No. 24-189

IN THE

Supreme Court of the United States

R.J. REYNOLDS 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

BRIEF OF ASSOCIATION OF NATIONAL ADVERTISERS AND SUMMUS 2, LLC AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae include the Association of National Advertisers, Inc. ("ANA") and Summus 2, LLC ("Summus").

The mission of the ANA is to drive growth for marketing professionals, brands and businesses, the industry, and humanity. The ANA serves the marketing needs of 20,000 brands, with a membership consisting of U.S. and international companies that include client-side marketers, nonprofits, fundraisers, and marketing solutions providers (data science and technology companies, ad agencies, publishers, media companies, suppliers, and vendors). The ANA serves, educates, and advocates for more than 50,000 industry members that collectively invest more than $400 billion in marketing and advertising annually. The ANA advances the interests of marketers and protects the well-being of the marketing community, while also serving its members by advocating for clear and coherent legal standards for advertising.

Summus, doing business as Summus Outdoor, is a sign management company with over 50 years of combined history managing the display of commercial messages on signs in multiple cities across the United States. Throughout decades of experience in operating signs in compliance with municipal codes, managing government requirements for messages that must be included, and defending advertising

[1] Both parties received notice of *amici curiae*'s intent to file this brief at least 10 days before its filing. No counsel for a party authored this brief, in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

clients against various types of purported infractions or burdens, Summus has practical knowledge regarding the proliferation and regulation of commercial speech. Summus has also suffered the effects of inconsistent and ideologically motivated enforcement of "acceptable" speech and government-mandated messaging requirements.

Amici's interest here focuses on preserving robust protections afforded advertising by the First Amendment. In particular, *amici* have a strong concern in safeguarding the longstanding vitality of constitutional protections for commercial speech. *See Cent. Hudson Gas & Elec. Co. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980). As this Court has recognized, "[a] consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011) (citation and internal quotation marks omitted). The commercial speech doctrine has steadily evolved, and since it was first acknowledged in *Bigelow v. Virginia*, 421 U.S. 809 (1975) and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), the protections afforded such expression have increased significantly. *Amici* in the present context seek to ensure courts remain vigilant in preventing overly burdensome compelled disclosures and government efforts to co-opt private property to carry its preferred messages.

INTRODUCTION

In 2009, Congress put the Food and Drug Administration ("FDA") into a bind. Despite this Court's clear guardrails proscribing the narrow realm of permissible compelled speech, Congress enacted legislation requiring the agency to promulgate rules that mandate massive "graphic" warning labels to dominate 50 percent of all cigarette packaging and 20 percent of all advertising. 15 U.S.C. § 1333(a)(2), (b)(2), (d). Unsurprisingly, the FDA's initial attempt was struck down for violating the First Amendment. *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 696 F.3d 1205 (D.C. Cir. 2012) ("*Reynolds I*"). Afterwards, the agency literally went back to the drawing board to create the new *Graphic Warnings Rule* at issue here. 21 C.F.R. pt. 1141 (the "*Rule*"). Although a district court held that the *Rule* merely repeated earlier problems identified by the D.C. Circuit, the Fifth Circuit reversed and upheld the validity of the FDA's compelled speech. *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 96 F.4th 863 (5th Cir. 2024) ("*Reynolds II*").

Beyond creating a circuit split, the Fifth Circuit's opinion undermines this Court's First Amendment jurisprudence and fundamental rights. Taken to its logical end, the ruling would mean that the FDA—as well as every other federal agency and state, county, or municipal government in the country—can routinely force private property holders to carry the government's messages. For if the Circuit's reasoning is upheld and disclosures are not subject to well-established limiting principles, packaging and advertisements for ***any and all*** goods or services can

be co-opted for compelled government speech—at least so long as the government claims it will "promote greater public understanding" of some risk or concern.

As this Court recognized when it spelled out the limitations on government authority in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), the government's ability to commandeer private property presents as great a threat as outright censorship: "involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence." *Id.* at 650 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943)); *see also Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796-97 (1988) ("[I]n the context of protected speech," there is no difference of "constitutional significance" "between compelled speech and compelled silence." "First Amendment guarantees [of] 'freedom of speech' … necessarily compris[e] the decision of both what to say and what *not* to say."). *Id.*

For the reasons discussed below, *amici* urge the Court to grant the petition for writ of certiorari to reaffirm that government authority to compel speech is narrowly limited and to reject the Fifth Circuit's unsupported opinion that would effectively allow governments to sidestep this Court's established jurisprudence on commercial speech. Otherwise, all advertisers and sign-owners like *amici* risk having half or more of their private property appropriated for government messaging—even when it conflicts with their own speech and forces them to adopt messages with which they disagree and that harm their businesses.

SUMMARY OF ARGUMENT

First, this Court should grant certiorari because the Fifth Circuit's opinion creates a lesser tier of scrutiny that disregards the requirements of *Central Hudson* and the basis for this Court's precedents concerning government regulation of commercial speech. In the Fifth Circuit's view, government powers to restrict or mandate commercial speech apparently have nothing to do with preventing or addressing commercial harms such as fraudulent or misleading advertising. The Fifth Circuit's opinion is fundamentally at odds with this Court's case law, however, as it would allow largely unfettered government power to co-opt businesses' speech and private property for government-dictated messages.

Second, even if *Zauderer* were to be viewed as creating an exception or different level of scrutiny, rather than as a part of the Court's commercial speech jurisprudence, the Court should grant certiorari to clarify the requirements under *Zauderer*. The Fifth Circuit's (and other courts') reduced restrictions on government-compelled speech have watered down the constraints and limits that *Zauderer* established by disregarding its intended purpose of countering potentially deceptive speech. If government authorities need only show that they have some interest in informing the public about some perceived concern in order to compel disclosures—even ones that are inflammatory or factually inaccurate or misleading, as in this case—then the exception swallows the rule.

ARGUMENT

I. THE GOVERNMENT MUST MEET A HEIGHTENED BURDEN TO FORCE PRIVATE PARTIES TO CONVEY ITS MESSAGES

As an initial matter, the Court should grant certiorari because the Fifth Circuit's application of a watered-down version of *Zauderer* contravenes this Court's historical approach to regulations on commercial speech. Indeed, after affirming that this Court established the intermediate scrutiny tier to evaluate commercial speech issues in *Central Hudson*, the Fifth Circuit makes the conclusory claim that this Court "created a carve-out to *Central Hudson*'s rule for government-*compelled* commercial speech" with an even lesser burden. *See Reynolds II*, 96 F.4th at 876 (emphasis in original). But as several justices have observed, this analytical leap is not warranted; it effectively strips down constitutional protections and ignores the reasons the Court has carefully applied lesser scrutiny for commercial speech.

It is black letter law that "speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another." *Va. State Bd.*, 425 U.S. at 761; *In re R.M.J.*, 455 U.S. 191, 203 (1982) ("Truthful advertising related to lawful activities is entitled to the protections of the First Amendment."). The governmental "interest in protecting consumers from 'commercial harms' … provides 'the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech.'" *44 Liquormart, Inc. v.*

Rhode Island, 517 U.S. 484, 502 (1996) (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426 (1993)). The reasoning for this Court's approach is straightforward: the First Amendment does not protect inherently fraudulent or misleading speech about products that could harm the consuming public. *See Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978); *Cent. Hudson*, 447 U.S. at 563-64. Therefore, to justify laws regulating commercial speech, the government must (i) identify a substantial governmental interest (such as the need to prevent possible deception), and (ii) demonstrate a sufficient fit between the law's requirements and that substantial governmental interest. *Id.* at 566.

Since those early days, the clear trajectory of the Court's cases is to provide greater protection for commercial speech, not less.[2] In so doing, "[t]he

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[2] In the five decades since *Virginia State Board of Pharmacy*, the Supreme Court has invalidated: (1) prohibitions on use of illustrations in attorney ads, *Zauderer*, 471 U.S. at 647-49; (2) a city ordinance regulating placement of commercial news racks, *Discovery Network*, 507 U.S. at 430-31; (3) a state ban on in-person solicitation by CPAs, *Edenfield v. Fane*, 507 U.S. 761, 776-77 (1993); (4) a state ban on using "CPA" and "CFP" on law firm stationery, *Ibanez v. Fla. Dep't of Bus. & Pro. Regul.*, 512 U.S. 136, 148-49 (1994); (5) a federal prohibition on disclosure of alcohol content on beer labels, *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 491 (1995); (6) a state ban on advertising alcohol prices, *44 Liquormart*, 517 U.S. at 503-05; (7) a federal ban on broadcasting casino ads, *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 195-96 (1999); (8) federal limits on advertising drug compounding practices, *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 377 (2002); (9) a speaker-based state restriction on data mining, *Sorrell*, 564 U.S. at 567-68; (10) a federal law restricting disparaging trademarks, *Matal v. Tam*, 582 U.S. 218, 247 (2017); (11) a state law requiring disclosure of

mere fact that messages propose commercial transactions does not in and of itself dictate the constitutional analysis that should apply to decisions to suppress them." *44 Liquormart*, 517 U.S. at 501 (STEVENS, J., plurality opinion). Regardless of whether expression is commercial or political, the government "may not burden the speech of others in order to tilt public debate," and any such regulation is subject to "heightened scrutiny." *Sorrell*, 564 U.S. at 571, 578-79. Notably, this Court has found in several cases that "the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied." *Id*. at 571. The Court's recent decision in *303 Creative* underscores the point. Rejecting arguments to uphold Colorado's compelled speech on the basis that the website designer was merely a commercial business advertising its services, the Court emphasized that "none of that makes a difference." 600 U.S. at 594.[3]

abortion-related information, *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 768-69 (2018); and (12) a state law that "seeks to force an individual to speak in ways that align with [state] views" but contradicts an individual's religious views, *303 Creative LLC v. Elenis*, 600 U.S. 570, 602-03 (2023).

[3] The Court has not held that lesser standards apply simply because government regulations target commercial businesses or advertising. To the contrary, for business representations and ads that are not deceptive or misleading, the Court has applied traditional, more exacting scrutiny. *See*, *e.g.*, *Becerra*, 585 U.S. at 768-69, 778 (state-mandated disclosures at crisis pregnancy centers and in advertising not subject to *Zauderer* and failed even under intermediate scrutiny); *Riley*, 487 U.S. at 796-97 (state-compelled disclosures by commercial fundraisers for charities were content-based and subject to exacting scrutiny; "we apply our test for fully protected expression"); *see also*

As Justice Blackmun observed in *Central Hudson*, the Court has "never held that commercial speech may be suppressed in order to further the State's interest in discouraging purchases of the underlying product that is advertised." 447 U.S. at 574-75 (BLACKMUN, J., concurring in judgment). Instead, "[p]ermissible restraints on commercial speech have been limited to measures designed to protect consumers from fraudulent, misleading, or

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Ibanez, 512 U.S. at 144-47 (rejecting application of *Zauderer* where state accountancy board failed to show that use of CPA and CFP designations were deceptive in any way).

The "graphic warnings" compelled by the FDA's *Rule* cannot be considered commercial speech under any traditional definition. The compelled disclosures are not advertisements proposing a commercial transaction; they do not promote purchase of a product (just the opposite); and manufacturers have no economic motivation in their content. *See United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-67 (1983). To be sure, the FDA has dictated that its messaging be attached to ads and packaging. But that by itself cannot transform the labels and notices themselves into commercial speech so as to allow the government to invoke lesser scrutiny. *See X Corp. v. Bonta*, — F.4th —, 2024 WL 4033063, at *8-9 (9th Cir. Sept. 4, 2024) (state-required reports about content and content-moderation on social media websites were not commercial speech, and statutory requirements were therefore subject to strict scrutiny).

Thus, *amici* also urge that the *Rule* should be judged under a strict scrutiny standard because it requires speech-related disclosures based on content and viewpoint distinctions ***about*** a product. *See Reed v. Town of Gilbert*, 576 U.S. 155, 168-69 (2015). Moreover, the *Rule* purports to address all forms of advertisements by cigarette manufacturers, distributors, or retailers (*see* 85 Fed. Reg. 15638-01; 21 C.F.R. § 1141.10), regardless of whether the "advertisement" does more than propose a transaction. *See Va. Pharmacy Bd.*, 425 U.S. at 762; *Riley*, 487 U.S. at 796.

coercive sales techniques." *Id*. Given that the government "may not place an absolute prohibition on certain types of *potentially* misleading information," the Court has admonished "that the remedy in the first instance is not necessarily a prohibition but preferably a requirement of disclaimers or explanation." *See R.M.J.*, 455 U.S. at 203 (citation omitted; emphasis added). In *Zauderer*, the Court confirmed that such disclosure requirements are tethered to the underlying reason for lesser protections on commercial speech: they must be purely factual, uncontroversial, not unduly burdensome, and "reasonably related to the State's interest in preventing deception of consumers." 471 U.S. at 651.

Within this historical framework, then, it is clear that this "Court's decision in *Zauderer* applied the *Central Hudson* 'tailored in a reasonable manner' requirement to compelled commercial disclosures" and "is best read simply as an application of *Central Hudson,* not a different test altogether." *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 33 (D.C. Cir. 2014) (KAVANAUGH, J., concurring in judgment). Specifically, if the government identifies a "substantial interest" in preventing inherently or potentially deceptive advertising (*Central Hudson* step 1), a regulation may be permissibly tailored to compel a purely factual and uncontroversial message to protect consumers that is not overly burdensome (*Central Hudson* step 2). Therefore, accepting *Zauderer*'s admonition that "[c]ommercial speech that is not false or deceptive and does not concern unlawful activities … may be restricted only in the service of a substantial governmental interest," *see* 471 U.S. at

638, a proper reading of this Court's commercial speech jurisprudence would recognize that combatting potentially false or deceptive speech *is* the substantial government interest. Because "[f]or *Central Hudson* purposes, … it is plainly not enough for the Government to say simply that it has a substantial interest in giving consumers information. After all, that would be true of any and all disclosure requirements. That circular formulation would drain the *Central Hudson* test of any meaning in the context of compelled commercial disclosures." *Am. Meat*, 760 F.3d at 31 (KAVANAUGH, J., concurring in judgment).

In this case, the Fifth Circuit believed that *Zauderer* was a "carve-out" to those longstanding principles of commercial speech. *Reynolds II*, 96 F.4th at 876. By "[d]istilling" later precedent, the opinion thus created a form of rational basis review, whereby a compelled disclosure need only be tied to "a legitimate state interest," and tailored only to the extent that it is factual, uncontroversial, and not unduly burdensome. *Id.* at 877. But this formulation ignores the Court's protections for commercial speech that does not make ***inherently*** misleading claims. *See Milavetz*, *Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 255 (2010) (THOMAS, J., concurring in part and concurring in judgment) ("Importantly, however, *Zauderer*'s advertisement was found to be misleading on its face."). Similar versions of this reductionist formulation have been applied by other circuits. *See*, *e.g.*, *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 310 n.8 (1st Cir. 2005); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001); *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d

509, 556 (6th Cir. 2012); *CTIA—The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832, 842-44 (9th Cir. 2019).[4] Because this progressive creeping expansion of *Zauderer* threatens dire implications for protecting all advertising and commercial speech, the Court should take this opportunity to clarify and "reconsider *Zauderer* and its progeny." *See Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2413 (2024) (THOMAS, J., concurring in judgment).

[4] These rulings primarily rely on the Court's observations in *Zauderer* about "material differences between disclosure requirements and outright prohibitions on speech." 471 U.S. at 650; *see also id.* at 652 n.14. But the Fifth Circuit's and other courts' readings of *Zauderer* ignore the context and the holding of that case. As the *Zauderer* Court wrote: "We do not suggest that disclosure requirements do not implicate the advertiser's First Amendment rights at all." *Id.* at 651. Rather, the Court held on the facts of the case that "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Id.* *Zauderer* has been misinterpreted to give governments near *carte blanche* powers to compel messages in advertising whenever authorities think there is a public interest to do so. Moreover, the circuits' efforts to create and apply lesser "*Zauderer* review" have been strained and muddied. *E.g.*, *Nat'l Ass'n of Wheat Growers v. Bonta*, 85 F.4th 1263, 1275-76 (9th Cir. 2023).

II. MERELY PURPORTING TO PROMOTE "PUBLIC UNDERSTANDING" CANNOT BE A SUFFICIENT GOVERNMENT INTEREST, AS IT WOULD EVISCERATE PROTECTIONS AGAINST BURDENSOME, CONTROVERSIAL COMPELLED MESSAGES

Even if *Zauderer* is treated as a separate standard untethered to the *Central Hudson* analysis, the Fifth Circuit's ruling also waters down that standard in an impermissible manner. By replacing *Zauderer*'s anti-deception interest with a free-floating requirement that the government need only show "an interest in 'greater public understanding,'" *Reynolds II*, 96 F.4th at 882; *see also id.* at 885 n.71, the Circuit has signed off on a regime that would permit compelled disclosures under countless circumstances. Because this new application of "*Zauderer* scrutiny" is inconsistent with this Court's case law and would eviscerate protections against compelled speech in the commercial setting, the Court should grant certiorari to address this fundamental issue as well.

Contrary to the Fifth Circuit's position here,[5] this Court has never applied *Zauderer* outside of the context of misleading or deceptive commercial speech. Nor has the Court ever suggested such application would be proper.[6] In *Ibanez*, for

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[5] As noted, other circuits have expressed similar views. *See*, *supra* note 4, at 11-12.

[6] Several justices have noted that "*Zauderer* carries no authority for a mandate unrelated to the interest in avoiding misleading or incomplete commercial messages." *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 491 (1997)

example, it refused to expand the scope of *Zauderer* based on state regulators' contention that an attorney's true disclosures might be "potentially misleading": "If … protections afforded commercial speech are to retain their force, we cannot allow rote invocation of the words 'potentially misleading' to supplant the [State's] burden." *Ibanez*, 512 U.S. at 146 (internal quotation marks and citation omitted). In *United States v. United Foods, Inc.*, the Court declined to apply *Zauderer* where there was "no suggestion … the mandatory assessments imposed to require one group of private persons to pay for speech by others are somehow *necessary to make [ads] nonmisleading*." 533 U.S. 405, 416 (2001) (emphasis added); *see also Milavetz*, 559 U.S. at 249 (applying *Zauderer* to federal statute requiring disclosures by debt relief agencies because the statute was "directed at *misleading* commercial speech").

Restrictions on commercial speech or requirements for forced disclosures are only permissible when the particular speech of a business or advertiser at issue is deceptive or misleading and could therefore harm the consuming public. *See Milavetz*, 559 U.S. at 257 (THOMAS, J., concurring in part and concurring in judgment) ("*Zauderer* does not stand for the proposition that the government can constitutionally compel the use of a scripted disclaimer in any circumstance in which its interest in preventing consumer deception

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(SOUTER, J., joined by REHNQUIST, C.J., and SCALIA and THOMAS, JJ., dissenting); *see also Milavetz*, 559 U.S. at 257 (THOMAS, J., concurring).

might plausibly be at stake"; instead the government must show that the particular advertising is inherently likely to deceive); *Reynolds I*, 696 F.3d at 1215 ("FDA does not frame this rule as a remedial measure designed to counteract specific deceptive claims made by the Companies.") (emphasis omitted). That a customer might not be fully versed about a product or possible consequences of its use does not make every advertisement about the product inherently or even potentially deceptive.

Most importantly, reading *Zauderer* to reduce the government's burden—*i.e.*, to suggest that it need not establish that ad representations are potentially deceptive , but only that it seeks to "promot[e] public understanding" or encourage consumers to make "an informed choice"—would eviscerate protections against compelled speech in the realm of commercial speech. *See Am. Meat*, 760 F.3d at 31-32 (KAVANAUGH, J., concurring). Allowing such a *de minimis* showing could apply to ***any*** lawful product or service that a government contends consumers may not understand as the government believes they should, or put more simply, anytime the government believes it knows best. Indeed, there would be no reason the FDA could not impose similar notice requirements for any number of products. And, likewise, all federal agencies as well as every state, county, and municipal government in the United States would be free to do the same.[7] Without strict and reasoned

[7] As Judge Brown warned in *American Meat*: "[T]he victors today will be the victims tomorrow, because the standard created by this case will virtually ensure the producers supporting this

application of *Zauderer*'s principles and limits, there is virtually no logical stopping point for disclosure requirements for any product or service that government authorities in one jurisdiction or another might conjure up.

The Fifth Circuit's interpretation of *Zauderer* allows that a government may require speech as to which not only does a business disagree, but for which there is data or scientific information contradicting the government's view. As the D.C. Circuit explained in the context of dietary disclosures, there are numerous perils when "promoting" public health. Scientific understandings evolve and "propositions once regarded as factual and uncontroversial may turn out to be something quite different." *Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 528 n.27 (D.C. Cir. 2015) (comparing a 1977 ruling requiring disclosure about cholesterol risk of eating eggs with a 2018 USDA report confirming no risk).[8] It is one thing for

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labeling regime will one day be saddled with objectionable disclosure requirements …. Only the fertile imaginations of activists will limit what disclosures successful efforts from … as-yet-unknown lobbies may compel." 760 F.3d at 52 (BROWN, J., dissenting); *see also id.* at 31-32 (KAVANAUGH, J., concurring) ("Not surprisingly, governments (federal, state, and local) would love to have such a free pass to spread their preferred messages on the backs of others.").

[8] *See* Peter Whoriskey, *Congress: We need to review the Dietary Guidelines for Americans*, WASH. POST (Dec. 18, 2015), at A13 (noting "[n]utrition science has been in turmoil in recent years," citing "disagreements over the positions [of] the Dietary Guidelines … on salt, whole milk and saturated fat, cholesterol, [and] the health implications of skipping breakfast"); https://www.washingtonpost.com/news/wonk/wp/2015/12/18/congress-we-need-to-review-the-dietary-guidelines-for-americans/. Consider too the oft-shifting guidance from public health officials

government to change its mind about messages it wants to convey, but it is quite another to force private parties to convey fluctuating messages when the government demands or when political majorities shift and new governments make different demands.

This Court has also affirmed that it is "incompatible with the First Amendment" to punish or restrict speech based on concerns that people will make bad decisions or to promote "what the government perceives to be their own good." *Sorrell*, 564 U.S. at 577 (quoting *44 Liquormart*, 517 U.S. at 503). "Nothing in *Zauderer* suggests … that the State is equally free to require corporations to carry the messages of third parties, where the messages themselves are biased against or are expressly contrary to the corporation's views." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 15-16 n.12 (1986). Again, quite simply, government bodies "may not burden the speech of others in order to tilt public debate." *Sorrell*, 564 U.S. at 578-79; *see 303 Creative*, 600 U.S. at 588-92. The Fifth Circuit's opinion—which puts a stamp of approval on the FDA's burdensome disclosures—does exactly that. Under the Fifth Circuit's reasoning, there is no limit to the number of disclosures, size of graphic images meant to dissuade, or businesses that could be subject to such requirements.

Under the Fifth Circuit's logic, advertisements for a product or service disfavored by any government from San Francisco to Orlando (or anywhere in

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about the applicable science and recommended actions during the COVID-19 pandemic.

between) become fair game for mandatory warnings, no matter how controversial or unsettled the facts, the science, or public views may be. *Reynolds I*, 696 F.3d at 1219 ("FDA's reliance on … questionable social science is unsurprising when we consider the raw data regarding smoking rates in countries that have enacted graphic warnings."). Every product or technology that some government body believes might have "bad" effects would be susceptible to having its marketing hijacked to become a platform for government hectoring.

These concerns are not hypothetical or hyperbolic. The FDA's *Rule* and the Fifth Circuit's holding in this case, if not reined in, would transcend cigarette ads or packaging and could be extended to ***any*** lawful product or service with which a government disagrees or about which it has something it wants to say. In cases in other states, for example, government authorities have sought to mandate disclosures about sugared soft drinks, *Am. Beverage Ass'n v. City & Cnty. of San Francisco*, 916 F.3d 749 (9th Cir. 2019), and cell phone electronic transmissions (despite admitting there was no proof of harm from cell phone signals), *CTIA—The Wireless Ass'n v. City & Cnty. of San Francisco*, 827 F. Supp. 2d 1054, 1058 (N.D. Cal. 2011), *aff'd*, 494 F. App'x 752 (9th Cir. 2012). If mere asserted government concerns and invocation of "public interest" are enough to support compelled speech in commerce and advertising, governments could dictate messaging disclosures for all types of products, regardless that nothing about the advertising, packaging, or representations about the products are misleading in any way.

For example, federal agencies (in some administrations) and some state legislatures might require gun sellers to provide graphic disclosures about mass shootings and accidental deaths from firearms that feature dead children.[9] Any product that can be misused (like alcohol or prescription medications) could similarly be subject to requirements for "informational" disclosures about potential harms, whether related to legitimate health concerns or meant to scare consumers not to use the product.[10] Governments could impose disclosure requirements to convey their views about hotly debated issues such as climate change (*e.g.*, in ads for gas-powered cars or heating oil), vaccines (requiring statements of views of those who oppose vaccines), social media or other online content (demanding disclosures of views about potential harm from use of social media),[11] or any of a host of topics that governments or politicians deem appropriate in the

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[9] U.S. Surgeon General's Advisory, *Firearm Violence: A Public Health Crisis in America* (June 25, 2024), https://www.hhs.gov/surgeongeneral/priorities/firearm-violence/index.html; *Firearm Warning Labels Approved by Board*, WESTCHESTER COUNTY BOARD OF LEGISLATORS (May 24, 2022), https://westchesterlegislators.com/latest-news/3232-firearm-warning-labels-approved-by-board.

[10] *Experts call for updated warnings on alcohol containers*, HARVARD SCHOOL OF PUBLIC HEALTH (Sept. 15, 2022), https://www.hsph.harvard.edu/news/hsph-in-the-news/experts-call-for-updated-warnings-on-alcohol-containers/.

[11] *See* Tabitha Burbidge, *42 AGs Back Call For Social Media Warning Label Law*, LAW 360 (Sept. 10, 2024), https://www.law360.com/california/articles/1878224/42-ags-back-call-for-social-media-warning-label-law.

"public interest."[12] Indeed, a business could be subjected to requirements for multiple conflicting disclosures if a state or local government disagrees with a disclosure required by a federal agency (or vice versa).

Fortunately, this Court's jurisprudence affirms that the First Amendment does not allow private parties' speech or their property used for speech to be co-opted whenever any government body or politician seeks to advance a cause *du jour*.

CONCLUSION

The Fifth Circuit's opinion ignores and undermines this Court's precedents and instead provides a broad imprimatur for government-compelled speech. The Court should grant certiorari to prevent such extensive erosion of First Amendment protections.

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[12] Indeed, the Fifth Circuit's position could allow regulators or politicians in one state to compel disclosures by industries from other states, even when contrary to views of the businesses' home states. *See*, *e.g.*, Sonal Patel, *Updates to California's Proposition 65 Warnings Will Affect Oil Industry Nationwide*, POWER (Jan. 3, 2018), https://www.powermag.com/updates-to-californias-proposition-65-warnings-will-affect-oil-industry-nationwide/; Jay Johnston, *The propane industry's duty to warn*, LPGAS (Dec. 13, 2017), https://www.lpgasmagazine.com/the-propane-industrys-duty-to-warn/; *Wheat Growers*, 85 F.4th at 1283.

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