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SIZE MATTERS: BIG TOBACCO AND THE FEDERAL GOVERNMENT JOUST OVER NEW CIGARETTE WARNING LABELS

I. INTRODUCTION

The Family Smoking Prevention and Tobacco Control Act ("FSPTCA") requires tobacco manufacturers to place large and graphic warning labels on all U.S. tobacco products.¹ These warning labels are designed to attract consumer attention and discourage smoking.² However, to the chagrin of FSPTCA supporters, the labels have also attracted significant attention from federal courts.³

Immediately after enactment of the FSPTCA, tobacco manufacturers launched legal challenges against the new warning labels.⁴ These lawsuits have resulted in a split among the U.S. Circuit Courts of Appeals.⁵ In *R.J. Reynolds Tobacco Company v. FDA*,⁶ the D.C. Circuit held that the FSPTCA's warning label requirements violate tobacco manufacturers' First Amendment rights.⁷ The Sixth Circuit, however, held in *Discount Tobacco City & Lottery, Inc. v. United States*⁸ that the warning labels do not violate the manufacturers' free speech rights.⁹

This note explains why the D.C. Circuit, in *R.J. Reynolds*, was correct to apply intermediate scrutiny, instead of rational basis review, to the FSPTCA warning labels, albeit for a different reason than the D.C.

¹ See Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 201, 123 Stat. 1776 (2009) (requiring new warning labels with text and graphic images).

² See Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36628, 36633 (June 22, 2011) (to be codified at 21 C.F.R. pt. 1141) (explaining purpose of new warning labels).

³ See *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, (D.C. Cir. 2012) (addressing whether labels violate First Amendment); *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 518 (6th Cir. 2012) (discussing whether labels withstand First Amendment challenge).

⁴ See Duff Wilson, *Tobacco Firms Sue to Block Marketing Law*, N.Y. TIMES (Aug. 31, 2009), available at http://www.nytimes.com/2009/09/01/business/01tobacco.html?_r=1& (describing litigation).

⁵ Compare *R.J. Reynolds*, 696 F.3d at 1221-22 (holding labels violate First Amendment), with *Disc. Tobacco City*, 674 F.3d at 531 (holding labels do not violate First Amendment).

⁶ 696 F.3d 1205 (D.C. Cir. 2012).

⁷ See *id.* at 1221-21 (invalidating FSPTCA warning labels).

⁸ 674 F.3d 509 (6th Cir. 2012).

⁹ See *id.* at 531 (upholding FSPTCA warning labels).

Circuit asserted.¹⁰ Intermediate scrutiny is the correct test because the FSPCTA warning labels go beyond the type of government-mandated disclosure statements to which the Supreme Court has applied rational basis review in *Zauderer* and its progeny.¹¹ The FSPTCA warning labels are so big (they take up 50% of the front and back of a cigarette pack) that they are de facto limitations on tobacco manufacturers' commercial speech.¹² Because the warning labels are not akin to *Zauderer* disclosures and cross the line into the realm of limitations on commercial speech, intermediate scrutiny is the correct test.¹³

In analyzing whether the FSPTCA warning labels violate tobacco manufacturers' First Amendment rights, the *R.J. Reynolds* court correctly held that the warning labels do not pass *Central Hudson* intermediate scrutiny.¹⁴ However, the court's reasoning is flawed.¹⁵ The *R.J. Reynolds* court should have recognized that the government has a valid and substantial interest in effectively communicating the health consequences of smoking to consumers and that the FSPCTA warning labels directly advance this interest.¹⁶

Nevertheless, the warning labels fail *Central Hudson* intermediate scrutiny because the government presented no evidence that these labels were the least restrictive means to accomplish this specific interest.¹⁷

¹⁰ See *infra* Part V. (analyzing *R.J. Reynolds*). The so-called "*Zauderer* test" applies rational basis review when a government entity requires disclosure of specific information as part of an advertisement. See *Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985). In the commercial speech context, rational basis review is satisfied if the mandated disclosure is reasonably related to the government's interest in preventing consumer deception. See *id.* Alternatively, the so-called "*Central Hudson* test" applies intermediate scrutiny when a government entity restricts or bans commercial speech. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 564 (1980). A more difficult burden to overcome than rational basis review, intermediate scrutiny is satisfied only if the speech restriction directly advances a substantial government interest and is not more restrictive than necessary to advance that interest. See *id.*

¹¹ See Principal Brief of Plaintiffs-Appellants, *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509 (6th Cir. 2012) (No. 10-5234), 2010 WL 6510607, at *24 (noting limited space remaining for tobacco manufacturers to advertise on cigarette package).

¹² See *id.* (noting unduly burdensome size of warning labels).

¹³ See *infra* Part V (analyzing *R.J. Reynolds*).

¹⁴ See Stephanie Jordan Bennett, Comment, *Paternalistic Manipulation Through Pictorial Warnings: The First Amendment, Commercial Speech, and the Family Smoking Prevention and Tobacco Control Act*, 81 MISS. L.J. 1909, 1911 (2012) (concluding labels are unconstitutional under any standard of review).

¹⁵ See *R.J. Reynolds*, 696 F.3d at 1223 (Rogers, J., dissenting) (disagreeing with reasoning of majority opinion).

¹⁶ See *infra* Part V (analyzing *R.J. Reynolds*).

¹⁷ See Clay Calvert & Christina M. Locke, *Playing Politics or Protecting Children? Congressional Action & A First Amendment Analysis Of The Family Smoking Prevention And Tobacco Control Act*, 36 J. LEGIS. 201, 233 (2010) (predicting that FSPTCA would fail *Central*

Despite the *R.J. Reynolds* court's flawed reasoning in choosing and applying *Central Hudson* intermediate scrutiny, the court accurately concluded that the warning labels are an impermissible infringement on tobacco manufacturers' free speech rights.¹⁸

This note is divided into five parts. Part II of this note explains the FSPCTA's legislative history and its provisions related to the new warning labels for cigarette packages.¹⁹ Part III describes the evolution of the Supreme Court's commercial speech cases.²⁰ Part IV summarizes the circuit split created by *R.J. Reynolds* and *Discount Tobacco City*.²¹ Finally, Part V analyzes the flawed reasoning, yet correct conclusion, of the *R.J. Reynolds* court.²²

II. OVERVIEW OF FSPTCA

President Obama signed the FSPTCA on June 22, 2009, after it received bipartisan support in Congress.²³ Representative Henry Waxman,

Hudson test because "the fit between the packaging restrictions and the reduction of youth smoking is not reasonable").

¹⁸ See *infra* Part V (analyzing *R.J. Reynolds*).

¹⁹ See *infra* Part II. (explaining purpose of FSPCTA and relevant provisions).

²⁰ See *infra* Part III (summarizing Supreme Court's treatment of commercial speech).

²¹ See *infra* Part IV (discussing *R.J. Reynolds* and *Discount Tobacco City*).

²² See *infra* Part V (analyzing *R.J. Reynolds*).

²³ See Barack Obama, Remarks by the President at the Signing of The Family Smoking Prevention and Tobacco Control Act (June 22, 2009), (transcript available in the White House Briefing Room archives) ("[T]he legislation I'm signing today represents change that's been decades in the making."); *H.R. 1256 (111th): Family Smoking Prevention and Tobacco Control Act (On Passage of the Bill)*, GOVTRACK (Jun. 11, 2009, 2:27 PM), <https://www.govtrack.us/congress/votes/111-2009/s207> (listing Senate vote); 155 CONG. H.R. 1256 (111th): *Family Smoking Prevention and Tobacco Control Act (On Senate Amendment)*, GOVTRACK (Jun. 12, 2009, 11:54 AM), <https://www.govtrack.us/congress/votes/111-2009/h335> (listing House vote). Significant interest in federal tobacco legislation began after the United States Surgeon General described the health consequences of smoking in a 1964 report. See Kristin Faucette, Note, *First Amendment Challenges to the Family Smoking Prevention and Tobacco Control Act: Balancing Congress' Interest in Preserving Public Health with the Tobacco's Industry's Right to Freely Communicate with Adult Smokers*, 6 J. HEALTH & BIOMEDICAL L. 301, 304-12 (2011) (describing history of federal tobacco legislation). The report stated, "Cigarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action." U.S. DEPT. OF HEALTH, EDUC., AND WELFARE, SMOKING AND HEALTH, REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE 33 (1964), available at <http://profiles.nlm.nih.gov/ps/access/NNBBMQ.pdf>. In 1965, Congress passed the Federal Cigarette Labeling and Advertising Act, which required the first warning labels on cigarette packages. See Faucette, *supra*, at 305. The Public Health Cigarette Smoking Act of 1970 banned cigarette advertising on television or radio. See 15 U.S.C. § 1335 (2012) (prohibiting advertising on all mediums of electronic communication). In 1984, Congress required longer and more descriptive warning labels. See 15 U.S.C. § 1333 (requiring one of nine specifically enumerated warning labels on all cigarette

chief sponsor of the legislation, described the FSPTCA as historic legislation "in the fight against the prevalence of tobacco use, its toll on human lives, and the clear and pervasive threat tobacco poses to public health."²⁴ Others derided the legislation as a violation of the First Amendment.²⁵

The primary purpose of the FSPTCA is to provide the FDA with authority to regulate tobacco products; the Supreme Court ruled in 1996 that the FDA did not have such authority without new authorizing legislation.²⁶ Among its many provisions, the FSPTCA requires all cigarette packages manufactured, sold, or distributed in the United States to display new warning labels.²⁷ The FSPTCA instructed the FDA to design

packages). In 1996, the Food and Drug Administration ("FDA") issued a landmark rule that sought to reduce the ability of minors to access tobacco products. *See* Faucette, *supra*, at 307. This rule prohibited the sale of tobacco to persons under the age of eighteen, the distribution of marketing items displaying cigarette brand names, and tobacco manufacturer sponsorship of music and sporting events. *See id.* Without explicit Congressional approval for the rule, the FDA declared that its statutory charter, the Federal Food, Drug, and Cosmetic Act of 1938, provided authority for the rule. *See id.* at 307-08 (describing FDA's explanation of authority). However, in 2000, the Supreme Court invalidated the 1996 rule as beyond the scope of the FDA's authority. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 126 (2000) ("[W]e believe that Congress has clearly precluded the FDA from asserting jurisdiction to regulate tobacco products.").

²⁴ Press Release, Rep. Henry Waxman, Energy and Commerce Comm. Passes Landmark Family Smoking Prevention and Tobacco Control Legislation (Mar. 4, 2009), *available at* <http://waxman.house.gov/press-release/energy-and-commerce-committee-passes-landmark-family-smoking-prevention-and-tobacco> (last visited Apr. 14, 2014).

²⁵ *See* 155 CONG. REC. H6657 (2009) (statement of Rep. Stephen Buyer) ("While we all agree that steps need to be taken to help lessen the use of tobacco products by underage youth, we must not do so in ways that clearly violate the First Amendment."). Rep. Ron Paul referred to the FSPTCA's regulatory regime as "authoritarianism" and as promoting a "nanny state." 155 CONG. REC. H6655 (2009) (statement of Rep. Ron Paul). The tobacco industry responded: "[T]he law contains provisions that severely restrict the few remaining channels we have to communicate with adult tobacco consumers and, in our opinion, cannot be justified on any basis consistent with the demands of the First Amendment." Press Release, R.J. Reynolds Tobacco Co., R.J. Reynolds Tobacco Company, Other Tobacco Manufacturers, Retailers, File Suit Challenging Provisions of FDA Tobacco Act (Aug. 31, 2009), *available at* <http://www.prnewswire.com/news-releases/rj-reynolds-tobacco-company-other-tobacco-manufacturers-retailer-file-suit-challenging-provisions-of-fda-tobacco-act-62107942.html> (last visited Apr. 14, 2014).

²⁶ *See* Family Smoking Prevention and Tobacco Control Act § 3 (listing numerous purposes of FSPTCA); *FDA*, 529 U.S. at 126 (holding that FDA lacked authority to regulate tobacco products). The FSPTCA's other purposes include ensuring that tobacco consumers are better informed about associated health risks and restricting the access of youth to tobacco products. *See* Family Smoking Prevention and Tobacco Control Act § 3.

²⁷ *See* Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 201 (a), 123 Stat. 1776 (2009) (listing text of nine required warning labels); Calvert & Locke, *supra* note 17, at 206-07 (describing provisions of FSPTCA). Other FSPTCA provisions restrict tobacco manufactures' ability to communicate with consumers about tobacco products. *See* Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, §§ 102 & 201, 123 Stat. 1776 (2009). For example, the FSPTCA requires that warning labels comprise twenty percent of print

the new warning labels, requiring that the labels contain both textual statements and graphic color images that portray the negative health consequences of smoking.²⁸ The legislation also requires that the warning labels comprise the top half of the front and back panels of each cigarette package.²⁹

On June 22, 2011, the FDA issued a final rule that included nine warning labels, and required the inclusion of one of those labels on each cigarette package.³⁰ The new warning labels are not for the faint of heart.³¹ One label depicts a man smoking through a hole in his throat with the accompanying text: "WARNING: Cigarettes are addictive."³² Another portrays a cadaver with a chest incision and the accompanying text: "WARNING: Smoking can kill you."³³ The FDA's rule requires tobacco manufacturers to display all nine labels on a roughly equivalent number of tobacco products that are then randomly distributed throughout the United States.³⁴

and poster cigarette advertisements. *See id.* at § 201(a). These labels must appear in English or the predominant language of the publication in which the advertisement appears. *See id.* In addition, tobacco manufacturers may not advertise a tobacco product as "light" or "mild." *See id.* at § 101(b)(3).

²⁸ *See* Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 201, 123 Stat. 1776 (2009) (requiring promulgation of regulations).

²⁹ *See id.* at § 201(a) (describing required placement of warning labels). In addition to the overall label size, the FSPTCA requires the text to appear in seventeen-point font. *See id.* (describing size and other requirements of new warning labels).

³⁰ *See* Required Warnings for Cigarette Packages and Advertisements, *supra* note 2, at 36648-57 (describing FDA selected warning labels). The FDA started with thirty-six images. *See id.* at 36636. The agency conducted an Internet-based study of 18,000 participants to measure the efficacy of each image. *See id.* at 36637. After considering the results of the study, the FDA selected nine images that the agency believed most effectively accomplished the goals of the FSPTCA. *See id.* at 36640.

³¹ *See* Megan McArdle, *Will FDA's New Gruesome Warnings Reduce the Number of Smokers?*, THE ATLANTIC (June 22, 2011), available at <http://www.theatlantic.com/business/archive/2011/06/will-fdas-new-gruesome-warnings-reduce-the-number-of-smokers/240843> (describing FDA selected images as "gruesome" and "disturbing"). Some experts believe that graphic images are necessary to reduce smoking rates. *See* Ellen Peters, Daniel Romer, Paul Slovic, Kathleen Hall Jamieson, Leisha Wharfield, C. K. Mertz & Stephanie M. Carpenter, *The Impact and Acceptability of Canadian-Style Cigarette Warning Labels Among U.S. Smokers and Nonsmokers*, 9 NICOTINE & TOBACCO RESEARCH 473, 474 (Apr. 2007), available at <http://ntr.oxfordjournals.org/content/9/4/473.full.pdf+html> ("One of the ways that more graphic warning labels can help consumers appreciate the risks of smoking is to create unfavorable emotional associations with the behavior. Bland descriptions of the health hazards of smoking . . . are unlikely to create such associations . . .").

³² *See* U.S. Food and Drug Admin., *Overview: Cigarette Health Warnings*, U.S. DEP'T OF HEALTH AND HUMAN SERVS., <http://www.fda.gov/TobaccoProducts/Labeling/ucm259214.htm> (last updated May 15, 2013) (introducing nine color images). Three of these images are depicted *infra* at Figure A.

³³ *See id.* (describing images).

³⁴ *See* Required Warnings for Cigarette Packages and Advertisements, *supra* note 2, at 36693

FIGURE A



In promulgating the rule, the FDA asserted that the primary purposes of the new warning labels are to effectively communicate the health consequences of smoking and to reduce smoking rates.³⁵ The FDA noted that existing warning labels are "unnoticed and stale."³⁶

III. SEMINAL COMMERCIAL SPEECH CASES

The First Amendment to the United States Constitution provides protections against governmental constraints on speech.³⁷ However, judicial interpretation of the Amendment has allowed the government to enact certain speech restrictions.³⁸ For example, the government can legislate the prohibition of libel, blackmail, perjury, and solicitation of

(describing required distribution of images).

³⁵ *Id.* (defining purpose of new labels). In the final rule, the FDA stated, "The set of required warnings we have selected will satisfy our primary goal, which is to effectively convey the negative health consequences of smoking on cigarette packages and in advertisements . . ." *Id.* at 36633.

³⁶ Required Warnings for Cigarette Packages and Advertisements, 75 Fed. Reg. 69524, 69530 (proposed Nov. 12, 2010) (to be codified at 21 C.F.R. pt. 1141), quoting ENDING THE TOBACCO PROBLEM: A BLUEPRINT FOR THE NATION Appendix C-3 (Richard J Bonnie, National Academies Press 2007), available at <http://www.nap.edu/catalog/11795.html> (describing need for new labels).

³⁷ See U.S. CONST. amend. I. ("Congress shall make no law . . . abridging the freedom of speech . . .").

³⁸ See *Schenck v. United States*, 249 U.S. 47, 52 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."); JEROME A. BARRON & C. THOMAS DIENES, FIRST AMENDMENT LAW IN A NUTSHELL, 2-3 (4th ed. 2008) (explaining scope of First Amendment).

illegal conduct.³⁹ In addition, the Amendment applies only to governmental restrictions and not to private restrictions on speech.⁴⁰

Prior to 1975, the Supreme Court excluded commercial speech from First Amendment protection.⁴¹ Commercial speech is any assertion related solely to the economic interests of the speaker or of the audience or an assertion proposing a commercial transaction.⁴² As a result, before 1975 government entities had unfettered authority to place restrictions on speech involving an economic transaction, such as advertising.⁴³

In *Bigelow v. Virginia*⁴⁴ and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,⁴⁵ the Supreme Court provided First Amendment protection to commercial speech for the first time.⁴⁶ Commercial speech, however, received less protection than other forms of

³⁹ See Barron & Dienes, *supra* note 38, at 3 (noting permissible government speech restrictions).

⁴⁰ See 16A AM. JUR. 2D *Constitutional Law* § 465 (2009) (explaining applicability of First Amendment).

⁴¹ See Martin H. Redish, *Tobacco Advertising and the First Amendment*, 81 IOWA L. REV. 589, 593 (1996) ("For many years, the Supreme Court simply refused even to consider the possibility that commercial advertising possessed any of the characteristics traditionally associated with First Amendment values."); Ann K. Wooster, *Protection of Commercial Speech Under First Amendment – Supreme Court Cases*, 164 A.L.R. FED. 1, § 2 (2000) (detailing history of First Amendment applicability to commercial speech). Prior to 1975, *Valentine v. Chrestensen* provided the controlling rule on commercial speech. See Sean P. Flanagan, *Up in Smoke? Commercial Free Speech in the United States and the European Union: Why Comprehensive Tobacco Advertising Bans Work in Europe, but Fail in the United States*, 44 SUFFOLK U. L. REV. 211, 217-18 (2011) (providing history of commercial speech and tobacco advertising regulation under First Amendment). In *Valentine*, the Court held that the First Amendment does not protect commercial speech. See *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) ("[T]he Constitution imposes no . . . restraint on government as respects purely commercial advertising."), *reported overruled by* *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (citing *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)).

⁴² See 16A AM. JUR. 2D *Constitutional Law* § 499 (2009) (describing Supreme Court's definition of commercial speech).

⁴³ See David F. McGowan, Comment, *A Critical Analysis of Commercial Speech*, 78 CALIF. L. REV. 359, 361-64 (1990) (explaining history of commercial speech jurisprudence); see also Dayna B. Royal, *Resolving the Compelled-Commercial-Speech Conundrum*, 19 VA. J. SOC. POL'Y & L. 205, 212-13 (2012) (defining commercial speech).

⁴⁴ 421 U.S. 809 (1975).

⁴⁵ 425 U.S. 748 (1976).

⁴⁶ See McGowan, *supra* note 43, at 364-67 (explaining erosion of *Valentine* and rise of *Virginia Board*). In *Virginia Board*, a consumer protection group challenged a Virginia law that prohibited pharmacists from advertising prescription drug prices. See *Virginia Board*, 425 U.S. at 752. The Court held that the law was unconstitutional because commercial speech deserved some First Amendment protection. See *id.* at 762. In explaining the need to extend the First Amendment to commercial speech, the Court acknowledged the important informational value of advertising. See *id.* at 765 ("It is a matter of public interest that . . . [economic] decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.").

expression.⁴⁷ The Court provided less protection because of the potentially deceptive nature of expression that is motivated by economic interests as weighed against society's "strong interest in the free flow of commercial information."⁴⁸ Therefore, today commercial speech is susceptible to some government regulation.⁴⁹

In *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*,⁵⁰ the Supreme Court held that intermediate scrutiny should apply to governmental restrictions of commercial speech.⁵¹ In *Central Hudson*, a public utility challenged a New York State ban on advertising that promoted the use of electricity.⁵² The Court established a four-part test to determine when a governmental restriction of commercial speech violates the First Amendment.⁵³ First, the Court asked whether the regulated commercial speech is false or misleading.⁵⁴ False or misleading commercial speech receives no First Amendment protection and can be

⁴⁷ See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562-63 (1980) ("The Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression."). Despite extending First Amendment protection to commercial speech for the first time, *Virginia Board* implied that the protection has limits. See McGowan, *supra* note 43, at 367. The Court stated that "commonsense" differences exist between commercial and non-commercial speech and that "a different degree of protection is necessary" for commercial speech. *Virginia Board*, 425 U.S. at 771 n.24. The Court also noted: "In concluding that commercial speech, like other varieties, is protected, we of course do not hold that it can never be regulated in any way." *Id.* at 770.

⁴⁸ *Virginia Board*, 425 U.S. at 764 (explaining why commercial speech receives less protection); see also *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 64-65 (1983) (stating that commercial speech receives less protection because of potential for deception in advertising); Wooster, *supra* note 41, at §2 ("Commercial speech is considered to be different from other kinds of protected expression because advertisers are particularly well-suited to evaluate the accuracy of their messages and the lawfulness of the underlying activity, and because commercial speech . . . is not particularly susceptible to being crushed by overbroad regulation.").

⁴⁹ See Royal, *supra* note 43, at 238 (explaining history of government regulation of commercial speech).

⁵⁰ 447 U.S. 557 (1980).

⁵¹ See *id.* at 561-66 (creating standard of review for commercial speech restrictions).

⁵² See *id.* at 558-61 (outlining facts of case).

⁵³ See McGowan, *supra* note 43, at 371 (explaining significance of *Central Hudson*). In *Central Hudson*, the Court considered whether the Public Service Commission of the State of New York could ban advertising by electric utility companies. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 558 (1980). During a fuel shortage in 1973, the Commission ordered all electric utilities in New York State to temporarily cease advertising that promoted electrical use. See *id.* at 558-59. Three years later, the Commission made the ban permanent, arguing that it furthered a national policy of energy conservation. See *id.* at 559. Some have referred to the *Central Hudson* test as a form of intermediate scrutiny. See Michael Hoefges, *Protecting Tobacco Advertising Under the Commercial Speech Doctrine: The Constitutional Impact of Lorillard Tobacco Co.*, 8 COMM. L. & POL'Y 267, 267 (2003).

⁵⁴ See *Cent. Hudson*, 447 U.S. at 564 (describing purpose of first prong).

completely banned.⁵⁵ Second, the Court asked whether the government has a substantial interest in its regulation of the commercial speech.⁵⁶ The lack of a substantial interest dooms the government regulation.⁵⁷ Third, the regulation must directly advance the government's interest.⁵⁸ Fourth, the regulation must be narrowly tailored to serving the interest.⁵⁹ If a less speech-restrictive means exists to accomplish the government's interest, the regulation is not permissible.⁶⁰

⁵⁵ See *id.* at 563 ("The government may ban forms of communication more likely to deceive the public than to inform it . . ."); see also *Friedman v. Rogers*, 440 U.S. 1, 9 (1979) (holding restrictions on false, deceptive, and misleading commercial speech are permissible). Misleading commercial speech includes communications that are inherently likely to deceive or that have in fact been deceptive. See *In re R.M.J.*, 455 U.S. 191, 202 (1982).

⁵⁶ See *Cent. Hudson*, 447 U.S. at 564 (describing purpose of second prong).

⁵⁷ See *id.* (explaining requirements of second prong). The Court has found a variety of governmental interests to be substantial. See *Hoefges*, *supra* note 53, at 271 (listing breadth of substantial government interests).

⁵⁸ See *Cent. Hudson*, 447 U.S. at 564-65 ("The State cannot regulate speech that poses no danger to the asserted state interest . . ."). The Court has applied the third prong with varied rigor. See *Hoefges*, *supra* note 53, at 271 (explaining evolution of Court's application of *Central Hudson*'s third prong). In *Edenfield v. Fane*, the Court struck down a Florida rule that prohibited certified public accountants ("CPA") from direct solicitation of clients. See *Edenfield v. Fane*, 507 U.S. 761, 763-64 (1993). The Court accepted Florida's asserted interests of protecting consumers from fraud and maintaining the fact and appearance of CPA independence. See *id.* at 768-70. However, the Court stated that Florida did not sufficiently demonstrate that the rule advanced the interests "in a direct and material way." *Id.* at 771. The Court required something more than "mere speculation or conjecture" of advancement. *Id.* at 770. In *Rubin v. Coors Brewing Company*, the Court struck down a federal law that prohibited the disclosure of beer alcohol content in advertising. See *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 478 (1995). The Court refused to accept the government's "anecdotal evidence and educated guesses" that the regulation directly advanced the government's substantial interest. *Id.* at 490. On the other hand, a divided Court has more recently found grounds for direct advancement. See *Hoefges*, *supra* note 53, at 271. In *Florida Bar v. Went for It, Inc.*, the Court, by a 5-4 vote, upheld a Florida Bar rule that prohibited personal injury lawyers from sending direct mail solicitations to victims within thirty days of an accident. See *Fla. Bar v. Went for It, Inc.*, 515 U.S. 618, 620 (1995). The Court agreed that the Florida Bar's asserted interests in protecting the privacy of personal injury victims and the reputation of lawyers were substantial. See *id.* at 624-25. The Court found that a 106-page summary of a two-year study of consumer opinion of personal injury mail solicitations to be sufficient evidence of direct advancement and that a "surfeit of background information" was unnecessary. *Id.* at 626-28. Justice Kennedy, writing in dissent, responded that the study was noteworthy only for its incompetence. See *id.* at 640 (Kennedy, J., dissenting). In *Lorillard Tobacco Company v. Reilly*, the Court struck down a Massachusetts law that, among other provisions, prohibited outdoor advertisements of tobacco products within 1,000 feet of a school or playground. See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 565-66 (2001). However, the Court, by a 5-4 vote, found a link between the restriction and the state's substantial interest in reducing underage smoking, because fewer advertisements may suppress product demand. See *id.* at 556-61.

⁵⁹ See *Cent. Hudson*, 447 U.S. at 564 (describing purpose of fourth prong and indicating two criteria used to measure compliance).

⁶⁰ See *id.* at 564-65 (stating government cannot "completely suppress information when narrower restrictions on expression would serve its interest as well"). Similar to the third prong,

Five years after *Central Hudson*, the Supreme Court addressed the constitutionality of a government mandate that required law firms to disclose certain information in their advertisements.⁶¹ At issue in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*⁶² was an Ohio Code of Professional Responsibility that required Ohio lawyers to include information about contingent fees in their advertisements.⁶³ The Court held that compelled commercial speech, in the form of a factual warning or disclaimer, does not face *Central Hudson* intermediate scrutiny.⁶⁴ Instead,

the Court has fluctuated on its requirements for narrow tailoring. See Hoefges, *supra* note 53, at 271 (explaining evolution of the Court's application of *Central Hudson*'s fourth prong). For example, in *Board of Trustees of the State University of New York v. Fox*, the Court held that the government need not employ the least restrictive means. See Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 477 (1989). The Court required only that a reasonable fit exist between the ends and means. See *id.* at 480. For the majority, Justice Scalia wrote: "Within those bounds we leave it to governmental decisionmakers [to judge what manner of regulation may best be employed." *Id.* On the other hand, in *Coors Brewing Company* the Court held that the government cannot employ a less direct means if a more direct means is available to accomplish the ends. See *Coors Brewing Co.*, 415 U.S. at 490-91. In *Lorillard*, the Court held that Massachusetts could not suppress speech directed to adults for the purpose of protecting children. See *Lorillard Tobacco Co.*, 533 U.S. at 564. As a result of these cases, the government must now demonstrate that a less speech-restrictive regulation would not effectively accomplish the government's goals. See Hoefges, *supra* note 53, at 271.

⁶¹ See Robert Post, *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Association in United Foods, Zauderer, and Abood*, 40 VAL. U. L. REV. 555, 559-61 (2006) (detailing historical significance of *Zauderer*). *Zauderer* applied when the government-required disclosure statement accompanied a misleading advertisement. See *Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio*, 471 U.S. 626, 652 (1985). Recently, the Supreme Court held that required disclosures are permissible due to a history of misleading speech. See *Milavetz v. United States*, 559 U.S. 229, 251 (2010) ("Evidence . . . demonstrating a pattern of advertisements that hold out . . . [a promise] without alerting consumers to its potential cost . . . is adequate to establish . . . the likelihood of deception . . ."). Courts, however, have liberally construed *Zauderer*'s requirement that the commercial speech at issue be misleading. See Case Comment, *D.C. Circuit Holds that FDA Rule Mandating Graphic Warning Images on Cigarette Packaging and Advertisements Violates First Amendment*, 126 HARV. L. REV. 818, 823 (2013) [hereinafter *Recent Case*]. For example, the Supreme Court has stated that a disclosure could be required to "dissipate the possibility of consumer confusion or deception." See *In re R.M.J.*, 455 U.S. 191, 201 (1982) (emphasis added). Later, in *Sorrell*, the Second Circuit considered a Vermont statute that required manufacturers of some mercury-containing products to label their products to inform consumers of the presence of mercury and of the importance of disposing of the product as hazardous waste. See *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 107 (2nd Cir. 2001). The statute's purpose was not to prevent consumer deception, but to increase information to consumers. See *id.* at 115. Despite the lack of deception, the court applied *Zauderer* because the statute's purpose was analogous to the First Amendment's emphasis on increasing information to consumers. See *id.*

⁶² 471 U.S. 626 (1985).

⁶³ See *Zauderer*, 471 U.S. at 633 (describing relevant Ohio Code of Professional Conduct); see generally *Milavetz*, 559 U.S. at 231-32 (analyzing federal law that required lawyers who provide debt relief to disclose certain information).

⁶⁴ See *Zauderer*, 471 U.S. at 651 n.14 (rejecting request to apply *Central Hudson* test). The Court held that compelled commercial speech deserves some First Amendment protection, just

the Court decided that compelled commercial speech is subject to the lower threshold of rational basis review.⁶⁵ Applying rational basis, the Court upheld Ohio's required disclosure of contingent fees because the requirement was reasonably related to the state's interest in preventing consumer deception.⁶⁶

The *Zauderer* Court analogized to *Central Hudson* in choosing rational basis review instead of intermediate scrutiny for compelled commercial speech.⁶⁷ The Court suggested that both rules facilitate an open marketplace of information.⁶⁸ In upholding the Ohio contingent fee disclosure requirement, the Court stated that compelled disclosure of "purely factual and uncontroversial information" is permissible because it enhances the "free flow of commercial information."⁶⁹ However, the *Zauderer* court admitted that "unjustified or unduly burdensome requirements might offend the First Amendment by chilling protected commercial speech."⁷⁰

IV. THE CIRCUIT SPLIT

Shortly after enactment of the FSPTCA, tobacco manufacturers sued the FDA in the Sixth Circuit and the D.C. Circuit.⁷¹ The resulting cases created a circuit split on two issues: 1) whether *Zauderer* rational

not the level of protection provided for speech restrictions. *See id.* at 651. The Court stated that disclosure requirements implicate First Amendment interests that are substantially weaker than the interests implicated by speech restrictions. *See id.* at 651 n.14. The Court stated, "[I]n virtually all our commercial speech decisions to date, we have emphasized that because disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, 'warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception.'" *See id.* at 651 (quoting *In re R.M.J.*, 455 U.S. at 201).

⁶⁵ *See id.* at 651 ("[A]n advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers."). An expert has described the *Zauderer* test as "extraordinarily lenient." *See Post, supra* note 61, at 560.

⁶⁶ *See Zauderer*, 471 U.S. at 651 (establishing rational basis review for disclosure requirements).

⁶⁷ *See id.* at 651 n.14 (analogizing to *Central Hudson*).

⁶⁸ *See id.* at 651 ("Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal.") (emphasis in original).

⁶⁹ *Id.* at 646, 651; *see also Post, supra* note 61, at 561 (describing reasoning in *Zauderer*).

⁷⁰ *Zauderer*, 471 U.S. at 651 (describing limits to its holding).

⁷¹ *See R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1208 (D.C. Cir. 2012) (noting identity of plaintiffs); *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 518 (6th Cir. 2012) (noting identity of plaintiffs).

basis review or *Central Hudson* intermediate scrutiny applies to the cigarette package warning labels; and 2) whether the labels survive the chosen test.⁷²

In *Discount Tobacco City*, the Sixth Circuit held that rational basis review applied because the court believed that the FSPTCA warning labels were compelled disclosures of factual information related to the health consequences of smoking, akin to the compelled disclosures of contingent fees in *Zauderer*.⁷³ The court found that the warning labels survived rational basis review because the labels were reasonably related to the government's interest in preventing deception of consumers.⁷⁴ Therefore, the court upheld the FSPTCA's warning label provisions.⁷⁵

In *R.J. Reynolds*, the D.C. Circuit came to a different conclusion.⁷⁶ The court held that rational basis review did not apply because the court believed that the warning labels were not "purely factual" disclosure statements, and therefore not akin to *Zauderer*.⁷⁷ As a result, the court

⁷² Compare *R.J. Reynolds*, 696 F.3d at 1217 (holding that *Central Hudson* applies), with *Disc. Tobacco City*, 674 F.3d at 527 (holding that *Zauderer* applies).

⁷³ See *Disc. Tobacco City*, 674 F.3d at 527 (holding *Zauderer* applies). The majority and dissent took divergent opinions on whether the color images that accompany the new warning labels present factual information. See *id.* at 526, 569. The dissent stated that graphic images are subjective and cannot be presumed neutral. See *id.* at 526 (Clay, J., dissenting). The dissent explained, "While it is permissible for the government to require a product manufacturer to provide truthful information, even if perhaps frightening . . . 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." *Id.* at 529. The majority argued that images are not inherently non-factual. See *id.* at 561. The majority explained, "[W]e vigorously disagree with the underlying premise that a disclosure that provokes a visceral response must fall outside *Zauderer's* ambit. Facts can disconcert, displease, provoke an emotional response, spark controversy, and even overwhelm reason, but that does not magically turn such facts into opinions." *Id.* at 569.

⁷⁴ See *id.* at 562 (stating that warning labels are reasonably related to preventing consumer deception). The court affirmed that tobacco companies "knowingly and actively" conspired to hide the health risks of smoking. See *id.* The court argued that tobacco companies' advertising inherently deceives consumers if it does not warn them about the health risks. See *id.* Others have noted that current warning labels might be ineffective for young and less-educated consumers. See NAT'L RESEARCH COUNCIL, ENDING THE TOBACCO PROBLEM: A BLUEPRINT FOR THE NATION Appendix C-3 (Richard J. Bonnie, 2007), available at <http://www.nap.edu/catalog/11795.html> (stating that comprehension of current labels require college reading level).

⁷⁵ See *Disc. Tobacco City*, 674 F.3d at 518 (affirming lower court's decision to uphold constitutionality of warning labels).

⁷⁶ See *R.J. Reynolds*, 696 F.3d at 1217 (holding that intermediate scrutiny applies).

⁷⁷ See *R.J. Reynolds*, 696 F.3d at 1213-17 (describing lack of applicability of *Zauderer*). The court stated that *Zauderer* applies only to accurate disclosure statements that are not subject to consumer misinterpretation. See *id.* at 1213 ("The Supreme Court has never applied *Zauderer* to disclosure requirements not designed to correct misleading commercial speech."). The court held that the FSPTCA warning labels are not purely factual because their purpose is to evoke an emotional response and pressure smokers into quitting. See *id.* at 1216 at 1216 (noting

applied *Central Hudson* intermediate scrutiny.⁷⁸

Applying the *Central Hudson* test, the *R.J. Reynolds* court analyzed whether the government's interest in the new warning labels was substantial.⁷⁹ The court dismissed one of the government's two asserted interests – effectively communicating the health consequences of smoking – as insubstantial.⁸⁰ The court accepted the government's other asserted interest: reducing smoking rates among Americans.⁸¹ Nevertheless, the court found insufficient evidence that the new warning labels directly advanced the goal of reducing smoking rates.⁸² The court stated that the government provided "mere speculation and conjecture" and, thus, failed to meet its burden.⁸³ Therefore, the *R.J. Reynolds* court found that the warning labels did not survive intermediate scrutiny and were a violation of tobacco manufacturers' First Amendment rights.⁸⁴

V. ANALYSIS

a. D.C. Circuit's Choice of *Central Hudson* over *Zauderer*

Despite coming to the appropriate conclusion that *Central Hudson* intermediate scrutiny applies over *Zauderer* rational basis, the *R.J.*

images are meant to symbolize textual warning and could be misinterpreted by consumers). "They are unabashed attempts to evoke emotion (and perhaps embarrassment) and browbeat consumers into quitting." *Id.* at 1217. The court decided that the FSPTCA cigarette package labels failed the *Zauderer* standard because the "FDA has not shown that the graphic warnings were designed to correct any false or misleading claims . . . [or that] consumers would likely be deceived by the Companies' packaging in the future." *Id.* at 1216.

⁷⁸ See *id.* at 1217 (stating *Central Hudson* is appropriate test).

⁷⁹ See *id.* at 1217-18 (applying second prong of *Central Hudson* test).

⁸⁰ See *id.* at 1221 (dismissing interest in effective communication as "too vague"). The court stated that this interest is "illusory absent some barometer for assessing . . . [its] effectiveness." *Id.* at 1221 n.16. It also interpreted this interest as a means to accomplish a reduction in smoking rates and not an interest in itself. See *id.* at 1221. The dissent disagreed: "[T]he government has an interest of paramount importance in effectively conveying information about the health risks of smoking to adolescent would-be smokers and other consumers." *Id.* at 1237 (Rogers, J., dissenting).

⁸¹ See *R.J. Reynolds*, 696 F.3d at 1236 (recognizing substantial government interest in reducing smoking rates).

⁸² See *id.* at 1219 (noting that government did not provide a "shred of evidence" of material advancement). The dissent responded that "history, consensus, and simple common sense" indicate that the warning labels directly advance the government's attempt to reduce smoking rates. See *id.* at 1234-36 (Rogers, J., dissenting) (quoting *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995)).

⁸³ *R.J. Reynolds*, 696 F.3d at 1219 (quoting *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995)).

⁸⁴ See *R.J. Reynolds*, 696 F.3d at 1222 (holding that warning labels do not pass *Central Hudson* test).

Reynolds court's rationale is flawed for three reasons.⁸⁵ First, the court misinterpreted that *Zauderer* only applies to government-mandated disclosures that accompany advertising that "would likely mislead consumers."⁸⁶ This interpretation does not follow precedent.⁸⁷ In fact, the Supreme Court has noted that compelled speech can be appropriate in response to the mere possibility of consumer deception.⁸⁸ Some courts have even applied *Zauderer* when prevention of consumer deception is not the primary purpose of the government-mandated disclosure.⁸⁹ The *R.J. Reynolds* court's conclusion that *Zauderer* rational basis review only applies to misleading commercial speech is incorrect.⁹⁰

Second, the *R.J. Reynolds* court failed to grasp the impact that past misleading advertising has on today's tobacco consumers.⁹¹ The court stated that insufficient evidence exists to find that, absent disclosure, deception of tobacco consumers is likely today.⁹² That assertion is incorrect.⁹³ Existing warning labels are ineffective for conveying the health consequences of smoking.⁹⁴ In addition, the Supreme Court has acknowledged that a pattern of past deceptive commercial speech is evidence that the consumer currently fails to understand the truth.⁹⁵ Given the tobacco manufacturers' history of deceit, a conclusion that consumers continue to be misled today is reasonable.⁹⁶ The *R.J. Reynolds* court

⁸⁵ See *Recent Case*, *supra* note 61, at 821 (explaining errors in D.C. Circuit's reasoning).

⁸⁶ See *Recent Case*, *supra* note 61, at 823 (stating that D.C. Circuit narrowly defined commercial speech covered under *Zauderer*); see also *supra* note 77 and accompanying text (describing D.C. Circuit's arguments against applicability of *Zauderer*).

⁸⁷ See *Recent Case*, *supra* note 61, at 823-34 (explaining type of commercial speech that D.C. Circuit excluded from *Zauderer*).

⁸⁸ See sources cited *supra* note 61 and accompanying text (describing liberal construction of misleading speech).

⁸⁹ See sources cited *supra* note 61 and accompanying text (explaining use of *Zauderer* in *Sorrell*).

⁹⁰ See *Recent Case*, *supra* note 61, at 823-34 (criticizing *R.J. Reynolds* court's narrow reading of *Zauderer*).

⁹¹ See *R.J. Reynolds*, 696 F.3d at 1228 (Rogers, J., dissenting) (describing deceptive nature of tobacco manufacturers' past advertising).

⁹² See *id.* at 1216 (arguing that FDA presented insufficient evidence of consumer deception).

⁹³ See *id.* at 1228 (Rogers, J., dissenting) ("Even absent any affirmatively misleading statements, cigarette packages and other advertisements that fail to display the final costs of smoking in a prominent manner are . . . misleading" (citation omitted)). Judge Rogers further stated, "Existing warnings, last revised in 1984, appear on one side panel and occupy only four percent of cigarette packages. Common sense, experience, and substantial scientific evidence support the conclusion that these warnings are ineffective." *Id.* (citation omitted).

⁹⁴ See Required Warnings for Cigarette Packages and Advertisements, *supra* note 36, at 69530 (describing that public fails to notice current cigarette package warning labels).

⁹⁵ See sources cited *supra* note 61 (explaining consumer deception requirement).

⁹⁶ See *Recent Case*, *supra* note 61, at 824 (stating that potential for cigarette packages to mislead consumer is self-evident). In *United States v. Philip Morris*, the D.C. Circuit, describing

should have concluded, as the Sixth Circuit found, that today's cigarette packages are sufficiently misleading to fall under the ambit of *Zauderer*.⁹⁷

Third, the *R.J. Reynolds* court was incorrect to conclude that the new warning labels lack a factual basis.⁹⁸ The court objected to the FSPCTA warning labels as having been designed to pressure consumers to quit smoking.⁹⁹ The court reasoned that the graphic images contained in the warning labels do not impart factual information because they are intended to induce an emotional response.¹⁰⁰

It is true that *Zauderer* applied specifically to forced disclosure of "purely factual and uncontroversial information."¹⁰¹ The reasoning of the *R.J. Reynolds* court, however, ignores the accuracy of the graphic images contained in the warning labels.¹⁰² In reality, the images represent uncontroverted facts.¹⁰³ The evidence that smoking leads to disease and death is conclusive.¹⁰⁴ The images portray these consequences in a truthful manner.¹⁰⁵

The *R.J. Reynolds* court further reasoned that the images are not factual because the government selected the images to shock consumers.¹⁰⁶ Shocking images, however, do not *per se* lack a factual basis.¹⁰⁷ Facts that provoke an emotional response are still facts.¹⁰⁸ The graphic images in the warning labels are facts because they accurately portray the consequences

the District Court's findings, stated that tobacco manufacturers "engaged in a scheme to defraud smokers and potential smokers by . . . falsely denying the adverse health effects of smoking . . . [and] suppressing documents, information, and research to prevent the public from learning the truth" *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1108 (2009). The tobacco companies disseminated these lies through advertisements and other public statements. *See id.* at 1106.

⁹⁷ *See* sources cited *supra* note 96 and accompanying text (describing tobacco manufacturers' past efforts to deceive consumers).

⁹⁸ *See R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1217 (D.C. Cir. 2012) (stating that warning labels are not factual).

⁹⁹ *See id.* (stating that images are intended to "browbeat consumers into quitting").

¹⁰⁰ *See id.* at 1216 (providing court's interpretation for purpose of warning labels).

¹⁰¹ *Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985) (describing accuracy of required disclosures).

¹⁰² *See R.J. Reynolds*, 696 F.3d at 1231-32 (Rogers, J., dissenting) (explaining veracity of graphic images).

¹⁰³ *See id.*

¹⁰⁴ *See Required Warnings for Cigarette Packages and Advertisements*, *supra* note 36, at 69527-29 (detailing negative health effects of cigarettes).

¹⁰⁵ *See R.J. Reynolds*, 696 F.3d at 1231-32 (explaining veracity of graphic images).

¹⁰⁶ *See id.* at 1217 (stating perceived purpose of graphic images).

¹⁰⁷ *See id.* at 1230 (Rogers, J., dissenting) (arguing that discomforting images can be accurate).

¹⁰⁸ *See Disc. Tobacco City*, 674 F.3d at 569 (stating that facts that promote emotional response are not automatically opinions).

of smoking, such as heart disease and death.¹⁰⁹ The *R.J. Reynolds* court should have recognized that the new warning labels, while perhaps discomfoting, satisfy *Zauderer's* demand that compelled speech provide factual information.¹¹⁰

A better reason to apply *Central Hudson* over *Zauderer* – a reason that escaped the *R.J. Reynolds* court – relates to the size of the new warning labels.¹¹¹ These labels occupy such a large portion of the cigarette package that they are not just simple disclosure statements.¹¹² In fact, the labels are a de facto limitation on tobacco manufacturers' ability to express commercial speech because they severely limit the remaining space on cigarette packages available for advertising.¹¹³

Past examples of government-mandated disclosure statements to which courts have applied rational basis review are wholly different from the FSPTCA cigarette package warning labels.¹¹⁴ For example, the disclosures permitted in *Zauderer* and its progeny are simple, textual statements that occupy limited space on advertisements.¹¹⁵ In contrast, the FSPTCA requires that the new warning labels comprise the top half of the front and rear panels of the cigarette package.¹¹⁶ Disclosures of this size restrict tobacco manufacturers' ability to advertise by significantly limiting the remaining space on the cigarette package available to the manufacturer.¹¹⁷

At least one circuit has held that compelled speech that takes up half of the space of an advertisement is inappropriate.¹¹⁸ The Seventh Circuit, describing a hypothetical situation, stated, "Certainly we would not condone a health department's requirement that half of the space on a restaurant menu be consumed by the raw shellfish warning."¹¹⁹ If a warning label that occupies half of a menu is impermissible, a warning

¹⁰⁹ See *R.J. Reynolds*, 696 F.3d at 1231-32 (explaining veracity of graphic images).

¹¹⁰ See *id.* at 1233 (Rogers, J., dissenting) (stating that FDA graphic images do not infringe tobacco companies' First Amendment rights).

¹¹¹ See Bennett, *supra* note 14, at 1928 (stating that FSPTCA labels suppress speech).

¹¹² See Principal Brief of Plaintiffs-Appellants, *supra* note 11, at* 24 (noting effect of labels on speech).

¹¹³ See *id.* (commenting on size of labels).

¹¹⁴ See cases cited *supra* note 63 (describing required disclosures in *Zauderer* and *Milavetz*).

¹¹⁵ See cases cited *supra* note 63 (highlighting *Zauderer* and *Milavetz* disclaimers).

¹¹⁶ See sources cited *supra* note 29 and accompanying text (describing required size and location of warning labels); see also *supra* Figure A (depicting three graphic warning labels).

¹¹⁷ See Bennett, *supra* note 14, at 1916 (explaining impact of labels on speech).

¹¹⁸ See *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006) (objecting to size of warning label).

¹¹⁹ *Id.*

label that occupies half of a cigarette package is also impermissible.¹²⁰ Because of the size of the warning labels, the *R.J. Reynolds* court was correct in applying *Central Hudson* over *Zauderer*.¹²¹

b. D.C. Circuit's Application of Central Hudson

While the *R.J. Reynolds* court was correct in choosing intermediate scrutiny, it partially erred in its application of the *Central Hudson* test to the new warning labels.¹²² Under *Central Hudson's* second prong, the government must demonstrate a substantial reason to restrict commercial speech.¹²³ The *R.J. Reynolds* court acknowledged that the government's interest in reducing smoking rates is substantial.¹²⁴ The court, however, refused to accept an additional and complimentary interest that the government asserted: effective communication to the public of the consequences of smoking.¹²⁵

The court argued that effective communication is a means to accomplish the government's goal of reducing smoking rates, but not an interest in itself.¹²⁶ In rejecting this interest, the *R.J. Reynolds* court ignored evidence that effective communication of the consequences of smoking is the primary goal of the FSPTCA.¹²⁷ For example, in its brief to the *R.J. Reynolds* court, the government stated, "The size and placement of the warning, and the inclusion of color images to illustrate the warning statements, are tailored to advance *the government's substantial interest in effectively communicating health information*."¹²⁸ If the *R.J. Reynolds*

¹²⁰ See Calvert & Locke, *supra* note 17, at 233 (explaining the practical effect of large warning labels in retail stores); See generally Bennett, *supra* note 14, at 1926 (analogizing to *Blagojevich*). Calvert and Locke note that warning labels on the top half of cigarette packages combined with opaque in-store display racks would nearly eliminate the consumer's ability to visually distinguish products in a retail setting.

¹²¹ See Bennett, *supra* note 14, at 1916, 1919 ("*Central Hudson* should . . . apply if a court determines that the warnings require a defendant to limit or suppress an advertisement's message, rather than disclose certain information.").

¹²² See *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1223 (D.C. Cir. 2012) (Rogers, J., dissenting) (outlining FDA's assertion of effective communication as substantial interest).

¹²³ See sources cited *supra* note 57 and accompanying text (describing second prong).

¹²⁴ See *R.J. Reynolds*, 696 F.3d at 1218 (accepting reduction of smoking rates as valid government interest).

¹²⁵ See *id.* at 1221 (rejecting effective communication of smoking risks as valid government interest).

¹²⁶ See *id.*

¹²⁷ See *id.* at 1223 (Rogers, J., dissenting) (outlining FDA's assertion of effective communication as government interest).

¹²⁸ Brief for Appellants, *R.J. Reynolds Tobacco Company v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012) (No. 11-5332), 2011 WL 6179451, at *28 (emphasis added) (asserting government's interest in effective communication).

court felt that the government was disingenuous in its brief, the court could have looked to the FPTCA itself.¹²⁹ Section 202 states that the FDA may alter the size or content of the warning labels if "such a change would promote greater public understanding of the risks associated with the use of tobacco products."¹³⁰ FDA regulations provide even further documentation of the government's substantial interest in effectively communicating the consequences of smoking.¹³¹

By dismissing the government's interest in effective communication to consumers, the *R.J. Reynolds* court also ignored precedent.¹³² In 1993, the Supreme Court stated, "[T]here is no question that [the government's] interest in ensuring the accuracy of commercial information in the market-place is substantial."¹³³ In addition, the D.C. Circuit itself has previously recognized the government's interest in providing accurate health information to the public.¹³⁴

The court also rejected the government's stated interest in effective communication as "illusory absent some barometer for assessing . . . [its] effectiveness."¹³⁵ The court's conclusion, however, fails to recognize that the government has extensively studied the effectiveness of the new warning labels.¹³⁶ In fact, before promulgation of the final rule, the FDA surveyed 18,000 participants about the effectiveness of the new warning labels in conveying health information about smoking.¹³⁷ The survey found that the images are effective in communicating health information.¹³⁸ The *R.J. Reynolds* court, therefore, not only failed to recognize that the government has a valid and substantial interest in effectively communicating health risks to the public, but also failed to understand the

¹²⁹ See Family Smoking Prevention and Tobacco Control Act § 202(b) (describing authority to modify warning labels).

¹³⁰ *Id.* (explaining purpose for future warning label change).

¹³¹ See Required Warnings for Cigarette Packages and Advertisements, *supra* note 2, at 36633 ("The set of required warnings we have selected will satisfy our primary goal, which is to effectively convey the negative health consequences of smoking on cigarette packages and in advertisements . . .").

¹³² See *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 485 (1995) (describing promotion of "health, safety, and welfare of its citizens" as substantial government interest).

¹³³ *Edenfield v. Fane*, 507 U.S. 761, 769 (1993) (recognizing Florida Bar's interest in protecting consumers from fraud is substantial).

¹³⁴ See *Pearson v. Shalala*, 164 F.3d 650, 656 (D.C. Cir. 1999) (stating restrictions on dietary supplement labels satisfy second prong of *Central Hudson*).

¹³⁵ *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1221 n.16 (D.C. Cir. 2012).

¹³⁶ See Required Warnings for Cigarette Packages and Advertisements, *supra* note 2, at 36637 (describing FDA's study of original thirty-six images).

¹³⁷ See *id.* (providing FDA study details).

¹³⁸ See *id.* at 36640 (detailing FDA study conclusions).

ability to measure the advancement of that interest.¹³⁹

In addition to passing the second *Central Hudson* prong, the government's interest in effective communication satisfies the third prong.¹⁴⁰ The third prong requires the government to provide some evidence that its restriction on commercial speech will directly advance its interest.¹⁴¹ During the rulemaking process, the FDA provided evidence that the new warning labels will directly advance the government's goal in effectively communicating the consequences of smoking.¹⁴² The FDA cited studies that demonstrate that graphic warning labels on cigarette packages in Canada and Australia proved to be effective communication tools.¹⁴³ In addition, the FDA called attention to reports from the Institute of Medicine and the World Health Organization that reached similar conclusions.¹⁴⁴ This evidence is more than sufficient to satisfy *Central Hudson's* third prong.¹⁴⁵

However, the government's attempt to serve its interest in effective communication by requiring graphic warnings that comprise half of the front and back of cigarette packages does not satisfy the fourth prong of *Central Hudson*.¹⁴⁶ To satisfy the fourth prong, the government must demonstrate that a less restrictive means would not effectively accomplish its goal.¹⁴⁷ In its defense of the FSPTCA, the government provided no such evidence; while stating that the new warning labels are *more* effective than the existing warning labels, the government failed to demonstrate that warning labels that comprise less than fifty percent of the package would not effectively communicate the consequences of smoking to the public.¹⁴⁸ Therefore, the government has not satisfied *Central Hudson's* intermediate

¹³⁹ See *R.J. Reynolds*, 696 F.3d at 1235 (Rogers, J., dissenting) (explaining flaws in majority's argument).

¹⁴⁰ See *id.* (arguing warning label requirement meets third prong).

¹⁴¹ See sources cited *supra* note 58 and accompanying text (explaining requirements to satisfy third prong of *Central Hudson*).

¹⁴² See *R.J. Reynolds*, 696 F.3d at 1235 (Rogers, J., dissenting) (arguing that FDA provided substantial evidence of direct advancement).

¹⁴³ See Required Warnings for Cigarette Packages and Advertisements, *supra* note 36, at 69532 (explaining results of studies in Canada and Australia).

¹⁴⁴ See *id.* at 69531 (describing reports).

¹⁴⁵ See sources cited *supra* note 58 and accompanying text (explaining requirements to satisfy third prong of *Central Hudson*).

¹⁴⁶ See Calvert & Locke, *supra* note 17, at 235-36 (stating that FSPTCA advertising restrictions likely fail fourth prong of *Central Hudson*).

¹⁴⁷ See sources cited *supra* note 60 and accompanying text (explaining requirements to satisfy fourth prong of *Central Hudson*).

¹⁴⁸ See Required Warnings for Cigarette Packages and Advertisements, *supra* note 2, at 36633 (characterizing new warning labels as "more effective").

scrutiny.¹⁴⁹

VI. CONCLUSION

While the D.C. Circuit incorrectly determined that the government has no substantial interest in effectively communicating the health consequences of smoking, and despite the fact that the new warning labels will directly advance that goal, the FSPTCA requirements are not narrowly tailored. The *R.J. Reynolds* court's conclusion on the application of *Central Hudson* intermediate scrutiny to the FSPTCA is correct. The new warning labels do not fully satisfy the *Central Hudson* test. They are an impermissible restriction on commercial speech and violate the First Amendment.

The Department of Justice appears to agree with this conclusion. On March 15, 2013, Attorney General Eric Holder announced that the Department of Justice would not seek review of *R.J. Reynolds* by the Supreme Court.¹⁵⁰ Instead, the FDA will commence a new rulemaking process to re-design the warning labels again, presumably in a manner that does not violate the First Amendment.¹⁵¹ In order to withstand the *Central Hudson* intermediate scrutiny that future challenges to its revised graphic warning label requirements will involve, the FDA would be wise to compile substantial data that clearly demonstrates how smaller and less graphic warning labels would not accomplish the FSPCTA's goals.

Paul A. Schmid

¹⁴⁹ See sources cited *supra* note 60 and accompanying text (explaining requirements to satisfy fourth prong of *Central Hudson*).

¹⁵⁰ Letter from Eric H. Holder, Jr., Atty. Gen., to John Boehner, Speaker of the House of Representatives (Mar. 15, 2013), available at <http://www.mainjustice.com/files/2013/03/Ltr-to-Speaker-re-Reynolds-v-FDA.pdf> (last visited Apr. 14, 2014).

¹⁵¹ See *id.* ("[The] FDA therefore remains free to conduct new rulemaking proceedings under the [FSPCTA,] and it can address issues identified by the court of appeals and other relevant issues in such proceedings.").

basis review or *Central Hudson* intermediate scrutiny applies to the cigarette package warning labels; and 2) whether the labels survive the chosen test.⁷²

In *Discount Tobacco City*, the Sixth Circuit held that rational basis review applied because the court believed that the FSPTCA warning labels were compelled disclosures of factual information related to the health consequences of smoking, akin to the compelled disclosures of contingent fees in *Zauderer*.⁷³ The court found that the warning labels survived rational basis review because the labels were reasonably related to the government's interest in preventing deception of consumers.⁷⁴ Therefore, the court upheld the FSPTCA's warning label provisions.⁷⁵

In *R.J. Reynolds*, the D.C. Circuit came to a different conclusion.⁷⁶ The court held that rational basis review did not apply because the court believed that the warning labels were not "purely factual" disclosure statements, and therefore not akin to *Zauderer*.⁷⁷ As a result, the court

⁷² Compare *R.J. Reynolds*, 696 F.3d at 1217 (holding that *Central Hudson* applies), with *Disc. Tobacco City*, 674 F.3d at 527 (holding that *Zauderer* applies).

⁷³ See *Disc. Tobacco City*, 674 F.3d at 527 (holding *Zauderer* applies). The majority and dissent took divergent opinions on whether the color images that accompany the new warning labels present factual information. See *id.* at 526, 569. The dissent stated that graphic images are subjective and cannot be presumed neutral. See *id.* at 526 (Clay, J., dissenting). The dissent explained, "While it is permissible for the government to require a product manufacturer to provide truthful information, even if perhaps frightening . . . 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." *Id.* at 529. The majority argued that images are not inherently non-factual. See *id.* at 561. The majority explained, "[W]e vigorously disagree with the underlying premise that a disclosure that provokes a visceral response must fall outside *Zauderer's* ambit. Facts can disconcert, displease, provoke an emotional response, spark controversy, and even overwhelm reason, but that does not magically turn such facts into opinions." *Id.* at 569.

⁷⁴ See *id.* at 562 (stating that warning labels are reasonably related to preventing consumer deception). The court affirmed that tobacco companies "knowingly and actively" conspired to hide the health risks of smoking. See *id.* The court argued that tobacco companies' advertising inherently deceives consumers if it does not warn them about the health risks. See *id.* Others have noted that current warning labels might be ineffective for young and less-educated consumers. See NAT'L RESEARCH COUNCIL, ENDING THE TOBACCO PROBLEM: A BLUEPRINT FOR THE NATION Appendix C-3 (Richard J. Bonnie, 2007), available at <http://www.nap.edu/catalog/11795.html> (stating that comprehension of current labels require college reading level).

⁷⁵ See *Disc. Tobacco City*, 674 F.3d at 518 (affirming lower court's decision to uphold constitutionality of warning labels).

⁷⁶ See *R.J. Reynolds*, 696 F.3d at 1217 (holding that intermediate scrutiny applies).

⁷⁷ See *R.J. Reynolds*, 696 F.3d at 1213-17 (describing lack of applicability of *Zauderer*). The court stated that *Zauderer* applies only to accurate disclosure statements that are not subject to consumer misinterpretation. See *id.* at 1213 ("The Supreme Court has never applied *Zauderer* to disclosure requirements not designed to correct misleading commercial speech."). The court held that the FSPTCA warning labels are not purely factual because their purpose is to evoke an emotional response and pressure smokers into quitting. See *id.* at 1216.at 1216.at 1216 (noting

applied *Central Hudson* intermediate scrutiny.⁷⁸

Applying the *Central Hudson* test, the *R.J. Reynolds* court analyzed whether the government's interest in the new warning labels was substantial.⁷⁹ The court dismissed one of the government's two asserted interests – effectively communicating the health consequences of smoking – as insubstantial.⁸⁰ The court accepted the government's other asserted interest: reducing smoking rates among Americans.⁸¹ Nevertheless, the court found insufficient evidence that the new warning labels directly advanced the goal of reducing smoking rates.⁸² The court stated that the government provided "mere speculation and conjecture" and, thus, failed to meet its burden.⁸³ Therefore, the *R.J. Reynolds* court found that the warning labels did not survive intermediate scrutiny and were a violation of tobacco manufacturers' First Amendment rights.⁸⁴

V. ANALYSIS

a. D.C. Circuit's Choice of *Central Hudson* over *Zauderer*

Despite coming to the appropriate conclusion that *Central Hudson* intermediate scrutiny applies over *Zauderer* rational basis, the *R.J.*

images are meant to symbolize textual warning and could be misinterpreted by consumers). "They are unabashed attempts to evoke emotion (and perhaps embarrassment) and browbeat consumers into quitting." *Id.* at 1217. The court decided that the FSPTCA cigarette package labels failed the *Zauderer* standard because the "FDA has not shown that the graphic warnings were designed to correct any false or misleading claims . . . [or that] consumers would likely be deceived by the Companies' packaging in the future." *Id.* at 1216.

⁷⁸ See *id.* at 1217 (stating *Central Hudson* is appropriate test).

⁷⁹ See *id.* at 1217-18 (applying second prong of *Central Hudson* test).

⁸⁰ See *id.* at 1221 (dismissing interest in effective communication as "too vague"). The court stated that this interest is "illusory absent some barometer for assessing . . . [its] effectiveness." *Id.* at 1221 n.16. It also interpreted this interest as a means to accomplish a reduction in smoking rates and not an interest in itself. See *id.* at 1221. The dissent disagreed: "[T]he government has an interest of paramount importance in effectively conveying information about the health risks of smoking to adolescent would-be smokers and other consumers." *Id.* at 1237 (Rogers, J., dissenting).

⁸¹ See *R.J. Reynolds*, 696 F.3d at 1236 (recognizing substantial government interest in reducing smoking rates).

⁸² See *id.* at 1219 (noting that government did not provide a "shred of evidence" of material advancement). The dissent responded that "history, consensus, and simple common sense" indicate that the warning labels directly advance the government's attempt to reduce smoking rates. See *id.* at 1234-36 (Rogers, J., dissenting) (quoting *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995)).

⁸³ *R.J. Reynolds*, 696 F.3d at 1219 (quoting *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995)).

⁸⁴ See *R.J. Reynolds*, 696 F.3d at 1222 (holding that warning labels do not pass *Central Hudson* test).

Reynolds court's rationale is flawed for three reasons.⁸⁵ First, the court misinterpreted that *Zauderer* only applies to government-mandated disclosures that accompany advertising that "would likely mislead consumers."⁸⁶ This interpretation does not follow precedent.⁸⁷ In fact, the Supreme Court has noted that compelled speech can be appropriate in response to the mere *possibility* of consumer deception.⁸⁸ Some courts have even applied *Zauderer* when prevention of consumer deception is not the primary purpose of the government-mandated disclosure.⁸⁹ The *R.J. Reynolds* court's conclusion that *Zauderer* rational basis review only applies to misleading commercial speech is incorrect.⁹⁰

Second, the *R.J. Reynolds* court failed to grasp the impact that past misleading advertising has on today's tobacco consumers.⁹¹ The court stated that insufficient evidence exists to find that, absent disclosure, deception of tobacco consumers is likely today.⁹² That assertion is incorrect.⁹³ Existing warning labels are ineffective for conveying the health consequences of smoking.⁹⁴ In addition, the Supreme Court has acknowledged that a pattern of past deceptive commercial speech is evidence that the consumer currently fails to understand the truth.⁹⁵ Given the tobacco manufacturers' history of deceit, a conclusion that consumers continue to be misled today is reasonable.⁹⁶ The *R.J. Reynolds* court should

⁸⁵ See *Recent Case*, *supra* note 61, at 821 (explaining errors in D.C. Circuit's reasoning).

⁸⁶ See *Recent Case*, *supra* note 61, at 823 (stating that D.C. Circuit narrowly defined commercial speech covered under *Zauderer*); see also *supra* note 77 and accompanying text (describing D.C. Circuit's arguments against applicability of *Zauderer*).

⁸⁷ See *Recent Case*, *supra* note 61, at 823-34 (explaining type of commercial speech that D.C. Circuit excluded from *Zauderer*).

⁸⁸ See sources cited *supra* note 61 and accompanying text (describing liberal construction of misleading speech).

⁸⁹ See sources cited *supra* note 61 and accompanying text (explaining use of *Zauderer* in *Sorrell*).

⁹⁰ See *Recent Case*, *supra* note 61, at 823-34 (criticizing *R.J. Reynolds* court's narrow reading of *Zauderer*).

⁹¹ See *R.J. Reynolds*, 696 F.3d at 1228 (Rogers, J., dissenting) (describing deceptive nature of tobacco manufacturers' past advertising).

⁹² See *id.* at 1216 (arguing that FDA presented insufficient evidence of consumer deception).

⁹³ See *id.* at 1228 (Rogers, J., dissenting) ("Even absent any affirmatively misleading statements, cigarette packages and other advertisements that fail to display the final costs of smoking in a prominent manner are . . . misleading" (citation omitted)). Judge Rogers further stated, "Existing warnings, last revised in 1984, appear on one side panel and occupy only four percent of cigarette packages. Common sense, experience, and substantial scientific evidence support the conclusion that these warnings are ineffective." *Id.* (citation omitted).

⁹⁴ See *Required Warnings for Cigarette Packages and Advertisements*, *supra* note 36, at 69530 (describing that public fails to notice current cigarette package warning labels).

⁹⁵ See sources cited *supra* note 61 (explaining consumer deception requirement).

⁹⁶ See *Recent Case*, *supra* note 61, at 824 (stating that potential for cigarette packages to mislead consumer is self-evident). In *United States v. Philip Morris*, the D.C. Circuit, describing

have concluded, as the Sixth Circuit found, that today's cigarette packages are sufficiently misleading to fall under the ambit of *Zauderer*.⁹⁷

Third, the *R.J. Reynolds* court was incorrect to conclude that the new warning labels lack a factual basis.⁹⁸ The court objected to the FSPCTA warning labels as having been designed to pressure consumers to quit smoking.⁹⁹ The court reasoned that the graphic images contained in the warning labels do not impart factual information because they are intended to induce an emotional response.¹⁰⁰

It is true that *Zauderer* applied specifically to forced disclosure of "purely factual and uncontroversial information."¹⁰¹ The reasoning of the *R.J. Reynolds* court, however, ignores the accuracy of the graphic images contained in the warning labels.¹⁰² In reality, the images represent uncontroverted facts.¹⁰³ The evidence that smoking leads to disease and death is conclusive.¹⁰⁴ The images portray these consequences in a truthful manner.¹⁰⁵

The *R.J. Reynolds* court further reasoned that the images are not factual because the government selected the images to shock consumers.¹⁰⁶ Shocking images, however, do not *per se* lack a factual basis.¹⁰⁷ Facts that provoke an emotional response are still facts.¹⁰⁸ The graphic images in the warning labels are facts because they accurately portray the consequences

the District Court's findings, stated that tobacco manufacturers "engaged in a scheme to defraud smokers and potential smokers by . . . falsely denying the adverse health effects of smoking . . . [and] suppressing documents, information, and research to prevent the public from learning the truth" *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1108 (2009). The tobacco companies disseminated these lies through advertisements and other public statements. *See id.* at 1106.

⁹⁷ *See* sources cited *supra* note 96 and accompanying text (describing tobacco manufacturers' past efforts to deceive consumers).

⁹⁸ *See R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1217 (D.C. Cir. 2012) (stating that warning labels are not factual).

⁹⁹ *See id.* (stating that images are intended to "browbeat consumers into quitting").

¹⁰⁰ *See id.* at 1216 (providing court's interpretation for purpose of warning labels).

¹⁰¹ *Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985) (describing accuracy of required disclosures).

¹⁰² *See R.J. Reynolds*, 696 F.3d at 1231-32 (Rogers, J., dissenting) (explaining veracity of graphic images).

¹⁰³ *See id.*

¹⁰⁴ *See Required Warnings for Cigarette Packages and Advertisements*, *supra* note 36, at 69527-29 (detailing negative health effects of cigarettes).

¹⁰⁵ *See R.J. Reynolds*, 696 F.3d at 1231-32 (explaining veracity of graphic images).

¹⁰⁶ *See id.* at 1217 (stating perceived purpose of graphic images).

¹⁰⁷ *See id.* at 1230 (Rogers, J., dissenting) (arguing that discomforting images can be accurate).

¹⁰⁸ *See Disc. Tobacco City*, 674 F.3d at 569 (stating that facts that promote emotional response are not automatically opinions).

of smoking, such as heart disease and death.¹⁰⁹ The *R.J. Reynolds* court should have recognized that the new warning labels, while perhaps discomfoting, satisfy *Zauderer's* demand that compelled speech provide factual information.¹¹⁰

A better reason to apply *Central Hudson* over *Zauderer* – a reason that escaped the *R.J. Reynolds* court – relates to the size of the new warning labels.¹¹¹ These labels occupy such a large portion of the cigarette package that they are not just simple disclosure statements.¹¹² In fact, the labels are a de facto limitation on tobacco manufacturers' ability to express commercial speech because they severely limit the remaining space on cigarette packages available for advertising.¹¹³

Past examples of government-mandated disclosure statements to which courts have applied rational basis review are wholly different from the FSPTCA cigarette package warning labels.¹¹⁴ For example, the disclosures permitted in *Zauderer* and its progeny are simple, textual statements that occupy limited space on advertisements.¹¹⁵ In contrast, the FSPTCA requires that the new warning labels comprise the top half of the front and rear panels of the cigarette package.¹¹⁶ Disclosures of this size restrict tobacco manufacturers' ability to advertise by significantly limiting the remaining space on the cigarette package available to the manufacturer.¹¹⁷

At least one circuit has held that compelled speech that takes up half of the space of an advertisement is inappropriate.¹¹⁸ The Seventh Circuit, describing a hypothetical situation, stated, "Certainly we would not condone a health department's requirement that half of the space on a restaurant menu be consumed by the raw shellfish warning."¹¹⁹ If a warning label that occupies half of a menu is impermissible, a warning

¹⁰⁹ See *R.J. Reynolds*, 696 F.3d at 1231-32 (explaining veracity of graphic images).

¹¹⁰ See *id.* at 1233 (Rogers, J., dissenting) (stating that FDA graphic images do not infringe tobacco companies' First Amendment rights).

¹¹¹ See Bennett, *supra* note 14, at 1928 (stating that FSPTCA labels suppress speech).

¹¹² See Principal Brief of Plaintiffs-Appellants, *supra* note 11, at* 24 (noting effect of labels on speech).

¹¹³ See *id.* (commenting on size of labels).

¹¹⁴ See cases cited *supra* note 63 (describing required disclosures in *Zauderer* and *Milavetz*).

¹¹⁵ See cases cited *supra* note 63 (highlighting *Zauderer* and *Milavetz* disclaimers).

¹¹⁶ See sources cited *supra* note 29 and accompanying text (describing required size and location of warning labels); see also *supra* Figure A (depicting three graphic warning labels).

¹¹⁷ See Bennett, *supra* note 14, at 1916 (explaining impact of labels on speech).

¹¹⁸ See *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006) (objecting to size of warning label).

¹¹⁹ *Id.*

label that occupies half of a cigarette package is also impermissible.¹²⁰ Because of the size of the warning labels, the *R.J. Reynolds* court was correct in applying *Central Hudson* over *Zauderer*.¹²¹

b. D.C. Circuit's Application of Central Hudson

While the *R.J. Reynolds* court was correct in choosing intermediate scrutiny, it partially erred in its application of the *Central Hudson* test to the new warning labels.¹²² Under *Central Hudson's* second prong, the government must demonstrate a substantial reason to restrict commercial speech.¹²³ The *R.J. Reynolds* court acknowledged that the government's interest in reducing smoking rates is substantial.¹²⁴ The court, however, refused to accept an additional and complimentary interest that the government asserted: effective communication to the public of the consequences of smoking.¹²⁵

The court argued that effective communication is a means to accomplish the government's goal of reducing smoking rates, but not an interest in itself.¹²⁶ In rejecting this interest, the *R.J. Reynolds* court ignored evidence that effective communication of the consequences of smoking is the primary goal of the FSPTCA.¹²⁷ For example, in its brief to the *R.J. Reynolds* court, the government stated, "The size and placement of the warning, and the inclusion of color images to illustrate the warning statements, are tailored to advance the government's substantial interest in effectively communicating health information."¹²⁸ If the *R.J. Reynolds*

¹²⁰ See Calvert & Locke, *supra* note 17, at 233 (explaining the practical effect of large warning labels in retail stores); See generally Bennett, *supra* note 14, at 1926 (analogizing to *Blagojevich*). Calvert and Locke note that warning labels on the top half of cigarette packages combined with opaque in-store display racks would nearly eliminate the consumer's ability to visually distinguish products in a retail setting.

¹²¹ See Bennett, *supra* note 14, at 1916, 1919 ("Central Hudson should . . . apply if a court determines that the warnings require a defendant to limit or suppress an advertisement's message, rather than disclose certain information.").

¹²² See *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1223 (D.C. Cir. 2012) (Rogers, J., dissenting) (outlining FDA's assertion of effective communication as substantial interest).

¹²³ See sources cited *supra* note 57 and accompanying text (describing second prong).

¹²⁴ See *R.J. Reynolds*, 696 F.3d at 1218 (accepting reduction of smoking rates as valid government interest).

¹²⁵ See *id.* at 1221 (rejecting effective communication of smoking risks as valid government interest).

¹²⁶ See *id.*

¹²⁷ See *id.* at 1223 (Rogers, J., dissenting) (outlining FDA's assertion of effective communication as government interest).

¹²⁸ Brief for Appellants, *R.J. Reynolds Tobacco Company v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012) (No. 11-5332), 2011 WL 6179451, at *28 (emphasis added) (asserting government's interest in effective communication).

court felt that the government was disingenuous in its brief, the court could have looked to the FPTCA itself.¹²⁹ Section 202 states that the FDA may alter the size or content of the warning labels if "such a change would promote greater public understanding of the risks associated with the use of tobacco products."¹³⁰ FDA regulations provide even further documentation of the government's substantial interest in effectively communicating the consequences of smoking.¹³¹

By dismissing the government's interest in effective communication to consumers, the *R.J. Reynolds* court also ignored precedent.¹³² In 1993, the Supreme Court stated, "[T]here is no question that [the government's] interest in ensuring the accuracy of commercial information in the market-place is substantial."¹³³ In addition, the D.C. Circuit itself has previously recognized the government's interest in providing accurate health information to the public.¹³⁴

The court also rejected the government's stated interest in effective communication as "illusory absent some barometer for assessing . . . [its] effectiveness."¹³⁵ The court's conclusion, however, fails to recognize that the government has extensively studied the effectiveness of the new warning labels.¹³⁶ In fact, before promulgation of the final rule, the FDA surveyed 18,000 participants about the effectiveness of the new warning labels in conveying health information about smoking.¹³⁷ The survey found that the images are effective in communicating health information.¹³⁸ The *R.J. Reynolds* court, therefore, not only failed to recognize that the government has a valid and substantial interest in effectively communicating health risks to the public, but also failed to understand the

¹²⁹ See Family Smoking Prevention and Tobacco Control Act § 202(b) (describing authority to modify warning labels).

¹³⁰ *Id.* (explaining purpose for future warning label change).

¹³¹ See Required Warnings for Cigarette Packages and Advertisements, *supra* note 2, at 36633 ("The set of required warnings we have selected will satisfy our primary goal, which is to effectively convey the negative health consequences of smoking on cigarette packages and in advertisements . . .").

¹³² See *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 485 (1995) (describing promotion of "health, safety, and welfare of its citizens" as substantial government interest).

¹³³ *Edenfield v. Fane*, 507 U.S. 761, 769 (1993) (recognizing Florida Bar's interest in protecting consumers from fraud is substantial).

¹³⁴ See *Pearson v. Shalala*, 164 F.3d 650, 656 (D.C. Cir. 1999) (stating restrictions on dietary supplement labels satisfy second prong of *Central Hudson*).

¹³⁵ *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1221 n.16 (D.C. Cir. 2012).

¹³⁶ See Required Warnings for Cigarette Packages and Advertisements, *supra* note 2, at 36637 (describing FDA's study of original thirty-six images).

¹³⁷ See *id.* (providing FDA study details).

¹³⁸ See *id.* at 36640 (detailing FDA study conclusions).

ability to measure the advancement of that interest.¹³⁹

In addition to passing the second *Central Hudson* prong, the government's interest in effective communication satisfies the third prong.¹⁴⁰ The third prong requires the government to provide some evidence that its restriction on commercial speech will directly advance its interest.¹⁴¹ During the rulemaking process, the FDA provided evidence that the new warning labels will directly advance the government's goal in effectively communicating the consequences of smoking.¹⁴² The FDA cited studies that demonstrate that graphic warning labels on cigarette packages in Canada and Australia proved to be effective communication tools.¹⁴³ In addition, the FDA called attention to reports from the Institute of Medicine and the World Health Organization that reached similar conclusions.¹⁴⁴ This evidence is more than sufficient to satisfy *Central Hudson's* third prong.¹⁴⁵

However, the government's attempt to serve its interest in effective communication by requiring graphic warnings that comprise half of the front and back of cigarette packages does not satisfy the fourth prong of *Central Hudson*.¹⁴⁶ To satisfy the fourth prong, the government must demonstrate that a less restrictive means would not effectively accomplish its goal.¹⁴⁷ In its defense of the FSPTCA, the government provided no such evidence; while stating that the new warning labels are *more* effective than the existing warning labels, the government failed to demonstrate that smaller warning would not effectively communicate the consequences of smoking to the public.¹⁴⁸ Therefore, the government has not satisfied *Central Hudson* intermediate scrutiny.¹⁴⁹

¹³⁹ See *R.J. Reynolds*, 696 F.3d at 1235 (Rogers, J., dissenting) (explaining flaws in majority's argument).

¹⁴⁰ See *id.* (arguing warning label requirement meets third prong).

¹⁴¹ See sources cited *supra* note 58 and accompanying text (explaining requirements to satisfy third prong of *Central Hudson*).

¹⁴² See *R.J. Reynolds*, 696 F.3d at 1235 (Rogers, J., dissenting) (arguing that FDA provided substantial evidence of direct advancement).

¹⁴³ See Required Warnings for Cigarette Packages and Advertisements, *supra* note 36, at 69532 (explaining results of studies in Canada and Australia).

¹⁴⁴ See *id.* at 69531 (describing reports).

¹⁴⁵ See sources cited *supra* note 58 and accompanying text (explaining requirements to satisfy third prong of *Central Hudson*).

¹⁴⁶ See Calvert & Locke, *supra* note 17, at 235-36 (stating that FSPTCA advertising restrictions likely fail fourth prong of *Central Hudson*).

¹⁴⁷ See sources cited *supra* note 60 and accompanying text (explaining requirements to satisfy fourth prong of *Central Hudson*).

¹⁴⁸ See Required Warnings for Cigarette Packages and Advertisements, *supra* note 2, at 36633 (characterizing new warning labels as "more effective").

¹⁴⁹ See sources cited *supra* note 60 and accompanying text (explaining requirements to

VI. CONCLUSION

While the D.C. Circuit incorrectly determined that the government has no substantial interest in effectively communicating the health consequences of smoking, and despite the fact that the new warning labels will directly advance that goal, the FSPTCA requirements are not narrowly tailored. The *R.J. Reynolds* court's conclusion on the application of *Central Hudson* intermediate scrutiny to the FSPTCA is correct. The new warning labels do not fully satisfy the *Central Hudson* test. They are an impermissible restriction on commercial speech and violate the First Amendment.

The Department of Justice appears to agree with this conclusion. On March 15, 2013, Attorney General Eric Holder announced that the Department of Justice would not seek review of *R.J. Reynolds* by the Supreme Court.¹⁵⁰ Instead, the FDA will commence a new rulemaking process to re-design the warning labels again, presumably in a manner that does not violate the First Amendment.¹⁵¹ In order to withstand the *Central Hudson* intermediate scrutiny that future challenges to its revised graphic warning label requirements will involve, the FDA would be wise to compile substantial data that clearly demonstrates how smaller and less graphic warning labels would not accomplish the FSPCTA's goals.

Paul A. Schmid

satisfy fourth prong of *Central Hudson*).

¹⁵⁰ Letter from Eric H. Holder, Jr., Atty. Gen., to John Boehner, Speaker of the House of Representatives (Mar. 15, 2013), available at <http://www.mainjustice.com/files/2013/03/Ltr-to-Speaker-re-Reynolds-v-FDA.pdf> (last visited Apr. 14, 2014).

¹⁵¹ See *id.* ("[The] FDA therefore remains free to conduct new rulemaking proceedings under the [FSPCTA,] and it can address issues identified by the court of appeals and other relevant issues in such proceedings.").