No. _____

In the Supreme Court of the United States

AMERICAN SNUFF COMPANY, LLC; COMMONWEALTH BRANDS, INC.; DISCOUNT TOBACCO CITY & LOTTERY, INC.; LORILLARD TOBACCO COMPANY; NATIONAL TOBACCO COMPANY, L.P.; R.J. REYNOLDS TOBACCO COMPANY,

Petitioners,

v.

UNITED STATES, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

FLOYD ABRAMS
JOEL KURTZBERG
CAHILL GORDON & REINDEL LLP
80 Pine St.
New York, NY 10005
Counsel for Petitioner Lorillard Tobacco Company

NOEL J. FRANCISCO
Counsel of Record
HASHIM M. MOOPPAN
WARREN D. POSTMAN
JONES DAY
51 Louisiana Ave. NW
Washington, DC 20001
(202) 879-3939
njfrancisco@jonesday.com
Counsel for Petitioners R.J. Reynolds Tobacco Co. and American Snuff Company, LLC

(*Additional Counsel Listed on Inside Cover*)

PHILIP J. PERRY
LATHAM & WATKINS LLP
555 11th St. NW
Suite 1000
Washington, DC 20004
Counsel for Petitioner Commonwealth Brands, Inc.

LEANNE MOORE
NATIONAL TOBACCO COMPANY, L.P.
5201 Interchange Way
Louisville, KY 40229
Counsel for Petitioner National Tobacco Company, L.P.

CHARLES E. ENGLISH
E. KENLY AMES
ENGLISH, LUCAS, PRIEST & OWSLEY LLP
1101 College St.
P.O. Box 770
Bowling Green, KY 42102
Counsel for Petitioner Discount Tobacco City & Lottery, Inc.

QUESTIONS PRESENTED

In the Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009) ("Act"), Congress imposed myriad restrictions on truthful, non-misleading speech to adult tobacco consumers concerning lawful tobacco products. The questions presented are:

1. Whether the Act violates the First Amendment by mandating new expanded warnings that occupy between 20% and 50% of the packaging and advertising for cigarettes and smokeless tobacco, and that include, for cigarettes, graphic images depicting the negative health consequences of tobacco use.

2. Whether the Act violates the First Amendment by imposing a prior-restraint requirement (the "MRTPR") on manufacturers' speech about modified-risk tobacco products that pose relatively fewer health risks than cigarettes.

3. Whether the Act violates the First Amendment by banning, in all or virtually all circumstances, the marketing of tobacco products through brand-name sponsorships, brand-name merchandise, sample tobacco products, and free gifts for purchase.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The Petitioners here, who were Plaintiffs-Appellants/Cross-Appellees below, are: American Snuff Company, LLC, fka Conwood Company, LLC, ("American Snuff"); Commonwealth Brands, Inc. ("Commonwealth Brands"); Discount Tobacco City & Lottery, Inc. ("Discount Tobacco"); Lorillard Tobacco Company ("Lorillard"); National Tobacco Company, L.P. ("National Tobacco"); and R.J. Reynolds Tobacco Company ("Reynolds").

American Snuff is a wholly-owned, indirect subsidiary of Reynolds American Inc., ("RAI"), which is a publicly held corporation. Brown & Williamson Holdings, Inc. ("BWHI"), and Invesco Ltd. hold more than 10% of the stock of RAI. British American Tobacco p.l.c. indirectly holds more than 10% of the stock of RAI through BWHI.

Commonwealth Brands is a wholly-owned subsidiary of CBHC, Inc., which is a wholly-owned subsidiary of Imperial Tobacco Group p.l.c., which is a publicly held corporation.

Discount Tobacco does not have a parent company, and no publicly held company has an ownership stake in it of 10% or more.

Lorillard is a wholly-owned subsidiary of Lorillard, Inc., which is a publicly held corporation.

National Tobacco is a limited partnership owned by North Atlantic Trading Company, Inc., and National Tobacco Finance Company, Inc., which are privately held corporations.

Reynolds is a wholly-owned indirect subsidiary of RAI, the ownership of which is set forth above.

The Respondents here, who were Defendants Appellees/Cross-Appellants below, are: the United States of America; the United States Food & Drug Administration; Margaret Hamburg, in her official capacity as Commissioner of the United States Food and Drug Administration; and Kathleen Sebelius, in her official capacity as Secretary of the United States Department of Health and Human Services.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL AND STATUTORY AUTHORITIES

RULES AND REGULATORY AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioners American Snuff, Commonwealth Brands, Discount Tobacco, Lorillard, National Tobacco, and Reynolds respectfully submit this petition for a writ of certiorari.[1]

OPINIONS

The opinion of the Court of Appeals for the Sixth Circuit (Pet.App. 1a) is reported at 674 F.3d 509. The opinion of the District Court for the Western District of Kentucky entering summary judgment (Pet.App. 117a) is reported at 678 F. Supp. 2d 512. An earlier opinion of the District Court denying a preliminary injunction (Pet.App. 166a) is unreported but available at 2009 WL 3754273.

JURISDICTION

The Sixth Circuit entered judgment on March 19, 2012, and denied rehearing en banc on May 31, 2012. By orders entered on July 26, 2012, and August 31, 2012, Justice Kagan extended the time to file this petition until October 26, 2012. No. 12A102. 28 U.S.C. § 1254(1) confers statutory jurisdiction to review the judgment.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The appendix reproduces the First Amendment, U.S. Const., amend. I, as well as relevant provisions of the Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009) ("Act"), and of 21 C.F.R. Part 1140.

---

[1] Herein, "R.__" refers to the district court's Docket Entries.

STATEMENT OF THE CASE

The Act sweepingly restricts the tobacco industry's truthful, non-misleading speech about its lawful products to adult tobacco consumers. Here, although the Sixth Circuit invalidated two of the Act's speech restrictions, including a ban on almost all color-or-graphic advertising, it upheld the many remaining restrictions, including the Act's provisions mandating vastly expanded, newly graphic warnings on packaging and advertising for cigarettes and smokeless tobacco. Subsequently, in *R.J. Reynolds Tobacco Co. v. FDA*, Nos. 11-5332, 12-5063, --- F.3d ----, 2012 WL 3632003 (D.C. Cir. Aug. 24, 2012) ("*RJRT*"), a separate case brought by an overlapping set of plaintiffs, the D.C. Circuit invalidated FDA's Rule adopting specific graphic images to implement the Act's cigarette warnings provisions.

Given several conflicts among precedent and the general importance of the issues, this Court should: (1) hold the question presented here involving the Act's mandatory warnings for later consideration with any certiorari petition filed in *RJRT* concerning FDA's Rule for cigarette warnings, with a view to grant the warnings question here and consolidate with any questions that may be granted in *RJRT*; and (2) grant review now on the other two questions presented here.[2]

A. Pre-Act Restrictions On Petitioners' Speech

"[T]here is no real dispute that adults consume more than 98% of all tobacco products sold in this

---

[2] This proposal assumes the Government's pending petition for rehearing en banc in *RJRT* will be denied. If it is granted, Petitioners will address the implications in their reply brief.

country." Pet.App. 60a (internal quotation marks omitted); *see also* R.71-2 ¶ 5. Nevertheless, before the Act, Petitioners' ability to communicate with, and compete for, existing adult consumers was already extensively restricted.

For example, federal law bans all advertising of cigarettes and smokeless tobacco on radio and television. 15 U.S.C. §§ 1335, 4402(f). Likewise, for decades, all packaging and advertising for these products have carried government-mandated warnings. *Id.* §§ 1333(a), 4402(a). Additionally, some (though not all) Petitioners are subject to the Master Settlement Agreement ("MSA") with the states, which imposes myriad marketing restrictions, like bans on billboards and marketing deemed "to target [y]outh." *See* Pet.App. 47a n.9; R.71-12 § III.

In short, even before the Act's passage, Petitioners had relatively few avenues to speak about their products to existing adult consumers. *See, e.g.*, R.71-11 ¶¶ 12-20.

B. The Act's Restrictions On Petitioners' Speech

The Act essentially ignores Petitioners' protected interest in truthfully communicating with adult consumers, fixating instead on the Government's professed interests in reducing youth tobacco use and preventing consumer confusion. It thus eviscerates many of the few remaining avenues available to Petitioners for speaking to adults.

1. New Mandatory Warnings. The Act requires massive warnings on packaging and advertising for cigarettes and smokeless tobacco, which overwhelm Petitioners' speech with the purpose and effect of advocating that adults not buy these lawful products.

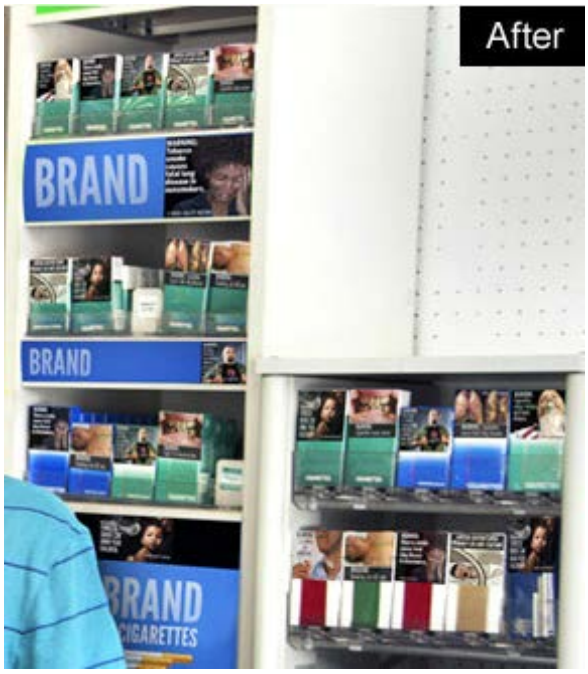
a. For cigarettes, the new warnings must occupy the top 50% of the front and back of the package and must include FDA-selected "color graphics depicting the negative health consequences of smoking." Pub. L. No. 111-31, § 201(a) (amending 15 U.S.C. § 1333(a),(d)). For smokeless tobacco, the new warnings must occupy 30% of the two principal display areas of the package, and FDA may require inclusion of the negative graphics. *Id.* §§ 204(a), 205(a) (amending 15 U.S.C. § 4402(a),(d)). For both products, the new warnings additionally must occupy 20% of all advertising (including the *top* 20% for cigarettes). *Id.* §§ 201(a), 204(a) (amending 15 U.S.C. §§ 1333(b), 4402(b)).[3]

b. The burden these expanded warnings impose on Petitioners' speech is straightforward and significant. These warnings commandeer massive portions of the most prominent parts of their packaging and advertising. No other compelled warning in America displaces this much speech just to disseminate messages as simple as "Smoking Can Kill You" or "Cigarettes Are Addictive."

Moreover, because tobacco products generally must be stored in areas behind sales counters that are inaccessible to customers, relegating Petitioners' speech to the periphery of their packaging will render it "invisible" compared to the dominating warnings. *See, e.g.*, R.71-9 ¶ 29; R.71-14 ¶ 31; R.71-11 ¶¶ 65-72. That this is the warnings' purpose and effect is illustrated by FDA's own depiction of the impact on retail displays:

---

[3]The Act also amends the warnings' *text*, Pub. L. No. 111-31, §§ 201(a), 204(a) (amending 15 U.S.C. §§ 1333(a), 4402(a)), but this action has not challenged those changes.



http://www.fda.gov/TobaccoProducts/Labeling/Labeling/CigaretteWarningLabels/ucm259862.htm. Indeed, many of Petitioners' marketing messages will not fit in the limited remaining space. *See, e.g.*, R.71-9 ¶ 28; R.71-16 ¶ 29. The Government introduced no contrary evidence refuting any of these burdens on Petitioners' speech.

Nor are these burdens justified by any need for these expanded warnings. Although the Government asserted that the old warnings "are given little attention," Pet.App. 102a, it adduced no evidence that such a massive expansion was necessary to draw attention. To the contrary, even the World Health Organization treaty invoked by the Government (*id.* 112a) does *not* mandate: (1) warnings exceeding 30% of the packaging; (2) warnings occupying the top of packaging or

advertising; (3) any minimum size for warnings on advertising, let alone 20%; or (4) color-graphic warnings. *See* R.73-44 at Art. 11.1(b), 13.4(b).

Indeed, the Government failed to introduce any evidence that *any* expansion was necessary to increase consumer knowledge of the health risks addressed in the warnings. Consumers do not pay attention to the old warnings because, as the evidence conclusively demonstrates, they *already fully know*—indeed, often overestimate—the risks described in the warnings. *See* R.71-4 ¶¶ 4-6, 20-44, 59-82. The Surgeon General's 1994 Report itself rejected the "assumption … [that] young people had a deficit of information that could be addressed by presenting them with health messages in a manner that caught their attention": "smoking-prevention programs based on the information deficit approach were not effective." *Id.* ¶ 34. The Government did suggest below that consumers might not fully comprehend the precise degree or nature of the risks involved. *See* Pet.App. 103a-104a, 110a-111a. But nothing in the new warnings speaks to any narrow gaps in knowledge that may exist. For example, even if youth "*underestimate the degree* to which smoking can shorten a smoker's life," *see id.* 104a (emphasis added), that information deficit is not addressed by plastering the *unquantified* statement "Smoking Can Kill You," with a graphic picture, across the top half of both sides of cigarette packages, *supra* at 4 & n.1.

In sum, as admitted by the Institute of Medicine in a 2007 report, "the primary objective" of such expanded warnings "is not to promote informed choice but rather to discourage consumption of

tobacco products," including through "'denormalizing' [them]" and "preventing promotional messages by tobacco companies as other avenues of advertising are curtailed." *See* R.73-16 at 289-91. Simply put, the Act's new warnings have the purpose and effect of rebranding Petitioners' marketing to convey "no more than [the] generalized anti-tobacco message: 'don't buy this product.'" *See* R.71-4 ¶ 68.

2. MRTPR. The Act also imposes the modified-risk tobacco product requirement ("MRTPR"), a prior restraint on certain speech by manufacturers to consumers about tobacco products that pose fewer health risks than cigarettes. The MRTPR stifles Petitioners' participation in an important public-health debate about whether the harms from tobacco use can be reduced through less-risky products like smokeless tobacco. It prevents Petitioners from speaking in a timely manner, and completely bans them from truthfully informing consumers that a given product is relatively less risky than cigarettes if FDA paternalistically concludes that too many consumers exposed to such speech will switch to the less-risky product instead of quitting altogether.

a. There is an ongoing debate about the role of reduced-risk tobacco products, like smokeless tobacco, in the public-health strategy to mitigate the health effects of tobacco use.

Participants on one side, like Petitioners, believe that, "while no tobacco product has been shown to be safe[,] some present more risks than others," and so "[p]olicies should encourage [users] of higher-risk products, like cigarettes, who can't or won't quit tobacco use altogether to switch to nicotine products or to [smokeless] tobacco products that present lower

risk." *See* R.71-18, Ex.A at 32:7-34:14; R.71-18, Ex.D-2. As the Royal College of Physicians has concluded, "if the public is offered a substantially less harmful smokeless tobacco product along with access to accurate information on relative risks, a substantial proportion can switch to the less harmful product." *See* R.72-2 ¶ 47. Notably, the *relative* health risks of smokeless tobacco for *individual* users is essentially undisputed in the scientific community, *see, e.g.*, *id.* ¶¶ 3-7, 18-37, 53-61, and was uncontested by the Government below.

Nevertheless, those on the other side, like the Government, fear that marketing products' reduced-risk attributes might cause existing tobacco users to "reduce … or delay cessation attempts" or cause non-tobacco-users to start by using lower-risk products. *See* R.43-2 at 11-12. If that happens, proponents of the Government's position believe that the individual health benefits to consumers who otherwise would have stuck with riskier cigarettes may be outweighed by the costs to the total population from "increasing rather than decreasing the fraction of the population using tobacco products." *See id.*

b. The Act stifles this public debate by imposing a prior restraint on key advocates for one side—namely, manufacturers. Under the MRTPR, manufacturers may not sell a "modified risk tobacco product" without obtaining an "order" from FDA granting permission. 21 U.S.C. § 387k(a),(g). Yet critically, the MRTPR defines the term "modified risk tobacco product" *solely based on the manufacturer's speech informing consumers about the product*. *Id.* § 387k(b).

First, the definition includes a product the "label, labeling, or advertising of which *represents explicitly or implicitly*" that the product has one of three traits: it (I) "presents a lower risk of tobacco-related disease or is less harmful than one or more other commercially marketed tobacco products," (II) "contains a reduced level of a substance or presents a reduced exposure to a substance," or (III) "does not contain or is free of a substance." *Id.* § 387k(b)(2)(A)(i) (emphasis added). *Second*, the definition includes a product for which the "manufacturer … has taken *any [other] action directed to consumers through the media or otherwise*" that "respect[s] the product" and "would be reasonably expected to result in consumers believing" that the product has one of the three traits above. *Id.* § 387k(b)(2)(A)(iii) (emphasis added).[4]

Thus, manufacturers may *sell* products like smokeless tobacco that are less risky than cigarettes, but they cannot *inform* consumers of their products' reduced-risk properties without first getting FDA permission. Uttering *such speech* instantly transforms their products into "modified risk tobacco products" that require pre-sale approval, on pain of *criminal* penalty. *Id.* §§ 331(a), 333(a), 387b(8).

c. The MRTPR's prior-restraint regime seriously interferes with Petitioners' speech, due to a lengthy pre-approval procedure and a narrow approval standard.

---

[4] The definition also includes a product "the label, labeling, or advertising of which uses the descriptors 'light,' 'mild,' or 'low' or similar descriptors." 21 U.S.C. § 387k(b)(2)(A)(ii). Petitioners have not challenged this provision, because they do not engage in such speech.

First, the pre-approval procedure significantly delays speech. The Act does not ensure prompt decisions by FDA on MRTPR applications. It merely requires FDA to "issue regulations or guidance" that "establish a reasonable timetable," *id.* § 387k(*l*)(1)(F)—and FDA has failed to do even that, other than issuing non-binding guidance that it "intends" to decide applications "within 360 days," 77 Fed. Reg. 20,026, 20,028 (Apr. 3, 2012). Nor does the Act ensure prompt judicial review of decisions denying approval. The Act does not authorize immediate D.C. Circuit review as it does for certain other FDA actions, 21 U.S.C. § 387*l*, relegating challengers to a normal APA action in district court. Thus, FDA can muzzle speech for lengthy periods through inaction and delay.

Second, the approval standard entirely bars some indisputably truthful and non-misleading speech. FDA may grant approval "*only* if [it] determines that the [manufacturer] has demonstrated" that the product will *both*: "(A) significantly reduce harm and the risk of tobacco-related disease to *individual* tobacco users; *and* (B) *benefit the health of the population as a whole* taking into account both users of tobacco products and persons who do not currently use tobacco products." *Id.* § 387k(g)(1) (emphases added). Thus, even if a manufacturer conclusively proves the accuracy of its claim that its product will reduce risk to "individual tobacco users," FDA *must* deny approval unless the manufacturer *also* proves the product will "benefit the health of the population as a whole."

Critically, for this latter determination, FDA must consider, *not* whether the manufacturer's

speech is misleading, but whether the speech will cause "existing users of tobacco products who would otherwise stop using such products [to] switch to the [relevant] product" or cause "persons who do not use tobacco products [to] start using th[at] product." *Id.* § 387k(g)(4). The MRTPR thus requires denying approval to speech that would *accurately* inform consumers of a relatively less-risky option, because of fears that those facts would cause "too many" consumers to make what the Government perceives to be the "wrong" decision—*i.e.*, to reject the Government's preferred "abstinence only" position in favor of using the reduced-risk product.

Finally, while the Act justifies the MRTPR's prior-restraint regime based on an interest in preventing consumers from being misled about reduced-risk products, *id.* § 387 note, Findings (40),(43), the Government neither introduced any evidence that the onerous pre-approval procedure was necessary to achieve that interest nor explained how the paternalistic approval standard serves that interest. Congress did include a statutory finding that disclaimers would not work because, in some unspecified context, "the [FTC] has found [that] consumers have misinterpreted advertisements in which one product is claimed to be less harmful than a comparable product, even in the presence of disclosures and advisories intended to provide clarification." *Id.* § 387 note, Findings (41). But that supposed FTC conclusion is not substantiated in the statute, legislative history, or record below.

d. In sum, the MRTPR's prior-restraint regime tilts the public-health debate toward the Government's "abstinence only" position. It muzzles

Petitioners' ability to timely speak to consumers about their reduced-risk products and suppresses their truthful speech whenever FDA decides that consumers overall would make "bad" decisions with that information.

3. Marketing Bans. Finally, the Act imposes sweeping bans on essential, commonly-used marketing methods, without regard for the significant impact on Petitioners' speech to existing adult consumers or the lack of need for such broad bans to reduce youth tobacco use.

a. The Act requires FDA to re-promulgate regulations restricting tobacco marketing that FDA enacted in 1996 but that were invalidated in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125-26 (2000), as exceeding FDA's then-existing regulatory authority. *See* 21 U.S.C. § 387a-1(a)(2). These marketing bans cover various communicative methods. Petitioners below challenged five of the bans (prevailing on the first and fifth):

i. Color-or-Graphic Advertisements. The regulations mandate that, subject to two narrow exceptions, advertising "shall use only black text on a white background." 21 C.F.R. § 1140.32(a).

ii. Brand-Name Sponsorships. The regulations prohibit using brand names to sponsor "athletic, musical, artistic, or other social or cultural event[s]." *Id.* § 1140.34(c).

iii. Brand-Name Merchandise. The regulations prohibit using brand names on promotional merchandise, like t-shirts. *Id.* § 1140.34(a).

iv. Sample Tobacco Products. The regulations prohibit providing free samples to market cigarettes or (with a narrow exception) smokeless tobacco. *Id.* § 1140.16(d).

v. Gifts For Purchase. The regulations prohibit providing free gifts for purchasing tobacco products, either at the time of purchase or through a continuity rewards program. *Id.* § 1140.34(b).

b. The banned practices are vitally important to Petitioners in communicating with and competing for existing adult consumers, particularly given the myriad pre-existing restrictions on tobacco marketing. For example, the "use of color and imagery in tobacco advertising" is "attention grabbing in a crowded marketplace," can "reinforce consumer preference[s]," and may be "informational." *See, e.g.*, Pet.App. 67a-68a. Similarly, Petitioners use brand-name sponsorships, brand-name merchandise, free samples, and free gifts as communicative tools to engage in inter-brand competition for existing adult consumers. *See, e.g.*, R.71-15 ¶¶ 6-10, 33-56. The Government introduced no contrary evidence. It did claim that such tools "more heavily influence" youth, partly because "adult tobacco users are extremely brand loyal." *See* Pet.App. 51a-54a; *see also id.* 62a-63a. But that just underscores that these *brand-enhancing methods* are especially vital for reinforcing the loyalty of Petitioners' adult customers and undermining the loyalty of their competitors' customers.

Nevertheless, the Act banned these marketing practices aimed at adults simply due to their alleged effect on youth. 21 U.S.C. § 387 note, Findings (30)-

(32). Specifically, when FDA promulgated these regulations in 1996, FDA hoped they would cut youth tobacco use by half within seven years. 61 Fed. Reg. 44,396, 44,423, 44,541-42 (Aug. 28, 1996).

Notably, however, since 1996, the federal government, states, and public-health community employed a variety of non-speech-restrictive alternatives that successfully reduced youth use by FDA's goal and more *even absent these regulations*. *See, e.g.*, R.71-2 ¶¶ 20, 23, 50-66 (discussing proven non-speech-restrictive strategies, like enforcing laws that bar sales to minors and designing anti-tobacco programs that youth find particularly meaningful). Again, the Government introduced no contrary evidence.

In sum, while purporting to protect youth, the Act's marketing bans broadly and needlessly stifle Petitioners' speech to adults.

C. This Litigation Challenged The Act's Provisions

As relevant here, Petitioners challenged the Act's provisions above on First Amendment grounds.

1. The district court, on cross-motions for summary judgment, invalidated some provisions and upheld others. *First*, it upheld the Act's new warnings. Pet.App. 138a-145a. *Second*, it upheld the MRTPR. *Id.* 145a-151a; *see also id.* 169a-192a. *Finally*, on the marketing bans, it struck down the color-or-imagery ban but upheld the rest. *Id.* 123a-137a, 159a-161a.

2. The Sixth Circuit affirmed in part and reversed in part. On the Act's new warnings, Judge Stranch wrote for the panel majority (joined by

District Judge Barrett), with Judge Clay dissenting in part. *Id.* 3a-4a, 77a-78a. On the MRTPR and marketing bans, Judge Clay wrote for a unanimous panel. *Id.* The panel held as follows:

First, the panel held that the Act's mandatory new warnings are facially constitutional. *Id.* 116a. It initially concluded they should be reviewed under the standard established in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), which it construed as holding that compelled commercial disclosures that are factual and accurate need only be "reasonably related" to the Government's asserted informational interest. Pet.App. 79a-99a. The panel then upheld the Act's expanded warnings under what it deemed to be *Zauderer*'s "rational-basis rule," because consumers are more likely to pay attention to larger text-and-graphic warnings. *Id.* 99a-116a. It decided this determination was sufficient under *Zauderer* to uphold the Act's warnings, *even if* they otherwise are "unjustified or unduly burdensome" or not "purely factual and uncontroversial." *Id.* 94a n.8, 110a-112a. But it emphasized that its conclusion was limited to the facial validity of the Act's warnings, because FDA's Rule selecting particular graphic images for cigarettes was not before it. *Id.* 114a-115a. Partially dissenting, Judge Clay would have invalidated the Act's graphic-image requirement as an improper attempt to dissuade consumers from purchasing tobacco products by manipulating their emotions, rather than a reasonably tailored effort to better inform their purchasing decisions. *Id.* 20a-31a.

Second, the panel held that the MRTPR is constitutional. *Id.* 45a-46a. It initially concluded

that the MRTPR is a commercial-speech restriction reviewed under *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), but not also reviewed under the special procedural and substantive safeguards normally applicable to prior restraints. Pet.App. 34a-37a. The panel then decided that, under *Central Hudson*, the MRTPR is narrowly tailored to preventing misleading speech about reduced-risk products. *Id.* 38a-45a. It ruled that the pre-approval procedure is needed to prevent misleading speech, because Congress had deemed inadequate less-speech-restrictive alternatives like disclaimers and post-market review. *Id.* 44a-45a. It further found that the "health of the population as a whole" approval standard does not ban truthful speech, because it "is inherently misleading" to say that "a product is less risky if it reduces harm to an individual[] when that harm is externalized to others." *Id.* 43a-44a.

Third, the panel held that the bans on brand-name sponsorships, brand-name merchandise, and free samples are constitutional. *Id.* 46a, 60a-61a. Notably, however, it concluded that these speech restrictions are narrowly tailored to reduce youth tobacco use under *Central Hudson* simply because they are not *over-inclusive*; it thus completely failed to consider the separate issue whether there are numerous and obvious *non-speech-restrictive alternatives* that would be at least as effective in reducing youth use. *Id.* 48a-59a.

Finally, the panel held that the other two marketing bans are unconstitutional under *Central Hudson*. It concluded that "banning the use of color and graphics in tobacco advertising is vastly

overbroad" to "alleviat[e] the effects of tobacco advertising on juvenile consumers." *Id.* 69a; *see also id.* 65a-69a. And it concluded that there is no evidence that banning free gifts for purchase would significantly affect youth. *Id.* 48a-50a, 59a-60a.[5]

3. The Sixth Circuit denied Petitioners' request for rehearing en banc. *Id.* 196a-197a.

D. The *RJRT* Decision Invalidated FDA's Rule Implementing The Act's Cigarette Warnings

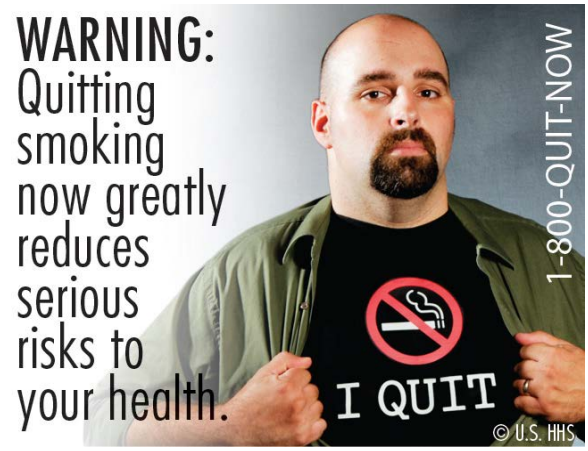
1. After this case began, FDA published its Rule implementing the Act's graphic-image requirement for cigarette warnings. 76 Fed. Reg. 36,628 (June 22, 2011). FDA selected nine images, which, under the Act, must appear on the top 50% of both sides of packaging and the top 20% of advertising:

[5] Although the panel occasionally referred only to "continuity programs" without mentioning gifts *at the time* of purchase, it elsewhere generally referred to "the distribution of free gifts in consideration for tobacco purchases," and its reasoning covered all such gifts. Pet.App. 46a-50a, 59a-61a. To be safe, though, Petitioners included this provision within the marketing-ban question presented.

WARNING: Cigarettes cause fatal lung disease.

WARNING:
Cigarettes cause cancer.


WARNING:
Cigarettes
cause strokes
and heart
disease.
© U.S. HHS
1-800-QUIT-NOW
WARNING: SMOKING DURING
PREGNANCY CAN HARM YOUR BABY.
1-800-QUIT-NOW
© U.S. HHS
© U.S. HHS
1-800-QUIT-NOW
WARNING:
Smoking can kill you.



2. In the *RJRT* litigation, several cigarette manufacturers, including some Petitioners here and others, challenged the Rule under the First Amendment. The District Court for the District of Columbia, on cross-motions for summary judgment, invalidated the Rule. *R.J. Reynolds Tobacco Co. v. FDA*, 845 F. Supp. 2d 266, 268 (D.D.C. 2012).

The D.C. Circuit affirmed, with Judge Brown writing for the panel majority (joined by Judge Randolph), and Judge Rogers dissenting in part.

The panel initially held that *Zauderer*'s lower standard of scrutiny is inapplicable. *RJRT*, 2012 WL 3632003, at *3-8. Of note here, it reasoned that *Zauderer*'s "ambit" extends only to "purely factual, accurate, or uncontroversial information," whereas the Rule's "inflammatory images and the provocatively-named [1-800-QUIT-NOW] hotline" are "unabashed attempts to evoke emotion (and perhaps embarrassment) and browbeat consumers into quitting." *Id.* at *7-8. Applying instead the *Central Hudson* standard, the panel invalidated the Rule because "FDA has not provided a shred of evidence … showing that the graphic warnings will 'directly advance' its interest in reducing the number of Americans who smoke." *Id.* at *8-12. In light of its conclusion that the Rule's warnings "cannot rationally be viewed as pure attempts to convey information to consumers," *id.* at *7-8, it further explained that any "purported 'interest'" in "'effectively communicating' the health risks of smoking is merely a description of the means by which [FDA] plans to accomplish its goal of reducing smoking rates, and not an independent interest capable of sustaining the Rule," *id.* at *12. Partially dissenting, Judge Rogers would have invalidated the Rule's 1-800-QUIT-NOW hotline. *Id.* at *13-14.

3. The Government filed a petition for rehearing en banc on October 9, 2012, and the challengers' response is due on October 29, 2012.

REASONS FOR GRANTING THE PETITION

The Act is the most comprehensive restraint in American history on a lawful industry's speech. In upholding several aspects of that restraint, the Sixth Circuit's decision conflicts with decisions of this Court and various circuit courts, and also raises vital constitutional questions about the Government's power to restrict truthful and non-misleading speech concerning a lawful but disfavored product.

I. The Act's expanded warnings have the purpose and effect of overwhelming Petitioners' speech while browbeating consumers with the Government's belief that they should refrain from purchasing lawful tobacco products. The need for this Court's review is clear. **(A)** The Sixth Circuit's decision upholding the Act's expanded warnings directly conflicts with the D.C. Circuit's *RJRT* decision invalidating FDA's Rule for cigarette warnings. Although the decisions resolved claims of different scope, Petitioners' facial challenge here necessarily would have prevailed under the D.C. Circuit's rationale. **(B)** Moreover, wholly apart from *RJRT*, the Sixth Circuit's decision on the proper standard for reviewing compelled commercial disclosures creates two conflicts with decisions of this Court and the Second, Fifth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits. The Sixth Circuit alone now holds that mandatory disclosures can be upheld under *Zauderer*'s "reasonably related" standard *even if* "unjustified or unduly burdensome" and *even if not* "purely factual and uncontroversial." **(C)** While the Sixth Circuit's warnings decision thus warrants review however *RJRT* is finally resolved, this Court should hold the warnings question presented here for

consideration with any certiorari petition filed in *RJRT*. Given the overlapping issues, joint consideration would benefit this Court's certiorari decision-making and facilitate consolidated merits briefing of all warnings-related questions this Court ultimately chooses to review. Alternatively, though, this Court could just grant review now on the warnings question presented here.

II. The MRTPR's prior-restraint regime stifles one side of an important public-policy debate about the role that less-risky tobacco products, like smokeless tobacco, should play within the public-health strategy for reducing the harms from tobacco use. Again, the need for this Court's review is clear: **(A)** by accepting Congress' unsubstantiated assertion that a prior restraint was necessary because disclaimers and other less-speech-restrictive means for preventing misleading speech would be inadequate, the Sixth Circuit's decision conflicts with decisions of this Court and the Second, Fifth, and D.C. Circuits; **(B)** by refusing to apply the special limits on prior restraints because commercial speech is involved, the Sixth Circuit's decision conflicts with decisions of the Second and Ninth Circuits and is in significant tension with decisions of this Court; and **(C)** by allowing FDA to suppress non-misleading speech based on the paternalistic fear that too many consumers would make bad decisions with truthful information, the Sixth Circuit's decision conflicts with decisions of this Court.

III. The sweeping bans on brand-name sponsorships, brand-name merchandise, free samples, and free gifts reflect no consideration of their impact on Petitioners when communicating

with adult consumers or the availability of non-speech-restrictive alternatives for achieving equivalent reductions in youth tobacco use. The need for this Court's review is again clear: **(A)** by restricting adults to receiving only speech that is deemed not to influence children, the Sixth Circuit's decision conflicts with decisions of this Court; and **(B)** by failing to consider whether the desired reductions in youth use could have been achieved without these blunderbuss speech restrictions, the Sixth Circuit's decision conflicts with decisions of this Court and the Third, Fifth, and Tenth Circuits.

IV. These questions presented also warrant this Court's review because they raise important First Amendment issues with dramatic implications for a major industry. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 540 (2001). Moreover, the Sixth Circuit's deferential review of the Act effectively establishes a reduced level of scrutiny for commercial-speech restrictions concerning lawful products that the Government disfavors, which contravenes this Court's admonition that there is no "vice" exception to commercial-speech jurisprudence, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (plurality opinion); *accord Lorillard*, 533 U.S. at 571. Indeed, this Court recently emphasized that, where speech regulations "seek to remove a popular but disfavored product from the marketplace," the First Amendment must be vigorously enforced. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2671 (2011). This Court's review is therefore necessary to reaffirm the fundamental principle that even commercial speech about disfavored products is entitled to robust constitutional protection.

Accordingly, this Court should grant review now on the questions presented involving the MRTPR and the marketing bans, and hold the warnings question presented for later consideration with *RJRT*, with a view to grant here and consolidate with any questions in *RJRT* that may be granted.

I. THE SIXTH CIRCUIT'S DECISION UPHOLDING THE NEW WARNINGS PROVISIONS WARRANTS REVIEW, BUT THIS QUESTION PRESENTED SHOULD BE HELD FOR CONSIDERATION WITH *RJRT*

The Sixth Circuit's ratification of the Act's expanded warnings conflicts with numerous precedents and principles that limit the Government's power to compel speech concerning a commercial product. Although review of the Act is warranted here however FDA's Rule for cigarette warnings is finally resolved in *RJRT*, this Court should hold this question presented for consideration with *RJRT*, given the overlapping issues.

A. The Sixth Circuit's Decision Upholding The Act's Warnings Provisions Directly Conflicts With The D.C. Circuit's Decision Invalidating FDA's Rule For Cigarette Warnings

The Sixth Circuit's decision directly conflicts with the D.C. Circuit's *RJRT* decision, because Petitioners' facial challenge to the Act's warnings failed in the Sixth Circuit but would have succeeded in the D.C. Circuit.

The D.C. Circuit held that "FDA has not provided a shred of evidence … showing that the graphic warnings will 'directly advance' its interest in reducing the number of Americans who smoke,"

RJRT, 2012 WL 3632003, at *9-12, which the court deemed the only "independent interest capable of sustaining the Rule," *id.* at *12, given that those expanded warnings "cannot rationally be viewed as pure attempts to convey information to consumers," *id.* at *7-8. Although that holding involved FDA's Rule, the reasoning equally applies to the Act's expanded warnings on their face: the Government identified no evidence that *any* version of the Act's warnings (with different images or no images) would decrease tobacco consumption or increase consumer knowledge. *Id.* at *6 n.8, 10-12; *see also* Pet.App. 107a-111a (emphasizing evidence showing that the expanded warnings were more likely to be noticed by consumers, but not showing they increased consumer knowledge, given the near-universal awareness of the information conveyed by the warnings).

The Act's new warnings are thus facially valid in the Sixth Circuit but effectively invalid in the D.C. Circuit. That disparate geographic result concerning a federal statute's constitutionality alone warrants this Court's review of the Sixth Circuit's decision.[6]

B. The Sixth Circuit's Decision Creates Two Conflicts Concerning The Proper Standard For Reviewing Compelled Commercial Disclosures

Wholly apart from *RJRT*, the Sixth Circuit's decision creates two doctrinal conflicts about *Zauderer*'s scope and application.

---

[6] But conversely, even the Sixth Circuit's decision upholding the Act's warnings does not ratify FDA's Rule. The Sixth Circuit declined to consider whether the Rule's specific images are "accurate and factual," Pet.App. 94a-95a, 114a-115a, and the D.C. Circuit held they are not, *RJRT*, 2012 WL 3632003, at *7-8.

1. The Sixth Circuit's Failure To Consider Whether The Expanded Warnings Are Unjustified Or Unduly Burdensome

The panel held that *Zauderer*'s standard does not require "separately analyz[ing] whether the warnings are unjustified" or "unduly burdensome." Pet.App. 110a-112a; *see also id.* 86a-91a. Instead, it concluded, "[d]eciding whether a disclosure requirement is reasonably related to [its informational] purpose is all the law requires." *Id.* 110a; *see also id.* 99a (employing "rational-basis" review). That holding conflicts with decisions of this Court and the Fifth, Seventh, Tenth, and Eleventh Circuits, which all hold that a mandated disclosure *is unconstitutional* under *Zauderer* if "unjustified or unduly burdensome."

In *Ibanez v. Fla. Dep't of Bus. & Prof'l Reg.*, 512 U.S. 136 (1994), this Court invalidated a disclosure requirement for "specialist" accountants solely because it was "unjustified" and "unduly burdensome" under *Zauderer*:

> Given … the failure of the Board to point to any harm that is potentially real, not purely hypothetical[,] we are satisfied that the Board's action is *unjustified*. We express no opinion whether, in other situations or on a different record, the Board's insistence on a disclaimer might serve as an appropriately tailored check against deception or confusion, rather than one imposing "*unduly burdensome* disclosure requirements [that] offend the First Amendment." *Zauderer*[, 471 U.S. at 651.] This much is plain, however: The detail required in the

> disclaimer currently described by the Board effectively rules out notation of the "specialist" designation on a business card or letterhead, or in a yellow pages listing.

Id. at 146-47 (emphases added); *accord Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1339-40 (2010) ("Unjustified or unduly burdensome disclosure requirements offend the First Amendment by chilling protected speech….").

Likewise, in *Public Citizen, Inc. v. La. Attorney Disciplinary Bd.*, 632 F.3d 212 (5th Cir. 2011), the Fifth Circuit held that certain formatting requirements for disclosures in attorney advertising failed both prongs of *Zauderer*. They could not be "justif[ied]" because "evidence that [the State's] previous disclaimer requirements were ineffective [was] not evidence that the specific [new] requirements" were needed, and they also were "overly burdensome" because they "effectively rule[d] out the ability … to employ short advertisements." *Id.* at 228-29. The Tenth and Eleventh Circuits similarly have emphasized that *Zauderer* prohibits "unduly burdensome" disclosure requirements. *United States v. Wenger*, 427 F.3d 840, 849 (10th Cir. 2005); *Borgner v. Brooks*, 284 F.3d 1204, 1214 (11th Cir. 2002); *cf. Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006) ("Certainly we would not condone a health department's requirement that half of the space on a restaurant menu be consumed by the raw shellfish warning.").

2. The Sixth Circuit's Failure To Require That The Expanded Warnings Be Purely Factual And Uncontroversial

The panel also held that warnings need not be "'purely factual and [un]controversial'" for *Zauderer*'s standard to apply. Pet.App. 94a n.8. It reasoned that this "language" from *Zauderer* was not "describing the characteristics that a disclosure must possess," but "merely describes the disclosure the Court faced in that specific instance." *Id.* Instead, it concluded, a disclosure need only be "accurate and factual." *Id.* 94a-95a & n.8. That holding conflicts with decisions of this Court and the Second, Seventh, Ninth, Tenth, and D.C. Circuits, which all hold that *Zauderer*'s lower standard is *limited* to "purely factual and uncontroversial" commercial disclosures.

In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), this Court explicitly so stated:

> Although the State may at times "prescribe what shall be orthodox in commercial advertising" by requiring the dissemination of "purely factual and uncontroversial information," *Zauderer*[, 471 U.S. at 651,] *outside that context* it may not compel affirmance of a belief with which the speaker disagrees … [or] *statements of fact the speaker would rather avoid*."

Id. at 573-74 (emphases added).

Likewise, in *United States v. Philip Morris USA Inc.*, 566 F.3d 1095 (D.C. Cir. 2009) (per curiam), the D.C. Circuit held that, when a court orders "corrective disclosures," it "must confine the statements to 'purely factual and uncontroversial

information.'" *Id.* at 1144. Similarly, the Second, Seventh, Ninth, and Tenth Circuits have emphasized that the *Zauderer* standard involves "purely factual and uncontroversial disclosure requirements." *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 113 (2d Cir. 2001); *Blagojevich*, 469 F.3d at 652; *CTIA - The Wireless Ass'n v. City & Cnty. of San Francisco*, Nos. 11-17707 & 11-17773, 2012 WL 3900689, at *1 (9th Cir. Sept. 10, 2012); *Wenger*, 427 F.3d at 849.

C. Although This Question Presented Warrants Review, It Should Be Held For Later Consideration With *RJRT*

As demonstrated, however FDA's specific graphic images for cigarette warnings are finally resolved in *RJRT*, the Sixth Circuit's decision here facially upholding the Act's expanded warnings for cigarettes and smokeless tobacco warrants review. Regardless of *RJRT*, the Sixth Circuit created two doctrinal conflicts while deciding an exceptionally important constitutional question.

Nevertheless, this Court should hold the warnings question presented here for later consideration with any certiorari petition filed in *RJRT*. Although Petitioners intend to oppose certiorari in *RJRT* if rehearing *en banc* is denied, *supra* at 26 n.6, they recognize that this Court's certiorari decision-making will benefit from joint consideration given the overlapping legal and factual issues. Moreover, if this Court ultimately decides to grant review of both cases' warnings-related questions, doing so contemporaneously would enable consolidated merits briefing, separate from any briefing on the additional questions presented here. *See Fla. v. Dep't of Health & Human Servs.*, 132 S.

Ct. 841 (2011) (ordering separate briefing on different questions presented). Alternatively, though, this Court could just grant review now on the warnings question presented here.

II. THE SIXTH CIRCUIT'S DECISION UPHOLDING THE MRTPR'S PRIOR-RESTRAINT REGIME CONFLICTS WITH DECISIONS OF THIS COURT AND THE CIRCUIT COURTS

The Sixth Circuit's ratification of the MRTPR conflicts with numerous precedents and principles that limit the Government's power to restrict commercial speech to influence consumer decision-making.

A. The Sixth Circuit's Failure To Require Evidence That Disclaimers And Other Less-Speech-Restrictive Alternatives To A Prior Restraint Would Be Inadequate

The Sixth Circuit held that the MRTPR's prior restraint was narrowly tailored to the Government's professed interest in preventing misleading speech, due to "Congress' determination" that "the alternatives suggested by [Petitioners] have already been tried and found wanting." Pet.App. 44a-45a. Yet neither the Government nor the Sixth Circuit cited *any evidence* supporting that "determination." *See id.* The Sixth Circuit's total abdication of judicial review under *Central Hudson*'s narrow-tailoring prong conflicts with decisions of this Court and the Second, Fifth, and D.C. Circuits.

1. The conflict is squarely presented for the alternative of disclaimers. This Court long has held that, where speech is potentially misleading, "the remedy in the first instance is not necessarily a

prohibition but preferably a requirement of disclaimers or explanation." *In re R.M.J.*, 455 U.S. 191, 203 (1982); *accord Alexander v. Cahill*, 598 F.3d 79, 95-96 (2d Cir. 2010); *Public Citizen*, 632 F.3d at 224; *Pearson v. Shalala*, 164 F.3d 650, 657-59 (D.C. Cir. 1999).

Moreover, the Second, Fifth, and D.C. Circuits all refuse to accept unsubstantiated assertions that disclaimers would be inadequate. In *Public Citizen*, the Fifth Circuit rejected a state agency's claim that "a disclaimer would not be able to cure or prevent" misleading attorney advertising, because the agency "did not support th[at] assertion[] with evidence or explanation" in the "record." 632 F.3d at 224; *accord Alexander*, 598 F.3d at 95-96. Likewise, in *Pearson*, the D.C. Circuit rejected "FDA's conclusory assertion" that disclaimers on dietary supplements would confuse consumers. 164 F.3d at 659.

These holdings reflect this Court's admonition that "rote invocation of the words 'potentially misleading'" cannot satisfy the Government's *evidentiary* "burden to []demonstrate that the harms it recites are real." *Ibanez*, 512 U.S. at 146. It is "incumbent upon [courts] to go behind" a "legislative declaration," lest "the scope of freedom of speech … be subject to legislative definition and the function of the First Amendment as a check on legislative power … be nullified." *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 843-44 (1978).

This case exemplifies why such review is essential. The Sixth Circuit blindly deferred to a Congressional finding that the FTC had concluded that disclaimers do not work in some unspecified context. Pet.App. 44a-45a. But that *ipse dixit*

finding—indistinguishable from FDA's conclusory assertion in *Pearson*—was unsupported by either Congress in the legislative record or the Government in the trial record. *Supra* at 11. Indeed, there is not even any explanation of the supposed finding's context. Yet in the tobacco-products context, the finding is demonstrably false, as the FTC *approved* a disclaimer for a "no-additive" tobacco product that stated: "No additives in our tobacco does **NOT** mean safer." FTC Consent Order, No. C-3952 (June 12, 2000), http://www.ftc.gov/os/2000/06/santafe.do.htm. The FTC thus acknowledges that disclaimers can eliminate any confusion about the relative risks of tobacco products.

2. The conflict extends more generally beyond disclaimers. This Court repeatedly has held that, because "regulating speech must be a last—not first—resort," the Government must explain "why [less-speech-restrictive] possibilities, alone or in combination, would be insufficient." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002); *see also, e.g.*, *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490-91 (1995). In *Thompson*, this Court invalidated a federal statute that restricted pharmacy advertising to distinguish between small-scale and large-scale "drug compounding," because "[s]everal non-speech-related means of drawing a line between compounding and large-scale manufacturing *might be possible*." 535 U.S. at 371-73 (emphasis added). Critically, it so held even though FDA "specifically warned that these [very] alternatives alone were insufficient." *Id.* at 386 (Breyer, J., dissenting).

Thompson forecloses the Sixth Circuit's defense of the MRTPR's prior-restraint regime. The Sixth

Circuit invoked the alleged inadequacy of existing "post-market review" in preventing past misleading speech about "light" cigarettes and in redressing any injuries from future misleading speech. Pet.App. 40a-42a, 44a-45a. But Congress may not impose a prior restraint without considering the "possibility" of *strengthening* post-market review *to better deter* misleading speech: *e.g.*, requiring contemporaneous regulatory disclosures of marketing (and its factual support), *see R.M.J.*, 455 U.S. at 206, or increasing significantly the penalties for misleading speech, *see United States v. Philip Morris USA Inc.*, 396 F.3d 1190, 1192 (D.C. Cir. 2005) (disgorgement of profits unauthorized for RICO violations concerning misleading marketing).

B. The Sixth Circuit's Failure To Apply Traditional Prior-Restraint Doctrine To Commercial Speech

"[P]rior restraints on speech … are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). This Court thus requires special procedural and substantive safeguards: there must be prompt administrative and judicial decision-making; the Government must bear the burden of proof; and the standard for approval must be objective and clear. *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553, 558-60 (1975). The MRTPR lacks *all* these safeguards, *supra* at 10-11, but the Sixth Circuit refused to consider those defects, invoking this Court's *dicta* that "commercial speech is such a sturdy brand of expression that traditional prior restraint doctrine may not apply to it," Pet.App. 35a (quoting *Central Hudson*, 447 U.S. at 571 n.13). The

Sixth Circuit's reliance on this *dicta* conflicts with decisions of the Second and Ninth Circuits and is in significant tension with this Court's prior-restraint decisions.

The Second Circuit has rejected *Central Hudson*'s *dicta*, holding that "the requirement of procedural safeguards in a system of prior restraints should not be loosened even in the context of commercial speech." *New York Magazine v. Metro. Transp. Auth.*, 136 F.3d 123, 131 (2d Cir. 1998). Likewise, the Ninth Circuit facially invalidated a prior restraint that applied to commercial speech because it lacked the substantive safeguard of "narrow, objective, and definite standards." *Desert Outdoor Adver. v. City of Moreno Valley*, 103 F.3d 814, 818-19 (9th Cir. 1996).

Moreover, *Central Hudson*'s *dicta* is at odds with this Court's rationale for limiting prior restraints. The fundamental flaw with such regimes is "the danger of censorship." *Se. Promotions*, 420 U.S. at 553, 559; *accord Freedman v. Maryland*, 380 U.S. 51, 57-59 (1965). It thus is irrelevant that "sturdy" commercial speakers are less likely to be *chilled* by a prior restraint. *See Central Hudson*, 447 U.S. at 571 n.13. Regardless, the risk of *censorship* is equally present. The MRTPR illustrates the danger: there is an ongoing debate about the role of reduced-risk products in the tobacco harm-reduction strategy, *supra* at 7-8, and the Government is favoring one side by suppressing Petitioners' speech to consumers in support of their "disfavored product[s]," *Sorrell*, 131 S. Ct. at 2671.

C. The Sixth Circuit's Failure To Invalidate A Prior-Restraint Approval Standard That Paternalistically Bars Non-Misleading, Potentially Life-Saving Speech

The MRTPR's "health of the population as a whole" approval standard proscribes truthful speech that the Government fears will persuade consumers to engage in lawful conduct the Government deems unhealthy. Specifically, this approval standard bars speech that non-misleadingly informs consumers that reduced-risk products like smokeless tobacco pose *relatively* fewer health risks to *individuals* than cigarettes (though still more risks than not using tobacco altogether), whenever FDA decides that *too many* consumers exposed to such speech will start using the smokeless product (instead of quitting or never starting tobacco use). *Supra* at 10-11.

Yet this Court has repudiated such a "highly paternalistic approach," which "prevent[s] the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions." *Thompson*, 535 U.S. at 374-75; *accord 44 Liquormart*, 517 U.S. at 503 (plurality opinion) ("The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."). In the "debate" over whether consumers should use a lawful product, the Government cannot "license one side … to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992). Indeed, this Court recently reiterated that the Government "may not seek to remove a popular but disfavored product from the

marketplace by prohibiting truthful, nonmisleading advertisements." *Sorrell*, 131 S. Ct. at 2670-71.

The Sixth Circuit distinguished this anti-paternalism precedent by holding that it is "inherently misleading" to "claim that a product is less risky if it reduces harm to an individual[] when that harm is externalized to others." Pet.App. 43a-44a. But that Orwellian conception of "misleading" speech eviscerates the anti-paternalism rule. When Petitioners truthfully inform individuals that they can reduce, but not eliminate, their health risks by switching from cigarettes to smokeless tobacco, the only so-called "harm" "externalized" is that some fully informed individuals will be persuaded to use smokeless tobacco instead of adopting the Government's "abstinence only" alternative. That the Government dislikes the *effect* of Petitioners' truthful speech, however, does not render their speech *misleading*, especially since every tobacco product prominently displays health warnings.

Indeed, it is the MRTPR that "externalizes" "harm," by depriving consumers of "information" about "public health" that "can save lives." *Sorrell*, 131 S. Ct. at 2664. The MRTPR distorts the information presented to consumers by creating a false dichotomy between cigarette usage and tobacco abstinence, in order to induce more consumers to adopt the latter position. That shields consumers from information about the middle-ground position of reduced-risk products, which are potentially life-saving for individuals who will not quit using tobacco but would be willing to switch products. The MRTPR is thus especially pernicious since it *sacrifices* the health of those individuals, keeping

them "in the dark," *not* even "for their own good," but for the good of others who might quit using tobacco if kept ignorant of the reduced-risk alternatives. This illustrates why a "consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue." *Id.*

III. THE SIXTH CIRCUIT'S DECISION UPHOLDING THE CHALLENGED MARKETING BANS CONFLICTS WITH DECISIONS OF THIS COURT AND THE CIRCUIT COURTS

The Sixth Circuit's ratification of the challenged marketing bans conflicts with numerous precedents and principles that limit the Government's power to restrict commercial speech to reduce youth use.

A. The Sixth Circuit's Failure To Consider Petitioners' Interest In Communicating With Adult Consumers

The Sixth Circuit upheld these marketing bans based solely on evidence suggesting that the communicative methods involved influence tobacco use by youth and do so more heavily than for adults. Pet.App. 50a-59a. That blinkered fixation on youth conflicts with this Court's decisions.

This Court repeatedly has held that "the adult population"—which purchases more than 98% of all tobacco products, *supra* at 2-3—cannot be reduced "to reading only what is fit for children." *Lorillard*, 533 U.S. at 564; *accord Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73-74 (1983) ("The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox."). Brand names and free products, just like "catchy jingles" and "impressive endorsements,"

Sorrell, 131 S. Ct. at 2671, serve the "important communicative functions" of "attract[ing] the attention of the audience" and "impart[ing] information directly," *Zauderer*, 471 U.S. at 647.

Moreover, this Court has emphasized that, where only "few avenues" exist for successfully communicating with adults, banning those avenues "place[s] a greater, not lesser, burden on" speakers. *Lorillard*, 533 U.S. at 564-65. That is directly applicable here, given the myriad other restrictions on tobacco marketing *and* adults' relative brand-loyalty. *Supra* at 3, 13.

B. The Sixth Circuit's Failure To Consider Non-Speech-Restrictive Alternatives

The Sixth Circuit upheld these marketing bans without considering the adequacy of non-speech-restrictive alternatives to reduce youth tobacco use. *Compare supra* at 14 (discussing the past success of alternatives like those proposed by Petitioners), *with* Pet.App. 54a-59a (deeming the bans narrowly tailored without analyzing those alternatives). But, again, the failure to consider such numerous and obvious alternatives conflicts with this Court's decisions like *Thompson* and *Rubin*. *Supra* at 33-34.

It likewise conflicts with decisions of the Third, Fifth, and Tenth Circuits. For example, in *Pitt News v. Pappert*, 379 F.3d 96 (3d Cir. 2004), then-Judge Alito held that Pennsylvania's ban on alcohol advertisements in a university newspaper was unconstitutional because "the Commonwealth [could] seek to combat underage and abusive drinking by other means … that do not affect the First Amendment," like "enforcement of the alcoholic beverage control laws on college campuses." *Id.* at

108; *see also Pruett v. Harris Cnty. Bail Bond Bd.*, 499 F.3d 403, 412-13 (5th Cir. 2007) (invalidating restriction on bail-bond solicitations to subjects of outstanding arrest warrants, because police could preserve the element of surprise through the non-speech-restrictive alternative of making arrests before making warrants public); *Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061, 1075 (10th Cir. 2001) (invalidating restriction on liquor advertising, because temperance could be promoted using non-speech-restrictive alternatives).

IV. THE SIXTH CIRCUIT'S DECISION RAISES EXCEPTIONALLY IMPORTANT QUESTIONS ABOUT THE GOVERNMENT'S POWER TO RESTRICT SPEECH CONCERNING A DISFAVORED PRODUCT

Wholly apart from conflicting authority, this Court's review is warranted given the "important First Amendment issues presented." *Lorillard*, 533 U.S. at 540. The First Amendment plainly prohibits confiscating the most prominent portions of packaging and advertising for so-called "warnings" that, at best, repeat well-known information about the product, and, at worst, convey the unmistakable message not to buy the product. Likewise, the First Amendment forbids imposing a prior restraint on truthful speech that contradicts the Government's position in a contested policy debate. And it also forecloses blanket bans on commercial marketing to adults in a simplistic effort to shield youth from speech about age-restricted products. That the Sixth Circuit ratified such unprecedented speech burdens on a major industry alone justifies review.

This case's significance, moreover, extends beyond these specific restrictions. The Sixth Circuit's overly-deferential review of Congress' sweeping regulation of tobacco-industry speech makes clear that settled First Amendment principles have been subordinated due to the disfavored status of tobacco products. For less controversial products, Congress likely would not have imposed such onerous regulations even to prevent consumer confusion or reduce youth use, and the Sixth Circuit certainly would not have upheld them. Thus, by effectively reducing the level of scrutiny for tobacco speech restrictions, the Sixth Circuit adopted a "vice" exception to commercial-speech doctrine, which this Court rejected, *44 Liquormart*, 517 U.S. at 501 (plurality opinion).

This Court had compelling reasons for doing so. "[S]o long as the sale and use of [a product] is lawful for adults, the [manufacturer] has a protected interest in communicating information about its products and adult customers have an interest in receiving that information." *Lorillard*, 533 U.S. at 571. Nor would there be any judicially manageable stopping point if the Government could "seek to remove [some] popular but disfavored product[s] from the marketplace by prohibiting truthful, nonmisleading advertisements" about assertedly harmful products, because "[t]hose who seek to censor or burden free expression" can always "assert that disfavored speech has adverse effects." *Sorrell*, 131 S. Ct. at 2670-71.

The Act thus cannot be ignored as a "*sui generis*" regulation of *tobacco* speech: it openly invites similar measures for "fast food," "alcohol," video

games, or any other product that falls into disfavor due to "the specter of some threatened harm" from the product's lawful marketing and use. *Lorillard*, 533 U.S. at 586-90 (Thomas, J., concurring in part and concurring in the judgment). Down this path lie laws compelling McDonald's to post pictures of obese people on their menus, requiring Coke to seek government approval before promoting diet soda as healthier than full-sugar soda, and banning Budweiser from sponsoring NASCAR. This Court's intervention is warranted to reaffirm that "disfavored products" like tobacco are entitled to the full protections of commercial-speech jurisprudence.

Moreover, any doubt in this regard would bolster the need for review. If current doctrine is sufficiently malleable that it even arguably sanctions the Act's draconian speech restrictions, this Court should follow the many Justices who have urged revisiting the precedents applying less-than-strict scrutiny to content-based restrictions on commercial speech. *Id.* at 554 (majority opinion) (citing cases); *Milavetz,* 130 S. Ct. at 1342-43 (Thomas, J., concurring in part and concurring in the judgment).

CONCLUSION

Accordingly, this Court should grant review now on the questions presented involving the MRTPR and the marketing bans, and hold the warnings question presented for later consideration with *RJRT*, with a view to grant here and consolidate with any questions in *RJRT* that may be granted.

Respectfully submitted,

FLOYD ABRAMS
JOEL KURTZBERG
CAHILL GORDON & REINDEL LLP
80 Pine St.
New York, NY 10005

Counsel for Petitioner Lorillard Tobacco Company

PHILIP J. PERRY
LATHAM & WATKINS LLP
555 11th St. NW
Suite 1000
Washington, DC 20004

Counsel for Petitioner Commonwealth Brands, Inc.

LEANNE MOORE
NATIONAL TOBACCO COMPANY, L.P.
5201 Interchange Way
Louisville, KY 40229

Counsel for Petitioner National Tobacco Company, L.P.

NOEL J. FRANCISCO
Counsel of Record
HASHIM M. MOOPPAN
WARREN D. POSTMAN
JONES DAY
51 Louisiana Ave. NW
Washington, DC 20001
(202) 879-3939
njfrancisco@jonesday.com

Counsel for Petitioners R.J. Reynolds Tobacco Co. and American Snuff Company, LLC

CHARLES E. ENGLISH
E. KENLY AMES
ENGLISH, LUCAS, PRIEST & OWSLEY LLP
1101 College St.
P.O. Box 770
Bowling Green, KY 42102

Counsel for Petitioners Commonwealth Brands, Inc. and Discount Tobacco City & Lottery, Inc.