R. J. REYNOLDS TOBACCO CO. V. FDA: THE D.C. CIRCUIT TELLS THE FDA TO BUTT OUT OF THE TOBACCO COMPANIES’ BUSINESS, CAUSING THE GRAPHIC IMAGE REQUIREMENT OF THE FAMILY SMOKING PREVENTION AND TOBACCO CONTROL ACT TO GO UP IN SMOKE

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I. INTRODUCTION

Nebraska has the seventh highest tobacco smoking-related mortality rate in the United States of America.1 More than one-fifth of deaths in the United States are associated with tobacco product usage.2 The Family Smoking Prevention and Tobacco Control Act ("Tobacco Control Act"),3 signed into law in 2009, provides the Food and Drug Administration ("FDA") the authority to regulate tobacco products.4 In part, the Tobacco Control Act requires cigarette manufacturers to display a graphic image health warning to convey the negative health consequences of tobacco product use.5

In R.J. Reynolds Tobacco Co. v. FDA,6 the United States Court of Appeals for the District of Columbia determined that regulations requiring tobacco products to contain a graphic image warning on the

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5. Discount Tobacco City & Lottery, Inc., 674 F.3d at 520.
6. 696 F.3d 1205 (D.C. Cir. 2012).
packaging violated freedom of speech rights under the First Amendment. In reaching its decision, the court of appeals rejected the application of the rational-basis standard of review, which is reserved for compelled speech meant to prevent consumer deception. Instead, the court applied intermediate scrutiny that applies to commercial speech. In its application of the intermediate scrutiny test, the court determined the regulation did not directly advance a substantial government interest, rendering the regulation invalid.

This Note will first review the facts concerning the Tobacco Control Act and the D.C. Circuit’s decision in R.J. Reynolds. This Note will then discuss jurisprudence related to First Amendment protections limiting government-compelled disclosures. This Note will show the D.C. Circuit in R.J. Reynolds correctly decided the rational-basis review standard does not apply. This Note will also demonstrate that the court of appeals correctly applied the intermediate scrutiny standard because tobacco packaging constitutes commercial speech. This Note will then show the court of appeals incorrectly considered the government’s interest was only in reducing smoking rates. Furthermore, this Note will establish that the court of appeals incorrectly determined the graphic image requirement does not directly advance the government’s interest in conveying health information. Finally, this Note will illustrate why the court of appeals should have found the regulation was narrowly tailored to directly advance the government’s substantial interest.

II. FACTS AND HOLDING

Congress passed and President Obama signed into law the Family Smoking Prevention and Tobacco Control Act (“Tobacco Control Act”) on June 22, 2009. The Tobacco Control Act provides the Food and Drug Administration (“FDA”) increased authority to regulate tobacco product manufacturing and sales in the United States of

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8. See R.J. Reynolds, 696 F.3d at 1217 (stating the images were not considered under the exception established in a United States Supreme Court case).
9. Id.
10. Id. at 1222.
11. See infra notes 18-82 and accompanying text.
12. See infra notes 83-208 and accompanying text.
13. See infra notes 209-37 and accompanying text.
14. See infra notes 238-54 and accompanying text.
15. See infra notes 255-86 and accompanying text.
16. See infra notes 287-316 and accompanying text.
17. See infra notes 317-29 and accompanying text.
America.\textsuperscript{20} Congress also authorized the United States Department of Health and Human Services ("DHHS") to issue regulations mandating that tobacco products packaging contain colored graphic images showing the negative health consequences associated with smoking tobacco.\textsuperscript{21} Additionally, Congress required that all cigarettes created, packaged, sold, distributed, and imported for retail or distribution in the United States display one of nine specified textual warnings.\textsuperscript{22} After an interest-based 18,000-person consumer study, the FDA chose nine images to accompany the nine warning statements on the cigarette packages.\textsuperscript{23} These images include a man smoking though a tracheotomy hole, a woman smoking while holding a child, a dead person, and other images selected by the FDA associated with the risks of smoking tobacco.\textsuperscript{24} Each image is accompanied by a warning that relates to the graphic image.\textsuperscript{25} The FDA issued the proposed rules that adopted these images on June 22, 2011.\textsuperscript{26}

After the FDA issued the Tobacco Control Act rules, five tobacco companies ("the tobacco companies") filed suit against the FDA and the DHHS in the United States District Court for the District of Columbia.\textsuperscript{27} The tobacco companies alleged the regulations established by the FDA requiring certain graphic and textual warnings on cigarette packages violated their First Amendment rights.\textsuperscript{28} The tobacco companies sought a preliminary injunction to prevent the implementation of the rule until fifteen months after a decision had been made on the merits of their suit against the FDA.\textsuperscript{29} After the district court granted the preliminary injunction, the tobacco companies moved for summary judgment on the constitutionality of the regulations.\textsuperscript{30} The FDA filed a cross-motion for summary judgment on the same issue.\textsuperscript{31} The District Court for the District of Columbia granted the tobacco

\begin{itemize}
  \item[\textsuperscript{20}] R.J. Reynolds Tobacco Co., 845 F. Supp. 2d at 269.
  \item[\textsuperscript{21}] Id.
  \item[\textsuperscript{22}] Id.
  \item[\textsuperscript{23}] R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1209 (D.C. Cir. 2012).
  \item[\textsuperscript{24}] See generally Ethan Klapper, PICTURES: The FDA's New Cigarette Warning Labels, National Journal, http://www.nationaljournal.com/healthcare/pictures-the-fda-s-new-cigarette-warning-labels-20110621 (last updated May 29, 2013) (showing the images selected by the FDA and stating the FDA's expectations regarding health results).
  \item[\textsuperscript{25}] Id.
  \item[\textsuperscript{26}] R.J. Reynolds, 696 F.3d at 1209.
  \item[\textsuperscript{27}] R.J. Reynolds Tobacco Co., 845 F. Supp. 2d at 268. These companies included: R.J. Reynolds Tobacco Company, Lorillard Tobacco Company, Commonwealth Brands, Inc, Liggett Group LLC, and Santa Fe Natural Tobacco Company, Inc. Id. at 266.
  \item[\textsuperscript{28}] Id. at 268.
  \item[\textsuperscript{29}] Id.
  \item[\textsuperscript{30}] Id. at 268, 271.
  \item[\textsuperscript{31}] Id.
\end{itemize}
companies' motion for summary judgment and denied the FDA's cross-
motion for summary judgment.\footnote{Id. at 268.}

The district court determined the required display of graphic
images on cigarette packages constituted compelled speech in viola-
tion of the First Amendment.\footnote{Id.} In reaching its conclusion, the court
used a strict scrutiny analysis, reasoning that the Tobacco Control Act
and its resulting rules constituted compelled speech.\footnote{R.J. Reynolds Tobacco Co., 845 F. Supp. 2d at 268, 274.} In applying
strict scrutiny, the court analyzed whether the government demonstr-
ated the FDA's promulgated rules were narrowly tailored to fit a
compelling government interest.\footnote{Id. at 274.} The court stated that the govern-
ment did not meet this burden.\footnote{Id.} Instead, the district court deter-
mined the government interest of the Tobacco Control Act was to
change the behavior of future and current smokers.\footnote{Id.} The court held
that discouraging individuals from purchasing a legal product was not
a compelling interest.\footnote{Id. at 275.} As a result, the district court decided that the
requirement to display graphic images on cigarette packages violated
the First Amendment.\footnote{Id. at 277.}

The district court analogized the mandated disclosures in the case
to \textit{Entertainment Software Ass'n v. Blagojevich}\footnote{469 F.3d 641 (7th Cir. 2006).} when deciding to apply
a strict scrutiny analysis.\footnote{R.J. Reynolds Tobacco Co., 845 F. Supp. 2d at 268, 274.} The court noted that in \textit{Blagojevich}
the United States Court of Appeals for the Seventh Circuit applied
strict scrutiny to a law requiring warning stickers be attached to sexu-
ally explicit video games because the warnings were opinion-based.\footnote{Id.} The district court in \textit{R.J. Reynolds} believed that the graphic images on
cigarette packages were similarly subjective.\footnote{Id.} Thus, the court deter-
mined the graphic images should undergo a similar strict scrutiny
analysis.\footnote{Id.}

The FDA appealed this determination to the United States Court
of Appeals for the District of Columbia.\footnote{R.J. Reynolds, 696 F.3d at 1208.} The FDA argued that the
district court erred in refusing to apply a lower level of scrutiny to the
graphic image requirements. The FDA argued the court should have applied the rational-basis scrutiny used to evaluate misleading commercial speech, or, in the alternative, intermediate scrutiny used to address other forms of commercial speech.

The D.C. Circuit affirmed the decision of the district court that the graphic images constituted compelled speech in violation of the First Amendment. Like the district court, the court of appeals noted that, generally, governmental attempts to compel individuals to communicate certain messages are subject to strict scrutiny. However, the D.C. Circuit recognized narrow exceptions to this general rule for compelled speech. The first exception is for protecting consumers from deception by compelling factual and uncontroversial disclosures, which is reviewed under a rational-basis standard. The second exception results in intermediate scrutiny for a government restriction of commercial speech. The court of appeals analyzed whether the graphic images fit within these exceptions.

The court of appeals declined to apply the rational-basis standard, which Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio established. The court reasoned that Zauderer only applies in cases where the government has shown an advertisement or packaging is likely to deceive consumers. It noted that the standard in Zauderer has not been used to require businesses to communicate a third party's messages, when the messages are contrary to the views of the businesses. The court determined the graphic images on cigarette packages were not designed to correct false or misleading claims. Instead, the graphic images attempted to encourage smokers to quit. For these reasons, the court of appeals rejected the rational-basis standard provided in Zauderer.

46. Id. at 1213.
47. Id.
48. Id. at 1208.
49. Id. at 1211.
50. Id. at 1212.
51. Id.
52. Id. at 1212, 1213.
53. Id. at 1212-18.
55. R.J. Reynolds, 696 F.3d at 1217. The "Zauderer standard" is an exception that applies a lower level of scrutiny required for disclosures to prevent consumer deception. R.J. Reynolds Tobacco Co., 845 F. Supp. 2d at 272.
56. R.J. Reynolds, 696 F.3d at 1214.
58. Id. at 1216.
59. Id. at 1217.
60. Id. at 1217.
The court of appeals then considered whether the intermediate standard enumerated in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York* applied. The court reasoned that intermediate scrutiny was the appropriate standard. The court analogized the graphic image warnings to the compelled disclosure in *United States v. Philip Morris USA Inc.*, which required tobacco manufacturers to make corrective statements through various media outlets. The D.C. Circuit in *Philip Morris* acknowledged that commercial speech receives a lower level of protection under the First Amendment and that compelled commercial disclosures should be considered under an intermediate scrutiny standard. Under intermediate scrutiny, the court of appeals noted it must determine if the regulation advances a substantial government interest and if the regulation is broader than necessary to serve the interest. The burden of justifying the regulation is on the party attempting to restrict commercial speech.

In its analysis, the court first considered the FDA's asserted interest, noting that the final regulation stated that the government's interest is in reducing the number of smokers. Assuming that reducing smoking rates was a substantial interest of the FDA, the court next considered whether the graphic images advanced the FDA's asserted interest. The court noted that the government could not satisfy its burden by speculation and conjecture. Instead, the restriction on speech must directly advance the FDA's interest because government interference would be in the service of objectives not otherwise considered as commercial expression. In analyzing whether the government supported its interest, the court stated that the FDA has not provided any evidence showing the graphic images would directly advance its interest in lessening the amount of Americans who smoke. The court reasoned the FDA's data constituted speculation.

63. *Id.*
64. 566 F.3d 1095 (D.C. Cir. 2009).
65. *See R.J. Reynolds*, 696 F.3d at 1217 (stating it intended to follow the lead of the court in *Philip Morris* in adopting the intermediate scrutiny analysis).
66. *Id.* (citing United States v. Phillip Morris USA Inc., 566 F.3d 1095, 1142-43 (D.C. Cir. 2009)).
67. *Id.*
68. *Id.*
69. *Id.* at 1218.
70. *Id.*
71. *Id.* at 1218-19.
72. *Id.* at 1219.
73. *See id.* (stating that the studies provided by the FDA did not show that large graphic warnings resulted in reduced smoking rates).
and conjecture.\textsuperscript{74} As a result, the court of appeals decided that the graphic image requirements did not satisfy the intermediate scrutiny test, and thus violated the First Amendment.\textsuperscript{75}

The dissent agreed that the regulation was indisputably commercial speech.\textsuperscript{76} However, the dissent disagreed with the majority's decision not to apply the rational-basis standard from\textsuperscript{77}\textit{Zauderer.}\textsuperscript{77} In addition, the dissent asserted that, even under intermediate scrutiny, the FDA's regulations satisfied intermediate scrutiny requirements established in\textit{Central Hudson}.\textsuperscript{78} Furthermore, the dissent noted that regardless of what standard applies, the majority opinion did not correctly examine the FDA's interests.\textsuperscript{79} Specifically, the dissent discussed the FDA's interests in requiring the graphic images.\textsuperscript{80} The dissent noted the FDA's stated interests were two-fold: effectively communicating the negative health consequences of smoking and decreasing smoking rates.\textsuperscript{81} The dissent asserted that the majority's failure to recognize the former interest caused it to improperly determine that the FDA did not meet its burden under intermediate or rational-basis scrutiny.\textsuperscript{82}

\section*{III. BACKGROUND}

The tobacco leaf is the key ingredient in tobacco products.\textsuperscript{83} It is a flowering plant, whose traits depend on climate and soil type.\textsuperscript{84} Once harvested, the tobacco product is cured, reducing the moisture content of the tobacco leaf considerably and readying it for use in tobacco products like cigarettes.\textsuperscript{85} The production of the tobacco leaf in the United States of America occurs on farms that vary significantly in size, locale, and yield.\textsuperscript{86} In 2007, in the United States, 16,234 farms grew tobacco leaf.\textsuperscript{87} The farming is labor intensive, requiring more

\begin{thebibliography}{99}
\bibitem{74} Id.
\bibitem{75} Id. at 1208, 1222.
\bibitem{76} Id. at 1222 (Rogers, J., dissenting).
\bibitem{77} Id. at 1222-23.
\bibitem{78} Id. at 1222, 1223.
\bibitem{79} Id. at 1223.
\bibitem{80} Id.
\bibitem{81} Id.
\bibitem{82} Id.
\bibitem{85} Id.
\bibitem{86} Gale, supra note 83, at 17.
\end{thebibliography}
than two hundred hours of labor per acre for certain tobacco leaf production. Despite the burden of production, most tobacco farms are in good financial condition. The profitability of tobacco farming attracts farmers who are younger on average than those who grow other crops.

Tobacco is grown for commercial purposes in sixteen states. It is estimated that 494.6 million pounds of flue-cured tobacco was produced in the United States in 2012. The United States exported more than $1.121 billion in tobacco crops in the same year. Although tobacco farms and production has decreased significantly in the last fifty years, the United States remains one of the four leading tobacco producers in the world. Cigarette manufacturing accounts for ninety-four percent of the tobacco crop usage in the United States. The remainder is used for alternative tobacco products like chewing tobacco and cigars.

Despite the economic benefits of tobacco crops, tobacco product usage has been called the most preventable cause of disability, disease, and death in the United States. Cigarette smoking alone results in 443,000 premature deaths yearly, twenty percent of the total number of American deaths. On average, smokers die thirteen years earlier than non-smokers. The medical costs and lost productivity costs ex-

88. Id.
89. Gale, supra note 83, at 17.
90. Id. at 20.
96. Id.
98. Id.
ceed $193 billion per year. Additionally, smoking is related to more than eight million chronic illnesses. The United States Supreme Court has called tobacco use one of the most significant public health threats in the United States. In Nebraska, 18.4% of adults and 11% of children aged twelve to seventeen are current cigarette smokers. Between the years 2000 and 2004, deaths for adults older than thirty-five totaled more than 2,300 per year as a result of tobacco use. This is the seventh highest smoking-related mortality rate among states.

Congress passed the Family Smoking Prevention and Tobacco Control Act ("Tobacco Control Act") in order to help prevent the negative consequences of smoking. Tobacco companies assert the Tobacco Control Act violates rights provided them by the First Amendment. The First Amendment states Congress cannot make a law "abridging the freedom of speech." The amendment protects the right to speak and the right to refuse to speak. If the government places a restriction on speech that is based on the content of the speech, the First Amendment requires courts to assess that restriction with strict scrutiny. In order to survive strict scrutiny, the restriction must promote a compelling governmental interest and be tailored only to eliminate the threat to that interest. The United States Supreme Court has given less protection to commercial speech than non-commercial speech. Commercial speech is subject to regulation if the government possesses a substantial interest. However, the speech restriction must directly advance the government's interest, and the government must show it is unable to achieve its interest with a less restrictive regulation. Additionally, the federal government

100. Id.
101. Id.
103. State Highlights: Nebraska, supra note 1. Additionally, more than half of Nebraska's cigarette smokers have only a high school degree or less. Id.
104. Id.
105. Id.
108. R.J. Reynolds, 696 F.3d at 1211.
111. Entm't Software Ass'n v. Blagojevich, 469 F.3d 641, 646 (7th Cir. 2006).
112. Entm't Software Ass'n, 469 F.3d at 646.
is allowed to prevent false, deceptive, or misleading commercial speech.116

This Note will first explain the four-prong intermediate scrutiny test created by the United States Supreme Court that intends to determine whether restrictions on commercial speech are constitutional.117 Next, this Note will describe the rationale-basis standard established by the Supreme Court applied to compelled speech that could be considered false, deceptive, or misleading.118 This Note will then discuss the application of the intermediate scrutiny test on compelled speech requirements placed on cigarette manufacturers in United States Court of Appeals for the District of Columbia.119 Finally, the Note will analyze the decision of the United States Court of Appeals for the Sixth Circuit to apply the rationale-basis review to the Tobacco Control Act, which has resulted in a circuit split with the D.C. Circuit.120

A. In Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, the United States Supreme Court Established a Four-prong Analysis to Determine Whether Commercial Speech is Protected by the First Amendment

In Central Hudson Gas & Electric Corp. v. Public Service Commission of New York,121 the Public Service Commission of New York ("Commission") banned electric utility companies from encouraging consumers to use electricity because the Commission wanted to protect insufficient energy supplies for the 1973-74 winter.122 After the Commission averted the energy crisis, it continued to ban advertisements of this nature.123 Public utility companies in New York challenged this ban as a violation of their First Amendment rights.124 The trial court and intermediate appellate court in New York upheld that ban.125 The New York Court of Appeals also upheld the ban, weighing the lack of consumer choice that minimized the public’s interest in such advertisements against the state’s significant interest in minimizing consumption for purposes of energy conservation.126 The pub-

117. See infra notes 121-45 and accompanying text.
118. See infra notes 146-75 and accompanying text.
119. See infra notes 176-88 and accompanying text.
120. See infra notes 189-208 and accompanying text.
121. 447 U.S. 557 (1980).
124. Id. at 560.
125. Id. at 560-61.
126. Id. at 561.
lic utility companies appealed this decision by petition to the United States Supreme Court.\textsuperscript{127}

In its opinion, the United States Supreme Court first acknowledged the First Amendment protects commercial speech.\textsuperscript{128} Although it recognized this protection, the Court declared that speech regarding commercial transactions was distinguishable from other forms of speech protected by the First Amendment and should receive less protection than other forms of expression.\textsuperscript{129} In explaining the protection commercial speech receives, the Court stated inaccurate and deceptive advertisements, and advertisements that encourage unlawful activity, receive no protection.\textsuperscript{130} For all other advertisements, the Supreme Court developed a four-pronged analysis for courts to determine whether commercial speech falls under the First Amendment’s protection.\textsuperscript{131} The analysis required a court to determine: (1) whether the speech is lawful and not misleading; (2) whether the government’s interest in the ban is substantial; (3) whether the regulation directly advances the government’s substantial interest; and (4) whether the regulation is overbroad.\textsuperscript{132}

In applying the four-pronged analysis, the Court noted the Commission did not claim that the advertisements were unlawful or inaccurate and dismissed the first prong of the analysis.\textsuperscript{133} After dismissing the first prong, the Court considered the substantiality of two interests alleged by the Commission: energy conservation and the aggravation of inequalities caused by utility rate pricing methods.\textsuperscript{134} In regards to the Commission’s interest in energy conservation, the Court noted the country’s energy issues plainly showed the State had a substantial interest in conservation.\textsuperscript{135} The nature of utility pricing methods and the potential for a significant increase in costs led the Court to recognize New York State had a significant interest in such rates as well.\textsuperscript{136} Therefore, the Commission satisfied the second prong of the test.\textsuperscript{137}

The Court then turned its attention to the third prong of the test, the relationship between the governmental interest and the regula-

\textsuperscript{127} See id. (stating the United State Supreme Court had probable jurisdiction and reversing the New York Court of Appeals’ conclusion).
\textsuperscript{128} Id.
\textsuperscript{129} Id. at 562-63.
\textsuperscript{130} Id. at 563-64.
\textsuperscript{131} Id. at 566.
\textsuperscript{132} Id.
\textsuperscript{133} Id. at 566-67.
\textsuperscript{134} See id. at 568 (stating the first prong was not at issue in the case because the Commission did not claim the advertisements were false or misleading).
\textsuperscript{135} Id.
\textsuperscript{136} Id. at 568-69.
\textsuperscript{137} See id. (stating the asserted interests were substantial).
Regarding the relationship between the ban and energy rates, the Court determined that the interest was tenuous and highly speculative because the advertisements' potential effect on those rates was limited.\textsuperscript{139} Regarding the relationship between the ban and energy conservation, the Court stated the Commission’s interest was directly advanced because the ban on advertising would limit energy use, and the energy companies would not have challenged the ban if it did not advance that interest.\textsuperscript{140}

Finally, the Court considered the fourth prong of the commercial speech test, which questioned whether the regulation was overly broad.\textsuperscript{141} While reaffirming the importance of the state’s interest in conservation, the Court determined the ban against the utility company’s advertisements was not sufficiently tailored to that interest.\textsuperscript{142} Specifically, the ban not only prevented advertisements encouraging wasteful energy use, it also banned conservational messages that utility companies might convey.\textsuperscript{143} The Court noted that a narrower advertisement ban might better provide for the government’s conservation interest.\textsuperscript{144} Thus, the Court decided the Commission’s advertisement ban violated the First Amendment.\textsuperscript{145}

B. \textbf{In Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, the United States Supreme Court Applied Rational-Basis Review to a Government Regulation that Compelled a Disclosure to Prevent False, Deceptive, or Misleading Commercial Speech}

In \textit{Zauderer v. Office of Disciplinary Counsel},\textsuperscript{146} the United States Supreme Court considered an advertisement published by an Ohio attorney that stated his firm would refund a client’s legal fee if convicted of drunk driving charges.\textsuperscript{147} The attorney also represented multiple clients in a lawsuit against a certain contraceptive maker after publishing an advertisement targeting users of the contraceptive.\textsuperscript{148} That advertisement stated users of the contraceptive joining the suit and failing to recover would not pay a legal fee.\textsuperscript{149} The

\begin{itemize}
\item \textsuperscript{138} \textit{Id} at 569.
\item \textsuperscript{139} \textit{Id}.
\item \textsuperscript{140} \textit{Id}.
\item \textsuperscript{141} \textit{Id} at 569-70.
\item \textsuperscript{142} \textit{Id}.
\item \textsuperscript{143} \textit{Id} at 570.
\item \textsuperscript{144} \textit{Id} at 570-71.
\item \textsuperscript{145} \textit{Id} at 571-72.
\item \textsuperscript{146} 471 U.S. 626 (1985).
\item \textsuperscript{147} \textit{Zauderer v. Office of Disciplinary Counsel}, 471 U.S. 626, 629-30 (1985).
\item \textsuperscript{148} \textit{Zauderer}, 471 U.S. at 630.
\item \textsuperscript{149} \textit{Id} at 631.
\end{itemize}
Office of Disciplinary Counsel of the Supreme Court of Ohio ("the Counsel") filed a complaint against the attorney for these advertisements.\textsuperscript{150} The Counsel alleged various violations of the Ohio Code of Professional Responsibility, including the prohibitions against: contingency fees in criminal cases, illustrations in soliciting legal employment, and false or deceptive statements.\textsuperscript{151}

The Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court ("the Board") reviewed these accusations.\textsuperscript{152} The attorney defended his actions by asserting that the advertisement restrictions were unconstitutional because they violated his First Amendment rights.\textsuperscript{153} To support his defense, the attorney presented experts who testified to the social and economic benefits of the advertisements.\textsuperscript{154} Rejecting these arguments, the Board found that the attorney's advertisements violated multiple rules of the Ohio Code of Professional Responsibility and advised public reprimand for his actions.\textsuperscript{155} The Ohio Supreme Court agreed with the Board's determination and issued a public reprimand.\textsuperscript{156} In response, the attorney petitioned the United States Supreme Court, which granted certiorari.\textsuperscript{157}

The United States Supreme Court explained commercial speech is protected by the First Amendment, but not to the same level as non-commercial speech.\textsuperscript{158} Specifically, state and federal governments can prohibit the communication of false, deceptive, or misleading commercial speech.\textsuperscript{159} If commercial speech is not considered false, deceptive, or misleading, then those governments may only restrict speech if the restriction provides for a substantial government interest and directly advances that interest.\textsuperscript{160}

For the rules that applied to the attorney's advertisement regarding the contraceptive device, the Supreme Court stated the speech was not false or misleading.\textsuperscript{161} As a result, the Ohio Supreme Court could not prohibit the advertisement.\textsuperscript{162} The United States Supreme Court

\textsuperscript{150} Id.
\textsuperscript{151} See id. at 630, 631-33 (providing the series of violations filed against the attorney).
\textsuperscript{152} Id. at 634.
\textsuperscript{153} Id.
\textsuperscript{154} Id.
\textsuperscript{155} Id. at 634-35.
\textsuperscript{156} Id. at 635-36.
\textsuperscript{157} Id. at 636.
\textsuperscript{158} Id. at 637.
\textsuperscript{159} Id. at 638.
\textsuperscript{160} Id.
\textsuperscript{161} See id. at 640-41 (explaining the burden was on the State to establish its substantial interest).
\textsuperscript{162} Id. at 641.
then considered whether the rule against such an advertisement furth-
ered a substantial government interest.\textsuperscript{163} The Supreme Court rea-
soned that, unlike in-person solicitation, print advertisements
encourage reflection and allow for the solicited party to choose
whether to purchase an attorney’s services.\textsuperscript{164} The Supreme Court
also rejected Ohio’s argument that prohibiting advertisements like the
contraceptive advertisements was a prophylactic rule to prevent fu-
ture false or misleading statements.\textsuperscript{165} It reasoned that such rules
are ambiguous in best-case scenarios and can be outright false.\textsuperscript{166}
Furthermore, the Supreme Court stated that such prophylactic rules
are not narrowly tailored enough to further the State’s interest.\textsuperscript{167}

The Supreme Court also considered whether the State could re-
strict an advertisement that failed to inform potential clients of oth-
erwise unknown litigations costs.\textsuperscript{168} The Supreme Court distinguished
between disclosure requirements and prohibited speech.\textsuperscript{169} While
noting that compelled speech may violate the First Amendment, a
state requirement to disclose factual and uncontroversial information
is not the same as compelling speech in regards to politics or reli-

gion.\textsuperscript{170} The Supreme Court reasoned that advertisers have limited in-

terest in not disclosing factual and uncontroversial information.\textsuperscript{171}
The Court held that unless the disclosure requirements are unjusti-

fied or unduly burdensome, requirements to disclose factual and un-

troversial information would not violate First Amendment rights if
they are reasonably related to the government interest in protecting
consumers from deceptive advertisements.\textsuperscript{172}

Applying the rational-basis standard to the omitted disclosure

about potential litigation costs, the Supreme Court the omissions
could mislead the potential clients.\textsuperscript{173} Additionally, the State’s re-
quired disclosures were reasonable.\textsuperscript{174} Using this reasoning, the Su-
preme Court found that required disclosures did not violate the First
Amendment.\textsuperscript{175}

\textsuperscript{163} Id.
\textsuperscript{164} Id. at 641-42.
\textsuperscript{165} Id. at 644.
\textsuperscript{166} Id.
\textsuperscript{167} Id.
\textsuperscript{168} Id. at 650.
\textsuperscript{169} Id.
\textsuperscript{170} Id. at 650-51.
\textsuperscript{171} Id. at 651.
\textsuperscript{172} Id.
\textsuperscript{173} Id. at 652.
\textsuperscript{174} Id. at 653.
\textsuperscript{175} Id. at 652.
C. In U.S. v. Philip Morris USA Inc., the Court of Appeals for the District of Columbia Applied Intermediate Scrutiny to a Judicial Decision Compelling Cigarette Manufacturers to Speak Through Various Media Outlets

In United States v. Philip Morris USA Inc., the United States Court of Appeals for the District of Columbia considered a civil action brought by the United States under the Racketeer Influenced and Corrupt Organization Act ("RICO") against cigarette manufacturers and tobacco trade organizations. The court of appeals considered the constitutionality of multiple affirmative duties the district court placed on cigarette companies as part of its judgment, including compelled disclosures of the health consequences of tobacco consumption on the corporation's website, in major newspapers, and on major television networks. The court analyzed whether these compelled commercial disclosures violated the First Amendment's freedom of speech protection.

The court of appeals initially noted the First Amendment protects individuals' and companies' right to speak and refrain from speaking. It further noted the protection that applies to speech proposing a commercial transaction receives a lower level of protection than other types of speech under the First Amendment. Under the lower level of protection, the government can burden commercial speech if it narrowly tailors its means to achieve a substantial governmental interest. The court declared the tobacco companies' claims regarding the health effects of tobacco use were commercial speech.

Because the government regulation burdened commercial speech, the court of appeals assumed the regulation furthered a substantial government interest through narrowly tailored means. The court stated the trial court's substantial interest was in preventing tobacco companies from committing future RICO violations through the communication of false and fraudulent statements. Additionally, the court stated the advertisements were tailored enough to achieve this goal. Because the compelled advertisements were sufficiently tai-

176. 566 F.3d 1095 (D.C. Cir. 2009).
179. Philip Morris USA Inc., 566 F.3d at 1142.
180. Id. at 1142-43.
181. Id. at 1142.
182. Id. at 1142-43.
183. Id. at 1143.
184. Id. at 1144.
185. Id. at 1145.
186. Id. at 1144.
187. Id.
lored to the government’s substantial interest, the court of appeals determined the advertisements were permissable under the First Amendment.\textsuperscript{188}

D. In Discount Tobacco City & Lottery, Inc. v. United States, the United States Court of Appeals for the Sixth Circuit validated the Family Smoking Prevention and Tobacco Control Act’s Graphic Image Requirement after it applied rational-basis review

In Discount Tobacco City & Lottery, Inc. v. United States,\textsuperscript{189} the United States Court of Appeals for the Sixth Circuit considered the constitutionality of the Family Smoking Prevention and Tobacco Control Act\textsuperscript{190} ("Tobacco Control Act"), including the graphic image requirement.\textsuperscript{191} In its analysis, the court noted the challenge to the graphic image requirement was a facial challenge.\textsuperscript{192} The court stated this meant that the regulation itself must be unconstitutional, not the graphic images chosen by the Food and Drug Administration ("FDA").\textsuperscript{193} Under this assumption, the court then analyzed whether the regulation should receive rational-basis review or a more stringent standard.\textsuperscript{194}

The Sixth Circuit noted that disclosure requirements, such as those considered in Zauderer v. Office of Disciplinary Counsel,\textsuperscript{195} were different than speech prohibitions considered in Central Hudson Gas & Electric Corp v. Public Service Commission of New York\textsuperscript{196} because disclosure requirements were not the same as outright prohibitions on speech, and this difference would impact the level of scrutiny applied.\textsuperscript{197} The court stated the graphic images mandated by the FDA

\textsuperscript{188} Id. at 1145. The court assumed the corrective statements would meet the intermediate scrutiny requirements once they were drafted. Id.

\textsuperscript{189} 674 F.3d 509 (6th Cir. 2012).


\textsuperscript{191} Discount Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 518 (6th Cir. 2012). The court applied rational-basis review to the Tobacco Control Act, which resulted in a circuit split when the D.C. Circuit applied intermediate scrutiny. Compare Discount Tobacco City & Lottery, Inc., 674 F.3d at 558 (applying rational-basis review to the Tobacco Control Act) with R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1217 (D.C. Cir. 2012) (stating it was applying intermediate scrutiny to the Tobacco Control Act).

\textsuperscript{192} Discount Tobacco City & Lottery, Inc., 674 F.3d at 522.

\textsuperscript{193} See id. at 554 (discussing the aspects of a facial challenge and the burden placed on the statute’s challenger).

\textsuperscript{194} Id. at 554.

\textsuperscript{195} 471 U.S. 626 (1985).

\textsuperscript{196} 447 U.S. 557 (1980).

\textsuperscript{197} See Discount Tobacco City & Lottery, Inc., 674 F.3d at 555 (discussing the United States Supreme Court’s analysis of Central Hudson in the Zauderer decision).
could act as disclosures.\textsuperscript{198} As a facial challenge, the court analyzed only whether there are circumstances in which graphic images could possibly satisfy the disclosure requirement of \textit{Zauderer}.\textsuperscript{199} The court provided multiple examples when graphic images would constitute a disclosure, such as a smoker's and non-smoker's lungs pictured next to one another.\textsuperscript{200} As a result, the court determined that it should apply the \textit{Zauderer} rational-basis standard.\textsuperscript{201}

Under the rational-basis standard, the graphic image requirements are constitutional if there is a rational correlation between the government's legitimate interest in preventing consumer deception and the government's use of graphic images to satisfy that interest.\textsuperscript{202} Therefore, in \textit{Discount Tobacco}, the consideration was whether the government's interest in conveying facts about tobacco's health risks was reasonably related to avoiding such deception.\textsuperscript{203} In analyzing whether the government's purpose was reasonably related to preventing consumer deception, the court considered the original intent of the Tobacco Control Act.\textsuperscript{204} The court referred to decades of falsehoods distributed by tobacco companies through all different forms of media, including advertisements, and the tobacco companies' continuing refusal to display such health risks.\textsuperscript{205} The court noted the ineffectiveness of the current textual warnings and the college reading level required to understand those warnings.\textsuperscript{206} In light of those factors, the court stated Congress intended the new warnings to resolve these past issues and that the warnings were rationally related to preventing continued deception.\textsuperscript{207} Due to the court's finding of the rational relationship between the Tobacco Control Act's purpose and the FDA's purpose of preventing deception, the court decided that the graphic image requirements were constitutional.\textsuperscript{208}

\section*{IV. ANALYSIS}

In \textit{R.J. Reynolds Tobacco Co. v. FDA},\textsuperscript{209} the United States Court of Appeals for the District of Columbia decided that a requirement of the Food and Drug Administration ("FDA") that all cigarette packages

\begin{thebibliography}{999}
198. \textit{Id.} at 559.
199. \textit{Id.} at 558-59.
200. \textit{Id.} at 559.
201. \textit{Id.} at 561.
202. \textit{Id.}
203. \textit{Id.} at 562.
204. \textit{Id.}
205. \textit{Id.} at 562-63.
206. \textit{Id.} at 563.
207. \textit{Id.} at 563, 566.
208. \textit{Id.} at 569.
209. 696 F.3d 1205 (D.C. Cir 2012).
\end{thebibliography}
display a graphic image chosen by the FDA violated speech protections provided by the First Amendment. The court characterized the graphic images as restrictions on commercial speech. Because the graphic images were considered commercial speech, the court reviewed the restrictions under intermediate scrutiny, which requires the government to narrowly tailor its regulation to reach a substantial government goal. Assuming the government’s interest was in reducing smoking rates, the court determined the graphic image requirements did not directly advance this interest because the government did not present evidence that the warnings would reduce smoking.

This Analysis will first show the United States Court of Appeals for the District of Columbia correctly refused to apply the rational-basis test. Next, this Analysis will demonstrate the court correctly decided that intermediate scrutiny should apply. The Analysis will then prove the court incorrectly refused to recognize a substantial government interest in conveying the health risks of tobacco use, despite the fact the court correctly recognized the substantial government interest in reducing smoking rates. Thereafter, this Analysis will exhibit the court incorrectly decided the government’s regulation did not directly advance a substantial government interest. Finally, this Analysis will establish that the government narrowly tailored its regulation to satisfy intermediate scrutiny review and, thus, is constitutional.

A. THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA
CORRECTLY REFUSED TO APPLY THE RATIONAL-BASED REVIEW TO THE TOBACCO CONTROL ACT’S
GRAPHIC IMAGE REQUIREMENTS

In R.J. Reynolds Tobacco Co. v. FDA, the United States Court of Appeals for the District of Columbia properly rejected the application of the Zauderer v. Office of Disciplinary Counsel rational-basis

211. R.J. Reynolds, 696 F.3d at 1217.
212. Id.
213. See id. at 1218-21 (stating the evidence did not show the regulation would reduce smoking rates).
214. See infra notes 209-38 and accompanying text.
215. See infra notes 238-54 and accompanying text.
216. See infra notes 255-86 and accompanying text.
217. See infra notes 287-299 and accompanying text.
218. See infra notes 300-16 and accompanying text.
review standard. While strict scrutiny is usually applied to compelled speech, there are two generally recognized exceptions. The two exceptions are restrictions of commercial speech and factual disclosures meant to prevent consumer deception. If the compelled speech is a factual disclosure meant to prevent consumer deception, the regulation compelling the speech will be analyzed under a rational-basis review. If not, it will be reviewed under a more stringent analysis. To qualify for rational-basis review, the product packaging or advertisements without the required disclosure must be false, deceptive, or concern unlawful activities. If that packaging or those advertisements are not false, deceptive, or concerned with illegal activity, the government compelled speech will not be reviewed according to the rational-basis standard.

The court in R.J. Reynolds noted that the Food and Drug Administration ("FDA") failed to provide proof that the cigarette packaging itself was misleading. Unchallenged portions of the Family Smoking Prevention and Tobacco Control Act ("Tobacco Control Act") eliminate specific practices considered misleading. Specifically, the Tobacco Control Act bans the use of terms like light, mild, and low on the cigarette packaging and advertisements. Additionally, the packaging and advertisement cannot state that cigarettes do not contain or have reduced levels of certain harmful substances. Thus, elements of cigarette packaging previously considered misleading no longer exist on cigarette products. Finally, there are no congressional findings in the Tobacco Control Act that cigarette packaging

221. See infra notes 239-58 and accompanying text.
223. R.J. Reynolds, 696 F.3d at 1212.
224. Id. at 1212-13.
225. Id.
228. R.J. Reynolds, 696 F.3d at 1215-16. The court noted the cigarette package was an advertisement. Id. at 1212 (referring to cigarette packages as an advertisement).
230. See R.J. Reynolds, 696 F.3d at 1214-15 (discussing the Tobacco Control Act's prohibition of descriptive terms that indicate a tobacco product has lower tobacco content).
231. Id.
232. Id. at 1214.
233. Compare R.J. Reynolds, 696 F.3d at 1214 (noting the Tobacco Control Act forbids the use of descriptive terms likely to mislead customers into believing cigarette brand is healthier), with United States v. Philip Morris USA Inc., 566 F.3d 1095, 1121 (D.C. Cir. 2009) (determining that cigarette companies attempts to market cigarettes using the term “light” as healthier for the consumer provided a trial court sufficient evidence to find tobacco company executives violated criminal statutes preventing deceptive advertising).
itself is misleading.\textsuperscript{234} Therefore, the court correctly decided the packaging was not misleading or deceptive.\textsuperscript{235}

Because the advertisements on cigarette packages are not considered misleading, the graphic images on the packaging are not correcting a misleading or potentially misleading advertisement.\textsuperscript{236} Because rational-basis review is only appropriate to prevent such an advertisement, the court should have analyzed the graphic image requirement at a higher level of scrutiny.\textsuperscript{237}

\textbf{B. The Court of Appeals for the District of Columbia Correctly Applied the Intermediate Scrutiny to the Graphic Image Requirements}

In \textit{R.J. Reynolds Tobacco Co. v. FDA},\textsuperscript{238} the United States Court of Appeals for the District of Columbia correctly chose to apply the intermediate scrutiny standard framed by \textit{Central Hudson Gas & Electric Corp. v. Public Service Commission of New York}\textsuperscript{239} from the United States Supreme Court.\textsuperscript{240} In \textit{Central Hudson}, the United States Supreme Court recognized compelled commercial speech that failed to merit rational-basis review could still receive intermediate scrutiny.\textsuperscript{241} As a result, the D.C. Circuit has previously applied intermediate scrutiny to compelled commercial speech by tobacco companies.\textsuperscript{242} As suggested in \textit{United States v. Philip Morris USA Inc.},\textsuperscript{243} the type of speech that is burdened by the compelled speech require-

\begin{itemize}
\item \textsuperscript{234} R.J. Reynolds, 696 F.3d at 1214-15.
\item \textsuperscript{235} Compare R.J. Reynolds, 696 F.3d at 1213-15 (noting the United States Supreme Court has never applied the rational-basis standard to commercial speech that is not misleading and that the cigarette packaging cannot contain misleading terms like "light" any longer), with Zauderer, 471 U.S. at 651-52 (applying rational-basis standard to misleading advertisements), and Philip Morris USA Inc., 566 F.3d at 1121 (determining that descriptive terms like "light" could mislead consumers).
\item \textsuperscript{236} See R.J. Reynolds, 696 F.3d at 1216-17 (deciding the graphic image requirements are not considered by the Zauderer rational-basis standard).
\item \textsuperscript{237} Compare R.J. Reynolds, 696 F.3d at 1214-15 (determining that because there were no congressional findings to the contrary and the Tobacco Control Act banned the use of terms such as "light" and "mild", cigarette packaging is not misleading), with Philip Morris USA Inc., 566 F.3d at 1121 (determining the use of terms like "light" on cigarette packages indicated a lower tobacco content was misleading), and Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566-68 (applying a higher level of scrutiny after determining the state's burden on speech did not prevent misleading or deceptive speech).
\item \textsuperscript{238} 696 F.3d 1205 (2012).
\item \textsuperscript{239} 447 U.S. 557 (1980).
\item \textsuperscript{240} See infra notes 259-338 and accompanying text.
\item \textsuperscript{242} See United States v. Philip Morris USA Inc., 566 F.3d 1095, 1143 (D.C. Cir. 2009) (deciding to apply intermediate scrutiny and coming later in time than Central Hudson).
\item \textsuperscript{243} 566 F.3d 1095 (D.C. Cir. 2009).
\end{itemize}
ment determines the level of scrutiny the regulation should receive.\textsuperscript{244} Thus, if cigarette packaging constitutes commercial speech, intermediate scrutiny is the correct test to apply to any challenged restriction on that speech.\textsuperscript{245}

The court in \textit{R.J. Reynolds} properly determined cigarette packaging is commercial speech.\textsuperscript{246} As discussed in \textit{Philip Morris USA Inc.} and the majority opinion in \textit{R.J. Reynolds}, the concern is whether the burdened speech, which in \textit{R.J. Reynolds} is cigarette packaging, is commercial.\textsuperscript{247} Packaging assists in proposing the sale of cigarettes, which is a commercial transaction.\textsuperscript{248} Additionally, tobacco companies recognize the tobacco products' packaging is commercial speech.\textsuperscript{249} Thus, because the compelled speech would regulate the cigarette packaging, the regulation concerns commercial speech.\textsuperscript{250}

Because cigarette packaging is commercial speech, the restrictions in the Family Smoking Prevention and Tobacco Control Act\textsuperscript{251} ("Tobacco Control Act") that affect the packaging should be considered under \textit{Central Hudson} intermediate scrutiny review.\textsuperscript{252} Under intermediate scrutiny, the party attempting to burden commercial speech has the burden of proof.\textsuperscript{253} Therefore, the government must show: (1) its interest in regulating the commercial speech through compelled disclosures or otherwise is substantial; (2), the regulations burdening

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{244} \textit{Philip Morris USA Inc.}, 566 F.3d at 1143.
\item \textsuperscript{245} \textit{Compare R.J. Reynolds Tobacco Co. v. FDA}, 696 F.3d 1205, 1216-17 (D.C. Cir. 2012) (applying intermediate scrutiny to cigarette packaging determined to be an advertisement), and \textit{Philip Morris USA Inc}, 566 F.3d at 1143 (applying intermediate scrutiny to compelled commercial speech through various media outlets), and \textit{Central Hudson}, 447 U.S. at 566 (applying intermediate scrutiny to prohibitions on utility company advertisements), \textit{with Zauderer}, 471 U.S. at 653-53 (applying rational-basis review for compelled speech intended to avoid the deception of consumers), and \textit{Entm't Software Ass'n v. Blagojevich}, 469 F.3d 641, 646 (7th Cir. 2006) (applying strict scrutiny analysis for content-based compelled speech).
\item \textsuperscript{246} \textit{See infra} notes 238-54 and accompanying text.
\item \textsuperscript{247} \textit{See Philip Morris USA Inc.}, 566 F.3d at 1142-43 (discussing the commercial nature of the mandated disclosures); \textit{R.J. Reynolds}, 696 F.3d at 1217 (stating the graphic image requirement should be analyzed under intermediate scrutiny because the speech is commercial in nature).
\item \textsuperscript{248} \textit{R.J. Reynolds}, 696 F.3d at 1226 n.5 (Rogers, J., dissenting).
\item \textsuperscript{249} \textit{See id.} (noting the tobacco companies do not contend the packaging is not commercial).
\item \textsuperscript{250} \textit{Compare R.J. Reynolds}, 696 F.3d at 1226 n.5 (reasoning that the tobacco companies recognize cigarette packaging as commercial speech proposing a commercial transaction), \textit{with Zauderer}, 471 U.S. at 637-38 (noting that speech that proposes a commercial transaction receives intermediate scrutiny), and \textit{Central Hudson}, 447 U.S. 562-63 (noting the intermediate scrutiny test will apply to commercial speech that proposes a commercial transaction and is not misleading, deceptive, or unlawful).
\item \textsuperscript{252} \textit{R.J. Reynolds}, 696 F.3d at 1217 (majority opinion).
\item \textsuperscript{253} \textit{Id.}
\end{itemize}
\end{footnotesize}
speech directly advanced the government’s asserted substantial interest; and (3) the type of regulation used is narrowly tailored, so as to not overly burden the commercial speech.\textsuperscript{254}

C. The Court of Appeals for the District of Columbia Incorrectly Rejected the Government’s Substantial Interest in Communicating the Health Risks of Cigarettes to its Citizens

In \textit{R.J. Reynolds Tobacco Co. v. FDA},\textsuperscript{255} the United States Court of Appeals for the District of Columbia properly identified the federal government has a substantial interest in reducing smoking rates, but improperly determined that interest was not served by conveying health information about cigarette smoking.\textsuperscript{256} First, the D.C. Circuit failed to find the government had a substantial interest in communicating the health issues associated with tobacco consumption.\textsuperscript{257} Second, the error in identifying the government’s substantial interest resulted in the court failing to find the regulation directly advanced the government interest.\textsuperscript{258} Finally, the court did not apply the narrowly tailored portion of intermediate scrutiny analysis because of its failure to find a substantial interest and that the regulation directly advanced the government’s interest.\textsuperscript{259}

To survive intermediate scrutiny review as applied in \textit{Central Hudson Gas & Electric Corp. v. Public Service Commission of New York},\textsuperscript{260} the federal government must show that it has a substantial interest in regulating the commercial speech of cigarette packaging.\textsuperscript{261} In \textit{R.J. Reynolds}, the D.C. Circuit applied intermediate scrutiny by assuming the government had a substantial interest in reducing smoking rates.\textsuperscript{262} The government’s interest in reducing smoking rates was based on the significant health consequences associated with smoking.\textsuperscript{263} Additionally, the United States Supreme Court has recognized the government has a substantial interest in re-

\begin{footnotesize}
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\item[254.] \textit{Id.}
\item[255.] 696 F.3d 1205 (D.C. Cir. 2012).
\item[256.] See infra notes 255-86 and accompanying text.
\item[257.] See infra notes 255-86 and accompanying text.
\item[258.] See infra notes 255-99 and accompanying text.
\item[259.] See infra notes 300-16 and accompanying text.
\item[260.] 447 U.S. 557 (1980).
\item[261.] \textit{R.J. Reynolds Tobacco Co. v. Food and Drug Admin.}, 696 F.3d 1205, 1217 (D.C. Cir. 2012).
\item[262.] \textit{R.J. Reynolds}, 696 F.3d at 1218.
\item[263.] \textit{Id.} at 1223 (Rogers, J., dissenting).
\end{enumerate}
\end{footnotesize}
ducing smoking rates. The court correctly assumed the government had a substantial interest in reducing smoking rates.

The majority in *R.J. Reynolds* erroneously rejected the interest of Food and Drug Administration ("FDA") in communicating the health impact of tobacco usage. The court labeled the government’s interest as too vague and dependent on its other stated interest in reducing smoking rates. The United States Supreme Court has recognized general communications regarding public health issues are of substantial interest to the government. The Supreme Court recognizes tobacco use as one of the most significant public health threats in the United States. Additionally, the D.C. Circuit has stated the public health interest is stronger when the government is addressing consumer fraud or confusion. In *United States v. Philip Morris USA Inc.*, the D.C. Circuit noted that tobacco companies: (1) already knew about smoking’s harmful health effects; (2) knowingly allowed dissemination of public statements contrary to the harmful effects of smoking; and (3) actually intended the disseminated information to deceive tobacco product consumers. Thus, given the historical fraud regarding the health impacts of cigarettes and the significant danger tobacco usage poses to public health, the court in *R.J. Reynolds* should have considered the government’s interest in disseminating health information substantial.

Additionally, the court reasoned the government’s interest was not substantial because there was no proof the graphic images effec-

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265. Compare *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 485 (1995) (stating that the government has a substantial interest in the health of its citizens), and *R.J. Reynolds*, 696 F.3d at 1218 n.13 (majority opinion) (noting the United States Supreme Court has implied government has a substantial interest in reducing smoking rates because it poses on of the most significant health risks to Americans), *with R.J. Reynolds Tobacco Co. v. FDA*, 545 F. Supp. 2d 266, 275 (D.D.C. 2012) (stating the government does not have a substantial interest in advocating the public not buy legal products).
266. See infra notes 255-56 and accompanying text.
270. *R.J. Reynolds*, 696 F.3d at 1223 (Rogers, J., dissenting) (citing *Pearson v. Shalala*, 164 F.3d 650, 656 (D.C. Cir. 1996)).
271. 566 F.3d 1095 (D.C. Cir. 2009).
273. Compare *Rubin*, 514 U.S. at 485 (stating that the government has a substantial interest in its citizens’ health), and *Brown & Williamson Tobacco Corp.*, 529 U.S. at 161 (noting tobacco consumption is one of the most significant health issues facing the United States), and *R.J. Reynolds*, 696 F.3d at 1223 (noting the government’s interest in communicating health information is heightened when the government is attempting to prevent fraud), *with Philip Morris*, 566 F.3d at 1107 (stating tobacco companies knowingly disseminated false information about tobacco), *with R.J. Reynolds*, 696 F.3d at 1221 (majority opinion) (rejecting the government has a substantial interest in communicating health information).
tively communicated the health impacts of cigarette usage.\textsuperscript{274} There are multiple studies that refute the court’s assertion that the graphic image requirement does not effectively communicate the health impacts of smoking.\textsuperscript{275} A study by the Department of Health and Human Services determined that forty percent of cigarette package viewers did not read the warnings or give those warnings any significant consideration.\textsuperscript{276} Specifically, the textual warnings lack prominence and are stale to readers.\textsuperscript{277} The content of the textual warnings require the consumer read at a college level.\textsuperscript{278}

In contrast, the newly required graphic images provide a new, more effective way for the government to convey the health issues insufficiently conveyed by the textual warnings.\textsuperscript{279} Canada and Australia adopted similar graphic image requirements to the ones contained in the Family Smoking Prevention and Tobacco Control Act,\textsuperscript{280} and experts have conducted studies analyzing the effectiveness of the warnings.\textsuperscript{281} In Canada, ninety-five percent of younger smokers reported the graphic warnings are effective.\textsuperscript{282} Additionally, Canadian smokers identified the graphic warnings as a source of information regarding the health effects of smoking.\textsuperscript{283} A study in Australia discovered children process graphical warnings at a higher cognitive level, leading to discussion regarding the health impacts of cigarette usage.\textsuperscript{284} These studies indicate the graphic warnings will effectively communicate the health impacts of cigarettes more than the current textual warnings.\textsuperscript{285} Because the government has a substantial interest in effectively communicating the health consequences of smoking, the court erred in its determination that the regulations did not sat-

\textsuperscript{274} See R.J. Reynolds, 696 F.3d at 1219, 1221 (stating that the effectiveness of the warnings would be determined by whether people stopped smoking, and that the government did not provide any evidence that the graphic images would reduce the number of smoking Americans).

\textsuperscript{275} Discount Tobacco City & Lottery, Inc v. United States, 674 F.3d at 509, 563-67 (6th Cir. 2012).

\textsuperscript{276} Discount Tobacco City & Lottery, Inc., 674 F.3d at 563.

\textsuperscript{277} Id.

\textsuperscript{278} Id.

\textsuperscript{279} See id. at 565 (explaining the graphic image warnings’ prominence will also aid in recall and comprehension).


\textsuperscript{281} Discount Tobacco City & Lottery, Inc., 674 F.3d at 565-67.

\textsuperscript{282} Id. at 565.

\textsuperscript{283} Id.

\textsuperscript{284} Id. at 566.

\textsuperscript{285} Id.
isfy the intermediate scrutiny test requirement that the regulation serve a substantial government interest.\textsuperscript{286}

1. The Court of Appeals for the District of Columbia Incorrectly Determined the Graphic Image Requirement does not Directly Advance a Substantial Government Interest

As stated above, the government's interest in communicating the health impact of tobacco consumption and the reduction of smoking rates are separate interests.\textsuperscript{287} The court in \textit{R.J. Reynolds Tobacco Co. v. FDA}\textsuperscript{288} asserted the interest was not directly advanced by the graphic image requirements because the government failed to provide evidence the warnings would reduce the number of American smokers.\textsuperscript{289} This analysis was insufficient because it did not consider the government's interest in providing information concerning the negative health consequences of smoking.\textsuperscript{290} Thus, for the regulation to be constitutional under the First Amendment, it must directly advance the government's interest in effectively conveying health information.\textsuperscript{291}

The Canadian and Australian studies discussed in \textit{Discount Tobacco City & Lottery, Inc. v. United States}\textsuperscript{292} contained substantial evidence that the graphic image requirements directly advance the

\textsuperscript{286} Compare Rubin, 514 U.S. at 485 (stating that the government has a substantial interest in its citizens' health), \textit{with Brown & Williamson Tobacco Corp.}, 529 U.S. at 161 (noting tobacco consumption is one of the most significant health issues facing the United States), \textit{and Discount Tobacco City & Lottery, Inc.}, 674 F.3d at 563-67 (providing studies that show the effectiveness of the graphic image health disclosures on cigarette packaging), \textit{with R.J. Reynolds}, 696 F.3d at 1219, 1221 (determining the government did not have a substantial interest in effectively conveying tobacco usage health information, and suggesting there is no proof that graphic warnings effectively communicate health information).

\textsuperscript{287} See supra notes 255-86 and accompanying text.

\textsuperscript{288} 696 F.3d 1205 (D.C. Cir. 2012).

\textsuperscript{289} R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1219-20 (D.C. Cir. 2012) (suggesting the government did not provide any evidence the regulation advanced the interest).

\textsuperscript{290} Compare Rubin v. Coors Brewing Co., 514 U.S. 476, 485 (1995) (noting government has a substantial interest in the health of its citizens), \textit{and FDA v. Brown & Williamson Tobacco Corp.}, 529 U.S. 120, 161 (2000) (stating that tobacco usage may be the greatest threat to the public health in the United States of America), \textit{with R.J. Reynolds}, 696 F.3d at 1221 (rejecting the FDA's assertion that the government has a substantial interest in communicating health information to its citizens regarding the dangers of tobacco usage).


\textsuperscript{292} 674 F.3d 509 (6th Cir. 2012).
government’s interest in providing health information. In the Canadian study, seventy-five percent of adult smokers and almost all the youth smokers stated the graphics contained on cigarette packaging provide health information. In Australia, a study showed teenagers were more likely to cognitively process the illustrated warnings than the textual warnings. Additionally, general psychological studies regarding illustrations, as opposed to texts, show illustrations are more memorable and noticeable than words. These studies show the graphic image regulation provides a significantly more effective way to directly advance the communication of the negative health consequences of smoking. Thus, the graphic image warnings communicate a substantial government interest. Therefore, the United States Court of Appeals for the District of Columbia in R.J. Reynolds incorrectly determined the graphic image requirements did not satisfy the intermediate scrutiny requirement that a burden on speech directly advance a government interest.

2. The Court of Appeals for the District of Columbia Failed to Consider Whether the Graphic Image Requirement was Narrowly Tailored to Directly Advance a Substantial Government Interest

The United States Court of Appeals for the District of Columbia did not analyze whether the government could show the graphic image requirement was narrowly tailored enough to satisfy the final element of the intermediate scrutiny test, because it did not find the

293. See Discount Tobacco City & Lottery, Inc. v. U.S., 674 F.3d 509, 565-67 (6th Cir. 2012) (discussing studies showing the effectiveness of graphic image requirements in other countries).
294. Discount Tobacco City & Lottery, Inc., 674 F.3d at 565.
295. Id. at 566.
296. Id.
297. Id. at 566, 569.
298. Compare Rubin, 514 U.S. at 485 (noting government has a substantial interest in the health of its citizens), and Brown & Williamson Tobacco Corp., 529 U.S. at 161 (stating that tobacco usage may be the greatest threat to the public health in the United States of America), and Discount Tobacco & Lottery, Inc., 674 F.3d at 565-67 (providing international studies that show graphic image requirements effectively communicate the health risks of smoking), with Central Hudson, 447 U.S. at 564 (stating ineffective or remote support will not directly advance a substantial government interest to satisfy intermediate scrutiny).
299. Compare Rubin, 514 U.S. at 485 (stating the government has a substantial interest in protecting the health of its citizens), and Brown & Williamson Tobacco Corp., 529 U.S. at 161 (noting tobacco use is possibly the most important health issue in the United States today), and Discount Tobacco City & Lottery, Inc., 674 F.3d at 565-67 (stating that the Canadian and Australian studies show that graphic images convey the health risks of tobacco use more effectively than textual warnings), with R.J. Reynolds, 696 F.3d at 1222 (stating the government has not shown the graphic images directly advance a substantial government interest).
graphic image requirement directly advanced a substantial government interest.\textsuperscript{300} As a result of this determination, the court erred by failing to find the graphic image requirement satisfied the final prong of the intermediate scrutiny—that the government’s burden on speech be narrowly tailored to the interest its seeks to advance.\textsuperscript{301} Tailoring under intermediate scrutiny requires that the government regulation only be as broad as is necessary to provide for the government’s substantial interest in effectively communicating health information.\textsuperscript{302} This requirement means that if the regulation burdens speech that does not concern the state’s interest, or if another less-restrictive regulation would better serve the government interest, then the regulation is not narrowly tailored enough.\textsuperscript{303} Thus, if narrower restrictions exist that match the regulations’ effectiveness in communicating health information about tobacco usage, the proposed graphic image requirement will not satisfy the intermediate scrutiny test’s tailoring requirement and the burden placed on commercial speech will not survive intermediate scrutiny.\textsuperscript{304}

The graphic image requirement is a narrowly tailored to advance the government’s substantial interest.\textsuperscript{305} The failures of the current regulations to effectively communicate health information are evident.\textsuperscript{306} Specifically, the current textual warnings regarding the health issues of tobacco consumption are often overlooked or misunderstood.\textsuperscript{307} The graphic images provide for simpler, more noticeable, and more memorable warnings.\textsuperscript{308} In Canada, more smokers reported getting health information from cigarette packages showing graphic images similar to those required in the Family Smoking Prevention and Tobacco Control Act\textsuperscript{309} than previously existing textual warnings.\textsuperscript{310} The Australian study compared an Australian regulation requiring graphic images on cigarette packaging to a British regulation,

\begin{footnotesize}
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  \item \textsuperscript{300} See \textit{R.J. Reynolds}, 696 F.3d at 1205-22 (failing to provide analysis on narrow tailoring).
  \item \textsuperscript{301} See infra notes 300-16 and accompanying text.
  \item \textsuperscript{302} \textit{R.J. Reynolds}, 696 F.3d at 1217.
  \item \textsuperscript{303} \textit{Central Hudson}, 447 U.S. at 565.
  \item \textsuperscript{304} See \textit{Central Hudson}, 447 U.S. at 564, 565 (stating that if the government’s interest is better served by another regulation that does not burden speech as much, the questioned restriction will fail the intermediate scrutiny test).
  \item \textsuperscript{305} See infra notes 300-16 and accompanying text.
  \item \textsuperscript{306} See \textit{Discount Tobacco City & Lottery, Inc.}, 674 F.3d at 564-67 (stating the current textual warnings are ineffective, especially as to youth, and providing studies showing that graphic image warnings are more effective in conveying health information).
  \item \textsuperscript{307} \textit{Discount Tobacco City & Lottery, Inc.} 674 F.3d at 563.
  \item \textsuperscript{308} \textit{Id.} at 564-67.
  \item \textsuperscript{310} \textit{Id.} at 565.
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requiring textual warnings be contained on the cigarette packaging.311 The study found the Australian regulations were more effective than the British regulations, even when another potential cause for the change was considered.312

Although the textual warnings could be considered less burdensome, textual warnings are not as effective as graphic warnings.313 Additionally, the graphic image requirement would only occupy fifty percent of the total front and back panel of cigarette packaging and twenty percent of cigarette advertisements, allowing cigarette companies to include additional health warnings in order to help further the government’s interest in effectively communicating health information.314 Thus, there are no narrower restrictions that would better provide for the government’s substantial interest.315 Therefore, because the regulations will more effectively provide for the government’s interest in effectively communication health information than the current textual warnings, the regulations are sufficiently tailored to satisfy the final prong of the intermediate scrutiny test.316

311. Id. at 566.
312. See id. (stating that the graphic image requirement in Australia led consumers to cognitively process health information more than the textual warnings in Britain even when variables such as timing were considered).
313. See id. at 525, 566. (stating graphic warnings are more effective than textual warnings at promoting greater public knowledge of the health dangers of tobacco use).
314. See R.J. Reynolds, 696 F.3d at 1208 (describing the amount of packaging the graphic image warning must occupy).
315. Compare Discount Tobacco City & Lottery, Inc., 674 F.3d at 563-66 (discussing multiple studies that showed people better understood and cognitively processed health information when viewing graphic image warnings than when viewing textual warnings), with Central Hudson, 447 U.S. at 565 (suggesting that a burden on commercial speech will survive the final prong of the intermediate scrutiny test if the regulation best advanced the government’s substantial interest).
316. Compare Discount Tobacco City & Lottery, Inc., 674 at 565-67 (providing studies comparing the effectiveness of graphic warnings that communicate the health risks of tobacco consumption to the ineffectiveness of the current textual warnings), and United States v. Philip Morris USA Inc., 566 F.3d 1095, 1144-45 (D.C. Cir. 2009) (asserting the district court’s injunctive requirement that compelled tobacco companies to communicate corrective information about tobacco usage through various media outlets was narrowly tailored enough to prevent future RICO violations), and R.J. Reynolds, 696 F.3d at 1236 (Rogers, J., dissenting) (determining that with one exception, the graphic image requirement was sufficiently tailored to satisfy the final prong of the intermediate scrutiny test because it communicated health information and did so more effectively than textual warnings), with Central Hudson, 447 U.S. at 570-71 (determining that burdens on commercial speech by the government were not narrowly tailored enough because the regulations prohibited the company from helping the government communicate its interest in energy conservation), and R.J. Reynolds, 696 F.3d at 1236-37 (determining the graphic image that read 1-800-QUIT-NOW was not narrowly tailored enough to satisfy the fourth prong of the intermediate scrutiny test because instead of communicating health information, it merely contradicted the tobacco companies interest in trying to market its product and was therefore overbroad).
V. CONCLUSION

In *R.J. Reynolds Tobacco Co. v. FDA*,\(^{317}\) the United States Court of Appeals for the District of Columbia determined the graphic image requirement of the Family Smoking Prevention and Tobacco Control Act\(^{318}\) was unconstitutional because it did not directly advance a substantial government interest.\(^{319}\) Specifically, the D.C. Circuit stated the government did not provide any evidence that its graphic image requirement would reduce smoking rates.\(^{320}\) The court rejected the government’s purported interest in effectively communicating the health risks of smoking.\(^{321}\) In declining to consider this governmental interest, the court failed to accurately complete the intermediate scrutiny test.\(^{322}\)

This Note established the United States Court of Appeals for the District of Columbia was correct in rejecting the application of the rational-basis standard established in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*\(^{323}\) to the graphic image requirement.\(^{324}\) The court in *R.J. Reynolds* correctly chose to apply the intermediate scrutiny test.\(^{325}\) The court incorrectly decided, however, that the government did not have a substantial interest in conveying accurately health information.\(^{326}\) Additionally, the court incorrectly determined the graphic image requirement did not directly advance the government’s interest in conveying health information.\(^{327}\) Finally, the court should have considered whether the graphic image regulation was narrowly tailored enough to satisfy the final prong of the intermediate scrutiny test, and decided the regulation was sufficiently tailored to satisfy the final prong of the intermediate scrutiny analysis.\(^{328}\)

The constitutionality of the Family Smoking Prevention and Tobacco Control Act ("Tobacco Control Act") does not make this type of compelled speech wise in all situations concerning public health. The Tobacco Control Act will not affect only the cigarette companies’ financial health, but will also affect the tobacco companies’ employees, to-

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317. 696 F.3d 1205 (D.C. Cir 2012).
320. *R.J. Reynolds*, 696 F.3d at 1222.
321. *Id.* at 1221.
322. See * supra* notes 255-316 and accompanying text.
324. See * supra* notes 209-37 and accompanying text.
325. See * supra* notes 239-54 and accompanying text.
326. See * supra* notes 255-86 and accompanying text.
327. See * supra* notes 287-316 and accompanying text.
328. See * supra* notes 317-28 and accompanying text.
bacco farmers, and store owners. While tobacco consumption is an easy target for government legislation, regulations such as those contained in the Tobacco Control Act could potentially be used to restrict fast food options, high fructose corn syrup consumption, and other consumer products that are tied to American health problems. With each of these regulations, more people are affected in ways government cannot anticipate. Thus, policymakers should proceed with caution, regardless of the constitutionality of their decisions.

Ronald R. Sylvester – ’13