, the First Amendment protects the right not to speak and the freedom not to associate with particular ideas.[262] Although the message conveyed by the graphic images is a worthwhile and important message, the value of the government's message does not diminish the First Amendment protections afforded tobacco manufacturers. Other

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[257] *See id.*; *see also supra* Part III.B.

[258] *See R.J. Reynolds I*, 823 F. Supp. 2d at 47.

[259] *Sorrell*, 131 S. Ct. at 2681 (Breyer, J., dissenting) (discussing the importance of "securing 'unbiased information'" as one of the reasons why commercial speech is subject to intermediate scrutiny).

[260] *See id.* (citing 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501 (1996) (discussing the importance of truthful and non-misleading commercial speech)).

[261] *See Sorrell*, 131 S. Ct. at 2681.

[262] *See, e.g.*, Wooley v. Maynard, 430 U.S. 705, 713–14 (1977) (holding that requirement to display state motto on license plate violated the First Amendment, as "the First Amendment [protects] both the right to speak freely and the right to refrain from speaking at all") (citing W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 633 (1943)); *see also* Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Bos., Inc., 515 U.S. 557, 559 (1995) (concluding that private parade organizers may control the message conveyed by the parade and may exclude a particular group from marching under its own banner). *Contra* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 87, 88 (1980) (holding that large privately owned shopping center may not prohibit tenants or visitors from participating in public expressive activity, such as circulating petitions). The Court emphasized that in the large shopping center context, no one would ascribe the views of those engaging in expressive activity to the mall owner and there was no threat of government discrimination based on the speaker, the content, or viewpoint of the message. *Id.*

countries that require graphic images on cigarette packages do not embrace our view of free speech, which requires government neutrality in the marketplace of ideas. [263] The freedom of expression enjoyed by Americans is unique. The First Amendment does not allow government to sanitize public discourse,[264] to punish offensive or racist speech,[265] to censor false ideas,[266] or even to criminalize false statements of fact in some contexts.[267]

Even expression that many consider utterly without social value[268] is protected. Such freedom to express ideas, that may "stir people to action, move them to tears . . . [or] inflict great pain,"[269] is necessary to maintain the marketplace of ideas, a principle fostered by the First Amendment.[270] Just as the government cannot restrict speech based on its low social value,[271] conversely, government cannot compel speech because of its great importance.

The message conveyed by the graphic images, no matter how

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[263] *R.J. Reynolds I*, 823 F. Supp. 2d at 48 n.21 (distinguishing countries with extreme cigarette labeling, such as Canada, Australia, and the United Kingdom from the United States based on the fact that none of them "afford First Amendment protections like those found in our Constitution.").

[264] *See, e.g.*, Erznoznik v. City of Jacksonville, 422 U.S. 205, 213–14, 218 (1975) (invalidating ordinance banning outdoor movie theaters from showing films with nudity, even though ordinance intended to protect the children from viewing inappropriate images); *see also* Hill v. Colorado, 530 U.S. 703, 751–52 (2000) (Scalia, J., dissenting) (quoting *Erzoznik*, 422 U.S. at 210 (discussing the fact that "the Constitution does not *permit* [the] government to decide which types of otherwise protected speech are sufficiently offensive to require protection *for the unwilling listener or viewer.*")).

[265] *See, e.g.*, Am. Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, 330 (7th Cir. 1985) (discussing that society must tolerate "[r]acial bigotry, anti-semitism, violence on television, reporters' biases . . . [because] all is protected as speech, however insidious.").

[266] *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 339–40 (1974) ("[T]here is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.").

[267] *See, e.g.*, United States v. Alvarez, 132 S. Ct. 2537, 2550–51 (2012) (determining that criminal sanctions for false statements about receiving military medals violates the First Amendment); *see also* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271–72 (1964) (protecting some false statements of fact as inevitable, if free, public debate).

[268] *See* United States v. Stevens, 130 S. Ct. 1577, 1585 (2010) (rejecting the creation of a new category of unprotected speech for animal cruelty videos based on the fact that the Court has rejected as "startling and dangerous" a "free-floating test for First Amendment coverage . . . [based on] an ad hoc balancing of relative social costs and benefits."); *accord* Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2734 (2011) (rejecting the creation of a new category of unprotected speech for violent video games).

[269] Snyder v. Phelps, 131 S. Ct. 1207, 1220 (2011) (holding that the imposition of damages for intentional infliction of emotional distress caused by offensive picketing at soldier's funeral violated the First Amendment).

[270] *Id.*

[271] This does not include the categories of speech historically recognized as outside the protective umbrella of the First Amendment. *See Alvarez*, 132 S. Ct. at 2544; *Brown*, 131 S. Ct. at 2738; *Stevens*, 130 S. Ct. at 1584 (listing the categories of unprotected speech).

noble, is government speech that cannot be foisted on private entities through a content-based, viewpoint discriminatory speech regulation. The graphic images mandate constitutes compelled private subsidization of the government's message. As with general taxes,[272] in limited circumstances, the Court has upheld forced subsidization of government speech from select private entities;[273] however, this mandate is different. It not only compels the tobacco companies to finance the government's message, it also compels them to express it. Given the amount of regulation already imposed on the tobacco industry, including how it produces, distributes, markets, and sells tobacco products, the graphic images requirement leaves little space[274] for the companies to enter the marketplace of ideas.[275] Even in the commercial speech context, the First Amendment protects the marketplace of ideas.[276] As the government cannot keep consumers "in the dark" for their own good,[277] or stifle speech merely because it is persuasive,[278] the government cannot compel private entities to display powerful messages, based on paternalistic notions.[279]

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[272] *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 563 (2005) (opining there is no difference between compelled subsidy of government speech when funds are raised through general taxes or targeted assessment; neither raises any First Amendment concerns).

[273] *Id.* (upholding government compelled contributions from beef growers for government sponsored ads to promote the sale of beef); Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 460–61, 473 (1997) (upholding government compelled contributions from fruit growers to financially support collective advertising as part of overall regulatory scheme did not implicate First Amendment concerns). *Contra* United States v. United Foods, Inc., 533 U.S. 405, 415 (2001) (distinguishing *Glickman* and *Johanns* and rejecting compelled contributions from mushroom handlers for generic ads promoting sales because not part of an overall economic regulatory scheme).

[274] The Tobacco Control Act mandates the size and location of the required disclosures on cigarette packages. *See supra* Part II.

[275] Although the marketplace of ideas was initially linked to free and open public debate on public officials and official conduct, the First Amendment protections extend to all types of expression, even nude dancing. *See* City of Erie v. Pap's A.M., 529 U.S. 277, 296 (2000).

[276] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 763 (1976) (recognizing that the "consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate."); *see also* Bates v. State Bar of Ariz., 433 U.S. 350, 364 (1977).

[277] *Va. State Bd. of Pharmacy*, 425 U.S. at 769–70 (rejecting a paternalistic view of commercial speech regulation).

[278] Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2671 (2011) ("That the State finds expression too persuasive does not permit it to quiet the speech or to burden its messengers."). In the area of seditious libel, the Court struggled with adopting a free speech doctrine that did not punish speech merely because of its persuasiveness. *See, e.g.*, Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) ("Every idea is an incitement."). Ultimately, the Court adopted a test that recognized punishment for advocacy of illegal action must include intent, imminence and likelihood of producing lawless action. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

[279] *See, e.g.*, Cohen v. California, 403 U.S. 15, 22–23 (1971) (rejecting the notion that

Rather than commandeer private entities to be its "mouthpiece," the government can express its own viewpoint-based anti-smoking message.[280] The fact that the previously mandated label warnings and disclosures have not sufficiently reduced the rate of tobacco use "does not allow [the government] to hamstring the opposition . . . [in order] to tilt public debate in a preferred direction."[281] Although the regulatory authority "in protecting the health and safety of the American public"[282] from the ill effects of smoking lies with the political branches, Congress cannot disregard the First Amendment in shaping its legislative policy.

On many occasions, the Court has eschewed legislators from "seek[ing] to achieve [their] policy objectives through the indirect means of restraining certain speech by certain speakers."[283] Indeed, "the Constitution presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct."[284] While deference to legislative judgment is an important aspect of judicial review, the government cannot disregard the Constitution in acting pursuant to its delegated powers. From its earliest time, Chief Justice Marshall recognized these important prudential concerns when defining the Court's function of judicial review.[285]

Specifically, when government seeks to influence consumer conduct, the First Amendment limits the speech-related ways in which it can attempt to shape behavior. In the context of smoking, the federal and state governments have used their taxing power to deter the use of tobacco products.[286] "Today, federal and state taxes can compose more than half the retail price of cigarettes, not just to

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government can act as "guardians of public morality" to cleanse public debate).

[280] *See* Thompson v. W. States Med. Ctr., 535 U.S. 357, 376 (2002) (invalidating a ban on the advertising of compounded drugs; the government can establish a prescription drug education program as a less speech restrictive way to inform the public about the differences between compounded drugs and mass manufactured prescription drugs).

[281] *Sorrell*, 131 S. Ct. at 2671.

[282] *Thompson*, 535 U.S. at 379 (Breyer, J., dissenting) (disagreeing with majority about requiring government to implement less speech-restrictive means to effectuate its legislative policy goal).

[283] *Sorrell*, 131 S. Ct. at 2670–71 (citing *Thompson*, 535 U.S. at 374; *Va. State Bd. of Pharmacy*, 425 U.S. at 769–70; 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 503 (1996); Linmark Assocs. v. Twp. of Willingboro, 431 U.S. 97 (1977)).

[284] *44 Liquormart*, 517 U.S. at 512.

[285] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176–77 (1803).

[286] *See* R.J. Reynolds Tobacco Co. v. Shewry, 423 F.3d 906, 920–21 (9th Cir. 2004) (finding that a tax on tobacco products to fund fully the government's anti-tobacco advertising was not a violation of free speech); *see also* City of Bessemer v. McClain, 957 So.2d 1061, 1065 (Ala. 2006) (holding that extra municipal taxes on packs of cigarettes, other tobacco products, and in some cases percentages of gross annual income was a violation of a statute already placing taxes on tobacco products and prohibiting other taxes not of the same type).

raise more money, but to encourage people to quit smoking."[287] Additionally, the federal government sponsors anti-smoking advertisements, funded, in part, by the tobacco companies.[288]

Indeed, the taxing power took center stage in the recent Supreme Court decision on the constitutionality of the Affordable Care Act's ("ACA") "shared responsibility provision" (a/k/a penalty provision or individual mandate).[289] Holding Congress's "feet to the fire" in regard to its constitutionally delegated power to enact the ACA, Chief Justice Roberts rejected Congress's invocation of the Commerce Clause.[290] Although Congress and the President continually denied that the penalty provision was a tax, and despite contrary statutory language, the Court upheld the individual mandate under the Tax and Spending Clause.[291]

Like the ACA, Congress invoked its Commerce Clause powers to pass the Tobacco Control Act and its graphic images provision.[292] While there is no doubt about congressional authority to regulate the tobacco industry, the government may not invoke the Commerce Clause as a shield to violate the First Amendment. Drawing a bright line between the government's authority to regulate products pursuant to the Commerce Clause and the First Amendment is crucial. As government becomes more concerned about Americans' unhealthy eating habits and rising health care costs,[293] its use of

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[287] Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2596 (2012) (discussing the use of the taxing power to influence conduct and upholding the ACA individual mandate, which requires people to purchase health insurance as a valid exercise of Congress's taxing power).

[288] Mikaela Conley, *CDC Launches Graphic Anti-Smoking Campaign*, ABC NEWS (Mar. 15, 2012, 2:01 PM), http://abcnews.go.com/blogs/health/2012/03/15/cdc-launches-graphic-anti-smoking-campaign (discussing the new public service announcements depicting real-life individuals who have suffered negative health consequences from long-term cigarette use).

[289] *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2600 (upholding the individual mandate under the tax and spend clause). For a brief discuss of the Affordable Care Act, see Alicia Ouellette, *Health Reform and The Supreme Court: The ACA Survives the Battle of the Broccoli and Fortifies Itself Against Future Fatal Attack*, 76 ALB. L. REV. 87, 90–94 (2013) ("The ACA is a massive federal act designed to expand access to health care coverage, control health care costs, and improve health care delivery systems.").

[290] *See Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2586–88 (holding that Congress exceeded its commerce clause powers in enacting the ACA's penalty provision).

[291] *See id.* at 2655 (Scalia, J., dissenting) (determining that the penalty is a "tax" for constitutional purposes, Chief Justice Roberts adhered to the principle that the Court must construe a statute in a way that upholds its constitutionality, if possible).

[292] *See* 15 U.S.C. § 1333 (2006).

[293] Michael M. Grynbaum, *Mayor Planning A Ban on Big Sizes of Sugary Drinks*, N.Y. TIMES, May 31, 2012, at A1, *available at* http://www.nytimes.com/2012/05/31/nyregion/bloomberg-plans-a-ban-on-large-sugared-drinks.html (discussing Mayor Bloomberg's proposed legislation to impose a ban on oversized soda drinks and other sugary drinks to combat obesity).

private property as "mini-billboard[s]"[294] to advocate healthy choices could become commonplace. The slippery slope of using gruesome, graphic images intended to influence consumer choices through scare tactics is not so far removed from the hypothetical society imagined in *Nineteen Eighty-Four*[295] in which people were controlled through government imposed mind control.[296]

Undoubtedly, the leap from graphic images to mind control is overstated. However, the power of government to shape thoughts and influence ideas by "conscripting" private entities to spread the government's message (at the expense of their own) is the type of tyranny the First Amendment was meant to prevent. Content-based and viewpoint discriminatory speech regulations are presumptively unconstitutional for the very reason that the First Amendment protects against government "tilt[ing] public debate" by silencing opposition.[297] This is true even when opposing ideas are harmful. Strict scrutiny judicial review guards against judicial "rubber-stamping" of legislative policies which employ impermissible speech regulations to influence conduct.

However, if the commercial aspect of the graphic images overshadows their speech implications, the U.S. Supreme Court (assuming it addresses the issue) may apply the less exacting standard of intermediate scrutiny.[298] Following the Sixth Circuit and D.C. Circuit,[299] the Court may insist that despite the "uniqueness" of the graphic images, they remain commercial speech and should be reviewed under the *Central Hudson* standard. In applying the *Central Hudson* test, the Court has been inconsistent in the amount of judicial deference it has afforded the legislature's judgment in effectuating policy objectives through regulations impacting commercial speech.

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[294] *R.J. Reynolds I*, 823 F. Supp. 2d 35, 48 (D.D.C. 2011) (placing significant emphasis on the fact that the graphic images would occupy 50% of the cigarette package), *vacated*, *R.J. Reynolds III*, 696 F.3d 1205 (D.C. Cir. 2012); *see also* Wooley v. Maynard, 430 U.S. 705, 715 (1977) (referring to New Hampshire's statute requiring license plate with state motto as "[the use of] private property as a 'mobile billboard' for the State's ideological message.").

[295] *See* GEORGE ORWELL, NINETEEN EIGHTY-FOUR (centennial ed., 2003) (1949) (writing about a futuristic society completely controlled by a totalitarian government and ideology). *See also* United States v. Alvarez, 132 S. Ct. 2537, 2547 (2012) (reflecting on the danger of content-based speech restrictions, especially referring to criminalizing false statements about subjects the government disfavors (citing ORWELL, *supra*)).

[296] *See* ORWELL, *supra* note 295.

[297] Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2671 (2011).

[298] Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985).

[299] *See* discussion *supra* Part III.A (explaining that two circuits applied the same level of scrutiny, but reached different conclusions about the mandate's constitutionality).

3. *Central Hudson* Intermediate Scrutiny

As the Court developed the categorical approach to expressive freedom, it afforded commercial speech various levels of First Amendment protection. For the past thirty years, however, the intermediate scrutiny standard articulated in *Central Hudson* has been the predominant level of protection for commercial speech.[300] As stated above, the *Central Hudson* analysis begins with an inquiry of whether the speech "concern[s] lawful activity and [is] not . . . misleading."[301] The next three prongs require that: (1) the regulation furthers a substantial governmental interest; (2) the regulation directly advances that interest; and (3) the regulation is narrowly tailored to further the government's interest.[302] Often, prongs two and three are the focus of contention. The amount of judicial deference given to legislative policy choices is inversely related to the rigor with which the Court analyzes the "fit" between these two factors. In the past, the Court upheld a complete ban against casino advertising targeted at local residents, despite the fact that some gambling was legal.[303] In that case, the Court afforded deference to the legislative policy judgment that local advertising would lead to increased gambling among residents, resulting in serious harm.[304] The Court accepted the government's argument that, since it could ban all advertising, "it [was] permissible . . . to take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising."[305] However, this "greater includes the lesser"[306] principle was expressly rejected in subsequent cases.[307]

Indeed, a decade later, the Court retreated from its position and rejected legislative attempts to reduce unhealthy behavior through commercial speech restrictions.[308] Striking down a price advertising

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[300] *See* discussion *supra* Part IV (explaining that regulations affecting commercial speech are reviewed under intermediate scrutiny, unless the *Zauderer* rational basis exception to *Central Hudson* is applicable).

[301] Cent. Hudson Gas & Elec. Corp. v. N.Y. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980)); *see also supra* Part IV.B.1.

[302] *Cent. Hudson*, 447 U.S. at 566.

[303] *See* Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328, 345–48 (1986).

[304] *Id.* at 344.

[305] *Id.* at 346.

[306] *Id.* at 345–46 ("[T]he greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling.").

[307] 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 510 (1996).

[308] *See id.* at 510–15

ban on all alcoholic beverages,[309] and a comprehensive scheme of advertising and sale restrictions on tobacco products,[310] the Court reasoned that *Central Hudson* required "stringent constitutional review."[311] As to the third prong of the *Central Hudson* analysis, the Court emphasized the government's burden to demonstrate that its asserted harms are "real" and that the speech restriction will in fact alleviate them "to a material degree."[312] The fourth prong focuses on "the fit between the legislature's ends and the means chosen to accomplish those ends," which does not require the least restrictive means.[313] However, the "fit" prong does require that the government consider other less speech restrictive means to achieve its legislative goals.[314]

In regard to tobacco advertising restrictions, Justice Thomas rejected the government's argument that "tobacco is . . . *sui generis* . . . [so] that application of normal First Amendment principles should be suspended."[315] Concerned that upholding the advertising ban on tobacco products would lead to "imposition of restrictions on fast food and alcohol advertising," Justice Thomas refused to recognize a "vice" exception to the First Amendment.[316]

For the reasons stated above, the graphic images provision should be subject to strict scrutiny, rather than the intermediate standard articulated in *Central Hudson* for commercial speech restrictions. Assuming, however, that *Central Hudson* is applicable, the graphic images provision still fails to pass constitutional muster.[317] When applying all four prongs of the *Central Hudson* analysis, the government cannot justify its graphic images mandate as a valid

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[309] *Id.* at 515–16 (invalidating a state statute prohibiting all advertising of the price of alcohol sold in the state).

[310] Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 570–71 (2001) (holding that the state regulations applying to cigarettes were preempted by federal law and the other regulations were unconstitutional).

[311] *44 Liquormart*, 517 U.S. at 508–09 (concluding that *Central Hudson* required stringent judicial review and its previous decision to leave it "'up to the legislature' to choose suppression over a less speech-restrictive policy" was wrong).

[312] *Id.* at 486.

[313] *Id.* at 529.

[314] Thompson v. W. States Med. Ctr., 535 U.S. 357, 371 (2002) ("In previous cases . . . we have made clear that if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so.").

[315] *Lorillard*, 533 U.S. at 586 (Thomas, J., concurring).

[316] *Id.* at 589 (concluding that deference to government's policy choice to restrict advertising on tobacco products as a means to address the problem of underage use would lead to advertising restrictions on fast food and alcohol).

[317] *See R.J. Reynolds III*, 696 F.3d 1205 (D.C. Cir. 2012).

commercial speech regulation.[318]

First, the graphic images concern lawful activity and are misleading.[319] Second, as the *R.J. Reynolds* court concluded, the asserted interest in reducing underage and adult smoking by providing better education and information about tobacco products is disingenuous.[320] Although studies demonstrate that the images elicit a visceral response, which may impact consumer behavior, the government's own projections estimate that the images will result in less than a one percent reduction in smoking.[321] This certainly falls short of the third prong requirement that the images will alleviate the harm of smoking "to a material degree."[322] Finally, the tobacco companies have suggested alternate ways in which the government can provide more effective warnings and not trample on the First Amendment.[323] Thus, the "fit" prong of the *Central Hudson* standard[324] is not satisfied.

V. CONCLUSION

Without regard to the First Amendment, the Tobacco Control Act's graphic images mandate imposes upon tobacco companies an obligation to adopt and express, at its own expense, the government's strong anti-smoking message.[325] While its mission to eradicate smoking is an eminently worthy goal, Congress cannot construct regulations that violate the First Amendment. Indeed, the Act's requirement that tobacco companies display powerful images advocating a non-smoking message on cigarette packages[326] runs afoul of the well-settled commercial speech doctrine, which permits the government to dictate the placement of factual, non-subjective statements on commercial products to inform buyers and avoid consumer deception.[327] These nine images convey more than just facts and information; they are disturbing, and they elicit a

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318 *Id.*

319 *See R.J. Reynolds II*, 845 F. Supp. 2d 266, 273 (D.D.C. 2012).

320 *See id.* at 272–73.

321 *See R.J. Reynolds I*, 823 F. Supp. 2d 36, 41–42 nn.10 & 13 (D.D.C. 2011), *vacated*, *R.J. Reynolds III*, 696 F.3d 1205 (D.C. Cir. 2012), *aff'g*, *R.J. Reynolds II*, 845 F. Supp. 2d 266 (D.D.C. 2012).

322 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 505 (1996) (quoting Edenfield v. Fane, 507 U.S. 761, 771 (1993)).

323 *R.J. Reynolds II*, 845 F. Supp. 2d at 276.

324 *See 44 Liquormart*, 517 U.S. at 529.

325 *See* 15 U.S.C. § 1333(d) (2006).

326 *See id.*

327 Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 638 (1985).

strong physiological and emotive response, which the government hopes will drive people to stop smoking.[328] As such, because this regulation compels speech that is content-based and viewpoint-discriminatory, it is "presumptively unconstitutional."[329] The mandate will be reviewed under strict scrutiny, and it is unlikely that the government will satisfy its heavy burden. Congress is certainly empowered pursuant to the Commerce Clause to regulate tobacco products and, ultimately, discourage consumer behavior.[330] But, government's latest offensive attack in the war against smoking is unprecedented.

There is no question that Congress "brought out the big guns" when it passed the Tobacco Control Act's graphic images mandate. These graphic images far exceed the government's stated purpose to inform and educate.[331] Indeed, when the short factual warnings traditionally printed on cigarette packages allegedly were insufficient,[332] the government impermissibly compelled non-factual, highly subjective disclosures to accomplish its goal of reducing smoking. This "nuclear arms race" approach to the regulation of a legal, commercial product,[333] which concededly imposes serious health risks, surpasses the bounds of the First Amendment.[334]

Government's arsenal to promote its anti-smoking campaign is large. It can discourage cigarette use by imposing even higher taxes on tobacco products; it can fund educational programming; it can sponsor its own stop-smoking message through various forms of media, most of which tobacco companies are prohibited from utilizing; or, it can ban cigarettes altogether.[335] But, it cannot conscript private entities to subsidize and express its highly subjective and controversial message.[336]

In effectuating congressional policy goals, the FDA strategically designed the images to invade the consciousness of the viewer and "scare him straight."[337] What's next: a photograph of cholesterol-

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[328] *R.J. Reynolds II*, 845 F. Supp. 2d at 272.

[329] *R.J. Reynolds I*, 823 F. Supp. 2d at 45 (quoting Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 830 (1995)).

[330] *See R.J. Reynolds III*, 696 F.3d 1205, 1207 (D.C. Cir. 2012).

[331] *Id.* at 1211.

[332] *Id.* at 1211.

[333] *R.J. Reynolds II*, 845 F. Supp. 2d at 273.

[334] *Id.* at 277.

[335] *Id.* at 276.

[336] *See id.* at 272 (quoting Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985)).

[337] *See R.J. Reynolds III*, 696 F.3d 1205 at 1232.

clogged arteries on Lay's potato chip bags; an image of a diseased liver on an Absolut vodka bottle; or perhaps, a picture of a morbidly obese child on a Ben & Jerry's carton? Is this government's prescription for Americans' unhealthy habits? The graphic images mandate is an unprecedented way of communicating the government's message, and it disregards long-standing First Amendment jurisprudence.