No. 24-___

IN THE

Supreme Court of the United States

R.J. REYNOLDS TOBACCO COMPANY; ET AL.,
Petitioners,

v.

FOOD & DRUG ADMINISTRATION; ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

FDA promulgated a rule requiring massive, provocative, and misleading graphic warnings on the top 50% of the front and back of every cigarette package and the top 20% of every cigarette advertisement. The district court invalidated the rule on First Amendment grounds, as the D.C. Circuit had done with an earlier version of the rule requiring materially identical warnings. The Fifth Circuit reversed, however, based on its "outcome-determinative" conclusion—which created a split with the D.C. and Ninth Circuits—that the warnings are "purely factual and uncontroversial" and thus entitled to review under *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). The Fifth Circuit further concluded that the warnings satisfy *Zauderer* because they are neither "unjustified [n]or unduly burdensome"—again splitting with a number of its sister circuits, including Seventh and Ninth Circuit decisions holding that far smaller warnings were unduly burdensome. The questions presented are:

1. Whether provocative and misleading government-mandated graphic warnings on product packaging and advertising are "purely factual and uncontroversial" for purposes of applying *Zauderer*.

2. Whether massive and gratuitous warnings are "unjustified or unduly burdensome" for purposes of satisfying *Zauderer*.

PARTIES TO THE PROCEEDING

Petitioners, who were Plaintiffs-Appellees in the Fifth Circuit, are R.J. Reynolds Tobacco Company; Santa Fe Natural Tobacco Company, Incorporated; ITG Brands LLC; Liggett Group LLC; Neocom, Incorporated; Rangila Enterprises, Incorporated; Rangila LLC; Sahil Ismail, Incorporated; and Is Like You, Incorporated.

Respondents, who were Defendants-Appellants in the Fifth Circuit, are the United States Food & Drug Administration; the United States Department of Health and Human Services; Robert M. Califf, in his official capacity as the Commissioner of the United States Food and Drug Administration; and Xavier Becerra, in his official capacity as the Secretary of the United States Department of Health and Human Services.

CORPORATE DISCLOSURE STATEMENT

Petitioner R.J. Reynolds Tobacco Company is a direct, wholly owned subsidiary of R.J. Reynolds Tobacco Holdings, Inc., which is a direct, wholly owned subsidiary of Reynolds American Inc., which is an indirect, wholly owned subsidiary of British American Tobacco, p.l.c., a publicly traded corporation.

Petitioner Santa Fe Natural Tobacco Company, Incorporated is a direct, wholly owned subsidiary of Reynolds American Inc., which is an indirect, wholly owned subsidiary of British American Tobacco, p.l.c., a publicly traded corporation.

Petitioner ITG Brands LLC is a limited liability company with its sole member being ITG Brands

Holdpartner LP. ITG Brands Holdpartner LP's general partner is ITG Brands Holdco LLC and its limited partner is ITG Holdings USA Inc. The sole member of ITG Brands Holdco LLC is ITG Holdings USA, Inc. ITG Holdings USA Inc. is a wholly owned subsidiary of Imperial Tobacco US Holdings BV, which is a Dutch private limited company. Imperial Tobacco US Holdings BV is an indirect subsidiary of Imperial Brands plc, which is a publicly traded United Kingdom public limited company.

Petitioner Liggett Group LLC is a direct, wholly owned subsidiary of VGR Holding LLC, which is a direct, wholly owned subsidiary of Vector Group Ltd., a publicly traded corporation.

Petitioner Neocom, Incorporated is a Texas corporation. It has no parent company and no publicly held company owns its stock.

Petitioner Rangila Enterprises, Incorporated is a Texas corporation. It has no parent company and no publicly held company owns its stock.

Petitioner Rangila LLC is a Texas limited liability company. It has no parent company.

Petitioner Sahil Ismail, Incorporated is a Texas corporation. It has no parent company and no publicly held company owns its stock.

Petitioner Is Like You, Incorporated is a Texas corporation. It has no parent company and no publicly held company owns its stock.

RELATED PROCEEDINGS

United States District Court (E.D. Tex.):

R.J. Reynolds Tobacco Co., et al. v. U.S. Food & Drug Administration, et al., No. 6:20-cv-00176 (Dec. 7, 2022) (granting in part plaintiffs' motion for summary judgment)

United States Court of Appeals (5th Cir.):

R.J. Reynolds Tobacco Co., et al. v. U.S. Food & Drug Administration, et al., No. 23-40076 (Mar. 21, 2024) (reversing district court judgment)

R.J. Reynolds Tobacco Co., et al. v. U.S. Food & Drug Administration, et al., No. 23-40076 (May 21, 2024) (denying petition for rehearing en banc)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

CONSTITUTIONAL AND STATUTORY AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page(s)

REGULATORY AUTHORITIES

OTHER AUTHORITIES

INTRODUCTION

FDA has mandated massive, provocative, and misleading graphic warnings commandeering the top 50% of the front and back of every cigarette package, as well as the top 20% of all cigarette advertisements. This is unprecedented in American history. Indeed, the D.C. Circuit struck down the materially identical prior iteration of these warnings under the First Amendment because it found them value-laden and potentially misleading. But, in the decision below, the Fifth Circuit concluded that the warnings are "purely factual and uncontroversial" and thus subject to review under the standard set forth in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). It further held that FDA's massive warnings are neither "unduly burdensome" nor "unjustified" and thus satisfy the *Zauderer* standard. *Id.* at 651. This decision merits review for three reasons.

First, the Fifth Circuit's holding that the warnings are subject to the *Zauderer* standard—a holding that the opinion acknowledged to be "outcome-determinative" (Pet.App. 19a)—creates clear circuit splits and is fundamentally wrong under this Court's precedents.

The decision below squarely conflicts with the D.C. Circuit's decision invalidating FDA's prior iteration of the warnings, which held *Zauderer* inapplicable to materially identical warnings because they carried a value-laden anti-smoking message and were potentially misleading. *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1212 (D.C. Cir. 2012), *overruled in part on other grounds by Am. Meat Inst. v. USDA*, 760 F.3d 18, 31 (D.C. Cir. 2014) (en banc). Both of

those rationales also compel rejecting *Zauderer* review here. The decision below similarly conflicts with the Ninth Circuit's decision in *CTIA – The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832, 847 (9th Cir. 2019), which held *Zauderer* inapplicable to disclosures that (like both the original graphic warnings and these graphic warnings) are subject to misinterpretation by consumers. Indeed, no court has *ever* applied *Zauderer* to a mandatory warning that includes a government-selected image.

The Fifth Circuit's holding that the warnings are subject to the *Zauderer* standard is also wrong. The Fifth Circuit dismissed the provocative and ideological nature of the warnings. Pet.App. 29a-30a. It thus allowed FDA to convert cigarette packages and advertisements into "a 'mobile billboard' for the State's ideological message" (*Wooley v. Maynard*, 430 U.S. 705, 715 (1977)), in order to "tilt public debate in [its] preferred direction" (*Sorrell v. IMS Health Inc.*, 564 U.S. 552, 578-79 (2011)). Indeed, the Fifth Circuit's holding hinged on the Orwellian view that compelled speech can be "purely factual" under *Zauderer* even if it is neither "true" nor "accurate," (Pet.App. 27a & n.48)—which conflicts with *Zauderer*, 471 U.S. at 638, 651.

As a result, the Fifth Circuit applied *Zauderer* review to provocative and misleading images such as this:

This message misleadingly presents a bulging, baseball-size neck tumor as a common result of smoking, when in reality the undisputed evidence showed that "it would be extraordinarily rare for someone to wait to have a mass of that size before coming to the doctor." C.A. ROA.1657.

Like this image, *all* of FDA's misleading warnings are designed to shock rather than inform, because the massive and inflammatory graphics go far beyond what would be necessary to communicate a simple factual message. The government bears the burden of proof here, and its only asserted interest is informing consumers of certain consequences of smoking. Yet it submitted no evidence—none—that smaller text-only warnings on the side or bottom-third of packaging would be insufficient to inform consumers of those conditions. And that is because providing "purely factual" information is not the real goal. Instead, the warnings can only be understood as an "unabashed attempt[] to … browbeat consumers into quitting." *RJR*, 696 F.3d at 1216-17. That is most decidedly not a "purely factual and uncontroversial" message under *Zauderer*. *Id.*

Second, the Fifth Circuit's holding that *Zauderer* is satisfied warrants review because it too creates numerous circuit splits and is fundamentally wrong under this Court's precedents.

The decision below directly conflicts with decisions from the Seventh and Ninth Circuits, which invalidated *far* smaller warnings—which included no images—as unduly burdensome. *Am. Beverage Ass'n v. City & Cnty. of San Francisco*, 916 F.3d 749, 757 (9th Cir. 2019) (en banc); *Ent. Software Ass'n v. Blagojevich*, 469 F.3d 641, 652 & n.13 (7th Cir. 2006). And it also squarely conflicts with decisions from the D.C. Circuit, the Second Circuit, and the Ninth Circuit, all of which have held that a purely informational interest—the only kind of interest the government asserts here—is not sufficient to justify compelling speech under *Zauderer*. *RJR*, 696 F.3d at 1221; *Int'l Dairy Foods Ass'n v. Amestoy,* 92 F.3d 67, 73-74 (2d Cir. 1996); *CTIA*, 928 F.3d at 844.

The Fifth Circuit's holding that FDA's warnings satisfy *Zauderer's* standard also cannot be reconciled with this Court's decisions in *Zauderer* and *Nat'l Inst. of Family & Life Advocates v. Becerra,* 585 U.S. 755, 775 (2018) ("*NIFLA*"). Those decisions make clear that the warnings are both "unjustified" and "unduly burdensome" (*Zauderer*, 471 U.S. at 651), particularly given their unprecedented size, obtrusive placement, provocative and misleading imagery, and ineffectiveness. Cigarette advertising is already highly restricted. *See, e.g.*, 15 U.S.C. § 1335 (banning cigarette advertising on television and radio); 21 U.S.C. § 387a-1(a)(2) (restricting use of brand names, restricting sponsorships, and prohibiting free samples); 21 C.F.R. § 1140.16(d); 21 C.F.R.

§ 1140.34(a), (c); Master Settlement Agreement § III(d), https://tinyurl.com/y6te8olv; *see also* 15 U.S.C. § 1334(c) (federal law does not preempt various state restrictions); 21 U.S.C. § 387p (same); C.A. ROA.1264. Packaging, therefore, is the primary mechanism by which manufacturers advertise their products. The warnings, however, eviscerate this mechanism by dominating the packaging with the government's own message. The Fifth Circuit ignored all of this—even though, once again, the government adduced *zero* evidence that smaller, text-only warnings would be insufficient.

The Fifth Circuit also refused to consider the undisputed record evidence showing that several less-restrictive alternatives, including smaller warnings, differently placed warnings, and/or text-only warnings would have been just as effective. *E.g.*, C.A. ROA.1586-87, 1593-1615, 1630-38, 1698. In doing so, it violated this Court's instruction in *NIFLA* to consider less-burdensome alternatives to the mandated disclaimer. *See* 585 U.S. at 777-78.

Third, this case presents critically important issues of compelled-speech jurisprudence with far-reaching implications in a wide array of industries and contexts. The Fifth Circuit's opinion, if permitted to stand, would authorize the government to require similar massive and grotesque admonitions on virtually any disfavored consumer product—from fast food, candy, and wine to plastic straws, firearms, and gas stoves. *Infra* pp. 42-43. Indeed, neither FDA nor the Fifth Circuit disagreed that this was the necessary consequence of the decision below. These exceptionally important issues warrant this Court's review.

At a minimum, however, the Court should grant, vacate, and remand given that the Fifth Circuit relied extensively on its prior decision in *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 485 (5th Cir. 2022), which this Court vacated after the Fifth Circuit's decision in this case. *See Moody v. NetChoice, LLC*, 144 S. Ct. 2383 (2024). The Fifth Circuit should at least have the opportunity to reconsider its holdings in light of this Court's ruling.

OPINIONS BELOW

The Fifth Circuit's opinion is reported at *R J Reynolds Tobacco Co. v. FDA*, 96 F.4th 863 (5th Cir. 2024), and is reproduced at Pet.App. 1a-47a. The Fifth Circuit's order denying rehearing en banc is not reported but is reproduced at Pet.App. 110a-111a. The opinion of the district court is not reported but is available at *R.J. Reynolds Tobacco Co. v. FDA*, No. 6:20-CV-00176, 2022 WL 17489170 (E.D. Tex. Dec. 7, 2022), and is reproduced at Pet.App. 51a-109a.

JURISDICTION

The Fifth Circuit issued its opinion and entered judgment on March 21, 2024, and denied rehearing en banc on May 21, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The relevant constitutional, statutory, and regulatory provisions are: U.S. Const. amend. I

(Pet.App. 112a), 15 U.S.C. § 1333 (Pet.App. 113a-122a), and 21 C.F.R. § 1141 (Pet.App. 123a-135a).

STATEMENT

The Tobacco Control Act requires that cigarette packages and advertising bear textual warnings. 15 U.S.C. § 1333(a)(1), (b)(1). It also requires FDA to "issue regulations that require color graphics … to accompany" these warnings. *Id.* § 1333(d)[1].[1] And it provides that the warnings "shall comprise the top 50 percent of the front and rear panels of the package," *id.* § 1333(a)(2), and "at least 20 percent of the area of the advertisement," *id.* § 1333(b)(2).

A. In 2011, FDA issued a rule requiring that cigarette packages and advertising bear graphic warnings materially identical to those at issue here. *See* 76 Fed. Reg. 36,628, 36,649–36,657 (June 22, 2011) (explaining that FDA selected nine graphic warnings); FDA, Tobacco Products Labeling (Nov. 2010), available at https://tinyurl.com/2r356vre (depicting the nine warnings). The D.C. Circuit held that the rule violated the First Amendment. *See RJR*, 696 F.3d at 1212. It concluded that the standard set forth in *Zauderer* did not apply because the warnings were neither "purely factual" nor "uncontroversial." The warnings were not "purely factual" because they were "primarily intended to evoke an emotional response, or, at most, shock the viewer into retaining the information in the text warning." *Id.* at 1216. And the warnings were not "uncontroversial" because

[1] Two separate provisions of the Act were codified as 15 U.S.C. § 1333(d). This brief cites the first one as § 1333(d)[1].

"many of the images chosen by FDA could be misinterpreted by consumers." *Id.*

The D.C. Circuit then held that the rule failed to satisfy the standard established in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). The court first held that "FDA ha[d] not provided a shred of evidence … showing that the graphic warnings will 'directly advance' its interest in reducing the number of Americans who smoke." 696 F.3d at 1219. The court then held that FDA's asserted interest in "effectively communicating health information regarding the negative effects of cigarettes" was "purely informational" and "not an independent interest capable of sustaining the Rule." *Id.* at 1221 (quotation marks omitted). The court therefore vacated the rule.

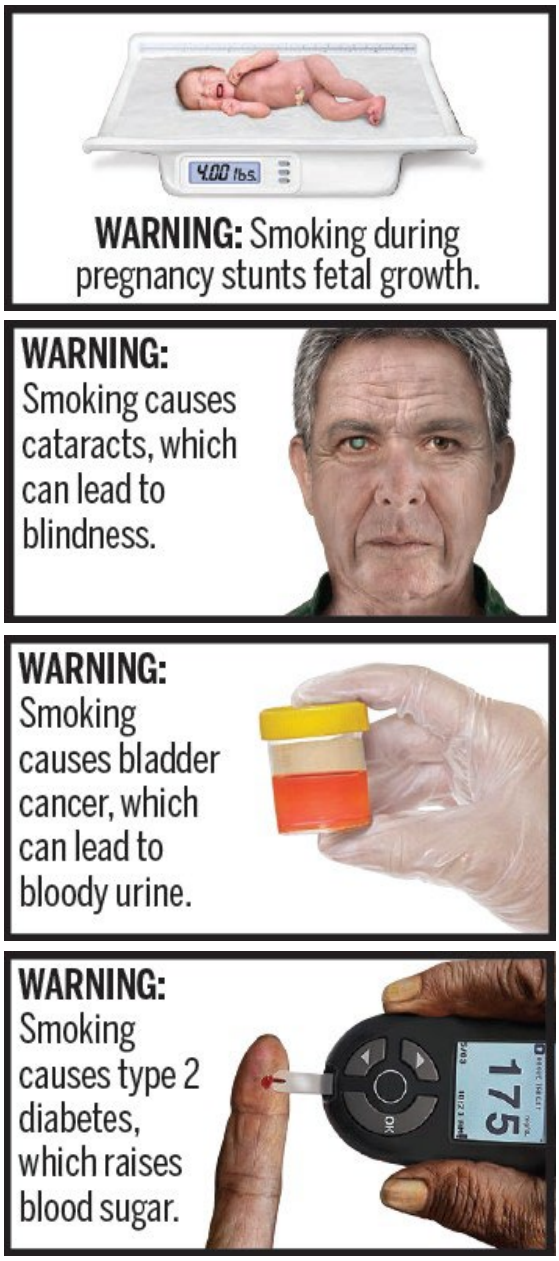
B. In 2020, after eight years of inaction, FDA issued a second graphic warnings rule, which once again required that the warnings occupy the top 50% of the front and back of cigarette packages and the top 20% of cigarette advertisements. 21 C.F.R. § 1141; 85 Fed. Reg. 15,638, 15,638-710 (Mar. 18, 2020). The warnings required by the new rule—which are materially identical to those that had been struck down by the D.C. Circuit—look like this:

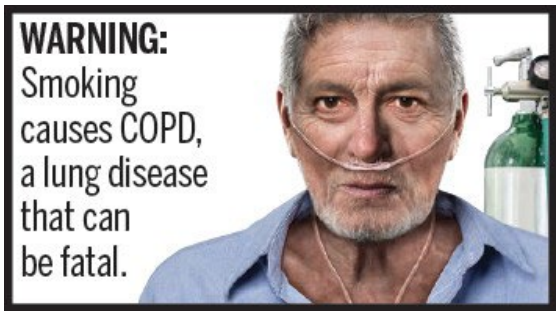
WARNING: Smoking can cause heart disease and strokes by clogging arteries.

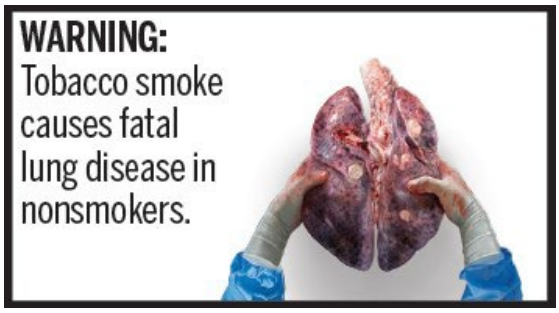
WARNING: Smoking reduces blood flow, which can cause erectile dysfunction.

WARNING: Smoking reduces blood flow to the limbs, which can require amputation.

WARNING: Tobacco smoke can harm your children.


4.00 lbs.
WARNING: Smoking during pregnancy stunts fetal growth.
WARNING: Smoking causes cataracts, which can lead to blindness.
WARNING: Smoking causes bladder cancer, which can lead to bloody urine.
WARNING: Smoking causes type 2 diabetes, which raises blood sugar.
175





This time, however, FDA did not even attempt to justify the rule on the grounds that it would affect smoking behavior. Instead, it justified the rule solely by reference to an informational interest—that is, informing the public of lesser known consequences of smoking. 85 Fed. Reg. at 15,638.

C. Petitioners challenged the rule on First Amendment and statutory grounds. C.A. ROA.1213-1288. The district court had subject-matter jurisdiction under 28 U.S.C. § 1331. The district court granted summary judgment to Petitioners on their First Amendment challenge. Pet.App. 51a-52a. Like the D.C. Circuit with the earlier version of the rule, the district court held that *Zauderer* is inapplicable and invalidated the warnings under *Central Hudson*. Pet.App. 81a.

When analyzing whether *Zauderer* applies, the court concluded that none of the warnings are "purely

factual" and "uncontroversial" because "each warning" is subject to multiple reasonable interpretations, each uses "provocative" imagery, and "it is not beyond reasonable probability that consumers would take from [each] a value-laden message that smoking is a mistake." Pet.App. 89a. The court also identified "a broader problem": "FDA has not made a record-based showing" "that each image-and-text pairing conveys only one, unambiguous meaning that is factually correct." Pet.App. 89a-90a. This problem, too, affected "each image-and-text pairing." Pet.App. 90a. For all of these reasons, the court concluded that the warnings are not "purely factual and uncontroversial and objectively accurate as required" for *Zauderer* to apply. Pet.App. 92a (internal quotation marks and citation omitted).

The district court then held that the rule fails *Central Hudson*. Pet.App. 93a. Citing *NIFLA*, 585 U.S. at 775, it concluded that "[t]he government has not shown that compelling these large, graphic warnings is necessary in light of other options," including "smaller or differently placed warnings" or public-information campaigns. Pet.App. 95a-96a. Having held that the rule violates the First Amendment, the district court did not reach Petitioners' statutory arguments. Pet.App. 97a-98a.

The Fifth Circuit reversed on the First Amendment claim and remanded on the others. Pet.App. 3a. The Fifth Circuit held that the warnings are subject to, and satisfy, the *Zauderer* standard—despite their massive size, provocative imagery, misleading messages, and failure to support a real-world interest. Pet.App. 19a, 45a. Petitioners sought

rehearing en banc, but the court denied their petition. Pet.App. 111a.

REASONS FOR GRANTING THE WRIT

The First Amendment protects "both the right to speak freely and the right to refrain from speaking at all." *Janus v. Am. Fed'n of State, Cnty., & Mun. Employees, Council 31*, 585 U.S. 878, 892 (2018) (quotation marks omitted). "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or *force citizens to confess by word or act their faith therein*." *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (emphasis added). Compelled speech "violates that cardinal constitutional command." *Janus*, 585 U.S. at 892. These principles apply not just to opinions, "but equally to statements of fact the speaker would rather avoid," and they apply to "business corporations" no less than individuals. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573-74 (1995); *see United States v. United Foods*, 533 U.S. 405, 409-11 (2001); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 16 (1986) (plurality op.). The government therefore may not compel cigarette manufacturers to "use their private property as a 'mobile billboard' for the State's ideological message." *Wooley*, 430 U.S. at 715; *see 303 Creative LLC v. Elenis,* 600 U.S. 570, 586 (2023).

The decision below held that the rule is constitutional under the test set out in *Zauderer*, which is a narrow exception that allows the government to compel commercial speakers to disclose

"purely factual and uncontroversial information about the terms under which [their] services will be available" if the disclosure is not "unjustified or unduly burdensome." *Zauderer*, 471 U.S. at 651. In reaching that conclusion, the decision below conflicts with decisions of other circuits and transgresses core First Amendment protections recognized by this Court.

I. THE FIFTH CIRCUIT'S HOLDING THAT *ZAUDERER* APPLIES WARRANTS REVIEW.

The Fifth Circuit's holding that the *Zauderer* standard applies to these warnings warrants review because it creates circuit splits and is manifestly wrong under this Court's precedents. In particular, this holding creates *two* square splits with the D.C. Circuit, which refused to apply *Zauderer* to materially identical warnings because they were (1) blatantly ideological and (2) misleading. The Fifth Circuit's holding also conflicts with the Ninth Circuit on the second point. And on both issues, the Fifth Circuit's holding is straightforwardly mistaken under this Court's precedents, which make clear that *Zauderer* review does not apply to ideological and misleading compelled disclosures.

A. The Fifth Circuit's Holding That Provocative And Misleading Warnings Are Subject To *Zauderer* Review Conflicts With Decisions Of The D.C. And Ninth Circuits.

In its decision striking down the prior iteration of the warnings, the D.C. Circuit declined to apply

Zauderer—and invalidated the warnings under *Central Hudson*. *RJR*, 696 F.3d at 1212, 1216, 1221. By applying *Zauderer* to the current iteration of the warnings—which are materially identical to the original warnings—the Fifth Circuit created two square conflicts with the D.C. Circuit.

First, the Fifth Circuit deemed the provocative and ideological message of the warnings irrelevant to whether *Zauderer* review applies. Pet.App. 29a-30a. The court even went so far as to call Petitioners' argument that "the Rule is unlawful because it conveys an ideological or provocative message" an "imaginative, novel limitation." *Id.*; Pet.App. 29a (holding that Petitioners were relying on a legal requirement "that is absent"). The D.C. Circuit, by contrast, refused to apply *Zauderer* to the first set of graphic warnings in part because those warnings "cannot rationally be viewed as pure attempts to convey information to consumers" and are instead "unabashed attempts to evoke emotion (and perhaps embarrassment) and browbeat consumers into quitting." *RJR*, 696 F.3d at 1216-17. In particular, those warnings conveyed the "subjective … view that consumers should reject this otherwise legal, but disfavored, product," thereby transforming "'every single pack of cigarettes in the country'" into a "'mini billboard' for the government's anti-smoking message." *Id.* at 1212 (citation omitted); *see also id.* at 1211 (reasoning that the government was "communicating an ideological message, a point of view on how people should live their lives: that the risks from smoking outweigh the pleasure that smokers derive from it, and that smokers make bad personal decisions, and should stop smoking").

Notably, the images approved by the Fifth Circuit are materially indistinguishable from ones the D.C. Circuit invalidated, as a side-by-side comparison shows:

Invalidated by D.C. Circuit

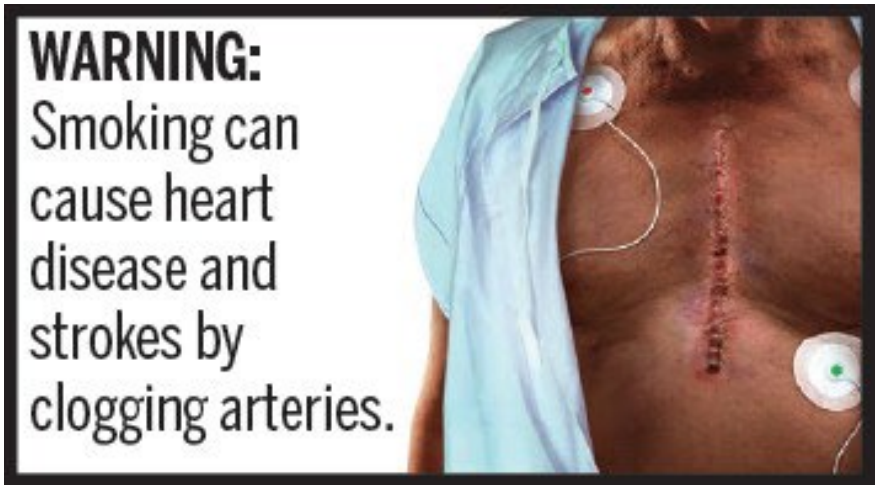
Approved by Fifth Circuit

Invalidated by D.C. Circuit

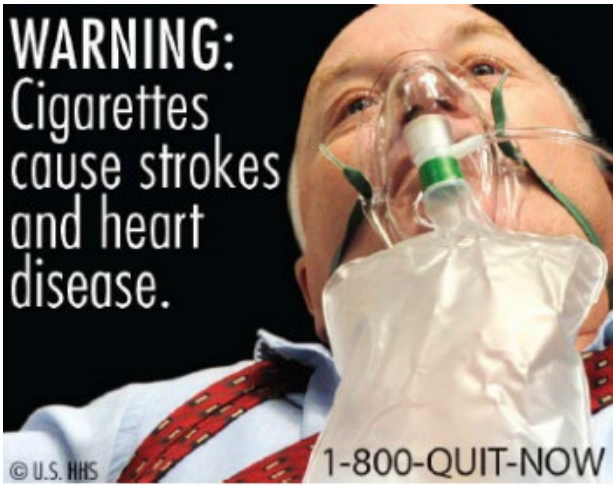
Approved by Fifth Circuit

Invalidated by D.C. Circuit

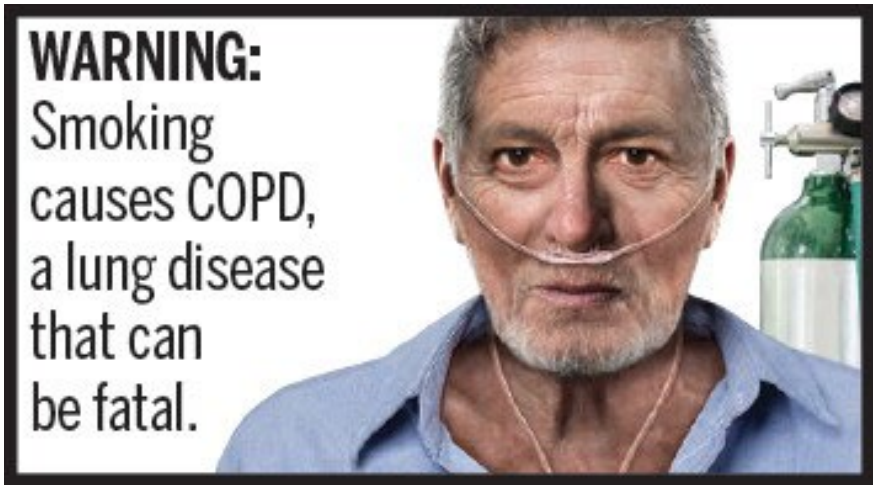
Approved by Fifth Circuit



Invalidated by D.C. Circuit



Approved by Fifth Circuit



Second, the Fifth Circuit refused to consider the misleading nature of the warnings, and in doing so split with both the D.C. Circuit and the Ninth Circuit. In response to Petitioners' demonstration that the

warnings are misleading—because, for example, they suggest that certain outcomes or treatments are more common than they really are—the Fifth Circuit held that compelled speech need not actually be "true" or "accurate" to be "purely factual" under *Zauderer*. Pet.App. 27a n.48 ("We expressly refrain from suggesting that a factual statement is necessarily an accurate one. … Instead, the 'factual' nature of a statement turns on the certainty the statement expresses."). And although the Fifth Circuit suggested it would consider the warnings' accuracy under the "uncontroversial" prong (*id.*), that portion of the opinion simply does not address whether the warnings are misleading; it instead focuses on whether they address a hot-button topic (Pet.App. 29a-30a). Thus, no part of the opinion addresses whether the warnings are misleading, and the opinion stands for the proposition that misleading warnings are entitled to *Zauderer* review.

That holding directly conflicts with the D.C. Circuit, which declined to apply *Zauderer* to the first set of warnings in part because they "could be misinterpreted by consumers," including by "suggesting that [certain] procedure[s] [are] a common consequence of smoking" when FDA meant them only to "symbolize[ ] 'the addictive nature of cigarettes.'" *RJR*, 696 F.3d at 1216; *see also Am. Meat*, 760 F.3d at 34 (Kavanaugh, J., concurring in the judgment) (explaining that "[u]nlike the mandated disclosures at issue in *R.J. Reynolds*," *Zauderer* review applies to a country-of-origin label "given the factually straightforward, evenhanded, and readily understood nature of the information"). It also conflicts with the Ninth Circuit, which has held that even "literally true"

statements may "nonetheless [be] misleading, *and, in that sense, untrue*" for purposes of *Zauderer* analysis. *CTIA*, 928 F.3d at 847 (emphasis added).

B. The Fifth Circuit's Holding That *Zauderer* Applies To Provocative And Misleading Warnings Is Wrong.

In resolving this question differently than its sister circuits, the Fifth Circuit transgressed core First Amendment principles established by this Court's precedents.

First, the decision below conflicts with this Court's decisions by applying *Zauderer* to a compelled disclosure that conveys a subjective, ideological message. This Court has held that the "State may not burden the speech of others in order to tilt public debate in a preferred direction" (*Sorrell*, 564 U.S. at 578-79), nor commandeer someone's property as a "'mobile billboard' for the [government's] ideological message" (*Wooley*, 430 U.S. at 715). As with the warnings that the D.C. Circuit reviewed in *RJR*, the provocative warnings here do just that, conveying the government's ideological message that people should not smoke. *See* Pet.App. 89a (district court holding that "it is not beyond reasonable probability that consumers would take from [the warning images] a value-laden message that smoking is a mistake").

For example, the warnings include images of diseased lungs from a dead person; a crying, underweight baby; an unhealed surgical wound that spans the entire length of a man's chest and into his abdomen; and an elderly man with bloodshot eyes wearing an oxygen tube—images materially identical

to those the D.C. Circuit invalidated. *See supra* pp. 16-19.

These images go far beyond conveying simple facts, as the record here shows. One study, for example, established that 74% of smokers understood these warnings to convey that people "should not smoke" and 85% believed that the warnings are "trying to make people afraid" or "trying to shock people." C.A. ROA.7638-39, 7715. And the record demonstrates that FDA doubled down on the shocking nature of the warnings, repeatedly accepting recommendations to make the images *more* emotional and *more* grotesque. *E.g.*, C.A. ROA.1407, 1417-18, 1420, 1422-23, 1234-35. In short, the district court correctly concluded that consumers could take from each warning "a value-laden message that smoking is a mistake." Pet.App. 89a. Accordingly, the warnings are "hardly … non-ideological" because they "skew public debate" and "stigmatize" consumers. *See Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 530 (D.C. Cir. 2015) (panel reh'g) (internal quotation marks omitted).

Indeed, the warnings' massive size, obtrusive placement, and provocative imagery alone demonstrate that they are not "purely factual and uncontroversial." The government's only asserted interest here is informing consumers that smoking causes certain conditions. 85 Fed. Reg. 15,640. But the warnings go so far beyond what is necessary to convey that simple message that they can only be understood, as the D.C. Circuit explained, as an attempt to "browbeat" consumers into submission. 696 F.3d at 1216-17. It would be no different than requiring cashiers at fast-food restaurants to scream,

at the top of their lungs, the calorie count in a cheeseburger. The verbal content of the scream may be factual. But the manner of the dissemination—the scream—so far exceeds what is needed to convey the factual content that it can only be understood as conveying an ideological message: "DON'T EAT CHEESEBURGERS!!" That is particularly so here, where the record demonstrates that smaller, text-only warnings would easily suffice to convey the purportedly factual portion of the government's message. *See infra* p. 37.

Second, this Court's decision in *Zauderer* makes clear that the standard articulated in that opinion does not apply to misleading disclosures. After all, a "disclosure requirement[]" cannot be "reasonably related to the State's interest in preventing deception of consumers" if it itself is affirmatively misleading. *Zauderer*, 471 U.S. at 651; *see also id.* at 638 (faulting "misleading" commercial speech). Notably, that is how the D.C. and Ninth Circuits have understood *Zauderer*. *See, e.g.*, *RJR*, 696 F.3d at 1216; *CTIA*, 928 F.3d at 847; *see also Am. Meat*, 760 F.3d at 34 (Kavanaugh, J., concurring in the judgment). Indeed, the D.C. Circuit held that materially identical warnings "could be misinterpreted by consumers" (696 F.3d at 1216), and that *Zauderer* therefore did not apply.

The problem of potentially misleading warnings is particularly acute for graphics. In sharp contrast to text-only warnings, images are often susceptible to multiple reasonable interpretations. *See id.* And that is certainly true of the "photorealistic" warnings here. *See id.*; 85 Fed. Reg. 15,640. As FDA's own studies showed—and as the district court expressly held

(Pet.App. 88a-92a)—the warnings are subject to multiple interpretations. C.A. ROA.1300-07 (showing study participants' various perceived meanings for the warnings); C.A. ROA. 2230-55 (same); *see also* C.A. ROA.1352, 1354, 1356, 1359, 1363-66, 1376-80, 1386-88, 1390-1411, 1414-18, 1420-22, 1429, 1431-32, 1434-41, 1443-45. And, as the district court held, many of those reasonable interpretations are clearly incorrect. Pet.App. 90a-92a.

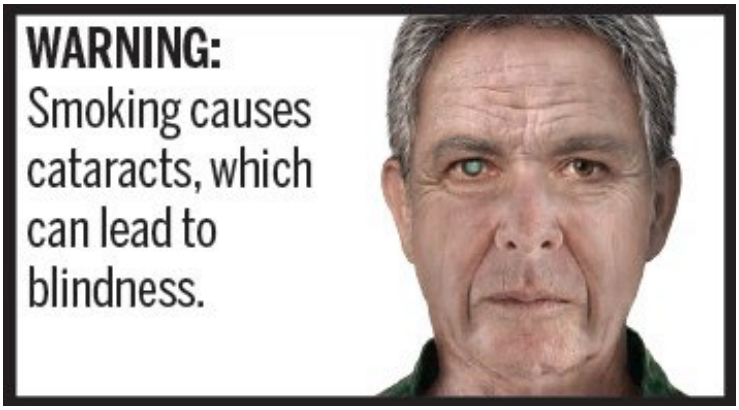
Take, for example, the "Neck Tumor" image:

As the district court explained, one person "might view the image as showing a stylized, exaggerated representation of neck cancer, perhaps in an effort to provoke repulsion." *Id.* Another "person might view the image as showing a typical representation of the sort of neck cancer caused by smoking before a person could seek medical treatment." *Id.* And although that latter interpretation is, as the district court noted, "reasonable" (*id.*) it is medically inaccurate and misleading. As explained in an uncontroverted declaration from a medical doctor, "it would be extraordinarily rare for someone to wait to have a

mass of that size before coming to the doctor," and it is misleading to suggest that "a reasonable person would not have had an opportunity to seek treatment before this point." C.A. ROA.1657. In response, FDA grasped at straws, stating that "late-stage diagnosis for head and neck cancer" can occur in underserved populations. 85 Fed. Reg. at 15,674. But nothing about the image even arguably indicates that it is limited to that context.

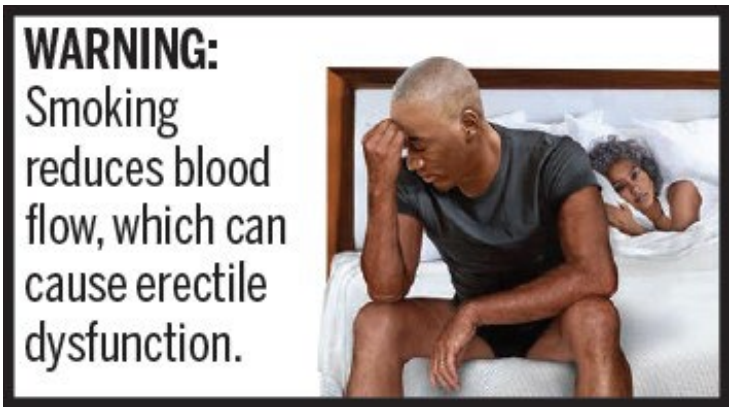
In other words, the image directly implicates the D.C. Circuit's concern that images are subject to misinterpretation if they could cause consumers to believe that rare consequences of smoking are common. *RJR*, 696 F.3d at 1216. Indeed, even FDA itself recognized that warnings should depict diseases as they are "typically experienced." 84 Fed. Reg. 42,754, 42,770 (Aug. 16, 2019). And the record shows that consumers did, in fact, find the warning misleading. As they told FDA: "I don't think that you'd let a lump get that big on your throat before you seek medical treatment." C.A. ROA.2232.

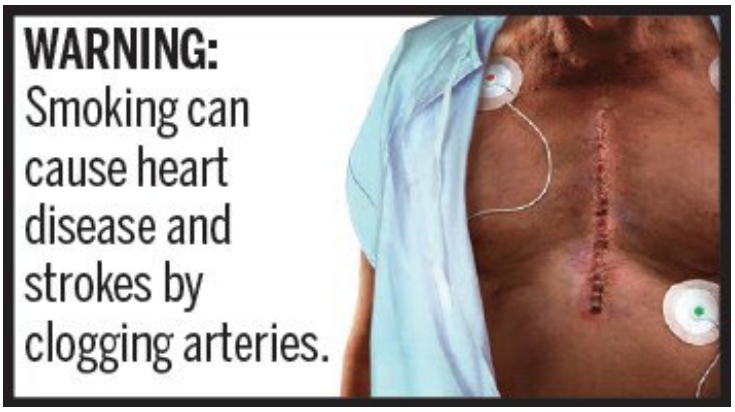
The same goes for the cataracts image:



Even though "some consumers may reasonably interpret the image as depicting the most common result of cataracts," FDA presented "no evidence of that depiction being accurate." C.A. ROA.10207. Rather, as "commenters told the FDA" and as FDA again conceded, "cataracts in the United States are typically treated long before they progress to the stage shown." C.A. ROA.10207; *see also* C.A. ROA.1648-50, 1691-99. FDA's only response was that "underserved populations may face barriers to receiving cataract surgery." 85 Fed. Reg. at 15,684. But again, nothing about the image indicates that it is limited to that context, which renders it misleading.

The same is true of the "Erectile Dysfunction" and "Open Heart Surgery" warnings:





The former misleadingly and confusingly suggests that smoking causes "depression," "not a happy relationship," "sleepless nights," and "[s]hame, defeat and disgust," C.A. ROA.2235-36.

And as to the latter, consumers reported that (an earlier, similar draft of) the warning is "confusing" and that they "don't know what's going on." C.A. ROA.2255. Indeed, consumers reported that the scar "could also mean" that the person had a "hole in [his] heart" as a "baby" or that a person has high "[c]holesterol." *Id.* Overall, the warning does nothing more than leave consumers "scared" (*id.*)—though they are not sure what they are scared of.

Indeed, *all* of the images are misleading because they use imagery to exaggerate the consequences of smoking. *See, e.g.*, C.A. ROA.10206-07, 1300-07, 2230-55. And, at a minimum, the government has not carried *its burden* of demonstrating the warnings are purely factual and uncontroversial. *See Zauderer*, 471 U.S. at 641 (explaining that this Court's "decisions *impose on the State the burden* of establishing" that a law advances a substantial government interest (emphasis added)); *NIFLA*, 585 U.S. at 776

("Importantly, *California has the burden* to prove that the unlicensed notice is neither unjustified nor unduly burdensome." (emphasis added)); *Ibanez v. Fla. Dep't of Bus. & Pro. Regul., Bd. of Acct.*, 512 U.S. 136, 146 (1994) (stating that it is "*the Board's burden*" to demonstrate that disclosure passes constitutional scrutiny (emphasis added)); *Am. Beverage*, 916 F.3d at 756 ("Defendant [the City and County of San Francisco] has the burden of proving that the warning is neither unjustified nor unduly burdensome."). After all, the government performed zero testing to ensure the warnings had a single—or even a dominant—accurate meaning. C.A. ROA.10206-08.

* * *

In sum, this Court should grant certiorari to resolve the square circuit splits created by the Fifth Circuit's holding that *Zauderer* review applies to the provocative and misleading graphic warnings here, and to make clear that the Fifth Circuit's holding violates this Court's precedents.

II. THE FIFTH CIRCUIT'S HOLDING THAT *ZAUDERER* IS SATISFIED WARRANTS REVIEW.

The Fifth Circuit's holding that *Zauderer* review is satisfied also warrants review because it creates multiple circuit splits and contravenes this Court's precedents. In particular, the Fifth Circuit's holding as to the "unduly burdensome" prong of *Zauderer* directly conflicts with an en banc Ninth Circuit decision invalidating substantially smaller warnings under *Zauderer* based on evidence of available alternatives that was far weaker than the evidence in

this case. And the Seventh Circuit similarly invalidated substantially smaller compelled warnings. The Fifth Circuit's holding as to the unjustified prong of *Zauderer* also conflicts with the holdings of three circuits that have made clear that a purely informational interest, which is the only interest FDA is asserting here, is not sufficient under *Zauderer*. Finally, the Fifth Circuit's holding as to both prongs is irreconcilable with this Court's precedents recognizing that gratuitously massive warnings that are not supported by any real-world interest cannot be sustained under *Zauderer*.

A. The Fifth Circuit's Holding That Massive And Gratuitous Warnings Satisfy *Zauderer* Conflicts With The Decisions Of Four Circuits.

The Fifth Circuit's holding that the warnings satisfy *Zauderer* because they are neither "unjustified" nor "unduly burdensome" creates two direct conflicts with other circuits.

First, the Fifth Circuit's conclusion that the warnings are not "unduly burdensome" despite their massive size and placement—they commandeer the *top* 50% of the front *and* back of cigarette packages *and* the top 20% of cigarette advertising—squarely conflicts with the Ninth Circuit's holding in *American Beverage*, 916 F.3d at 757. In that case, the en banc Ninth Circuit invalidated far smaller and less obtrusive warnings as too burdensome under *Zauderer*. *Id.* The decision considered a city ordinance requiring text-only health warnings for certain advertisements—but not product packages or

containers—for sugar-sweetened beverages. Applying *Zauderer*, the Ninth Circuit recognized that the "unduly burdensome" analysis requires considering reasonably available alternatives. *Id.* The court went on to invalidate the required warnings, which occupied only 20% of the advertisements, because the record showed "that a smaller warning—half the size—would accomplish Defendant's stated goals." *Id.*

The Fifth Circuit's opinion directly conflicts with *American Beverage* because the Fifth Circuit held that significantly larger warnings (dominated by provocative graphic imagery) satisfy *Zauderer* without considering, or even acknowledging, any of the numerous less-burdensome ways that FDA could have advanced its goals. Indeed, the record here contains even clearer evidence than that credited in *American Beverage,* showing that several less-restrictive alternatives—including smaller and differently placed warnings—would have been just as effective. *E.g.*, C.A. ROA.1586-87, 1593-1615, 1630-38, 1698.

The Fifth Circuit's approval of such large and obtrusive warnings similarly splits with the Seventh Circuit, which invalidated a state law requiring an "18" sticker on the cover of sexually explicit video games. *Ent. Software*, 469 F.3d at 652 & n.13. The court, applying strict scrutiny, invalidated these stickers—which covered less than 10% of packaging—as too burdensome, noting that the government had failed to "explain why a smaller sticker would not suffice." *Id.* Indeed, the court made the on-point observation that it "[c]ertainly … would not condone a health department's requirement that *half* of the space on a restaurant menu"—the precise size of the cigarette-pack warnings at issue here—"be consumed"

by a warning about raw shellfish. *Id.* at 652 (emphasis added). This observation demonstrates that the court's reasoning was not driven by the standard of review: A raw shellfish warning presumably could be subject to *Zauderer*, yet the court had no qualms declaring that a warning that occupied 50% of the menu would be unduly burdensome. The Seventh Circuit's reasoning therefore cannot be reconciled with the decision below, which, as noted, approved far larger and more obtrusive warnings without even considering less-burdensome alternatives.

Second, the Fifth Circuit's decision that the warnings are not "unjustified" squarely conflicts with the holdings of three circuits that a purely informational interest is not sufficient to justify compelled disclosures for *Zauderer* purposes. Importantly, in this case, FDA does not contend that the rule is justified because it will reduce smoking, presumably because it has no evidence to support such a claim. *See RJR*, 696 F.3d at 1219 ("FDA has not provided a shred of evidence …."); *id.* at 1219-20 (noting that FDA's regulatory impact analysis for the original graphic warnings rule "essentially concedes the agency lacks any evidence showing that the graphic warnings are likely to reduce smoking rates"). By contrast, the Surgeon General recently declared that the existing textual warnings have actually "change[d] behavior," [2] and have been "a part" of reducing smoking rates from about 40% to under 12%

[2] Dr. Vivek H. Murthy, *Surgeon General: Why I'm Calling for a Warning Label on Social Media Platforms*, N.Y. Times, June 17, 2024, https://tinyurl.com/y66xv7vc.

in the last fifty years.[3] Unable to defend its graphic warnings based on any similar real-world impact, FDA instead defends them solely on the basis of an *informational* interest. 85 Fed. Reg. at 15,638. The Fifth Circuit held that such a purely informational interest satisfies *Zauderer*. Pet.App. 38a-41a.

By contrast, when striking down the earlier iteration of the graphic warnings, the D.C. Circuit held that a "purely informational" interest cannot "stand on its own" and is "not an independent interest." *RJR*, 696 F.3d at 1221; *see Am. Meat*, 760 F.3d at 31 (Kavanaugh, J., concurring in the judgment) (explaining that an "interest in giving consumers information" is an improper "circular formulation" that would support "any and all disclosure requirements"). And there is no logical reason why a purely informational interest would be an *adequate and sufficient* interest under *Zauderer*, but would not even qualify as an *independent* interest under *Central Hudson*.

Likewise, the Second Circuit rejected the adequacy of an informational interest when it invalidated a state law requiring dairy manufacturers to label products from cows treated with growth hormone. *Int'l Dairy*, 92 F.3d at 73-74. The Second Circuit held that the government's asserted interest—"the demand of its citizenry for such information"—was "insufficient" to permit the government "to compel the dairy manufacturers to speak against their will." *Id.* (applying the *Central Hudson* test). The Second

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[3] Interview by Savannah Guthrie, Today Show, with Dr. Vivek H. Murthy, U.S. Surgeon General (June 17, 2024), https://tinyurl.com/h4eau8ds ("Murthy Interview").

Circuit noted that, if such an interest sufficed, "there is no end to the information that states could require manufacturers to disclose about their production methods." *Id.* at 74. Again, this problem would arise under *Zauderer* as surely as under *Central Hudson*.

Similarly, the Ninth Circuit, in analyzing what sorts of governmental interests can satisfy *Zauderer*, made clear that the compelled disclosure must promote a substantial interest, and that "mere consumer curiosity" is not enough. *CTIA*, 928 F.3d at 844 (internal quotation marks omitted). The Fifth Circuit's endorsement of an informational interest under *Zauderer* conflicts with all of these decisions.

B. The Fifth Circuit's Holding That Massive And Gratuitous Warnings Satisfy *Zauderer* Is Wrong.

This Court has explained that "[e]ven under *Zauderer*, a disclosure requirement cannot be 'unjustified or unduly burdensome.'" *NIFLA*, 585 U.S. at 776 (citation omitted). As noted above, other circuits have followed this Court's directives by invalidating much *smaller* warnings as unduly burdensome and rejecting the informational interest justification offered by the government here. The Fifth Circuit, by contrast, ran afoul of this Court's decisions.

First, the Fifth Circuit's holding that the warnings are not "unduly burdensome" contravenes this Court's precedents. The warnings are unprecedentedly huge: They commandeer *the top 50%* of the front *and* back of cigarette packages, *as well as* the top 20% of cigarette advertising. Petitioners are aware of no similar

warning in American history—other than FDA's first set of graphic warnings, which did not survive judicial review.

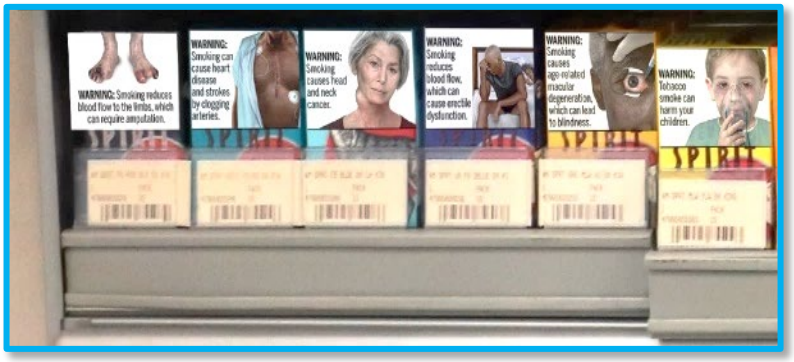
The warnings' enormous size, shocking and misleading images, and highly charged messaging would "drown[ ] out" Petitioners' speech by effectively shouting "DON'T SMOKE!!!" *NIFLA*, 585 U.S. at 778; *see Ibanez*, 512 U.S. at 146 (disclosure unduly burdensome because "[t]he detail required … effectively rules out" speaker's own speech). As noted, they are no different than compelling fast-food cashiers to scream the foods' calorie-count at customers. C.A. ROA.1666.

Manufacturers cannot fix this problem by simply shrinking the brand name and logo. Cigarettes in the United States generally cannot be sold via self-service, and virtually all cigarettes must be displayed several feet behind a sales counter. C.A. ROA.1668; *see* 21 C.F.R. § 1140.16(c). As a result, substantially reducing the size of the brand message on those packages would make it very difficult—if not impossible—to read. C.A. ROA.1668; *see NIFLA*, 585 U.S. at 778 (invalidating compelled speech that was so large and detailed that it drowned out other speech); *Am. Meat*, 760 F.3d at 27.

The warnings exacerbate these problems by occupying the top portion of packages and advertising, which by definition is the most prominent part of the packaging. C.A. ROA.1666. Indeed, cigarette packages are typically displayed such that *only* the top portion is visible, which would mean that consumers would see *only* the graphic warnings, C.A. ROA.1668-69:

Current Retail Display

Modified Retail Display



These burdens are magnified because, under current law, Petitioners have few very avenues for communicating with adult consumers. For example, federal law bars cigarette manufacturers from advertising on television, radio, wire, satellite, or cable. 15 U.S.C. § 1335. It also bars cigarette manufacturers from advertising on t-shirts, coffee mugs, baseball hats, or any other non-tobacco product; and from sponsoring any athletic, musical, or artistic event using the cigarette's brand name. 21 C.F.R. § 1140.34(a),(c). And it prevents cigarette

manufacturers from giving free samples of their products (with limited exceptions). 21 U.S.C. § 387a-1(a)(2); 21 C.F.R. § 1140.16(d). In addition to the restrictions imposed by Congress, cigarette manufacturers face even more restrictions on their ability to advertise by virtue of a Master Settlement Agreement, entered to settle lawsuits brought by virtually every state. These include, for example: No advertising on subways, buses, or any other public transportation; no advertising on billboards; and no advertising on signs in arenas, stadiums, or shopping malls. *See* Master Settlement Agreement § III(d), https://tinyurl.com/y6te8olv; 15 U.S.C. § 1334(c) (federal law does not preempt various state restrictions); 21 U.S.C. § 387p (same).

Packaging thus remains one of the few places where manufacturers can advertise—and thus differentiate—their products. Yet the rule commandeers the top half of both sides of the packaging for *the government's* message. Because Petitioners have so "few avenues of communication" left with consumers, the rule "place[s] a greater, not lesser, burden on [their] speech." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 564-65 (2001); *see also Linmark Assocs. v. Twp. of Willingboro*, 431 U.S. 85, 93 (1977).

Moreover, *NIFLA* emphasized that analyzing whether a compelled disclosure is unduly burdensome requires considering reasonably available alternatives. *NIFLA*, 585 U.S. at 777-78; *see also, e.g.*, *Am. Beverage*, 916 F.3d at 757. After all, if adequate but less-burdensome alternatives are available, the burden is necessarily "undue." Here, undisputed record evidence shows that several less-restrictive

alternatives, including smaller and differently placed warnings, would have been just as effective.

For instance, an expert survey compared FDA's warnings to several less-restrictive alternatives, such as text-only warnings and warnings on the side of packs. The survey found very few statistically significant differences regarding the amount of "new information" conveyed and respondents' beliefs about smoking risks—which are FDA's own metrics for success—after viewing the warnings. C.A. ROA.1630-31; C.A. ROA.1630 (finding no statistically significant differences between FDA's warnings and text-only warnings on the side of cigarette packs); *see also* C.A. ROA.1586-87, 1593-1615, 1698, 1266-67. And experience shows that text-only warnings can be effective; as noted, the U.S. Surgeon General recently reiterated that the current text-only warnings have played a role in reducing smoking rates from about 40% to under 12% in the last fifty years. *See* Murthy Interview, *supra* p. 32 n.3.

In addition, FDA could have conveyed the information contained in the warnings through its own public-information campaign rather than commandeering Petitioners' packaging as a "mobile billboard for the [government's] ideological message." *Wooley*, 430 U.S. at 715. FDA boasts that such campaigns are effective in the tobacco context, but it has never even once run a campaign addressing any of the risks addressed in the warnings. C.A. ROA.10210. In *NIFLA*, this Court held that the availability of this alternative was fatal to the government's position. 585 U.S. at 775. *NIFLA* thus invalidated a compelled-speech requirement under intermediate scrutiny partly because the government "identified no

evidence" that a public-advertising campaign would be insufficient. *Id.* And in reaching this holding, *NIFLA* built on other decisions that have likewise invalidated compelled-speech requirements on this ground. *See, e.g.*, *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 798, 800 (1988) (applying "exacting" scrutiny to hold that a compelled-speech requirement was "unduly burdensome" partly because the government had ignored the more tailored option of "communicat[ing] the desired information to the public" itself); *Ent. Software Ass'n*, 469 F.3d at 652 (invalidating a compelled warning under strict scrutiny because the government had not carried its burden to show that it "could not accomplish [its] goal with a broader educational campaign"); *cf. 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996) (plurality op.) (stating that speech restriction failed *Central Hudson* review in part because "[e]ven educational campaigns focused on the problems of excessive, or even moderate, drinking might prove to be more effective"). The same conclusion should hold here.

Moreover, the decision below mistakenly relies on *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509 (6th Cir. 2012). Pet.App. 28a-30a. But that decision applied a now-defunct "rational-basis" version of *Zauderer*. 674 F.3d at 554, 567. Pursuant to that standard, the Sixth Circuit held that there was no need to "separately analyze whether the warnings are unduly burdensome." *Id.* This approach to *Zauderer,* while always wrong, was squarely rejected by *NIFLA*. That case not only made clear that *Zauderer* does require a separate "unduly burdensome" analysis, 585 U.S. at 776, but also went on to invalidate a disclosure requirement as unduly

burdensome, *id.* at 777-78. In doing so, it noted that the requirement was over- and under-inclusive and also intrusively required advertisements to feature some means of "call[ing] attention to the notice," such as "larger text or contrasting type or color." *Id.* That is a far cry from rational-basis review.

Second, the warnings also flunk *Zauderer* because they are "unjustified." *Id.* at 776. As noted above, FDA does not contend that the rule is justified by any real-world interest, such as reducing smoking—presumably because there is no evidence that the rule would have any such effect. *See RJR*, 696 F.3d at 1219. Indeed, the D.C. Circuit held that "FDA has not provided a shred of evidence … showing that the graphic warnings will 'directly advance' its interest in reducing the number of Americans who smoke." *Id.* Instead, FDA justifies the warnings *solely* based on an abstract interest in providing information. 85 Fed. Reg. at 15,638. But if imparting information alone sufficed to compel speech, then "any and all disclosure requirements" would be fair game. *Am. Meat*, 760 F.3d at 31-32 (Kavanaugh, J., concurring in the judgment); *see also Int'l Dairy*, 92 F.3d at 74.

A purely informational interest is particularly inadequate in this case. The Supreme Court held in *NIFLA* that a compelled disclosure cannot remedy a harm by telling people things that they "already know," 585 U.S. at 777, and here, the public "already know[s]" about the risks of smoking. For decades, cigarette packages and advertising have displayed warnings that inform the public about smoking risks. *See* Pub. L. No. 89-92, 79 Stat. 282 (1965); Pub. L. No. 98-474, 98 Stat. 2200 (1984). The public has also received such information from other sources,

including the government, public-health entities, doctors, insurers, and schools. C.A. ROA.1594-96; C.A. ROA.1619-27; C.A. ROA.1580; *see also United States v. Philip Morris USA Inc.*, No. 99-CV-2496 (GK), 2016 WL 3951273, at *1 (D.D.C. Apr. 19, 2016) (requiring tobacco companies to make corrective statements). Indeed, FDA's own PATH survey shows that *99.5%* of individuals believe that cigarette smoking is harmful to health. C.A. ROA.1597-98. That is higher than the percentage of Americans who know that the Earth revolves around the sun (74%), or the percentage of young Americans who know where the United States is on a map (94%). C.A. ROA. 1581.

As in *NIFLA*, the record demonstrates the public "already know[s]" smoking is dangerous and thus addressing purportedly lesser known risks is immaterial. *NIFLA*, 585 U.S. at 776-77; *see also, e.g.*, C.A. ROA.1581, 1597-98, 1602-06. Moreover, FDA's studies show that the warnings performed dismally in changing beliefs about smoking. C.A. ROA.1471-72; 1485-87, 1489-92. For example, FDA's own study showed that five of the rule's eleven graphic warnings had no significant effect on the participants' beliefs about smoking risks, and five more had only a small effect that quickly dissipated. *See* C.A. ROA.1489-92, 1485-87; *see also* C.A. ROA.1239-40. And finally, there is no evidence that smaller text-only warnings would be insufficient to further FDA's asserted "informational" interest—in fact, as noted above, the record reveals that those less-burdensome alternatives would be just as effective in conveying new information about smoking risks. *See supra* p. 37. The decision below thus cannot possibly be squared with *NIFLA*'s mandate that *the government* bears the

burden of proving that the massive graphic warnings here solve a real, non-hypothetical problem.

* * *

In sum, this Court should grant the writ to resolve the numerous circuit splits created by the Fifth Circuit's holding that the massive and gratuitous warnings satisfy *Zauderer*, and to bring the Fifth Circuit into alignment with the fundamental First Amendment principles articulated in decisions like *NIFLA*.

III. THE QUESTIONS PRESENTED ARE EXCEPTIONALLY IMPORTANT.

It is *undisputed* that the massive government-mandated warnings approved by the Fifth Circuit are unprecedented in American history—with the exception of FDA's first set of graphic warnings, which the D.C. Circuit invalidated. And the Fifth Circuit's opinion authorizing massive graphic warnings is not limited to cigarette packaging or health warnings. It would allow the government to compel all manner of shocking warnings on numerous consumer products in order to bully consumers into not using them, as illustrated by the following examples:

Indeed, although Petitioners have vigorously pressed the implications of the government's theory throughout this litigation, both the government and the Fifth Circuit refused to disavow that this was the necessary implication of the decision blessing the regulation at issue here.

These examples, moreover, could be effortlessly multiplied: for instance, to browbeat or shame consumers seeking to purchase products it disfavors, the government could require ammunition packaging to depict images of the carnage caused by mass shootings, single-use products to depict consequences of pollution, and animal products to depict images of maltreatment of livestock. Similarly, the government could require concert performers to take lengthy breaks to read warnings about hearing loss, accompanied by a slideshow of bleeding eardrums; or it could require real-estate listings within three miles of certain industrial facilities to warn that "LIVING IN THIS HOME MAY CAUSE BIRTH DEFECTS," accompanied by gruesome pictures of babies with birth defects.

This cannot possibly be correct. Yet it is the unavoidable consequence of the Fifth Circuit's misguided decision. The Court should grant review to correct the Fifth Circuit's decision.

IV. AT A MINIMUM, THE COURT SHOULD GRANT, VACATE, AND REMAND IN LIGHT OF *NETCHOICE*.

Although this case warrants plenary review for the reasons set forth above, the Court should at least grant, vacate, and remand in light of its recent decision in *NetChoice*, 144 S. Ct. at 2383.

This Court has explained that where "intervening developments … reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a

redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate." *Lawrence v. Chater*, 516 U. S. 163, 167–68 (1996) (per curiam). Thus, "[t]his Court often 'GVRs' a case … when [it] believe[s] that the lower court should give further thought to its decision in light of an opinion of this Court that (1) came after the decision under review and (2) changed or clarified the governing legal principles in a way that could possibly alter the decision of the lower court." *Flowers v. Mississippi*, 136 S. Ct. 2157, 2157 (2016) (Alito, J., dissenting from the decision to grant, vacate, and remand); *see also Lawrence*, 516 U.S. at 168–69.

This standard is met here. The Fifth Circuit rejected Petitioners' First Amendment challenge because it concluded that the warnings were "both factual and uncontroversial" and thus subject to *Zauderer* review—an "outcome-determinative" holding, by the Fifth Circuit's own admission. Pet.App. 19a. The Fifth Circuit's conclusion that the warnings are uncontroversial rested in large part on its earlier decision in *NetChoice*, along with *Chamber of Commerce of United States v. SEC*, 85 F.4th 760 (5th Cir. 2023), which itself hinged on *NetChoice*, *see id.* at 769-70. Indeed, the decision below cited *NetChoice* no fewer than sixteen times. Pet.App. 21a & n.36, 23a-25a, 32a, 33a, 35a, 36a, 43a, 44a.

The Fifth Circuit rejected Petitioners' First Amendment challenge and denied rehearing en banc on the basis of *NetChoice*, but this Court subsequently vacated that decision. Accordingly, at a minimum, the Fifth Circuit should reconsider the decision below in light of this Court's ruling in *NetChoice*.

CONCLUSION

This Court should grant the petition for certiorari. Alternatively, the Court should grant, vacate, and remand in light of *NetChoice*.

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Respectfully submitted,

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