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COMPELLED COMMERCIAL DISCLOSURES—THE D.C. CIRCUIT HOLDS GRAPHIC WARNING REQUIREMENTS FOR TOBACCO PRODUCTS UNCONSTITUTIONAL

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IN *R.J. Reynolds Tobacco Co. v. FDA*, the D.C. Court of Appeals expounded on the constitutional limits placed on compelled speech in a commercial setting.[1] Specifically, the court held that certain graphic images required to be included on cigarette packages violated tobacco companies' First Amendment rights.[2] In its analysis, the majority used an incorrect level of scrutiny and should have instead applied the less-exacting *Zauderer* standard.[3] This analysis would have required the court to uphold the graphic images against the constitutional challenge.[4]

In 2009, Congress enacted the Family Smoking Prevention and Tobacco Control Act (the Act) requiring, *inter alia*, cigarette packages to bear certain textual and graphic warning labels "compris[ing] the top 50 percent of the front and rear panels of the package."[5] To implement this requirement, the Act directed the U.S. Department of Health and Human Services to "issue regulations that require color graphics depicting the negative health consequences of smoking" to be included on cigarette packages.[6] Pursuant to this direction, the Food and Drug Administration (FDA) promulgated the final set of nine required images in a 2011 regulation (the Rule).[7]

The FDA chose these nine images by evaluating the "effectiveness of the proposed color graphic images and their accompanying textual warn-

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1. R.J. Reynolds Tobacco Co. v. FDA (*R.J. Reynolds II*), 696 F.3d 1205, 1211–13 (D.C. Cir. 2012).
2. *Id.* at 1222.
3. *See id.* at 1222–23 (Rogers, J., dissenting).
4. *Id.* at 1223.
5. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 201, 123 Stat. 1776, 1842 (2009).
6. *Id.* at 1845.
7. Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628, 36,648-57 (June 22, 2011) (to be codified at 21 C.F.R. pt. 1141).

ing statements at conveying information about various health risks of smoking, and additionally, at encouraging smoking cessation and discouraging smoking initiation."[8] This evaluation process measured key outcomes, including salience, recall, influence on beliefs, and behavioral intentions.[9]

The graphic images chosen by the FDA include an image of a man smoking "through a tracheotomy hole . . . , a pair of diseased lungs next to a pair of healthy lungs . . . , [and] a bare-chested male cadaver lying on a table"[10] The FDA explained that the purpose of the warnings was to "communicate effectively and graphically the very real, scientifically established adverse health consequences of smoking."[11]

Five tobacco companies (the Companies) challenged the Rule, claiming that the proposed graphic warnings violated the First Amendment.[12] The district court granted the Companies' motion for summary judgment, finding that the Rule violated the First Amendment because it was not "narrowly tailored to achieve a constitutionally permissible form of compelled commercial speech," as required under strict scrutiny.[13] The FDA appealed this decision, arguing that the district court failed to use the correct level of scrutiny and erroneously found the Rule unconstitutional.[14]

The First Amendment prevents excessive government regulation of "[b]oth the right to speak and the right to refrain from speaking."[15] Although both individual and commercial speech are protected by the First Amendment, courts have afforded a lesser constitutional protection to the latter, leading to two relevant exceptions to the general rule that content-based speech regulations are subject to a strict scrutiny review.[16] The first exception provides that if the challenged regulation requires a "purely factual" disclosure by the company, as opposed to "'matters of opinion," "an advertiser's rights are adequately protected so long as disclosure requirements are reasonably related to the state's interest in preventing deception" or confusion and are not "unduly burdensome."[17]

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8. *Id.* at 36,636.

9. *Id.* at 36,638. The FDA's evaluation process included a study where participants were exposed to either one of the thirty-six proposed graphic images or one of the nine textual warning statements. *Id.* The participants evaluated their reactions to the images or texts immediately after the viewing and again one week after completing the survey. *Id.*

10. R.J. Reynolds Tobacco Co. v. U.S. FDA (*R.J. Reynolds I*), 845 F. Supp. 2d 266, 270 (D.D.C.), *aff'd sub nom. R.J. Reynolds II*, 696 F.3d 1205 (D.C. Cir. 2012).

11. Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. at 36641.

12. *R.J. Reynolds I*, 845 F. Supp. 2d at 268.

13. *Id.* at 277.

14. *R.J. Reynolds II*, 696 F.3d at 1208, 1213.

15. *Id.* at 1211.

16. *Id.* at 1211–12. Both the majority and dissenting opinions in *R.J. Reynolds II* appear to assume that the speech in question was properly classified as commercial speech. *See id.* at 1212, 1222.

17. Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 651 (1985).

This *Zauderer* standard "is akin to rational-basis review."[18] Under *Zauderer*, "regulations aimed at false or misleading advertisements are permissible only where 'the particular advertising is *inherently likely* to deceive or where the record indicates that a particular form or method of advertising has *in fact* been deceptive.'"[19] If the restriction on commercial speech does not fit within the *Zauderer* framework, the second exception requires the government to "prove that (1) its asserted interest is substantial, (2) the restriction directly and materially advances that interest, and (3) the restriction is narrowly tailored."[20]

In the present case, the majority opinion first addressed the FDA's contention that the Rule should be analyzed under the *Zauderer* standard.[21] While analyzing Supreme Court precedent, the majority explained that the lenient *Zauderer* standard only applies if the disclosure is aimed at "correc[ting] misleading commercial speech."[22] Due to the nature of the disclosure and the commercial speech, and "the absence of any congressional findings on the misleading nature of cigarette packaging itself," the majority held that the images did not justify using the *Zauderer* standard.[23] The majority followed this conclusion by dismissing the dissent's argument that cigarette packaging that "fail[s] to prominently display the negative consequences of smoking [is] misleading," arguing that the tobacco industries' existing compliance with FDA laws, including the new textual requirements, provided adequate warning to consumers.[24] The majority then addressed—and quickly dismissed—the argument put forth by amicus that the graphic images be evaluated in light of past deception by the tobacco industry, concluding that the FDA implemented the warnings not to combat deceptive claims but, instead, to discourage consumers from buying tobacco products.[25]

The majority further held that the graphic images were not the type of factual, accurate, and uncontroversial statements that *Zauderer* requires, noting that the disclosures upheld in *Zauderer* and *Milavetz* "were clear

18. *R.J. Reynolds II*, 696 F.3d at 1212.

19. Milavetz, Gallop & Milavetz, P.A. v. United States, 130 S. Ct. 1324, 1344 (2010) (Thomas, J., concurring) (quoting *In re* R.M.J., 455 U.S. 191, 202 (1982)).

20. *R.J. Reynolds II*, 696 F.3d at 1212 (citing Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 564 (1980)). There appears to be differing views on whether the *Central Hudson* intermediate scrutiny standard applies in the context of compelled commercial disclosures. *See id.* at 1217. In the context of commercial disclosures, as opposed to restrictions on speech, some circuits choose between strict scrutiny and the *Zauderer* standard. *See, e.g.*, Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 554 (6th Cir. 2012). However, in the present case, both the majority opinion and the dissenting opinion appear to agree that the D.C. Circuit approach is to analyze disclosures under either the *Zauderer* standard or the intermediate scrutiny test of *Central Hudson*. *See R.J. Reynolds II*, 696 F.3d at 1217, 1222 (Rogers, J., dissenting).

21. *See R.J. Reynolds II*, 696 F.3d at 1213–17.

22. *Id.* at 1213–16 (discussing *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, Bd. of Accounting*, 512 U.S. 136 (1994); Milavetz, Gallop & Milavetz, P.A. v. United States, 130 S. Ct. 1324 (2010)).

23. *Id.* at 1214–15.

24. *Id.* at 1215.

25. *Id.* at 1215–16.

statements that were both indisputably accurate and not subject to misinterpretation by consumers."[26] In coming to this conclusion, the majority opined that some images chosen by the FDA, like "a man smoking through a tracheotomy hole," could potentially be misinterpreted by consumers and were primarily intended to "shock [consumers] into retaining the information in the text warning."[27] The majority then pointed to the image of a man wearing a T-shirt containing the words "I QUIT," stating that these and other images were "attempts to evoke emotion" and could not "rationally be viewed as pure attempts to convey information to consumers."[28]

After determining that the *Zauderer* standard did not apply, the opinion next analyzed the images under the *Central Hudson* test.[29] The majority framed its analysis by stating that "[t]he *only* explicitly asserted interest in either the Proposed or Final Rule is an interest in reducing smoking rates."[30] The majority next determined that the studies performed by the FDA of other countries implementing similar graphic images did not provide "a shred of evidence" that the images directly advanced this interest, as required by *Central Hudson*.[31] Accordingly, the majority vacated the image requirements as an unconstitutional infringement on commercial speech.[32]

The dissenting opinion vigorously disagreed with this holding. The dissent began by arguing that the images should have been analyzed under *Zauderer* scrutiny.[33] The dissent disputed the majority's analysis by citing to the Supreme Court and the D.C. Circuit for the proposition that the government need only show the "possibility of deception or a tendency to mislead" and that where the "'likelihood of deception' is 'hardly a speculative one' the court may rely instead on experience and common sense."[34] Using this authority, the dissent argued that "[c]ommon sense, experience, and substantial scientific evidence support the conclusion that [the existing] warnings are ineffective" and that even absent affirmative misleading statements, cigarette packaging that does not display the costs of smoking in a prominent manner is misleading.[35] Similarly, the dissent cited to D.C. Circuit precedent for the proposition that the decades of

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26. *Id.* at 1216.

27. *Id.* (contending that the "FDA tacitly admit[ed]" this intention, and thus the warnings could not be "'purely' factual").

28. *Id.* at 1216–17.

29. *Id.* at 1217.

30. *Id.* at 1218.

31. *Id.* at 1219. For purposes of this analysis, the majority assumed that the interest was substantial. *See id.* at 1218.

32. *Id.* at 1222.

33. *Id.* at 1222–23 (Rogers, J., dissenting).

34. *Id.* at 1227 (quoting Milavetz, Gallop & Milavetz, P.A. v. United States, 130 S. Ct. 1324, 1340 (2010); Spirit Airlines, Inc. v. U.S. Department of Transp., 687 F.3d 403, 413 (D.C. Cir. 2012)) (internal quotation marks omitted).

35. *Id.* at 1228.

past tobacco industry deception renders current packaging misleading.[36]

The dissent further argued that the images, when properly viewed in light of their accompanying textual warning, disclose factually accurate information and thus do not infringe on the Companies' First Amendment rights.[37] The dissent concluded by arguing that, in light of scientific literature in the FDA's study, these warnings were "'reasonably related' to the government's interest in effectively conveying the negative health consequences of smoking to consumers" and should thus be upheld as constitutional.[38]

This case is the first to directly confront the constitutionality of the final nine images. Although the Sixth Circuit has upheld the Act as constitutional, it noted that its ruling pertained only to the Act as a whole, and not to the specific images that were presently challenged.[39] The opinion went so far as to explicitly distinguish itself from the district court case from which the present appeal arose.[40] Accordingly, as the graphic warnings continue to be challenged across the country, the outcome of the present case will serve as a benchmark for other circuits.

The outcome of this case turned on applying the correct level of scrutiny.[41] Contrary to the holding, this Note takes the position that *Zauderer* is the correct standard and that the proposed images should have been upheld.[42] The majority's position that the Rule is not aimed at deceptive advertising is rebutted by D.C. Circuit precedent, which recognizes the tendency of cigarette marketing to mislead consumers in light of past deception by tobacco industry marketing efforts.[43] Furthermore, the existing warnings have failed to correct these industry-created misconceptions.[44] The majority noted that disclosures will meet the *Zauderer* standard if there is a "'potentially real' . . . danger that an advertisement will mislead consumers."[45] As D.C. Circuit precedent and the FDA's exhaustive analysis indicate, the danger that cigarette packaging will mislead consumers is not merely *potentially* real—it is in fact real.[46]

Furthermore, the proposed graphic images are the type of factual infor-

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36. *Id.* at 1228–29 (citing Warner-Lambert Co. v. FTC, 562 F.2d 749, 760 (D.C. Cir. 1977)).

37. *Id.* at 1232–33.

38. *Id.* at 1223. Alternatively, the dissent argued that warnings should meet all the requirements of the *Central Hudson* test. *Id.* at 1235.

39. *See* Disc. Tobacco City & Lottery, Inc. v. United States, 647 F.3d 509, 567–68 (6th Cir. 2012); *see also R.J. Reynolds II*, 696 F.3d at 1211.

40. *Disc. Tobacco*, 647 F.3d at 568–69.

41. *See R.J. Reynolds II*, 696 F.3d at 1222 (Rogers, J., dissenting).

42. *See id.* at 1229.

43. *See id.* at 1215–16 (majority opinion); United States v. Philip Morris USA Inc., 566 F.3d 1095, 1144–45 (D.C Cir. 2009).

44. Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628, 36,632–33 (June 22, 2011) (to be codified at 21 C.F.R. pt. 1141).

45. *R.J. Reynolds II*, 696 F.3d at 1214 (quoting Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, Bd. of Accounting, 512 U.S. 136, 146 (1994)).

46. *See Philip Morris USA Inc.*, 566 F.3d at 1144–45; Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. at 36,632–33.

mation required by *Zauderer*.[47] The *Zauderer* opinion foreclosed the argument that graphic images could not be factual information by noting that "[t]he use of illustrations or pictures in advertisements serves important communicative functions . . ., and it may also serve to impart information directly."[48] Moreover, these images were not imposed by themselves but were instead chosen to accompany textual warnings.[49] As the dissent observed, when these images are properly viewed with their accompanying textual warning, they clearly convey factual information.[50]

Finally, it must be determined whether the disclosure requirements reasonably relate to the government's interest. The majority asserts that the *only* government interest is curtailing smoking.[51] Yet, the government states in the Rule that "*the purpose* of these required warnings is to communicate effectively and graphically the very real, scientifically established adverse consequences of smoking" and that "graphic health warnings effectively increase awareness of the health risks of smoking, which is the *principal purpose* of the warnings."[52] Accordingly, it must be determined whether the images were rationally related to communicating the adverse consequences of smoking, which will in turn combat existing misconceptions about smoking. As the dissent notes, in light of strong "salience measures reported in [the FDA's] study, . . . [these images are] reasonably related to the government's interest in effectively communicating information."[53]

The effect of the majority's holding is to overturn a law that will help combat a major health concern in the United States. Approximately 47 million U.S. adults smoke cigarettes, as well as 19.5% of children in grades nine through twelve.[54] Although the health consequences of smoking are devastating, these consequences are not adequately conveyed by existing warnings, particularly in light of past industry deception.[55] The results of the FDA's research indicate that the chosen images will help to elucidate these consequences to consumers and possibly have the effect of lowering the smoking rate.[56] Given the possibility of these laudable results, this holding is disconcerting not only in a strictly legal sense, but in a broader social sense as well.

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47. *See R.J. Reynolds II*, 696 F.3d at 1230, 1233 (Rogers, J., dissenting).

48. Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 647 (1985).

49. *R.J. Reynolds II*, 696 F.3d at 1208 (majority opinion).

50. *Id.* at 1231 (Rogers, J., dissenting).

51. *Id.* at 1218 (majority opinion).

52. Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628, 36,641, 36,642 (June 22, 2011) (emphasis added).

53. *See R.J. Reynolds II*, 696 F.3d at 1233 (Rogers, J., dissenting) (citing Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. at 36,638, 36,642, 36,649–57).

54. Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. at 36,629.

55. *See id.* at 36,631–32.

56. *See id.* at 36,637–41.

For the aforementioned reasons, the majority opinion applied the improper level of scrutiny in its analysis and incorrectly found the image requirements unconstitutional. These images and their textual warnings convey factual information and are reasonably related to conveying the health risks of smoking, thus combatting the historical deception of the tobacco industry. Overturning these warning requirements will act to the detriment of disseminating the negative consequences of smoking and will thus prevent possible reductions in smoking rates.