

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

R.J. REYNOLDS TOBACCO COMPANY,
LORILLARD TOBACCO COMPANY,
COMMONWEALTH BRANDS, INC.,
LIGGETT GROUP LLC, and SANTA FE
NATURAL TOBACCO COMPANY, INC.,

Civil Action No. 11-01482 (RCL)

Plaintiffs,

v.

UNITED STATES FOOD AND DRUG
ADMINISTRATION, MARGARET
HAMBURG, Commissioner of the United
States Food and Drug Administration, and
KATHLEEN SEBELIUS, Secretary of the
United States Department of Health and
Human Services,

Defendants.

**BRIEF OF *AMICI CURIAE*
ASSOCIATION OF NATIONAL ADVERTISERS, INC.
AND THE AMERICAN ADVERTISING FEDERATION**

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INTRODUCTION

The Food and Drug Administration (“FDA”) rules challenged here require producers of tobacco products to carry “shocking and repelling” government-mandated graphic images and textual warnings to proselytize the public. *R.J. Reynolds Tobacco Co. v. FDA*, ___ F. Supp. 2d ___, 2011 WL 5307391, at *1 n.1, *7 (D.D.C. Nov. 7, 2011). As this Court noted in granting a preliminary injunction upon finding plaintiffs had established likelihood of success in constitutionally challenging the rules under the First Amendment, “instead of focusing on its own alleged primary goal – providing information to consumers – ... the Government’s emphasis on the images’ ability to provoke emotion, strongly suggests that [its] *actual* purpose is not to inform, but rather to advocate a change in consumer behavior.” *Id.* at *6 (footnote omitted). As such, these unprecedented rules confiscate plaintiffs’ property for the purpose of skewing the marketplace of ideas.

As undersigned *Amici* noted in supporting grant of the preliminary injunction, the required graphic warnings do not just fail to survive First Amendment scrutiny – the effort to control public discourse for fear people might otherwise make bad choices is not even a legitimate purpose. The government has numerous non-regulatory means at its disposal to persuade the public to change its ways, and the United States Supreme Court has emphatically rejected the proposition that the state may regulate *private* speech “in order to tilt public debate in a preferred direction.” *Sorrell v. IMS Health Inc.*,

131 S. Ct. 2653, 2671-72 (2011). This principle applies regardless whether the subject of the regulation is a political idea or a product, because the First Amendment’s general command is that “the speaker and the audience, not the government, assess the value of the information presented.” *Id.* (quoting *Edenfield v. Fane*, 507 U.S. 761, 767 (1993)).

Amici Association of National Advertisers (“ANA”) and the American Advertising Federation (“AAF”) (collectively, the “Advertising Associations”) hereby submit this brief in support of plaintiffs’ motion for summary judgment because of their ongoing grave concern over the fundamental constitutional principles at stake. The Advertising Associations submitted a brief in support of the above-referenced motion for a preliminary injunction, now granted,¹ and reassert their views and concern for consideration in connection with the parties’ summary judgment motions. In doing so, the Advertising Associations also show that the Court’s preliminary assessment that the challenged rules cannot withstand constitutional scrutiny was entirely sound, and should be reaffirmed.

The important issues in this case are not limited to tobacco products. Rather, they affect a wide range of products and services about which some may believe the

¹ The interests of *Amici* were also set forth in the Unopposed Motion for Leave to File Brief of *Amici Curiae* filed concurrently with their preliminary injunction *amicus* brief (Dkt. 27). *See also infra* 3-4. Such motion would appear unnecessary here given the Court’s Stipulation and Order Establishing Briefing Schedule (Dkt. 30) that accepted the parties’ stipulated schedule, which expressly contemplated *amicus* briefs on summary judgment.

government knows “best,” a concern the Court also expressed in granting the preliminary injunction, as discussed further below. *See R.J. Reynolds*, 2011 WL 5307391, at *7 & n.26, *10. *See also infra* 24-28. If the government can deputize tobacco companies through their product packaging and advertisements to deliver its message, there is no reason it could not do so for other things. Both history and “the logical extension” of the government’s effort here show it will not hesitate to do so. *Id.* Fortunately, the law is quite clear that such a purpose is illegitimate. Accordingly, *Amici* urge this Court to grant summary judgment for plaintiffs and convert the preliminary injunction against the *Graphic Warnings Rule* into a permanent injunction.

INTEREST OF AMICI

Amici Curiae Advertising Associations respectfully submit that the FDA’s Final Rule implementing Section 201 of the Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009) (the “Tobacco Control Act” or “Act”) violates the First Amendment. *See Required Warnings for Cigarette Packages and Advertisements*, 76 Fed. Reg. 36628 (June 22, 2011) (the “*Graphic Warnings Rule*”). The ANA leads the marketing community by providing insights, collaboration and advocacy on behalf of a membership of 400 companies with 9,000 brands that collectively spend over \$250 billion annually in U.S. marketing communications and advertising. The ANA strives to communicate marketing best practices, lead industry initiatives, influence industry practices, manage industry affairs, and advance, promote,

and protect advertisers and marketers. The AAF is the Washington, D.C. trade association that represents 50,000 professionals in the advertising industry, with 130 corporate members that are advertisers, agencies, and media companies representing the nation's leading brands and corporations.

The Advertising Associations participated as *amici* in litigation challenging certain of the marketing provisions in the Tobacco Control Act that repudiate core principles of commercial speech doctrine developed over several decades,² and as alluded to above supported plaintiffs' motion for a preliminary injunction, now granted, in this case. The Advertising Associations' concerns continue, of course, to focus on our nation's commitment to the First Amendment and, particularly, the commercial speech doctrine. See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

BACKGROUND

The FDA's *Graphic Warnings Rule* implements one of the Tobacco Control Act's many restrictions and requirements that target advertising, marketing, and promotion. While the Act states that it intends to "continue to permit the sale of tobacco [] to adults," one of its overarching goals is "to promote cessation" of use generally. Compare

² See Brief of *Amici Curiae ANA et al., Commonwealth Brands, Inc. v. United States*, 678 F. Supp. 2d 512 (W.D. Ky. 2010) (No. 1:09-cv-117, filed Nov. 30, 2009); Brief of *Amici Curiae ANA et al., Discount Tobacco City & Lottery, Inc. v. United States*, Nos. 10-5234 & 10-5235 (6th Cir. filed June 4, 2010).

Pub. L. No. 111-31, § 3(7), *with id.* §§ 2(33)-(34), 3(9). The principal tools it adopts to curtail tobacco use involve an assortment of broad restrictions on advertising and marketing. These include prohibitions on the use of color and images in most tobacco ads and displays; the brand-name sponsorship by tobacco providers of athletic, musical, artistic, or other social or cultural events; the distribution of cigarette samples, or even of branded non-tobacco promotional items; and the joint marketing of tobacco and certain non-tobacco goods.³

The specific rules at issue here implement a section of the Act that mandated changes to the content of the warnings that must appear on all cigarette packages and in ads. Section 201(a) specified nine new textual messages, including statements that cigarettes can kill, that they cause cancer, fatal lung disease, strokes and heart disease, and that “quitting now” reduces health risks. Pub. L. No. 111-31, § 201(a). These new warnings must appear in large-font, accompanied by color graphics that occupy the top

³ *Id.* §§ 101(a)-(b), 102(a)(2). Some of these restrictions were challenged in the U.S. District Court for the Western District of Kentucky, which invalidated the ban on color and imagery in tobacco ads (and one other provision) but rejected other challenges – including to the Act’s mandate for tobacco ads and packages to display graphic warnings – in a decision that both sides appealed. *See Commonwealth Brands, Inc. v. United States*, 678 F. Supp. 2d 512 (W.D. Ky. 2010), *appeal docketed sub nom., Discount Tobacco City & Lottery, Inc. v. United States*, Nos. 10-5234 & 10-5235 (6th Cir. Mar. 9, 2010). However, *Commonwealth Brands* did not include a challenge to the particular requirements of the *Graphic Warnings Rule*, because the FDA had not yet promulgated it. Accordingly, this case involves issues not available, litigated, or considered in *Commonwealth Brands* or on appeal in *Discount Tobacco*, as this Court has agreed. *R.J. Reynolds*, 2011 WL 5307391 at *5. *See also infra* note 13.

50 percent of both sides of cigarette packages. *Id.* The Act also requires tobacco companies to further stigmatize their products by requiring the top 20 percent of ad space be used for the new anti-tobacco “warnings” along with the color graphics. *Id.* §§ 201(a), 204(a).

Implementing this statutory mandate, the FDA’s new *Graphic Warnings Rule* requires tobacco companies to use disturbing, emotionally charged images and accompanying warnings on all cigarette ads and packaging as of October 22, 2012. 21 C.F.R. § 1141.10. These stark graphics, which appear at pp. 5-6 of Plaintiffs’ Memorandum in Support of their Motion for Summary Judgment and Permanent Injunction, include an image of a man smoking through what appears to be his tracheostomy opening to accompany the warning “cigarettes are addictive.” 21 C.F.R. § 1141.12; <http://www.fda.gov/cigarettewarningfile>. For “cigarettes cause fatal lung disease,” the *Graphic Warning Rule* requires a picture of traumatized lungs. *Id.* There is also a “lesion on lip” photo for the “cigarettes cause cancer” warning, an image of a crying “baby in incubator” for the “smoking during pregnancy” warning and, for “smoking can kill you,” a cadaver with chest staples. *Id.* In addition to being emblazoned atop all cigarette packs and cartons, the graphics must appear on all advertisements, including magazine and newspaper ads, pamphlets, leaflets, brochures, point of sale displays, posters, billboards, direct mailers, and Internet advertising. *Required Warnings for Cigarette Packages and Advertisements*, 75 Fed. Reg. 69524, 69537

(Nov. 12, 2010) (the “*Graphic Warnings Notice*”). See *Graphic Warnings Rule*, 76 Fed. Reg. 36679, 36676-78; 21 C.F.R. § 1141.30.

At the outset of this case, plaintiffs sought a preliminary injunction to enjoin enforcement of the *Graphic Warnings Rule*, until fifteen months after resolution of their claims on the merits. The motion argued (*inter alia*) that having to comply with the *Graphic Warnings Rule* would violate plaintiffs’ First Amendment rights, and that pending resolution of that issue, preparing to comply with the rules, and perhaps having to actually comply, would impose irreparable harm. The court heard argument on the motion on September 21, 2011, and on November 7 granted the preliminary injunction as sought by plaintiffs. It also issued a Memorandum Opinion concluding plaintiffs had demonstrated a substantial likelihood of prevailing on their claim that the mandatory graphic images unconstitutionally compel speech, and that plaintiffs would suffer irreparable harm absent injunctive relief pending judicial review. *R.J. Reynolds*, 2011 WL 5307391, *supra*.

ARGUMENT

This Court should (and did) grant injunctive relief where plaintiffs are likely to succeed on the merits of their challenge to the rules, particularly where regulations threaten freedom of expression, *Davis v. Pension Benefit Guarantee Corp.*, 571 F.3d 1288, 1291 (D.C. Cir. 2009); *People for Ethical Treatment of Animals v. Gittens*, 215 F. Supp. 2d 120, 134 (D.D.C. 2002), and the standard is essentially the same for a permanent injunc-

tion except plaintiff must, of course, actually succeed on the merits. *ACLU v. Mineta*, 319 F. Supp. 2d 69, 87 (D.D.C. 2004) (citing, *inter alia*, *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 546 n.12 (1987)). In this case, the FDA's rules implementing the Tobacco Control Act's graphic warnings requirement ignore core limits on government authority to regulate commercial speech.

These include the principles that "the power to prohibit or to regulate particular conduct does not necessarily include the power to ... regulate speech" about it, *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173, 193 (1999), and that, when government seeks to further interests in the commercial arena, "regulating speech must be a last – not first – resort." *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 373 (2002). For present purposes, however, *Amici* focus on one overriding flaw of the rules – the government's commandeering of space on commercial products and advertisements for the paternalistic purpose of controlling public debate and altering individual behavior. Such a governmental purpose is foreign to the First Amendment. *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 510, 516 (1986).

I. THE GRAPHIC WARNINGS RULE IS AN ILLEGITIMATE EFFORT TO DEPUTIZE PRODUCT PRODUCERS AND ADVERTISERS TO PROMOTE THE GOVERNMENT'S MESSAGE

A. The Government's Goal is to Change Behavior, Not to Inform

This Court correctly held that the *Graphics Warnings Rule's* "actual purpose is not to inform but to advocate [] change in consumer behavior." *R.J. Reynolds*, 2011 WL

5307391, at *7. Indeed, the graphics for the new cigarette warnings are expressly designed to be propagandistic rather than informative, a purpose that is clear from the face of the Act, and from the *Graphic Warnings Rule* itself. It is to dissuade consumers from purchasing the lawful products on which the warnings appear. The Tobacco Control Act explicitly states that its “purposes” include promoting cessation.⁴ It seeks to achieve that purpose largely by restricting the speech of tobacco companies while simultaneously mandating carriage of the government’s message.⁵

The FDA’s protests notwithstanding,⁶ there can be no serious doubt tobacco users already know smoking poses serious health risks. Indeed, as one academic in the forefront of tobacco cessation has noted, “[i]n recent years, public opinion polls have consistently indicated that the public, including the smoking public, is well aware of the health risks of smoking.” Robert L. Rabin, *Tobacco Control Strategies: Efficacy and Future Promise*, 41 LOYOLA L. REV. 1721, 1748 & nn.a1 & 106 (Summer 2008); *id.* at 1726. *See also*

⁴ *See supra* at 4 (quoting Pub. L. No. 111-31, § 3(9)). The Act is premised on the assumption that “[c]omprehensive advertising restrictions will have a positive effect on the smoking rates of young people.” *Id.* § 2(22), (25). Its marketing restrictions are based on the proposition that “advertising regulations that are stringent and comprehensive have a greater impact on overall tobacco use.” *Id.* § 2(27).

⁵ The FDA claims that its goal is merely to educate or inform consumers, *R.J. Reynolds*, 2011 WL 5307391 at *7, but the Supreme Court has found that review of statutory language, the regulations at issue, and statements by the regulators can reveal that the true purpose is unconstitutional. *See Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2825 & n.10 (2011).

⁶ *E.g.*, *Graphic Warnings Notice*, 75 Fed. Reg. at 69525, 69529-30, 69533.

Robert L. Rabin, *The Tobacco Litigation: A Tentative Assessment*, 51 DEPAUL L. REV. 331, 352 (Winter 2001) (same). Cf., e.g., *Glassner v. R.J. Reynolds Tobacco Co.*, 223 F.3d 343, 350-51 (6th Cir. 2000) (collecting tobacco cases applying “common knowledge” doctrine). The problem is not that people do not know that smoking entails health risks; it is that too few – in the government’s estimation – act on this knowledge.

The FDA openly embraced the purpose of persuading people to change their ways in adopting the *Graphic Warnings Rule*. It acknowledged that the “primary goal” is to have the graphic warnings appear on cigarette packages and advertisements “both to discourage nonsmokers ... from initiating cigarette use and to encourage current smokers to consider cessation.”⁷ This, in turn, reflects a view that “health warnings that evoke strong emotional responses” ultimately are “reasonably likely” to foster “healthier behaviors, such as trying to quit smoking or deciding not to start.” *Id.* at 36641. Similarly, in its rulemaking notice, the FDA observed that the *Graphic Warnings Rule* is intended to support smokers’ intentions “to quit or decrease [] consumption, and to discourage nonsmokers, particularly youth, from initiating cigarette use.” *Graphic Warnings Notice*, 75 Fed. Reg. at 69535.

⁷ *Graphic Warnings Rule*, 76 Fed. Reg. at 36634. See also *id.* at 36640 (“The purpose of graphic health warnings is to effectively communicate [] negative health consequences ... to smokers and nonsmokers” with the expectation that a supposed “greater understanding” thereof “will motivate some smokers to stop smoking and prevent some nonsmokers from starting[.]”).

In adopting the final rule, the FDA specifically measured whether the graphic warnings under consideration made respondents feel “depressed,” “discouraged,” or “afraid,” and selected the final images based on their ability to provoke strong emotional reactions. *Graphic Warnings Rule*, 76 Fed. Reg. at 36638. See also *R.J. Reynolds*, 2011 WL 5307391, at *7. Clearly, the focus of this effort was to choose shocking visual images, rather than finding warnings that could impart neutral factual information. Its rulemaking notice acknowledged that such warnings differ from “disclosure requirements that apply to other products that FDA regulates,” which “have a different purpose.” *Graphic Warnings Notice*, 75 Fed. Reg. at 69539. Specifically, while medical products like drugs and devices, for example, “require that ... labeling and advertising disclose all material risk information” to facilitate safety in use and/or prescription, *id.* at 69539-40, the graphic warnings here seek to “encourage cessation and discourage initiation.” *Id.* at 69540. See also *R.J. Reynolds*, 2011 WL 5307391, at *7.

The FDA acknowledged that its purpose is to elicit “strong emotional and cognitive reactions to graphic warnings,” but argues that doing so more effectively and graphically communicates “the very real, scientifically established adverse health consequences of smoking.” This, in turn, changes “attitudes and beliefs,” and eventually can lead to “changes in intentions to quit or to start smoking and then later can lead to lower likelihood of smoking initiation and greater likelihood of successful cessation.” *Graphic Warnings Rule*, 76 Fed. Reg. at 36641. Existing warnings fail to achieve

the same purpose, the FDA claims, because textual warnings have grown “unnoticed and stale,” *id.* at 36697, 36699, while graphic warnings on product packaging is the most “efficient” way of reaching smokers. Def.’s Sum. J. Mot. at 23 (Dkt. 35).

Such claims are beside the point. The reference to “scientifically established” evidence hardly means that the purpose of the rules is just to educate and inform the public. Virtually all arguments include some fact, but here, the clear purpose of the *Graphic Warnings Rule* is to require tobacco companies to publish the government’s *arguments* against smoking. FDA Commissioner Margaret Hamburg was quite clear about this purpose when she stated that the warnings will ensure that “every single pack of cigarettes in our country will in effect become a mini-billboard” for the government’s anti-smoking message,⁸ or, as this Court called it, its “obvious anti-smoking agenda.” *R.J. Reynolds*, 2011 WL 5307391, at *7. HHS Secretary Kathleen Sebelius likewise explained that the rule will have the effect of “rebranding our cigarette packs.” *Id.* See also White House Press Briefing (June 21, 2011) (www.whitehouse.gov/the-press-office/2011/06/21/press-briefing-press-secretary-jay-carney-secretary-health-and-human-ser.).

Any claim that the government’s “mini-billboards” are just presenting “facts” is absurd. To begin with, this argument flatly contradicts the government’s own rationale

⁸ FDA, Tobacco Strategy Announcement (Nov. 10, 2010) (www.fda.gov/TobaccoProducts/NewsEvents/ucm232556.htm).

for banning color and graphics in cigarette marketing, a restriction it said was necessary because young people “are particularly ‘susceptible to peripheral cues such as color and imagery.’” Reply Br. for Defendants-Appellees/Cross Appellants, *Discount Tobacco City & Lottery, Inc. v. United States*, Nos. 10-5234 & 10-5235 (6th Cir.) at 8 (quoting 61 Fed. Reg. 44468). The government cannot argue in one breath that the use of any color or imagery in tobacco marketing is an unfair persuasive technique that must be banned, and in the next assert that a government mandate requiring lurid and frightening full-color images on product packaging and advertising is presenting “just the facts, ma’am.”

But one needn’t explore the illogic of the government’s contradictory arguments to understand the true purpose of the *Graphic Warnings Rule*. The regulators freely admit that their purpose is advocacy, not education. Secretary Sebelius was quite clear about the FDA’s intent when she announced the required labels:

Somebody said when they first saw the warnings, ‘These are really gross.’ And they are. We want kids to understand smoking is gross, not cool, and there’s really nothing pretty about having mouth cancer or making your baby sick if you smoke. So some of these are very driven to dispelling the notion that somehow this is cool and makes you cool.⁹

⁹ Kathleen Sebelius, Sec’y of Health & Human Servs., Press Briefing by Press Secretary Jay Carney, Secretary of Health and Human Services Kathleen Sebelius, and FDA Commissioner Margaret Hamburg (June 21, 2011), <http://thepage.time.com/2011/06/21/carney-briefs-36/> (“June 21 Press Briefing”).

Commissioner Hamburg likewise stressed that those “who are under the impression that smoking is cool or glamorous will be confronted by a very different reality when they’re tempted to pick up a cigarette pack” after the rule’s expected effective date. June 21 Press Briefing.

The FDA’s intended message is clear: “If you smoke, you will become a gruesome pariah with Dickensian teeth who abuses children and dies early and alone.” *The Smoky Horror Show*, THE ECONOMIST, June 21, 2011 (<http://www.economist.com/blogs/schumpeter/2011/06/tobacco-regulation?page=2>). “Such is the message conveyed by graphic new cigarette labels, unveiled by America’s Food and Drug Administration,” THE ECONOMIST noted, describing the warnings as “the latest attempt by a government to nauseate and petrify its citizenry.” *Id.* The World Health Organization acknowledges that such images are designed to “elicit strong emotions, such as fear.” *Id.* Clearly, the intent of the HHS and FDA was to choose graphic warnings that are provocative, visually confrontational, and propagandistic, rather than to impart factual and neutral information.

B. The *Graphic Warnings Rule*’s Purpose is Illegitimate

Whether or not such tactics are effective, regulating speech and forcing companies to highlight the government’s message in order to scare people into “improving” their behavior is antithetical to the First Amendment. The Supreme Court recently rejected an analogous state effort to “balance” the marketplace of ideas, finding

that “the law’s express purpose and practical effect are to diminish the effectiveness of marketing.” *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2663 (2011). Here, the FDA’s rules are premised on the idea that tobacco company marketing efforts will be too persuasive unless the government can restrict commercial appeals and replace them with its own messages. But, as the Court made clear in *Sorrell*, “the fear that speech might persuade provides no lawful basis for quieting it.” *Id.* at 2670.

The Court repeatedly has rejected such a “highly paternalistic approach,” *Linmark Assocs, Inc. v. Township of Willingboro*, 431 U.S. 85, 97 (1977), as “incompatible with the First Amendment.” *Id.* at 2671. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 770 (1976) (“It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.”). As in this case, those “who seek to censor or burden free expression often assert that disfavored speech has adverse effects. But the ‘fear that people would make bad decisions if given truthful information’ cannot justify content-based burdens on speech.” *Sorrell*, 131 S. Ct. at 2670-71 (quoting *Thompson*, 535 U.S. at 374). Indeed, the First Amendment “directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.” 44 *Liquormart*, 517 U.S. at 503. See also *Linmark Assocs.*, 431 U.S. at 96-97 (constitutional defect “is far more basic” where

regulation of commercial speech is premised on the belief that people will act “irrationally” unless the government intervenes).

The bottom line is that the government lacks any legitimate interest either in suppressing truthful commercial information or in controlling debate about it “in order to prevent members of the public from making bad decisions with the information.”

Thompson, 535 U.S. at 374. As constitutional scholar Burt Neuborne put it:

When society provides its members with lawful choices, respect for individual dignity compels that the choices be the autonomous expression of individual preference. It is impossible to respect individual autonomy with the left hand while selectively controlling the information available to the individual with the right hand. A purportedly free individual choice premised on a government controlled information flow is a basic affront to human dignity.¹⁰

The Supreme Court in *Sorrell* reaffirmed that the government lacks any interest in regulating speech “to reverse a disfavored trend in public opinion.” 131 S. Ct. at 2671. It certainly may use its own resources to persuade the public to choose a different course of action, but it could not “ban campaigning with slogans, picketing with signs, or marching during the daytime” to achieve the same result. *Id.* Likewise, the government cannot “seek to remove a popular but disfavored product from the marketplace by prohibiting truthful, nonmisleading advertisements that contain impressive endorsements or catchy jingles. That the State finds expression too persuasive does not

¹⁰ Burt Neuborne, *The First Amendment and Government Regulation of Capital Markets*, 55 BROOK. L. REV. 5, 37 (1989).

permit it to quiet the speech or to burden its messengers.” *Id.* Nor may the government require private parties to vilify their own products. Congress has no authority “to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.” *RAV v. City of St. Paul*, 505 U.S. 377, 392 (1992).

The FDA’s claim that existing health warnings have grown “stale” or that people pay insufficient attention to the textual statements does not legitimize the government’s purpose. Its measure of success boils down to the notion that people would be better off if they could be persuaded to follow the government’s health recommendations. Perhaps so. Such a purpose may call for a public education campaign or government-sponsored public service announcements, but it cannot justify broad restrictions on commercial speech or drafting private speakers to deliver the government’s message.

C. The *Graphic Warnings Rule* Unconstitutionally Compels Speech

Not only is the purpose of the *Graphic Warnings Rule* constitutionally deficient, its mandate imposes excessive burdens on free expression, as this Court correctly held in granting the preliminary injunction. *R.J. Reynolds*, 2011 WL 5307391, at *5-8. Compelling tobacco companies to display government-prescribed graphic images and accompanying warnings violates the First Amendment, which secures “both the right to speak [] and ... to refrain from speaking at all.” *Id.* at *5 (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)). Except for purely factual and non-controversial disclosures, the government may not compel private entities to publish messages selected or

dictated by the government. *Id.* at 715. This is because, where regulations “[m]andat[e] speech that a speaker would not otherwise make,” they “necessarily alter[] the content of the speech.” *Riley v. National Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988). The Supreme Court has noted that some of its “leading First Amendment precedents have established ... that freedom of speech prohibits the government from telling people what they must say.” *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006). This is as true for “corporations as for individuals,” *Pacific Gas & Elec. Co. v. Public Utils. Comm’n*, 475 U.S. 1, 16 (1986) (plurality op.), and that includes tobacco companies as much as any other advertiser or other company. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 571 (2001).

The lurid images of the *Graphic Warnings Rule* cannot be justified under the narrow constitutional exception permitting disclosure requirements for non-controversial information. Under *Zauderer* and its progeny, compelled disclosure may be permissible to convey “purely factual” information, to protect consumers from “confusion or deception.” *R.J. Reynolds*, 2011 WL 5307391, at *5 (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985)). See also, e.g., *New York State Rest. Ass’n v. New York City Bd. of Health*, 556 F.3d 114, 131-34 (2d Cir. 2009); *National Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 113-14 (2d Cir. 2001). However, such disclosures may be required only if they are “uncontroversial” and apply to commercial messages that may otherwise mislead or deceive. E.g., *Zauderer*, 471 U.S. at 651. See *Milavetz*,

Gallop & Milavetz, P.A. v. United States, 130 S. Ct. 1324, 1339-40 (2010). If government seeks to compel overly burdensome disclosures or to co-opt a speaker's message, its regulation is unconstitutional, and courts consistently reject efforts to compel private entities to sponsor government propaganda. *E.g.*, *Pacific Gas & Elec. Co.*, 475 U.S. at 15; *Wooley*, 430 U.S. at 714.

Compelling tobacco companies to devote half their cigarette packages and 20 percent of their advertising space to the government's prescribed warnings "both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set." *Pacific Gas & Elec. Co.*, 475 U.S. at 9. Such requirements are particularly offensive constitutionally where they require a speaker to foster views that are contrary to its interests. Thus, notwithstanding *Zauderer*, no Supreme Court decision suggests that the government may require corporations to carry messages "where the messages themselves are biased against or are expressly contrary to the corporation's views." *Id.* at 16 n.12. Moreover, the Court has expressly rejected the argument that compelling such expression furthers the constitutional goal of providing "more speech," because "the State cannot advance some points of view by burdening the expression of others." *Id.* at 20. Rather, "[t]hat

kind of forced response is antithetical to the free discussion that the First Amendment seeks to foster.”¹¹

To be sure, as this Court held, “the line between the constitutionally permissible dissemination of factual information and the impermissible expropriation of a company’s advertising space for Government advocacy can be frustratingly blurry” in some cases. 2011 WL 5307391, at *5. But “the evidence here overwhelmingly suggests that the Rule’s graphic-image requirements are *not* the type of purely factual and uncontroversial disclosures.” *Id.* As the Court went on to find:

That some of the graphic images here appear to be cartoons, and others appear to be digitally enhanced or manipulated, would seem to contravene the very definition of “purely factual.” That the images were unquestionably designed to evoke emotion—or, at the very least, that their efficacy was measured by their “salience,” which the FDA defines in large part as a viewer’s emotional reaction—further undercuts the Government’s argument that the images are purely factual and not controversial. Moreover, it is abundantly clear from viewing these images that the emotional response they were crafted to induce is calculated to provoke the viewer to quit, or never to start, smoking: an objective wholly apart from disseminating purely factual and uncontroversial information.

Id. (citations omitted). And, as the Court noted, it did not help that the government “repeatedly failed to answer this Court’s question ... about when the dissemination of purely factual, uncontroversial information crosses the line into advocacy.” *Id.* at *5

¹¹ *Id.* at 16. Additionally, the Supreme Court has stressed that the fact that a product “poses some threat to public health or public morals” does not justify commercial speech regulation “by the simple expedient of placing the ‘vice’ label on selected lawful activities.” 44 *Liquormart*, 517 U.S. at 514.

n.19. While the government continues to argue that the warnings are purely informational, even though its most recent filing post-dates the preliminary injunction hearing, it still fails to attempt to explain where this line lies, or how it is drawn. Def.'s Sum. J. Mot. 28-29.

As this Court agreed, the decision in *Entertainment Software Association v. Blagojevich*, 469 F.3d 641 (7th Cir. 2006), well illustrates this point. *R.J. Reynolds*, 2011 WL 5307391, at *6. In *Blagojevich*, the Seventh Circuit invalidated mandatory stickers on “violent” and “sexually explicit” video games – even though they comprised no more than a four-inch square sticker with the number “18,” indicating that the games could not be sold to minors. The court explained that the mandatory labeling requirement could not be upheld for the same reason “we would not condone a health [] requirement that half of the space on a restaurant menu be consumed by [a] raw shellfish warning.” *Id.* at 652. If a stark numeral 18 could not clear the hurdle of being “uncontroversial” and an innocuous (hypothetical) shellfish warning could not stand if it was merely too big, it is impossible to see how the writ-large, lurid imagery the FDA has adopted survives constitutional scrutiny.

The graphics proposed here far exceed current, eminently noticeable textual warnings, which also are proposed to become more prominent and emphatic. Or, as the Court put it in granting the preliminary injunction, “the sheer size and display requirements for the graphic images are anything but narrowly tailored.” *R.J. Reynolds*,

2011 WL 5307391, at *7. Taken together, purposefully disturbing imagery combined with large text warnings will turn cigarette packs into “mobile billboards” for the government’s “ideological messages” about smoking. *Wooley*, 430 U.S. at 715. *Cf.*, Hamburg Tobacco Strategy Announcement, *supra* note 8 (new warnings are “mini-billboards”). The graphics are *intended* to be “controversial,” to draw attention, and to repel consumers from buying a legal product. The warnings far exceed the court’s assumption in *Commonwealth Brands*, that the graphics do not “alter the substance of [the] message,” and that the warnings are “objective” and “ha[ve] not been controversial for many decades.”¹²

Its summary judgment motion coming before the grant of preliminary injunction, the government in this case continued to rely heavily on *Commonwealth Brands* despite the fact that it is not binding on this Court and that it predated both the FDA’s *Graphic Warnings Rule*,¹³ and the Supreme Court’s reaffirmation that “a State’s failure to persuade does not allow it to hamstring the opposition.” *Sorrell*, 131 S. Ct. at 2671. Such

¹² *Commonwealth Brands*, 678 F. Supp. 2d at 531-32. However, the court in *Commonwealth Brands* reached its conclusion without seeing the images in question, as the FDA had yet to unveil them. *R.J. Reynolds*, 2011 WL 5307391, at *5 n.17. Now that they have been revealed, images like “hole in throat,” “crying baby in incubator,” “lesion on lip,” and a cadaver with chest staples can hardly be called purely “informational” or “uncontroversial,” as this Court found. *Id.* See also *infra* note 13.

¹³ This Court has already rejected any claim that this case and *Commonwealth Brands* are factually analogous, or that *Commonwealth Brands* could be binding here, while also noting the two cases are “wholly separate ... legally,” such that, ultimately, “*Commonwealth Brands* [] is of little value here.” *R.J. Reynolds*, 2011 WL 5307391, at *5.

reliance, however, cannot overcome the serious constitutional deficiencies of the rule. In this respect, the government's argument that tobacco companies have little reason to complain because "half of cigarette packs, ... and 80% of advertisements remain available for their speech," Def.'s Sum. J. Mot. at 20 (quoting *Commonwealth Brands*, 678 F. Supp. 2d at 531), is reminiscent of the Beatle's song *Taxman*: "Should five percent appear too small, be thankful I don't take it all." But it is no defense for the government to argue that it refrained from taking over all of the tobacco companies' modes of communication. The "distinction between laws burdening and laws banning speech is but a matter of degree." *Sorrell*, 131 S. Ct. at 2664 (quoting *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 812 (2000)).

Ultimately, the FDA relies on the claim that "there is no more efficient method of reaching smokers than through the use of graphic and highly visible warning labels." Def.'s Sum. J. Mot. at 23 (citation omitted). But this runs headlong into the constitutional command, recently reaffirmed by the Supreme Court, that "the First Amendment does not permit the State to sacrifice speech for efficiency." *Arizona Free Enter.*, 131 S. Ct. at 2824 (quoting *Riley*, 487 U.S. at 795). Accordingly, the *Graphic Warnings Rule* is unconstitutional and should be enjoined.

II. THE CONSTITUTIONAL ISSUES AT STAKE TRANSCEND FREE EXPRESSION REGARDING TOBACCO PRODUCTS

Even with this Court's grant of the preliminary injunction, *Amici* Advertising Associations are very concerned with the outcome of this case because the First

Amendment principles involved extend far beyond the rights of tobacco companies. If the government prevails with the novel argument that companies may be compelled to devote space on their packaging and in advertisements for government-mandated messages of this type, then no product is safe from such regulation. As this Court noted in granting the preliminary injunction, “[o]ne can only wonder what the Congress and the FDA might conjure for fast food packages and alcohol containers if ... they were not compelled to comply with the intricacies of our First Amendment jurisprudence.” *R.J. Reynolds*, 2011 WL 5307391, at *7 n.26. Once such paternalistic notions gain a legal foothold, demands to apply similar requirements in other contexts will soon follow – as history well shows.¹⁴

¹⁴ This risk is illustrated by the federal Interagency Working Group on Food Marketed to Children, authorized by the Omnibus Appropriations Act of 2009. H.R. 1105, 111th Cong. (2009). Implementing this mandate, the Federal Trade Commission, the FDA, the Centers for Disease Control, and the U.S. Department of Agriculture have proposed “voluntary guidelines” to control the marketing of food to children or adolescents. See Interagency Working Group on Food Marketed to Children: Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts – Request for Comments (2011). However, even where such efforts are characterized as “voluntary,” they often are backed by the threat of regulation. See, e.g., White House Task Force on Childhood Obesity Report to the President, *Solving the Problem of Childhood Obesity Within a Generation* at 32 (May 2010) (“If voluntary efforts to limit the marketing of less healthy foods and beverages to children do not yield substantial results, the FCC could consider revisiting and modernizing rules on commercial time during children’s programming.”). Cf. *Yale Broad. Co. v. FCC*, 478 F.2d 594, 606 n.22 (D.C. Cir. 1973) (Bazelon, C.J., dissenting) (“The main value of the sword of Damocles is that it hangs, not that it drops.”).

The government operates numerous product-related programs designed to educate consumers and that otherwise make the government a participant in the marketplace of ideas. For example, the Surgeon General promotes breastfeeding by encouraging hospitals to refuse advertisements for infant formulas.¹⁵ The Environmental Protection Agency promotes “Energy Star” guidelines to advocate energy efficiency.¹⁶ Congress has authorized a media campaign designed to reduce underage drinking.¹⁷ The Department of Agriculture issues nutritional guidelines.¹⁸ Such programs do not raise constitutional concerns to the extent they are solely informational and do not attempt to use the express or implied coercive force of the government to skew the marketplace of ideas. But it is important to recognize the inherent temptation in such programs to use government authority to get members of the public to make “correct” decisions. If this Court were to uphold the FDA’s constitutional authority to convert products into platforms for government messages, there is no doubt the practice would spread to other products beyond tobacco.

¹⁵ The Surgeon General’s Call to Promote Breastfeeding (2011) at 43 (www.surgeongeneral.gov/topics/breastfeeding/calltoactiontosupportbreastfeeding.pdf).

¹⁶ See U.S. Environmental Protection Agency (www.energystar.gov).

¹⁷ See Sober Truth on Preventing Underage Drinking Act, 42 U.S.C. § 290bb-25b, 120 Stat. 2890, Pub. L. No. 109-422 (2006).

¹⁸ See U.S. Department of Agriculture (www.choosemyplate.gov).

In this regard, the FCC's experience in applying its now-defunct Fairness Doctrine to tobacco products provides a cautionary tale. In the late 1960s, the Commission interpreted its rule to require broadcasters to air counter-advertising for cigarette product advertising on the theory that such advertising was needed to provide the public with a "balanced" presentation of views on a controversial issue. *WCBS-TV*, 8 F.C.C.2d 381, *stay and recon. denied*, 9 F.C.C.2d 921 (1967). At the time, the Commission expressly rejected as a "parade of horrors" the claim that "if governmental and private reports on the possible hazard of a product are a sufficient basis" for requiring counter-advertising, "the ruling would apply to a host of other products, such as: automobiles, food with high cholesterol count, alcoholic beverages, fluoride in toothpaste, pesticide residue in food, aspirin, detergents, candy, gum, soft drinks, girdles, and even common table salt." *Id.*, 9 F.C.C.2d at 942-43.

Despite the FCC's confidence about its ability to draw the line with cigarettes as "a unique situation and product,"¹⁹ it soon was overrun by calls for mandatory counter-advertising in a wide variety of situations. Demands for time arose from retail store advertising during a labor dispute, automobile advertisements, gasoline advertising, institutional advertising praising commercial television, advertisements advocating oil exploration, institutional advertisements for a power company, army recruiting

¹⁹ *Amendment of Part 73 of the Federal Communications Commission Rules With Regard to the Advertisement of Cigarettes*, 16 F.C.C.2d 284, 292 (1969).

advertisements, advertisements for snowmobiles, and even advertisements for dog food.²⁰ While the FCC rejected some demands for counter-advertising (army recruiting, gasoline additives, snowmobiles, etc.), it accepted others (oil exploration, utility rates, retail advertising). Even in a case where the FCC did not mandate responsive ads, the Court of Appeals did, rejecting the FCC's claim that cigarettes were a "unique" product and not understanding how the Commission could "plausibly differentiate the case presently before us."²¹

Ultimately, the FCC was forced to admit it had been a "great mistake" to impose counter-advertising requirements and it expressly declined to do so in the future. *Fairness Report*, 48 F.C.C.2d 1, 26 (1974). In particular, the Commission found that the policy had become "particularly troublesome" because it could not be limited to cigarette advertising as originally promised. *Id.* at 25. The D.C. Circuit agreed that the

²⁰ *Public Interest Research Group v. FCC*, 522 F.2d 1060 (1st Cir. 1975) (ads about snowmobiles); *Neckritz v. FCC*, 502 F.2d 411 (D.C. Cir. 1974) (ads about particular brand of gasoline); *Friends of Earth v. FCC*, 449 F.2d 1164 (D.C. Cir. 1971) (ads about high powered automobiles and high-test gasoline); *Green v. FCC*, 447 F.2d 323 (D.C. Cir. 1971) (ads about military service); *Retail Store Employee's Union, Local 880 Retail Clerks Int'l Ass'n v. FCC*, 436 F.2d 248 (D.C. Cir. 1970) (ads for department store picketed by union); *Complaint by Media Access Project*, 44 F.C.C.2d 755 (1973) (ads by power company about need for rate increases, expansion, etc.); *Complaint by Mrs. Fran Lee*, 37 F.C.C.2d 647 (1972) (ads about dog food and pet products); *Complaint by Wilderness Soc'y and Friends of Earth*, 30 F.C.C.2d 643 (1971) (ads about particular brand of gasoline); *Complaint by Anthony R. Martin-Trigona*, 19 F.C.C.2d 620 (1969) (ads about broadcast network and the free television industry).

²¹ *Friends of Earth*, 449 F.2d at 1170 (advertisements for high-powered cars).

agency had “great difficulties” in fashioning a coherent policy regarding counter-advertisements and found that “if anything, [the FCC] understated the problem.” *National Citizens Comm. for Broad. v. FCC*, 567 F.2d 1095, 1100 (D.C. Cir. 1977). Eventually, the Commission abandoned the Fairness Doctrine altogether after concluding it was inconsistent with First Amendment principles. *Complaint of Syracuse Peace Council*, 2 FCC Rcd. 5043 (1987), *aff’d*, *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989). As often is the case, however, these legacy regulations lingered on the FCC’s books long after their demise, and only very recently were deleted. *Amendment of Parts 1, 73 and 76 of the Commission’s Rules*, 26 FCC Rcd. 11422 (MMB Aug. 24, 2011).

It is rare that federal agencies voluntarily relinquish grants of authority, and it is highly doubtful that any such thing would occur here. If this Court were to reverse course and approve the FDA’s extraordinary rule, it certainly would become the model for the government’s next effort to control commercial speech to ensure consumers make the “right” choices. As this Court has already noted in this case, “when one considers the logical extension of the Government’s defense of its compelled graphic images to possible graphic labels that the Congress and the FDA might wish to someday impose on various food packages (*i.e.*, fast food and snack food items) and alcoholic beverage containers (from beer cans to champagne bottles),” the constitutional implications become clear. *R.J. Reynolds*, 2011 WL 5307391, at *10. So, too, does the ultimate outcome on the merits.

CONCLUSION

The FDA's *Graphic Warning Rule* represents an unjustified incursion into First Amendment protections for commercial speech. The FDA plays down free expression concerns by pointing out that the specific graphics set forth in the rule are like those required by Canada and other nations such as the United Kingdom and Australia, and basing arguments on those countries' experience with such warnings. Def.'s Sum. J. Mot. *passim*. Such an assurance is cold comfort, since none of those countries enjoys the same level of protections for free speech as are provided by our First Amendment, as this Court acknowledged. *E.g., R.J. Reynolds*, 2011 WL 5307391, at *7 nn.21, 26. This Court should continue to disallow the dilution of American freedoms by reference to the regulatory regimes of foreign governments. As the Court noted in granting the preliminary injunction: "while the Congress and the FDA might be genuinely challenged to craft tailored images that pass constitutional muster, that does not excuse them from striving to do so in the first instance," especially as "First Amendment jurisprudence in this area of compelled commercial speech should have *compelled* them to at least try." *Id.* at *8 n.28.

For that and all the foregoing reasons, the Court should grant Plaintiffs' motion for summary judgment, deny the government's motion for summary judgment, and permanently enjoin enforcement of the *Graphic Warnings Rule*.

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