No. 24-189

In the Supreme Court of the United States

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

v.

FOOD & DRUG ADMINISTRATION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Can *Zauderer* scrutiny apply when the government's goal is something other than preventing consumer deception?

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato files *amicus* briefs, publishes books and studies, conducts conferences, and issues the annual *Cato Supreme Court Review*.

Cato's interest in this case arises out of the importance of free expression in both political and commercial expression. Preserving the right to speak and not to speak are both essential for a self-governing, free society.

SUMMARY OF ARGUMENT

This Court's decision in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), established a standard of review for the compelled disclosure of "purely factual and uncontroversial information . . . ." *Id.* at 651. The Court applied a more lenient standard of scrutiny than it had just five years earlier in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), which prescribed intermediate scrutiny for commercial speech restrictions. The Court justified this difference on the grounds that "an advertiser's rights are adequately

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[1] Rule 37 statement: All parties were timely notified before the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Zauderer*, 471 U.S. at 651. But the Court made clear that a compelled disclosure would fail under the *Zauderer* standard if it were "unjustified or unduly burdensome" and chilled commercial speech. *Id.*

Since *Zauderer* was decided, lower courts have struggled to interpret whether the *Zauderer* standard applies *only* when the government's interest is "preventing deception of consumers." Some lower courts, including the Fifth Circuit below, have interpreted *Zauderer* to apply beyond that context. The Fifth Circuit held that *Zauderer* can apply when the government's interest is as generic as "greater public understanding." Pet. App. at 35a. As a result, the Fifth Circuit held that the Food and Drug Administration (FDA) can compel cigarette manufacturers to use their own products as canvases for the government's anti-smoking message. The government received deferential review for a rule that would lecture consumers and further stigmatize cigarette consumption.

This interpretation of *Zauderer* provides an easy workaround to the First Amendment that is incompatible with *Central Hudson*. Extending *Zauderer* beyond the narrow category of preventing deception would render the First Amendment a mere speed bump when the government wants to force companies to use their products as billboards for the government's message.

The Court should grant certiorari to halt this worrying trend of expansive interpretations of *Zauderer* in the lower courts. Clarifying *Zauderer*'s narrow

reach would remove a glaring inconsistency in commercial speech protections and ensure that the purpose of the First Amendment is more fully realized. Compelled speech violates the freedom of speech. *Central Hudson* made clear that even for so-called "commercial speech," the government cannot simply remove speech it finds politically inconvenient or suboptimal for society. That principle is integral for self-governance. The Court should make clear that the same principles apply to *compelled* speech, and that *Zauderer* only justifies disclosures that prevent consumer deception.

ARGUMENT

I. THE FIFTH CIRCUIT DECISION EMPHASIZES AN UNWORKABLE LEGAL STANDARD AND CIRCUIT SPLIT OVER THE *ZAUDERER* STANDARD.

The First Amendment protects the right to speak and not to speak. Caroline Mala Corbin, *Compelled Disclosures*, 65 ALA. L. REV. 1277, 1293 (2014). In the commercial context, such safeguards evolved as the Court grappled with the distinction between purely political discourse and expression aimed at soliciting commercial transactions. *See Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748 (1976). It is questionable whether such differences were meaningful at the time of the Founding. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 495 (1996) (plurality opinion) ("Benjamin Franklin authored his early defense of a free press in support of his decision to print, of all things, an advertisement for voyages to Barbados."). This Court eventually held that the First Amendment does indeed protect against

infringements on "commercial speech" in *Central Hudson Gas & Electric v. Public Service Commission.* Five years later in *Zauderer*, the Court held that the government may compel an attorney to make disclosures about the significant litigation cost his clients could incur, to counteract his misleading representation that he would refund their "full legal fee." 471 U.S. at 642.

Following this decision, a circuit split has emerged over whether *Zauderer* review only applies to deceptive representations.[2] Some courts have held that *Zauderer* is so limited. *See* Alexis Mason, *Compelled Commercial Disclosures:* Zauderer*'s Application To Non-Misleading Commercial Speech*, 72 U. MIAMI L. REV. 1193 (2018) (citing *Ocheesee Creamery LLC v. Putnam*, 851 F.3d 1228, 1235–36 (11th Cir. 2017); *Dwyer v. Cappell*, 762 F.3d 275, 281–83 (3d Cir. 2014); *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt.*, 721 F.3d 264, 283 (4th Cir. 2013); *Pub. Citizen, Inc. v. La. Att'y Disciplinary Bd.*, 632 F.3d 212, 218 (5th Cir. 2011)). But other courts have held that *Zauderer* can apply to a factual, uncontroversial disclosure advancing any substantial government interest. *See, e.g.*, *CTIA Wireless Ass'n v. City of Berkeley*, 854 F.3d 1105, 1116–17 (9th Cir. 2017), *vacated and remanded*, 138 S. Ct. 2708 (2018) (citing *Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 522 (D.C. Cir. 2015); *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 22 (D.C. Cir. 2014) (en banc); *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 310 n.8 (1st Cir. 2005);

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[2] The question whether *Zauderer* only applies to deceptive representations is fairly encompassed by the first of the Petition's two questions presented.

Safelite Grp. v. Jepsen, 764 F.3d 258 (2d Cir. 2014)). For example, in *CTIA*, the Ninth Circuit ruled that the City of San Francisco could impose an ordinance requiring cellphone retailers to post warnings that their phones emitted radio-frequency radiation that exceeded the amount set forth in Federal Communications Commission (FCC) guidelines. In *Safelite Group*, the Second Circuit affirmed previous precedent prescribing rational basis review for otherwise factual and uncontroversial language about a product. 764 F.3d at 264.

This Court should take the opportunity to end this growing confusion amongst the lower courts and clarify that *Zauderer* review only applies to instances of curing consumer deception or misrepresentation. These lower-court decisions demonstrate that compelled disclosures are expanding into more and more industries as state and local governments exercise paternalistic tendencies or even engage in overt political messaging. *See, e.g.*, *Planned Parenthood v. Rounds* 653 F.3d 662, 665 (8th Cir. 2011) (upholding a state law mandating that abortion clinics inform patients that "abortion will terminate the life of a whole, separate, unique, living human being"); *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755 (2018) (striking down a state law mandating that pro-life pregnancy crisis centers display certain messages about family planning services). Unless mandatory commercial disclosures are limited to instances of consumer deception, they will be weaponized to forward political messaging campaigns justified by the "factual and uncontroversial" standard. Indeed, as shown by the contrasting opinions of the district and circuit court show in this case, that standard "provides broad

leeway for judges' own subjective beliefs—both conscious and unconscious—to shape their decision making." Note, *Repackaging* Zauderer, 130 HARV. L. REV. 972, 989 (2017).

Clarifying that *Zauderer* review applies only to deceptive conduct would align the standard with the rest of the Court's First Amendment jurisprudence and avert creating a workaround to the fundamental right it protects. "*Zauderer*, properly understood, is but an application of the underlying *Central Hudson* framework to a specific context—one that *Central Hudson* expressly contemplated[:] Preventing consumers from being misled by advertising or other commercial speech." Jonathan H. Adler, *Compelled Commercial Speech and the Consumer "Right to Know,"* 58 ARIZ. L. REV. 422, 436 (2016) (footnote omitted). Interpreting *Zauderer* to allow the government to compel speech premised on only a "right to know" would create a drastic exception to the protections for commercial speech established in *Central Hudson*.

II. LIMITING *ZAUDERER* TO CONSUMER DECEPTION IS CONSISTENT WITH THE INTENT AND SPIRIT OF THE FIRST AMENDMENT.

Proponents of expanding the scope of *Zauderer* argue that a lower standard of review for "factual and uncontroversial" compelled speech is justified because the government is only *adding* speech to the marketplace, not restricting it. Note, *Two Models of the Right to Not Speak,* 133 HARV. L. REV. 2359, 2360–61 (2000). These proponents argue that the commercial speech doctrine rests on the government's interest in improving the consumer's information environment,

removing fraudulent speech, and providing substantive information about possible physical or ethical concerns. *See, e.g.*, *Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d at 518; *Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011); *Nat'l Inst. of Fam & Life Advocs. v. Becerra*, 585 U.S. at 755. However, accepting this argument requires rejecting a number of core tenets of the First Amendment.

This Court has been clear that, for both individuals and corporations, the First Amendment protects the right to speak and *not* to speak. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 16 (1986). This principle extends to advertisements and packaging, which often aim to propose more than a transaction. Jonathan H. Adler, *Persistent Threats to Commercial Speech*, 25 J.L. & POL'Y, 289, 298 (2016). Companies use marketing tactics to create a brand image, propose a lifestyle, and argue for their superiority over competitors. Many brands even go as far as to make overt political statements. After "the Supreme Court's decision in *Obergefell v. Hodges*, for example, numerous Fortune 500 companies covered their logos with the rainbow that has come to symbolize gay rights, celebrating the Court's decision in the context of brand messaging. This was commercial speech, but it also contained a powerful political and cultural message." *Id.* (citing 135 S. Ct. 2584 (2015); Susana Kim & Alexa Valiente, *Same-Sex Marriage: How Companies Responded to Supreme Court's Decision*, ABC NEWS (June 26, 2015);[3] Alison Griswold, *Brands Are Draping Their Logos in Rainbows to Celebrate*

[3] Available at abcnews.go.com/Business/sex-marriage-companies-responded-supreme-courtsdecision/story?id=32053240.

Marriage Equality, SLATE (June 26, 2015, 12:11 PM)).[4] The commercial marketplace is a forum where sellers do not merely propose transactions for widgets but also actively participate in shaping social, cultural, and political norms. "Consider the person who drives a Toyota Prius hybrid, wears Toms on his feet, and carries a hemp sack emblazoned with a 'fair trade' sticker when going to Whole Foods or Trader Joe's to shop for humanely raised, free-range chicken or a carbon-neutral, vegan, meat substitute. This individual is acting as more than a mere economic consumer." *Id.* at 299. What companies choose to say or *not* say is integral to their First Amendment rights as well their relationship to consumers in the marketplace. The government's belief that consumers or society at large may be better off if certain companies were prevented from promoting certain ideas is not a compelling reason to suppress commercial expression. *Va. Pharmacy Bd.*, 425 U.S. at 770.

Product packaging and advertising is ultimately a canvas for a company to express a particular message. Companies are limited by space constraints and consumer attention, which means that any government-compelled speech ultimately crowds out and limits the speech of private actors. Mason, *supra*, at 1230–31. Indeed, as demonstrated by a myriad of lower-court cases, the "factual and uncontroversial" standard is a low bar when the government can cite a consumer's "right to know" as justification. *Id.* at 1200. Under this approach, the government's power to promote its preferred narratives and opinions would be vast and

[4] Available at http://www.slate.com/blogs/moneybox/2015/06/26/brands_celebrate_marriage_equality_with_rainbows_and_supportive_tweets.html.

expansive, constrained only by what individual judges may view as "factual and uncontroversial."

If the *Zauderer* standard extended beyond curing deception, the state could commandeer a company's property for the government's own advocacy towards consumers, while simultaneously diluting or restricting the expressive rights of the targeted company. *See, e.g.*, *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 73 (6th Cir. 1996) (holding that Vermont could not mandate dairy manufactures issue disclosures stating their cattle were treated with r-BST solely on the basis that some consumers would be interested in knowing that information). "If the First Amendment guarantee means anything, it means that, absent clear and present danger, government has no power to restrict expression because of the effect its message is likely to have on the public". *Cent. Hudson*, 447 U.S. at 575 (Blackmun, J., concurring) (citing Comment, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. CHI. L. REV. 205, 243–251 (1976)). As the Court reiterated in *Sorrell*, the "State may not burden the speech of others in order to tilt public debate in a preferred direction. 'The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented.'" 564 U.S. at 579 (quoting *Edenfield v. Fane*, 507 U.S. 761, 767 (1993)).

Allowing consumers to assess the value of information on their own and arrive at independent conclusions is a core tenet of democratic self-governance.

Even in cases such as tobacco sales, where the state has a legitimate interest in educating consumers about possible health effects, the "First Amendment also constrains state efforts to limit advertising of tobacco products, because so long as the sale and use of tobacco is lawful for adults, the tobacco industry has a protected interesting in communicating information about its products and adult customers have an interest in receiving that information." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 571 (2001).

The same can be said about virtually any product. Much like tobacco products, alcohol is often depicted in a myriad of positive lights ranging from being socially uplifting or amusing, to sophisticated or rustic, to even a core aspect of a nation's culture. Whether or not a brand's packaging carries an overt political message, the purpose remains the same: to create a positive association within a target demographic of consumers. And consumers use this information to organize their private lives and make their own decisions.

Absent deceptive conduct, such speech and reactions to speech are part of a self-governing democracy. While the state is more than free to create public-awareness campaigns to persuade the public otherwise, compelling speech in cases other than deception merely amounts to a thinly veiled effort to undermine disfavored advertisements, narratives, or ideas. *See Cent. Hudson*, 447 U.S. at 575. Although the state may argue that the compelled disclosure of "factual and uncontroversial" warnings amounts to mere consumer education, such warnings often serve to sabotage product packaging with alarming, unsolicited information and thus restrict a company's efforts to promote itself. Mason, *supra*, at 1234. Indeed, in *303*

Creative v. Elenis, 600 U.S. 570 (2023), this Court remarked that there is "an unfortunate tendency by some to defend First Amendment values only when they find the speaker's message sympathetic. But '[i]f liberty means anything at all, it means the right to tell people what they do not want to hear.'" *Id.* at 602 (quoting *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1190 (10th Cir. 2021) (Tymkovich, C.J., dissenting)).

Further, the state's interference in the information environment can itself mislead consumers, since the state is not infallible. *See, e.g.*, *Am. Beverage Ass'n v. City & Cty. of S.F.*, 871 F.3d 884, 895 (9th Cir. 2017) (holding that the city of San Francisco's mandatory disclosure for sugary food products was misleading in light of current research).

Consumers should not be subject to lectures and scare tactics every time they wish to indulge in a product disfavored by the state. Although such excesses have been enabled by the vague "factual and uncontroversial" requirement, clarifying *Zauderer* to apply only to curing consumer deception would bring the Court's compelled speech doctrine substantially closer to the ideals enshrined in the First Amendment.

CONCLUSION

For the reasons in this brief and those described by the Petitioners, this Court should grant the petition.

Respectfully submitted,

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