

No. 12-521

IN THE
Supreme Court of the United States

AMERICAN SNUFF COMPANY, LLC, *ET AL.*,

Petitioners,

v.

UNITED STATES, *ET AL.*,

Respondents.

On Petition for Writ of *Certiorari* to the
United States Court of Appeals for the Sixth Circuit

**BRIEF OF *AMICI CURIAE* ASSOCIATION
OF NATIONAL ADVERTISERS, INC.,
AMERICAN ADVERTISING FEDERATION, AND
AMERICAN ASSOCIATION OF ADVERTISING
AGENCIES IN SUPPORT OF PETITIONERS**

ROBERT CORN-REVERE

Counsel of Record

RONALD G. LONDON

DAVIS WRIGHT TREMAINE LLP

1919 Pennsylvania Ave., NW

Suite 800

Washington, DC 20006

(202) 973-4200

bobcornrevere@dwt.com

Counsel for Amici Curiae

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF THE ARGUMENT.....	5
REASONS FOR GRANTING THE WRIT.....	6
CONCLUSION.....	11

TABLE OF AUTHORITIES

Cases

<i>44 Liquormart, Inc. v. Rhode Island</i> , 517 U.S. 484 (1986)	7
<i>Ashcroft v. ACLU</i> , 542 U.S. 656 (2004).....	9
<i>Bigelow v. Virginia</i> , 421 U.S. 809 (1975)	7
<i>Bolger v. Youngs Drug Prods. Corp.</i> , 463 U.S. 60 (1983)	8, 10
<i>Central Hudson Gas & Electric Corp. v. Public Service Commission</i> , 447 U.S. 557 (1980).....	4
<i>City of Cincinnati v. Discovery Network, Inc.</i> , 507 U.S. 410 (1993)	7
<i>Discount Tobacco City & Lottery, Inc. v. United States</i> , 674 F.3d 509 (6th Cir. 2012).....	1, 3, 4
<i>Edenfield v. Fane</i> , 507 U.S. 761 (1993).....	7
<i>Greater New Orleans Broadcasting Ass’n v. United States</i> , 527 U.S. 173 (1999).....	5, 7, 8
<i>Ibanez v. Florida Dep’t of Bus. & Prof’l Regulation</i> , 512 U.S. 136 (1994)	7
<i>Linmark Assocs., Inc. v. Township of Willingboro</i> , 431 U.S. 85 (1977)	10

<i>Lorillard Tobacco Co. v. Reilly</i> , 533 U.S. 525 (2001).....	8, 10
<i>R.J. Reynolds Tobacco Co. v. FDA</i> , 696 F.3d 1205 (D.C. Cir. 2012).....	1, 4, 9
<i>R.J. Reynolds Tobacco Co. v. FDA</i> , 823 F. Supp. 2d 36 (D.D.C. 2011).....	4, 9
<i>Rubin v. Coors Brewing Co.</i> , 514 U.S. 476 (1995)	7
<i>Sorrell v. IMS Health Inc.</i> , 131 S. Ct. 2653 (2011).....	5, 7, 8
<i>Thompson v. Western States Med. Ctr.</i> , 535 U.S. 357 (2002)	5, 7, 8
<i>Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council</i> , 425 U.S. 748 (1976).....	7
<i>Zauderer v. Office of Disciplinary Counsel</i> , 471 U.S. 626 (1985)	7
Statutes	
The Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009).....	2, 3, 5, 6, 8, 9, 10

Amici Curiae Association of National Advertisers, Inc., American Advertising Federation and American Association of Advertising Agencies (“Advertising Associations”) respectfully request that this Court grant the Petition for a Writ of *Certiorari* to the U.S. Court of Appeals for the Sixth Circuit (“Pet.”), of American Snuff Company, LLC, *et al.* (“Petitioners”), seeking review and ultimate reversal of parts of the decision upholding commercial speech restrictions in *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509 (6th Cir. 2012). Like the Petitioners, *amici* agree that certain issues should be held for later and potentially consolidated for consideration upon completion of the related case *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012).¹

INTEREST OF *AMICI CURIAE*

The Association of National Advertisers, Inc. (“ANA”) leads the marketing community by providing insights, collaboration and advocacy on behalf of a membership encompassing 450 companies with 9,000 brands that collectively spend over \$250 billion annually in U.S. marketing communications and advertising. ANA strives to communicate marketing best practices, lead industry initiatives, influence industry practices, manage industry affairs, and

¹ All parties have consented to this *amicus curiae* brief and letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *amici* here represent that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amici* and their counsel made a monetary contribution to preparation or submission of this brief.

advance, promote and protect advertisers and marketers. ANA also serves its members by advocating clear and coherent legal standards for advertising.

The American Advertising Federation (“AAF”), headquartered in Washington, D.C., is the trade association representing 50,000 professionals in the advertising industry. AAF’s 130 corporate members are advertisers, agencies, and media companies that constitute the nation’s leading brands and corporations.

The American Association of Advertising Agencies is the national trade association of the advertising agency business. The 1,196 member agency offices it serves in the U.S. employ 65,000 people, offer a wide range of marketing communications services, and place 80 percent of all national advertising. The management-oriented association helps its members build their businesses, and acts as the industry’s spokesman with government, media, and the public sector.

The core mission of the Advertising Associations includes safeguarding marketers’ First Amendment rights. The Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009) (“Tobacco Control Act”), the constitutionality of which Petitioners challenge, is arguably “the most comprehensive restraint in American history” on commercial speech about a lawful product. Pet. 22. Among other things, the Act (i) prohibits use of color and images in most tobacco advertising, (ii) forces full-color graphic warnings to predominate in tobacco ads and packages with inflammatory images

and provocative messages crafted by the Food and Drug Administration (“FDA”), and (iii) prohibits tobacco-branded promotional items, free gifts with tobacco purchases, and brand-name sponsorship of artistic, athletic, musical, and other social/cultural events. Pub. L. No. 111-31, §§ 101(b), 102(a)(2), 201(a), 204(a), 205(a). *See Discount Tobacco*, 674 F.3d at 520-21. The Tobacco Control Act also limits true statements about modified risk tobacco products unless prior, affirmative FDA approval is obtained. Pub. L. No. 111-31, § 101(b).

These restrictions and requirements strike at the heart of advertiser rights to convey truthful information about legal products to adults. Moreover, the Tobacco Control Act could serve as a template for regulations aimed at disfavored products that would impair commercial speech far beyond tobacco-related issues, via harsh restrictions that conflict with core First Amendment principles painstakingly developed over the last several decades.

Accordingly, the Advertising Associations entered as *amici* in both the district and circuit courts below, as well as before the district and circuit courts in the related *R.J. Reynolds* case that examined the FDA’s selection and imposition of the graphic warnings. The Advertising Associations are participating in the Tobacco Control Act cases because the important issues at stake are not limited to tobacco, but rather affect a wide range of products and services about which some may believe that the government knows “best,” a concern also judicially voiced from early on in the FDA graphic-warnings case. *R.J. Reynolds*

Tobacco Co. v. FDA, 823 F. Supp. 2d 36, 47-48, 52 (D.D.C. 2011).

The decision below in *Discount Tobacco* denied Petitioners' facial constitutional challenges to the Act's advertising and marketing restrictions, except for those involving the color and image ban for ads and displays, and the ban on distributing free gifts with purchase. 674 F.3d at 523-69. Otherwise, applying the test for commercial speech in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), the court upheld the marketing limits as well as the concept that FDA-crafted graphic warnings occupying the top 30 to 50 percent of tobacco packages and top 20 percent of ads are no more extensive than necessary to advance a substantial government interest, 674 F.3d at 523-69, though the court did not pass on the specific warnings FDA adopted.

Instead, in a separate case that raised an as-applied First Amendment challenge to FDA rules, the U.S. Court of Appeals for the D.C. Circuit invalidated as unconstitutional the specific graphics the FDA had adopted. *R.J. Reynolds*, 696 F.3d at 1211-22. The FDA filed a petition for rehearing in that case, which remains pending. Appellant's Pet. for Reh'g and Reh'g En Banc, *R.J. Reynolds*, No. 12-5063, filed Oct. 9, 2012. The Petition here explains how the Sixth Circuit and D.C. Circuit intertwine – and are at constitutional odds – with each other. Pet. 22, 25-26.

SUMMARY OF THE ARGUMENT

The Sixth Circuit’s decision upholding most of the Tobacco Control Act’s advertising restrictions raises important questions about the government’s ability to regulate commercial speech. Review is necessary to reaffirm that power to prohibit or regulate certain conduct does not include power to prohibit or regulate speech about it, *Greater New Orleans Broadcasting Ass’n v. United States*, 527 U.S. 173, 193 (1999), that even when pursuing important interests “regulating speech must be a last – not first – resort,” *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 373 (2002), and that the government may not regulate private speech in hopes of tilting public debate in a preferred direction. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2671-72 (2011). This Court should make clear that it is never a legitimate governmental purpose to seek to control public discourse for fear people might make bad choices.

Review also is critical because regulation such as that embodied by the Tobacco Control Act often begins with such heavily regulated or controversial products, but quickly spreads. If the government is permitted to deputize tobacco companies to deliver its message through their product packaging and ads, there is no reason it would not attempt do the same with other products. A paternalistic rule that forces companies to devote space on their packaging and in ads for government-mandated images that “inflammate” and attempt to dissuade consumers from purchasing lawful products leaves no product safe from such regulation.

The Tobacco Control Act's banishment of tobacco purveyors from the arenas of branded promotional items and brand name sponsorship of artistic, athletic, and other social events also reflects an expansive view of government authority to decide what commercial speech is "unfit" for children. This Court has never upheld such far-reaching restrictions on commercial speech, based simply on a chance that young persons may come across an ad or mere logo. Review is necessary to prevent such overreaching from gaining a foothold, and to confirm that existing commercial speech jurisprudence leaves no room for reduced scrutiny of commercial-speech restrictions involving lawful products disfavored by the government.

REASONS FOR GRANTING THE WRIT

Amici Advertising Associations write to urge this Court to grant the Petition for *Certiorari* and review (and reverse) the Sixth Circuit's decision upholding the Tobacco Control Act's advertising and marketing provisions. Review is warranted because the Act's numerous harsh marketing rules directly repudiate core commercial speech principles established by this Court. Though these provisions of the Act restrict tobacco marketing, the *amici* Advertising Associations' constitutional focus is not cigarettes or other tobacco products. Rather, it involves this Court's commitment to the First Amendment, and particularly its commercial speech doctrine's essential underpinnings.

Over three decades ago, the Court acknowledged a "consumer's interest in the free flow of commercial

information ... may be as keen, if not keener by far, than his interest in the [] most urgent political debate.” *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 763 (1976). *See also Bigelow v. Virginia*, 421 U.S. 809, 818-20 (1975). Commercial speech jurisprudence evolved steadily, and since *Bigelow* and *Virginia Board*, has conferred significantly increased protection. The decision below not only conflicts with precedents of its sister Circuits as Petitioners note, Pet. 25-28, 31-32, 39-40, it stands as a direct threat to progress made in the constitutional protection of commercial speech.

Over the decades, the Court has invalidated: (1) prohibitions on illustrations in attorney ads, *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 647-49 (1985); (2) regulation of commercial newsracks, *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 430-31 (1993); (3) a ban on CPA in-person solicitations, *Edenfield v. Fane*, 507 U.S. 761, 777 (1993); (4) a ban on “CPA” and “CFP” in law firm stationery, *Ibanez v. Florida Dep’t of Bus. & Prof’l Regulation*, 512 U.S. 136 (1994); (5) restrictions on alcohol content on beer labels, *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 491 (1995); (6) a ban on advertising alcohol prices, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1986); (7) a ban on broadcasting casino ads, *Greater New Orleans Broadcasting*, 527 U.S. 173; (8) limits on advertising drug-compounding practices, *Western States Med. Ctr.*, 535 U.S. at 377; and (9) a prohibition on the use of prescriber data by pharmaceutical representatives to promote specific prescription drugs. *Sorrell*, 131 S. Ct. at 2671-72. Notably,

and most relevant here, the Court also has invalidated restrictions on tobacco advertising, stressing that “so long as sale and use of tobacco is lawful for adults, [there is] a protected interest in communication about it [that] adult consumers have an interest in receiving.” *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 571 (2001). *See also Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983).

The Sixth Circuit’s decision upholding most of the Tobacco Control Act’s restrictions raises important questions about the government’s ability to regulate commercial speech. Key principles at stake include the precept that “the power to prohibit or to regulate particular conduct does not necessarily include the power to prohibit or regulate speech about that conduct,” *Greater New Orleans*, 527 U.S. at 193, and that, even when pursuing important interests, “regulating speech must be a last – not first – resort.” *Western States Med. Ctr.*, 535 U.S. at 373. This Court’s review is necessary to reaffirm these principles and to make clear that any attempt to control public discourse for fear people might otherwise make bad choices is not even a legitimate governmental purpose.

The government has numerous non-regulatory means at its disposal to persuade the public to change its ways. This Court accordingly has held that the state may not regulate *private* speech “in order to tilt public debate in a preferred direction.” *Sorrell*, 131 S. Ct. at 2671-72. But if “current doctrine is sufficiently malleable that it even arguably sanctions” the decision below, Pet. 42, this Court’s review is needed to clarify this area, and to

keep the “starch’ in our constitutional standards” that apply to commercial speech. *Ashcroft v. ACLU*, 542 U.S. 656, 670 (2004).

Review also is critical because such regulation often begins with heavily regulated or controversial products, like tobacco, but quickly spreads. If the government can deputize tobacco companies through their product packaging and ads to deliver its message, there is no reason it could not do so for other products as well. Both history and the “logical extension” of the government’s effort here show it will not hesitate to do so. *R.J. Reynolds*, 823 F. Supp. 2d at 52.

A rule that forces companies to devote space on their packaging and in ads for government-mandated “inflammatory images” that attempt to dissuade consumers from purchasing lawful products, *R.J. Reynolds*, 696 F.3d at 1216-17, leaves no product safe from such speech regulations. “[W]hen 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*, 823 F. Supp. 2d at 52. Once such paternalistic notions gain a legal foothold, demands for similar requirements in other contexts will soon follow.

The Sixth Circuit’s affirmation of the Tobacco Control Act’s wholesale banishment of tobacco

purveyors from the arena of branded promotional items and brand name sponsorship of artistic, athletic, and other social events also reflects a wildly expansive view of government authority to decide what commercial speech is “unfit” for children. While these provisions purport to be child-protective, they dictate the level of tobacco-related expression permissible for all consumers, and their outright prohibitions – in all contexts, including adult-only venues – are far from narrowly tailored. *Lorillard*, 533 U.S. at 563-64.

This Court has never upheld such far-reaching restrictions on commercial speech based simply on a chance that young persons may come across an ad, or even a mere logo.² The Tobacco Control Act’s marketing provisions are so sweeping, and so little effort was made to tailor them to serve interests in protecting minors, that they intrude far too deeply on protected commercial speech. This Court’s review is necessary to prevent such overreaching from gaining traction. Review also is needed to confirm that its existing commercial speech jurisprudence leaves no room for “the Sixth Circuit’s deferential review” that “effectively establishes a reduced level of scrutiny for commercial-speech restrictions

² See, e.g., *Lorillard*, 533 U.S. at 561-66; *Bolger*, 463 U.S. at 73. Indeed, even where regulations target but one channel of communication, ostensibly leaving many others open, the Court still has invalidated commercial speech restrictions as too extreme. E.g., *Lorillard*, 533 U.S. at 563-65 (outdoor ads and signage); *Bolger*, 463 U.S. at 69 n.18, 74-75 (direct mail); *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 93 (1977) (residential for-sale signs).

concerning lawful products that the Government disfavors.” Pet. 24.

CONCLUSION

Consistent, coherent First Amendment protection of truthful commercial speech is essential to a robust economy, and in particular to the *amici* Advertising Associations and their members, who rely upon the protections of the First Amendment every day in conducting their businesses nationwide. For the foregoing reasons, *amici* Advertising Associations respectfully submit that the Court should grant the Petition for a Writ of *Certiorari* in this matter, as Petitioners request.

Respectfully submitted,

ROBERT CORN-REVERE

Counsel of Record

RONALD G. LONDON

DAVIS WRIGHT TREMAINE LLP

1919 Pennsylvania Ave., NW

Suite 800

Washington, DC 20006

(202) 973-4200

bobcornrevere@dwt.com

Counsel for Amici Curiae

Association of National

Advertisers, Inc.

American Advertising

Federation

American Association of

Advertising Agencies

November 26, 2012