

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
TYLER DIVISION

R.J. REYNOLDS TOBACCO COMPANY,  
*et al.*,

*Plaintiffs,*

*v.*

UNITED STATES FOOD AND DRUG  
ADMINISTRATION, *et al.*,

*Defendants.*

Civil Action No. 6:20-cv-00176

**BRIEF OF AMICUS CURIAE THE PUBLIC HEALTH LAW CENTER  
IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT  
AND OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT  
AND A PRELIMINARY INJUNCTION**

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## INTRODUCTION AND INTEREST OF AMICUS<sup>1</sup>

Accurate, factual statements and images depicting the negative health impacts of smoking cigarettes may “frighten, shock, and disgust” viewers for the simple reason that the health effects of smoking are frightening, shocking, and disgusting. Smoking kills half of its long-time users and leads to many other horrible health consequences: throat cancer and tumors, underweight newborns, blindness, amputation, erectile dysfunction, and heart disease requiring surgery, among others. These are all terrible things to see, and being alerted to these dangers naturally provokes negative emotions. But, contrary to the plaintiffs’ argument, that negative emotional reaction does not mean that a warning label is nonfactual or controversial, subject to heightened First Amendment scrutiny. Facts, and factual images, make us feel.

While Congress decided not to ban cigarettes in the Tobacco Control Act of 2009 (TCA), it did want to ensure that consumers had the facts every time they went to buy cigarettes. So the TCA mandates that cigarette packages and advertisements carry prominent factual warnings “depicting the negative health consequences of smoking” with color graphic images—a well-established means of communicating information. Fulfilling this mandate, the Food and Drug Administration’s (FDA or agency) recent graphic warning rule, promulgated after notice and comment, requires eleven new rotating graphic warnings with explanatory text depicting the health risks of smoking, particularly those risks that are “less-known.” 85 Fed. Reg. 15,638, 15,640, 15,686, 15,708–09 (Mar. 18, 2020). The FDA’s purpose with these new graphic warnings is to correct “misperceptions about the health risks caused by smoking.” *Id.* at 15,638. So it is critical that the warning be seen, read, and understood, and then that the information be remembered by viewers.

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<sup>1</sup> No party opposes the filing of this brief. No counsel for any party to this proceeding authored any part of this brief. No party or party’s counsel, or person other than amicus curiae and its members, contributed money to the preparation or submission of this brief.

Government-mandated warning labels that are “factual, accurate, and uncontroversial,” like the ones at issue in this case, are subjected to lenient rational-basis review under the First Amendment, called “*Zauderer*” review after the case that announced the standard. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985). The D.C. Circuit concluded that the FDA’s first attempt at graphic warnings were not “purely factual” and could not be reviewed under the *Zauderer* standard in part because they were “*primarily intended to evoke an emotional response,*” and were not aimed at “convey[ing] information” but instead were “unabashed attempts to evoke emotion (and perhaps embarrassment) and browbeat consumers into quitting.” See *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 696 F.3d 1205, 1216–17 (D.C. Cir. 2012), *overruled on other grounds by Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18, 22–23 (D.C. Cir. 2014) (en banc) (emphasis added). In promulgating the new warnings, the FDA was careful to ensure that the images were targeted to inform consumers and not designed with the purpose of provoking emotion. During the rulemaking, the FDA addressed several comments challenging whether these new paired images and textual warnings were “factual, accurate, and uncontroversial,” as required for disclosure mandates under *Zauderer*. The agency explained that the new images were not “designed to evoke an emotional response,” 85 Fed. Reg. at 15,645–46, and outlined the “science-based, iterative research process” it used to design “factually accurate warnings,” *id.* at 15,663. Through this process—undertaken in direct response to the D.C. Circuit’s concerns in *R.J. Reynolds*—FDA medical experts from a range of different specialties and a “certified medical illustrator” worked together to “develop high quality, factually accurate photorealistic images” that “depict[] common visual presentations of the health conditions and/or show[] disease states and symptoms as they are typically experienced.” *Id.* at 15,646. Further addressing the D.C. Circuit’s concerns in *R.J. Reynolds*, the FDA made sure to pair each medical image with a related, specific health warning, and tested the final sets to ensure they were “unambiguous and unlikely to be misinterpreted.” *Id.*



Regardless, the plaintiffs—manufacturers and distributors of cigarettes (collectively, the “Tobacco Industry”)—not only challenge these specific warnings as a violation of their First Amendment rights, but also contend that the TCA’s graphic warnings requirement is facially unconstitutional because graphic images of smoking risks will always evoke negative emotional reactions. MSJ at 47–48. Because these (and in its view any) graphic warnings “frighten, shock, and disturb” some consumers, the Tobacco Industry argues that they are not (and can never be) “factual” and “uncontroversial,” and hence cannot be reviewed under *Zauderer*. Rather, the Industry argues, they are subject to (and fail) strict scrutiny. The Industry repeatedly faults the FDA for not questioning focus group participants on how the graphics made the viewers “feel,” MSJ at 10–11, 24, and emphasizes that the participants still “voluntarily” shared their feelings of disgust. But it makes sense that the FDA did not ask about “feelings” because its goal was not to target emotion.

That some viewers described the FDA’s newly designed graphic images depicting the harms of smoking as “startling,” “gruesome,” “disgusting,” and “powerfully disturbing” is not the FDA’s fault. *Id.* at 11, 23–24. It is the *plaintiffs’* fault for designing and selling such a dangerous product that has the depicted—and indeed many other serious—health consequences. It is the plaintiffs’ product, not any graphic warning, that is “heartbreaking.” The FDA has designed “factual, accurate, and noncontroversial” pictorial images of the results of smoking. And to the extent that these factual images evoke an emotional response, that reaction is merely an expected byproduct of the warnings’ ability to effectively communicate the real and serious health risks of smoking. As the agency put it: “the possibility that factual content may evoke an emotional reaction does not render the content less factual.” 85 Fed. Reg. at 15,646.

The Tobacco Industry’s First Amendment argument, therefore, rests on a false dichotomy between fact and emotion. Facts make us feel, so warnings that evoke emotion are not thereby rendered ineligible for *Zauderer* review. That is a matter of common sense; if one gets the news that a

loved-one has cancer, it provokes a sad emotion; learning about slavery can provoke feelings of shock and disgust, and can be “grotesque”—it does not make it any less accurate or true. Scientific research, moreover, provides a robust account of the relationship between receiving factual information, experiencing feelings, and then learning the information. As described below, emotion often links the conveyance of information with the receiver’s learning and retention. Indeed, if there was no emotional response to information about the grave harms caused by smoking, one might question whether it was an accurate disclosure or properly conveying information, because we do not expect consumers to be callous to death, disease, addiction, and the other health consequences of smoking. Likewise, if the FDA only promulgated graphic warnings of the minor effects of smoking, like a cough, or only used small text that is quickly bypassed, those warnings would arguably be misleading because they could suggest that smoking’s harms are less severe than they really are. It is factual, accurate, and noncontroversial that smoking leads to grave harms; a picture showing as much does not change that.

Accordingly, the Public Health Law Center submits this brief to provide the Court with detailed information about the science behind graphic warnings and the relationship between warnings and emotions. Understanding that relationship is critical in this case because it demonstrates why the Tobacco Industry’s attempt to evade *Zauderer* review rests on a false distinction between information and emotion. The incidental emotion provoked by these carefully crafted warnings (1) does not mean the warnings require heightened scrutiny, and (2) if anything, will further the government’s goal of combatting misperceptions about smoking’s risks. Amicus curiae is an expert not just in the efficacy of public health warnings—as it works closely with scholars and scientists across the country—but also in the First Amendment concerns that such warnings raise.

The Public Health Law Center is a public interest legal resource center dedicated to improving health through the power of law and policy, grounded in the belief that everyone deserves to be healthy. Located at the Mitchell Hamline School of Law in Saint Paul, Minnesota, the Center helps

local, state, national, Tribal, and global leaders promote health by strengthening public policies.<sup>2</sup> For over twenty years, the Center has worked with public officials and community leaders to develop, implement, and defend effective public health laws. This work is evidence-based, informed by the leading empirical research on policy interventions. As such, the Center is particularly suited to provide its expertise regarding warning labels. The Center has filed more than sixty amicus briefs; among the briefs are more than twenty addressing the regulation of commercial speech. Because graphic warning labels are an important tool for informing the public about the dangers of smoking, the Center has a strong interest in supporting the government’s ability to require tobacco companies to effectively warn consumers about the dangers of their products.

### ARGUMENT

When the government requires businesses to place “purely factual and uncontroversial” warning labels on their products, the First Amendment requires that the commercial disclosure be reviewed under the more lenient *Zauderer* rational-basis review. 471 U.S. at 651. And that makes sense. “Protecting commercial speech under the First Amendment is principally justified by protecting the flow of accurate information, and requiring factual disclosures furthers that goal.” *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 555 (6th Cir. 2012). Thus, the Tobacco Industry’s “constitutionally protected interest in *not* providing any particular factual information in [its] advertising is minimal.” *Zauderer*, 471 U.S. at 651. Under *Zauderer*, the government cannot “force citizens to confess by word or act” what it believes “shall be orthodox in politics, nationalism, religion

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<sup>2</sup> The Public Health Law Center’s commercial tobacco control program operates as part of a national network of nonprofit legal centers working to protect the public from the devastating consequences of tobacco use, including: ChangeLab Solutions, Oakland, California; Legal Resource Center for Tobacco Regulation, Litigation & Advocacy, at University of Maryland Francis King Carey School of Law, Baltimore, Maryland; Public Health Advocacy Institute and the Center for Public Health and Tobacco Policy, both at Northeastern University School of Law, Boston, Massachusetts; Smoke-Free Environments Law Project, at the University of Michigan, Ann Arbor, Michigan; and Tobacco Control Policy and Legal Resource Center at New Jersey GASP, Summit, New Jersey.

or other matters of opinion.” *Id.* (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). But mandated factual disclosures about the impacts of dangerous products like cigarettes—which Congress could ban outright—do not run afoul of the First Amendment under *Zauderer*.

The Tobacco Industry does not want *Zauderer* review to apply to the FDA’s new mandated graphic warnings, urging strict scrutiny instead. It devotes the lion’s share of its First Amendment argument—over twenty-five pages (MSJ at 20–45)—to evading *Zauderer*, no doubt because it knows the FDA’s carefully crafted new warning labels survive *Zauderer* review. But its attempt to evade *Zauderer* rests on two fundamental misperceptions of the *Zauderer* standard. *First*, it rests on an artificial distinction between fact and emotion, arguing that because the warnings evoke emotion they (somehow) are not “factual and uncontroversial” and thus fail the *Zauderer* threshold. That is wrong. Contemporary scientific evidence demonstrates what is understood as a matter of common sense: facts can evoke emotions, and, indeed, those emotions are critical to the learning process. *Second*, the Tobacco Industry argues that *Zauderer* cannot apply unless the government’s warnings are targeted to preventing deception of customers. No circuit court—including the Fifth Circuit—imposes such a narrow view of *Zauderer*. Even if that were the law, however, the Tobacco Industry has conducted the master class in deceiving customers, and the warning labels are unfortunately necessary to combat historic and current deceptive practices. This Court, therefore, should analyze (and uphold) the TCA’s graphic warnings requirement and the FDA’s new rule under the *Zauderer* standard.<sup>3</sup>

**I. The Tobacco Industry’s First Amendment argument rests on a false distinction between fact and emotion.**

The plaintiffs argue that their challenge to the FDA’s new rule cannot be subject to the more lenient standard for commercial disclosures under *Zauderer* because the graphic warnings evoke

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<sup>3</sup>This brief focuses on why *Zauderer* is the appropriate standard to apply. Amicus curiae adopts the arguments of the FDA as to why the graphic warnings survive *Zauderer* review.

negative emotions and, in their view, information cannot be “purely factual” if it is “intended to evoke an emotional response.” MSJ at 22 (citing *R.J. Reynolds*, 696 F.3d at 1216–17). Specifically, the plaintiffs assert that the graphic component of these warning labels cannot serve any purpose other than stoking emotion because the graphics are produced alongside textual warning statements. *Id.* at 22–23. Reaching even further, the plaintiffs additionally contend that no “photorealistic image” could *ever* meet *Zauderer*’s “factual” requirement because images are “inherently susceptible to multiple, subjective interpretations and lack precise meaning” and, in particular, visual depictions of the negative impacts of smoking “exist to frighten, shock and disturb consumers.” *Id.* at 23, 43. These arguments lack merit and rest on an artificial distinction between fact and emotion. Images have long been used as an important tool for communicating factual information, and the recognition that factual images (or even informational text) may incidentally provoke emotion does not transform them into impermissible ideological opinion speech the government cannot compel. Rather, as the research demonstrates, it is this natural emotional response that helps viewers learn the facts conveyed—precisely the purpose of the FDA’s warnings.

**A. Images are an important tool for communicating factual information.**

Courts considering First Amendment challenges have long recognized that images are an effective means of “impart[ing] information” in an accurate and non-ideological manner. *Zauderer*, 471 U.S. at 647. The Supreme Court’s decision in *Zauderer* “itself eviscerates the argument that a picture or a drawing cannot be accurate and factual.” *Disc. Tobacco*, 674 F.3d at 560. In addition to challenging the mandated disclosures, the attorney in *Zauderer* challenged Ohio’s attorney professional-conduct rule forbidding the use of illustrations in ads because one of his ads featured a drawing of a medical device. The state argued, much as the Tobacco Industry does here, that the use of images misleads, manipulates, and confuses the public because “subtle uses of illustrations” can “play on the emotions” and “convey false impressions” to the public. *Zauderer*, 471 U.S. at 647. But *Zauderer* “foreclosed this

argument,” reasoning instead that “the use of illustrations or pictures in advertisements serves important communicative functions: it attracts the attention of the audience . . . and it may also serve to impart information directly.” *Disc. Tobacco*, 674 F.3d at 560 (quoting *Zauderer*, 471 U.S. at 647). The Supreme Court thus upheld the attorney’s use of an “accurate representation” of the medical device. *Zauderer*, 471 U.S. at 649. Building off this holding, the Tobacco Industry has itself contended in other contexts—contrary to its argument in this case—that images are not necessarily aimed at emotional manipulation but can impart factual information. In *Discount Tobacco*, for instance, the Industry used this argument to challenge TCA advertising regulations that would have prohibited the use of all color and images in tobacco advertisements. 674 F.3d at 548. The Sixth Circuit agreed, adopting the Tobacco Industry’s argument that a ban on images and color was overbroad, explaining that some images “teach adult consumers how to use novel products, . . . merely identify products and producers, and . . . communicate information about the nature of a product.” *Id.*

That same principle holds true for images in required warning labels. While the discussion of images in *Zauderer* dealt with restrictions on commercial advertising rather than required disclosures, “the Court’s reasoning demonstrates that a picture can be accurate and factual.” *Id.* at 560. The Sixth Circuit recognized as much in this exact context. In another section of *Discount Tobacco* (a case the Tobacco Industry conspicuously fails to cite), the Sixth Circuit rejected a facial challenge to the TCA’s graphic warnings requirement—the same challenge the Industry makes here. As the Sixth Circuit reasoned, if a picture could “accurately represent” a medical device in *Zauderer*, there is “no reason why a picture could not also accurately represent a negative health consequence of smoking, such as a cancerous lung.” *Id.* The court explained that the Industry’s position that “pictures can never be factually accurate . . . stands at odd with reason.” *Id.* at 559. Citing the use of medical images in biology, anatomy, and medical school textbooks, the court outlined a “nonexhaustive” list of images that would “constitute factual disclosures under *Zauderer*.” *Id.* On that list, the Sixth Circuit recommended “a

picture or drawings of a person suffering from a smoking-related medical conditions” or of “the internal anatomy of a person suffering from a smoking-related medical condition,” *id.*—exactly what the FDA’s new graphic warnings mandate.

The Sixth Circuit also rejected the Tobacco Industry’s argument, which it repeats here, that images depicting the negative consequences of smoking are (somehow) not factual simply because not everyone suffers of the warned diseases or experiences them in the same way. It is well-understood that “[b]y virtue of our genes and environment, every person is different” and will not experience health risks in the same way. *Id.* But that does not mean a depiction of the health risks, especially with explanatory language, is transformed into an impermissible opinion. *Id.* “[A]rguing that a representation of a medical condition becomes an opinion when people could have that medical conditions in ways that deviate from the representation would lead to the insupportable conclusion that textual or pictorial descriptions of standard medical conditions must be opinions as well.” *Id.* That is absurd. A sign on the side of the highway warning of falling rocks by (as is custom) depicting rocks falling from above onto the roof of a car does not mean that all persons driving down the highway will experience falling rocks, or that if there are falling rocks they will necessary fall on the top of one’s car, as opposed to hitting one’s windshield or already being on the road. No one, though, would argue that the pictorial description is nonfactual, is controversial, and constitutes impermissible opinion. The same is true here; that everyone may not experience these risks or suffer from tobacco in the same way does not make these images the ideological opinions the Tobacco Industry paints them to be. We are no longer in the 1950s; the Tobacco Industry claims in its brief that the FDA’s warnings “exaggerate smoking risks,” MSJ at 26, but it can no longer plausibly deny that these—and others—are the very risks of smoking cigarettes. The images convey that fact.

**B. The plaintiffs’ assumption that images cannot be “purely factual and uncontroversial” because they “evoke[] an emotional response” contravenes contemporary scientific understanding of how people process information.**

Nor is there merit to the Tobacco Industry’s argument that these graphic warnings (or any graphic warnings depicting the negative consequences of smoking) fail *Zauderer*’s “factual, accurate, and uncontroversial” threshold because they provoke emotional responses from viewers. Throughout its motion for summary judgment, the Tobacco Industry repeatedly relies on reports that viewers and media outlets found the warnings “scary,” “unsettling,” and “gruesome.” MSJ at 23; *see also id.* at 11, 24. These reactions, they contend, mean that the images are not “factually straightforward, evenhanded, and readily understood.” *Id.* at 22. Not so. The images accurately and evenhandedly portray the effects of smoking—those effects are just “scary.”

The link between the facts conveyed in the graphic warnings and these negative emotions is not the result of the agency trying to peddle an ideological message; it is a matter of science. The Tobacco Industry’s argument is essentially that, in order to be factual and evenhanded, a warning must not trigger emotion. But that contention rests on an artificial distinction between fact and emotion that contemporary psychology rejects. Current science of human brain function and behavior demonstrates that information triggers emotions, and this emotional reaction, in turn, helps ensure that the information is understood and remembered.

Scientists now believe that the tools humans use to process factual and emotional information are inextricably linked. Although “[t]raditional approaches to the study of cognition emphasize[d] an information-processing view that . . . generally excluded emotion,” the “emergence of cognitive neuroscience” has revealed the interaction between emotion and comprehension.<sup>4</sup> As one review of research on the link between emotion and decision making put it, “it is now believed that emotion

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<sup>4</sup> Elizabeth A. Phelps, *Emotion and Cognition: Insights from Studies of the Human Amygdala*, 57 *Ann. Rev. Psychol.* 27, 27 (2006).



and cognition are not separate systems, per se; they interact continuously . . . .”<sup>5</sup> The plaintiffs assert that there is a “natural inference” that when graphic warning labels trigger an emotional response the images must be meant not to “convey facts,” but to “scare consumers.” MSJ at 23. That is scientifically false. What is “natural” is that facts sometimes evoke emotion.

Contemporary research in psychology further demonstrates that the emotional valence of how information is presented plays a significant role in several different parts of the process of learning and incorporating new information.<sup>6</sup> Recall of past events and information involves “at least three memory phases”: recording or encoding; consolidation “into a stable and lasting representation”; and retrieval.<sup>7</sup> “There is evidence to indicate that when an experience elicits an arousal response, there are emotion-specific processes that are engaged at each of these stages . . . .”<sup>8</sup> The “affective” content of a factual communication—the likelihood that it triggers a positive or negative emotion—has been shown to act as a “spotlight” on the information it contains.<sup>9</sup> As a result, information presented in a way that arouses emotions tends to be given more attention, and is thus more likely to be encoded in an individual’s memory.<sup>10</sup> There is further emerging evidence that “arousing information seems more likely to be established into a durable memory once encoded.”<sup>11</sup> Finally, emotion may play a significant

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<sup>5</sup> Jennifer S. Lerner et al., *Emotion and Decision Making: Online Supplement*, 66 *Ann. Rev. Psychol.* 33.1 (2015).

<sup>6</sup> Kevin S. Labar & Roberto Cabeza, *Cognitive Neuroscience of Emotional Memory*, 7 *Nature Revs. Neurosci.* 54 (2006) (“Emotion has powerful influences on learning and memory that involve multiple brain systems engaged at different stages of information processing.”)

<sup>7</sup> Elizabeth A. Kensinger, *Remembering the Details: Effects of Emotion*, 1 *Emotion Rev.* 99, 101 (2009).

<sup>8</sup> *Id.*

<sup>9</sup> Ellen Peters et al., *The Functions of Affect in Health Communications and in the Construction of Health Preferences*, 56 *J. Comm.* s140, s142 (2006).

<sup>10</sup> Kensinger, *supra* note 7, at 101; R.J. Dolan & Patrick Vuilleumier, *Amygdala Automaticity in Emotional Processing*, 985 *Annals N.Y. Acad. Sci.* 348, 353–54 (2003).

<sup>11</sup> Kensinger, *supra* note 7, at 101; *see also* LaBar & Cabeza, *supra* note 6 (demonstrating that activation of the amygdala during processing of stimuli modulates the encoding and consolidation of memory); Adam K. Anderson et al., *Emotion Enhances Remembrance of Neutral Events Past*, 103 *PNAS*

role in allowing individuals to better retrieve that information from their memory, long after it is first conveyed.<sup>12</sup> Studies have repeatedly found that individuals have higher “recall rates” when presented with positive or negative stimuli, rather than more “neutral” ones.<sup>13</sup>

Research also demonstrates that negative emotional responses play an especially powerful role in encouraging better learning and understanding of factual information. As a review of behavioral science research on emotion and memory put it, “when it comes to remembering the details of . . . emotional experiences,” “valence is a critical factor.”<sup>14</sup> Brain imaging studies have found that different parts of the brain are activated when information triggers positive or negative emotions.<sup>15</sup> Perhaps as a result of these different brain processes, researchers have found evidence that “[n]egative affect in particular, is more likely to lead to focal memory enhancements, whereas positive affect often conveys little benefit to memory accuracy.”<sup>16</sup>

The upshot: whether and how humans remember information—i.e., learn—depends in part on the emotional content of that information. There is significant evidence demonstrating that “engagement of emotion processing regions” of the brain “increases the likelihood that emotional events are remembered.”<sup>17</sup> This does not mean that the underlying information is any less factual; it is

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1599, 1599 (2006) (finding “important role for emotional arousal in the postencoding enhancement of episodic memory consolidation”).

<sup>12</sup> See Tony W. Buchanan, *Retrieval of Emotional Memories*, 133 *Psychol. Bull.* 761, 776 (2007).

<sup>13</sup> See Elizabeth A. Kensinger & Daniel L. Schacter, *Memory and Emotion*, in *HANDBOOK OF EMOTIONS* 601, 602 (Michael Lewis et al. eds., 2008) (collecting studies testing a variety of stimuli, including words, sentences, pictures, and narrated slide shows).

<sup>14</sup> Kensinger, *supra* note 7, at 100.

<sup>15</sup> Katherine R. Mickley & Elizabeth A. Kensinger, *Emotional Valence Influences the Neural Correlates Associated with Remembering and Knowing*, 8 *Cognitive, Affective & Behav. Neurosci.* 143, 149–50 (2008).

<sup>16</sup> Kensinger, *supra* note 7, at 100.

<sup>17</sup> *Id.*

simply the case that people respond to information with emotions, and that information with an emotional valence is more likely to be noticed, remembered, and recalled.

**C. Smoking-related graphics evoking negative emotions have been shown to aid understanding of the risks of cigarettes.**

Researchers have extended these general principles about the role emotion plays in cognition and memory to the context the plaintiffs challenge here: graphic warnings on cigarette labels. As the FDA explained in the preamble to its final rule, the labels it designed are not, in fact, intended to evoke any emotional response. 85 Fed. Reg. at 15,646. Indeed, the agency explicitly rejected calls for it to make the images more “shocking” or “gross.” *Id.* at 15,670. But even if the FDA’s factually accurate graphic warnings are not *targeted* at an emotional response, research supports the conclusion that any emotions they might trigger will aid in accurately conveying the risks of smoking.

Among American smokers, there are continued widespread misperceptions about the risks of smoking, despite decades of textual warnings. It is true, as the plaintiffs point out, that “the public already knows that smoking is harmful.” MSJ at 30. But beyond that headline, there remain significant gaps in smokers’ knowledge of the specific risks of smoking.<sup>18</sup> Moreover, there is considerable evidence that smokers, even after decades of exposure to the Surgeon General’s limited warnings, still underestimate their risks of experiencing certain serious health effects of cigarettes.<sup>19</sup> Research indicates that health warnings on tobacco products that evoke negative emotions—particularly graphic warning labels—are an important tool in fixing these misperceptions.

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<sup>18</sup> See, e.g., K. Michael Cummings et al., *Are Smokers Adequately Informed About the Health Risks of Smoking and Medicinal Nicotine?*, 6 *Nicotine & Tobacco Res.* S333, S333 (2004); Victor J. Strecher et al., *Do Cigarette Smokers Have Unrealistic Perceptions of Their Heart Attack, Cancer, and Stroke Risks?*, 18 *J. Behav. Med.* 45, 52 (1995). The FDA’s consumer research studies found that the warning labels the plaintiffs challenge here presented “new information” to a large percentage of viewers. See 85 Fed. Reg. at 15,671–78.

<sup>19</sup> Christina Lee, *Perceptions of Immunity to Disease in Adult Smokers*, 12 *J. Behav. Med.* 267, 274–76 (1989); Sue Boney McCoy et al., *Perceptions of Smoking Risk as a Function of Smoking Status*, 15 *J. Behav. Med.* 469, 487 (1992).

Because of the emotional responses they may evoke, graphic warnings are better able to draw consumers' attention to warning labels that otherwise "go unnoticed and are effectively 'invisible.'" 85 Fed. Reg. at 15,638. A 2016 meta-analysis of experimental studies on tobacco warnings, for example, found that pictorial warnings—combining both images and text—were better able to attract study participants' attention, and held that attention for longer.<sup>20</sup> These graphic warnings resulted in more "cognitive elaboration" and were seen as more credible by study participants.<sup>21</sup> A systematic review of observational studies in countries that had implemented graphic warnings likewise found "significant support for the proposition that enhancing cigarette warnings increases warning attention and stimulates message processing."<sup>22</sup>

Experimental studies demonstrate that graphic warning labels that trigger emotional responses are more effective in other stages of the learning process as well. Images that trigger negative emotional responses—particularly large ones—have been shown to be "stickier," leading to greater recall. For example, one study exposed smokers to graphic warnings in their natural context—on the packs of their preferred brand of cigarettes for several weeks. The study demonstrated that "compared to text-only" labels, "graphic warning labels . . . elicited greater scrutiny of the warning message[] and enhanced label memory."<sup>23</sup> In that study, smokers exposed to graphic warning labels also rated the message as more "credible" than those shown additional textual detail.<sup>24</sup> Brain imaging studies confirm

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<sup>20</sup> Seth M. Noar et al., *Pictorial Cigarette Pack Warnings: A Meta-Analysis of Experimental Studies*, 25 *Tobacco Control* 341, 346 (2016).

<sup>21</sup> *Id.* at 347–48.

<sup>22</sup> Seth M. Noar et al., *Effects of Strengthening Cigarette Pack Warnings on Attention and Message Processing: A Systematic Review*, 94 *Journalism & Mass Comm. Q.* 416, 434 (2016).

<sup>23</sup> Abigail T. Evans et al., *Graphic Warning Labels Elicit Affective and Thoughtful Responses from Smokers: Results of a Randomized Clinical Trial*, 10 *PLoS One* (2015).

<sup>24</sup> *Id.*

that “labels rated high on emotional reaction,” which triggered “greater neural activation in brain regions mediating emotional memory,” were ultimately “better remembered.”<sup>25</sup>

Researchers have linked the efficacy of these graphic warnings to their ability—even if unintended—to evoke an emotional response in viewers. Still, this research does not support the plaintiffs’ argument that the visual content of graphic warning labels is “necessarily serving a purpose other than conveying purely factual information”—namely, to “scare consumers.” MSJ at 23. Rather, the process of learning new factual information presented in the warnings—both in the text and images—necessarily implicates emotions. Underscoring this point is a 2017 study comparing three kinds of warnings: text-only; warnings with graphic images related to smoking; and warnings with graphic images unrelated to smoking but similarly evoking negative emotions.<sup>26</sup> The second set of warnings, with images associated with the label text and triggering negative emotions, were rated as more believable and were more memorable at follow-up than the text-only labels were.<sup>27</sup> By contrast, smokers rated the warning labels with the irrelevant images as less believable, and they were less likely to remember them a week later.<sup>28</sup> This study supports the conclusion that, to the extent the FDA’s newest graphic warning labels trigger an emotional response, they will improve smokers’ memory and perceptions of the warning content, and they will do so precisely because the images are serving an *informational* purpose. By contrast, stripping away the images from the FDA’s labels in order to reduce “emotion” would reduce the agency’s ability to accurately convey factual information about cigarettes’ risks.

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<sup>25</sup> An-Li Wang et al., *Emotional Reaction Facilitates the Brain and Behavioural Impact of Graphic Cigarette Warning Labels in Smokers*, 24 *Tobacco Control* 225, 225, 227 (2015).

<sup>26</sup> Zhenhao Shi et al., *The Importance of Relevant Emotional Arousal in the Efficacy of Pictorial Health Warnings for Cigarettes*, 19 *Nicotine & Tobacco Res.* 750, 751–52 (2017).

<sup>27</sup> *Id.* at 753.

<sup>28</sup> *Id.*

Buttressing this experimental data is the experience of the dozens of countries that have introduced graphic warning labels and found them more effective at informing consumers than text alone. Among high-income countries, the U.S. now stands relatively alone in its continued use of limited, textual warning labels for smoking products. Between 2001 and 2016, more than a hundred countries and jurisdictions implemented policies requiring pictorial warnings on cigarette packages.<sup>29</sup> As the FDA noted in its Proposed Rule, the introduction of graphic warnings in these countries increased smokers' knowledge about the risks mentioned in warning text. *See* 84 Fed. Reg. 42,754, 42,762–64 (Aug. 16, 2019).<sup>30</sup>

Additional research backs the FDA's conclusion. A 2016 comprehensive review found that a country's move to strengthen cigarette-pack warnings—most commonly through introducing graphic warnings—was associated with “increased knowledge about smoking risks,” among other public health outcomes.<sup>31</sup> A review of studies conducted in Australia, Mexico, Thailand, and the United Kingdom after those countries introduced graphic warnings found that smokers spent more time “looking at and reading the warnings,” leading to an overall increase in attention.<sup>32</sup> Researchers also found that the possibility that graphic warnings could elicit negative emotions did not undercut their efficacy: In one survey of Canadian smokers nine months after the introduction of graphic warnings, just 13 percent of smokers found the images at all inaccurate or not-credible, even as a “substantial portion” of them reported experiencing fear (44 percent) or disgust (58 percent) after looking at

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<sup>29</sup> *Cigarette Package Health Warnings: International Status Report*, Canadian Cancer Soc'y (5th ed. Oct. 2016), <https://perma.cc/TJJP5-DYFH>.

<sup>30</sup> *See also* James F. Thrasher et al., *Smokers' Reactions to Cigarette Package Warnings with Graphic Imagery and with Only Text: A Comparison Between Mexico and Canada*, 49 *Salud Pública de México* S233 (2007); Tara Elton-Marshall et al., *The Lower Effectiveness of Text-Only Health Warnings in China Compared to Pictorial Health Warnings in Malaysia*, 24 *Tobacco Control* iv6 (2015).

<sup>31</sup> Seth M. Noar et al., *The Impact of Strengthening Cigarette Pack Warnings: Systematic Review of Longitudinal Observational Studies*, 164 *Soc. Sci. & Med.* 118, 125 (2016).

<sup>32</sup> Noar et al., *Effects of Strengthening Cigarette Pack Warnings*, *supra* note 22, at 427.

them.<sup>33</sup> Significantly, researchers have found that when countries introduced graphic warning labels, it was a more effective tool to convey health information *already* being imparted to consumers in other ways. In Australia, for instance, the introduction of graphic images on cigarette labels improved smokers' knowledge of specific health harms—even though the information conveyed had already been part of a national advertising campaign starting nearly a decade earlier.<sup>34</sup>

This research reveals that the plaintiffs' claims rest on an inaccurate view of the role that emotion plays in shaping human learning and behavior. Even though the agency did not design the graphic warnings to trigger negative emotion, emotion may naturally arise from viewing depictions of the effects of smoking. That emotion in turn aids in the processing, learning, and recall of the harms attendant with smoking—exactly what Congress wanted and what the FDA aimed to do.

## **II. Graphic warnings that may evoke negative emotions are necessary to counteract continued widespread misunderstandings of the risks of smoking cigarettes.**

Beyond focusing on the emotional reaction to the warnings, the Tobacco Industry argues that *Zauderer* review does not apply to these warnings for a second reason: in its view, *Zauderer* only applies when a disclosure is needed as a “corrective” for deceptive commercial speech. MSJ at 20–22. That is not the law from the Supreme Court or in the Fifth Circuit, as the plaintiffs contend, nor in any other Circuit. But even if correcting misinformation or deceptive practices were the only circumstance where *Zauderer* applied, the FDA's graphic warning labels would count. Decades of Tobacco Industry deception mean that smokers do not understand the full risks of smoking, and studies demonstrate that the way cigarette manufacturers and marketers continue to package and advertise their products misleads current consumers about the health risks of smoking. Textual warning labels have proven

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<sup>33</sup> David Hammond et al., *Graphic Cigarette Package Warning Labels Do Not Lead to Adverse Outcomes: Evidence from Canadian Smokers*, 94 Am. J. Pub. Health 1442, 1444 (2004).

<sup>34</sup> Ryan David Kennedy et al., *Positive Impact of Australian 'Blindness' Tobacco Warning Labels: Findings from the ITC Four Country Survey*, 95 Clinical & Experimental Optometry 590 (2012).

insufficient to correct these deceptions. Instead, studies demonstrate that graphic warning labels depicting the effects of smoking—which may naturally evoke negative emotional responses—are the most effective corrective to this deception.

**A. No precedent—either in the Fifth Circuit or elsewhere—mandates that *Zauderer* only applies when a warning is needed to correct misinformation.**

The Tobacco Industry argues that, even if the FDA’s warnings are factual, the *Zauderer* standard “cannot apply here” because that standard only applies to government warning labels that “seek[] to combat misleading [commercial] speech,” thereby “preventing deception of consumers.” MSJ at 20 (quoting *Zauderer*, 471 U.S. at 451). That argument relies on a misreading of both Supreme Court and relevant circuit precedent.

The Tobacco Industry first overreads the Supreme Court’s limited case law on disclosure requirements. Looking at the few cases where the Court has upheld disclosures, the plaintiffs claim the “Supreme Court has held the use of the *Zauderer* standard appropriate only when commercial speech is potentially deceptive or misleading and a compelled disclosure would fix that problem.” MSJ at 20. Not so. In *Zauderer* and some other cases where the Supreme Court has applied that standard, the government did assert an interest in correcting misleading speech. But the Supreme Court has never held that such a governmental interest is a predicate condition of *Zauderer*. The cases the plaintiffs cite (at 20–21) do not stand for that limited rule.

In *Milavetz*, for example, the Court described two separate reasons for applying the “less exacting scrutiny described in *Zauderer*”: (1) because the disclosure was “directed at *misleading* commercial speech” and, (2) more generally, because “the challenged provisions impose a disclosure requirement rather than an affirmative limitation on speech.” *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249 (2010). Although the Court noted that the statutes at issue in *Milavetz* and *Zauderer* shared the “essential feature[]” of an “inten[t] to combat the problem of inherently misleading commercial advertisements,” it framed that feature as merely a sufficient—not a necessary—reason



to apply the same test. *Id.* at 250. Likewise in *Ibanez*, the Court’s decision about what test to apply did not turn on whether the state had professed an interest in combatting deception, or in some other legitimate regulatory purpose. *See Ibanez v. Fla. Dep’t of Bus. & Prof’l Regulation*, 512 U.S. 136, 146 (1994). There, the Court refused to apply *Zauderer* only because the government had not provided evidence to show its purported interest in addressing deception was more than “purely hypothetical.” *Id.* That holding says nothing about *Zauderer*’s applicability to disclosure requirements seeking to mitigate other real, non-hypothetical harms.

While this limited case law says little about the application of *Zauderer* beyond the context of deceptive advertising, the Supreme Court’s broader discussions of First Amendment scrutiny suggest that the plaintiffs’ narrow reading is incorrect. In one of its most recent discussions of the various First Amendment tests, the Court described the “more deferential review” in *Zauderer* as applying “to some laws that require professionals to disclose factual, noncontroversial information in their ‘commercial speech.’” *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372 (2018) (citing *Zauderer*, 471 U.S. at 651; *Milavetz*, 559 U.S. at 250; *Obralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 455–456 (1978)). Nowhere did the Court suggest that these laws could only be aimed at deceptive commercial speech.

Given the absence of convincing support in Supreme Court precedent, the plaintiffs next claim that the “Fifth Circuit has recognized that a less-exacting *Zauderer* review applies only to regulations aimed at preventing consumer deception.” MSJ at 21. This, too, misreads the relevant precedent. The plaintiffs mischaracterize *Allstate Insurance Co. v. Abbott* as holding that, because the advertisement “without the mandated disclosure carried only a ‘minimal’ ‘potential for customer confusion,’ heightened scrutiny, rather than *Zauderer*, applied.” *Id.* at 21 (citing *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 166 (5th Cir. 2007)). But that case did not even address a mandated government disclosure; it was about an advertising restriction that prevented a car insurance company from exclusively

recommending its body shop to its insureds, so the Fifth Circuit did not even discuss whether the *Zauderer* standard was appropriate. Instead, it correctly applied the more stringent *Central Hudson* framework used for reviewing limitations on commercial speech (as opposed to mandated warnings or disclosures). *Allstate*, 495 F.3d at 165. The court only discussed *Zauderer* in a single sentence, to note that there was “minimal” potential for customer confusion, unlike the factual circumstances in *Zauderer*. *Id.* at 166. Contrary to the Industry’s deceptive argument, the existence of a deception-focused rationale for the government’s law was not a part of the court’s reasoning regarding what First Amendment test to apply. The other Fifth Circuit cases the Tobacco Industry cites are similarly unavailing. *See, e.g., Test Masters Educ. Servs., Inc. v. Robin Singh Educ. Servs., Inc.*, 799 F.3d 437, 453 (5th Cir. 2015) (applying *Zauderer* to a disclosure requirement designed to remediate misleading commercial speech, but not holding that another standard would necessarily apply if the regulation targeted some other problem); *Hersh v. United States ex rel. Mukasey*, 553 F.3d 743, 764–68 (5th Cir. 2008) (finding a disclosure requirement survived strict scrutiny without deciding whether a lower level of scrutiny would apply).

Nor can the Tobacco Industry ignore that other circuits have explicitly held that *Zauderer* applies to disclosure requirements designed to address problems other than deception in commercial speech. The Ninth Circuit, for instance “rejected the argument that *Zauderer* applies only to situations in which the government requires disclosures to prevent consumer deception.” *Am. Beverage Ass’n v. City & Cty. of S.F.*, 916 F.3d 749, 755–56 (9th Cir. 2019) (en banc). So, too, have several other courts of appeals. *See Disc. Tobacco*, 674 F.3d at 519, 557; *N.Y. State Rest. Ass’n v. N.Y. City Bd. of Health*, 556 F.3d 114, 132–33 (2d Cir. 2009); *Pharm. Care Mgmt. Ass’n v. Rowe*, 429 F.3d 294, 310 n.8 (1st Cir. 2005). Although the D.C. Circuit decision striking down the FDA’s first graphic warnings rule could be read to reach a contrary conclusion, *see R.J. Reynolds*, 696 F.3d at 1214, that court has since “overrule[d]”

any cases that “may be read as . . . limiting *Zauderer* to cases in which the government points to an interest in correcting deception,” *Am. Meat Inst.*, 760 F.3d at 22–23.

Neither the Supreme Court nor any circuit—including the Fifth—mandate that a disclosure regime must target consumer deception to receive the less-stringent *Zauderer* review. It is enough that the government wants to inform consumers about the myriad ways smoking cigarettes can ruin one’s health (or a baby’s health) before they take a puff.

**B. Even if addressing misinformation were a prerequisite to a *Zauderer* disclosure, graphic warnings are needed to correct the misperceptions of the risks of smoking that current cigarette packages and marketing create.**

Nevertheless, even under the plaintiffs’ own formulation, the FDA’s graphic warnings rule should be subject to—and survive—the *Zauderer* test. The graphic warning labels the FDA has mandated are designed to effectively counter the misleading impressions about the risks of smoking that cigarette packaging currently promotes. As such, they fall into a category where the plaintiffs themselves acknowledge the *Zauderer* standard “makes sense” because the “compelled disclosure [is] necessary to make a commercial advertisement nonmisleading.” MSJ at 21.

There is considerable evidence that American consumers continue to hold inaccurate beliefs about the health risks of smoking.<sup>35</sup> The longstanding deceptive practices of the Tobacco Industry are well-documented. *See generally United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1 (D.D.C. 2006), *aff’d in relevant part*, 566 F.3d 1095 (D.C. Cir. 2009). That deception was not limited to the Mad Men days but continued as the Tobacco Industry rolled out new cigarettes that falsely purported to reduce risk (e.g., the so-called “light” and “low tar” cigarettes), secretly redesigned cigarettes to make them more addictive, misled the public about the harms of secondhand smoke, and much more. *See id.* at 308–384, 430–561, 692–801. To be sure, following years of public health messaging, consumers now

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<sup>35</sup> *See Cummings et al.*, *supra* note 18, at S333.

“have some knowledge of smoking’s major health risks.”<sup>36</sup> Yet studies have still found that “in-depth knowledge of tobacco’s health risks is low.”<sup>37</sup> People may understand that smoking is generally unhealthy and fatal, but fail to understand many of the various negative health risks that follow or how likely they are. Specifically, studies demonstrate that smokers have an “optimistic bias,” underestimating their personal risk of contracting diseases and overestimating the likelihood that some of the most serious health effects—like lung cancer—are curable.<sup>38</sup>

Moreover, public knowledge of the risks of smoking is necessarily far from complete, as medical experts continue to discover new links between smoking and diseases. For instance, the U.S. Surgeon General’s Report on the health consequences of smoking only recently linked tobacco use to age-related macular degeneration, diabetes, and erectile dysfunction<sup>39</sup>—three health effects highlighted in the FDA’s new graphic warnings rule. The Industry cannot claim these risks are well-known to the public when they were acknowledged by the Surgeon General less than a decade ago.

And to this day the deceptive practices continue. Current cigarette packaging and retail practices—including by the plaintiffs in this case—contribute to confusion about smoking risks. Manufacturers and retailers have found new ways to package their products to “positively influence consumer perceptions” of this inherently dangerous product<sup>40</sup> and effectively deceive consumers about the risks of smoking.<sup>41</sup> For instance, the use of “more white space, less action, and muted colors”

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<sup>36</sup> Ellen Peters et al., *Emotion in the Law and the Lab: The Case of Graphic Cigarette Warnings*, 2 Tobacco Reg. Sci. 404, 405 (2016).

<sup>37</sup> *Id.*; see also *Philip Morris*, 449 F. Supp. 2d at 578.

<sup>38</sup> Peters et al., *supra* note 36, at 405.

<sup>39</sup> See Office on Smoking & Health, U.S. Dep’t of Health & Human Servs., *The Health Consequences of Smoking—50 Years of Progress: A Report of the Surgeon General* 10–11 (2014) (hereinafter “SGR”).

<sup>40</sup> Vaughan W. Rees et al., *Assessing Consumer Responses to PREPs: A Review of Tobacco Industry and Independent Research Methods*, 18 Cancer Epidemiology, Biomarkers & Prevention 3225 (2009).

<sup>41</sup> Noar et al., *Impact of Strengthening Cigarette Pack Warnings*, *supra* note 31, at 118 (“Tobacco product packaging is a key part of marketing efforts to make tobacco use appealing.”). See also Melanie

on cigarette packages is “intended to reinforce the lower tar delivery message” of particular brands—a message that implies, wrongly, that these brands are safer.<sup>42</sup> At least one plaintiff in this case has used that strategy to great effect. Take the example of “Camel Blue”—the brand name that plaintiff R.J. Reynolds gave to its former “light” cigarette brand, after the TCA prohibited the use of “light” descriptors.<sup>43</sup> In their motion for summary judgment, the plaintiffs introduced a mock-up of a Camel Blue pack with the new required warning label to support their contention that the rule unduly burdens manufacturers. *See* MSJ at 40. What that image shows, instead, is the message that the package, in faded blues and whites, conveys to consumers now: that these cigarettes are the “lighter” and “safer” alternative.<sup>44</sup> But they are not.<sup>45</sup>

The Surgeon General’s textual warning labels, last updated in 1984, have proven insufficient at combating these implied messages of safety; indeed, they are barely even seen by consumers. As discussed above, research indicates graphic warning labels like the FDA has mandated here are likely one of the most effective tools to use to further the agency’s stated purpose of “correct[ing] consumer misperceptions regarding the risks presented by cigarettes.” 85 Fed. Reg. at 15,645.

This Court, too, cannot ignore that there is something uniquely and inherently deceptive about the sale of cigarettes. Cigarettes are *sui generis* because they are the only consumable product on the market that cannot be used safely in any quantity and that kills at least half of the people who use the

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Wakefield et al., *The Cigarette Pack as Image: New Evidence from Tobacco Industry Documents*, 11 *Tobacco Control* i73, i78–i79 (2002); Crawford Moodie & Gerard Hastings, *Tobacco Packaging as Promotion*, 19 *Tobacco Control* 168 (2010).

<sup>42</sup> Rees et al., *supra* note 40.

<sup>43</sup> Mary Falcone et al., *Awareness of FDA-Mandated Cigarette Packaging Changes Among Smokers of ‘Light’ Cigarettes*, 30 *Health Educ. Res.* 81, 84 (2015).

<sup>44</sup> *Id.*; *see also* Gregory N. Connolly & Hillel R. Alpert, *Has the Tobacco Industry Evaded the Intent and Purpose of the FDA’s Ban on ‘Light’ Cigarette Descriptors?*, 23 *Tobacco Control* 140 (2013).

<sup>45</sup> *See* SGR, *supra* note 39, at 157, 178–185.

product as intended.<sup>46</sup> Given the very real and serious health risks of smoking, courts have found that tobacco advertising and promotion “deceive[] consumers if [they] do[] not warn consumers about tobacco’s serious health risks.” *Disc. Tobacco*, 674 F.3d at 562 (citing *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 527 (1992)). The Supreme Court, for instance, cited approvingly the Federal Trade Commission’s conclusion that “[t]o avoid giving a false impression that smoking [is] innocuous, the cigarette manufacturer who represents the alleged pleasures or satisfactions of cigarette smoking in his advertising must also disclose the serious risks to life that smoking involves.” *Cipollone*, 505 U.S. at 527. No one expects that boxes of poison be sold without a warning, and companies that actively market poison and encourage the public to use it are already required to use a graphic warning—a skull and crossbones symbol—prominent enough to be noticed and to convey the poison’s danger. *See* 16 C.F.R. § 1500.121. No one suggests that this violates the First Amendment. Yet that is the import of what the Tobacco Industry is arguing for here.

In fact, researchers have found that graphic warning labels like the ones challenged here are more effective in countering misperceptions about the harms of smoking than either of the alternatives that the plaintiffs posit: (1) text-only warnings or (2) “more neutral” graphic warnings selected to evoke no emotional response. MSJ at 23, 25. As one nationally representative study of adult and teen smokers found, information conveyed alongside images that evoked little emotion actually *reduced* the perception of smoking’s risks relative to a text-only warning.<sup>47</sup> That result reflects consumers’ common-sense expectation that if a product is truly harmful, that danger will be accurately reflected in the product’s warning. Images that evoked negative emotions, by contrast, were more

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<sup>46</sup> *See* World Health Org., *Fact Sheet: Tobacco* (May 27, 2020), <https://perma.cc/M59C-QH65>; World Health Org., *WHO Report on the Global Tobacco Epidemic, 2013: Enforcing Bans on Tobacco Advertising, Promotion, and Sponsorship* 23 (2013), <https://perma.cc/MDW5-QNLZ>.

<sup>47</sup> Abigail T. Evans et al., *Cigarette Graphic Warning Labels Are Not Created Equal: They Can Increase or Decrease Smokers’ Quit Intentions Relative to Text-Only Warnings*, 19 *Nicotine & Tobacco Res.* 1155, 1161 (2017).

likely to accurately convey the factual message of the accompanying text and were more likely to be recognized by study participants later on.<sup>48</sup> In short: the FDA's warnings are necessary to correct the misperceptions about smoking and inform customers more fully about smoking's risks.

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The First Amendment is a powerful right, but it does not allow those who sell poison or addictive, deadly, and harmful products to avoid the government's requirement to communicate basic factual information about health risks in an effective manner. The FDA's warnings may incidentally evoke negative emotions because the bare facts about smoking are "gross," "horrific," and "heartbreaking." Those emotions may help consumers learn the risks of smoking, combatting the decades of deception that continues today, but they do not justify elevated First Amendment scrutiny. The FDA's graphic warnings are factual and noncontroversial and properly subject to *Zauderer* review.

### CONCLUSION

For these reasons, amicus respectfully requests that the Court deny the Tobacco Industry's motions for a preliminary injunction and for summary judgment and grant the FDA's motion for summary judgment, upholding the congressionally mandated graphic warnings.

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<sup>48</sup> *Id.*

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Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 17, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the United States District Court for the Eastern District of Texas by using the CM/ECF system. All participants are registered CM/ECF users and will be served by the CM/ECF system. I further certify that, in accordance with Local Rule CV-5(a)(9), I sent a paper copy of this document to the presiding judge's chambers.

July 17, 2020

/s/ Rachel Bloomekatz  
Rachel Bloomekatz