ORAL ARGUMENT SCHEDULED FOR APRIL 10, 2012

**No. 11-5332**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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

*Plaintiffs-Appellees*,

v.

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

*Defendants-Appellants*.

*On Appeal from the United States District Court for the District of Columbia, District Court No. 11-148 (Hon. Richard J. Leon)*

# *AMICUS CURIAE* BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE OF THE DECISION BELOW

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## CERTIFICATE OF PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

*Amicus Curiae* the Chamber of Commerce of the United States of America (the "Chamber") adopts and incorporates by reference the Certificate of Parties, Rulings Under Review, and Related Cases included in the Brief filed by Plaintiffs-Appellees.

## DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Circuit Rule 29(b), Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, the Chamber makes the following disclosures:

1. The Chamber is the world's largest business federation and routinely represents the interests of its members in matters before Congress, the Executive Branch, and the courts, including this Court.

2. The Chamber has no parent corporation. No publicly held corporation owns any portion of the Chamber, and the Chamber is neither a subsidiary nor an affiliate of any publicly owned corporation.

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## GLOSSARY OF ABBREVIATIONS

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| Act | Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009). |
| FDA | Food and Drug Administration |
| Secretary | Secretary of Health and Human Services |

## STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Brief for Appellants.

## STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE

Pursuant to Federal Rule of Appellate Procedure 29, the Chamber of Commerce of the United States of America (the "Chamber") submits this brief *amicus curiae* in support of Plaintiffs-Appellees. The Chamber is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber routinely represents the interests of its members in matters before Congress, the Executive Branch, and the courts, including this Court.

The members of the Chamber have a fundamental interest in the First Amendment rights of commercial entities, because the ability to communicate truthfully about products and services is integral to the work of American businesses and critical to the operation of a free-market economy that allocates resources based on consumer sovereignty. This case presents important questions concerning the standard of review applicable when government seeks to compel a business enterprise to disseminate a government-created message[1] and,

[1] Government regulation of speech by commercial enterprises takes prohibitory and prescriptive forms, both of which are susceptible to government overreaching. Prohibitory regulation restricts messages that are conceived and published by commercial enterprises but that regulators deem potentially harmful

specifically, the legitimacy of the government's asserted interest in using compelled speech to discourage consumers from choosing to buy lawfully available products.

Businesses face a serious threat if, as Defendants-Appellants argue here, the government has broad latitude to require the producers of goods and services to use their own packaging and marketing materials to disseminate government-mandated graphics that are designed to persuade consumers to reject the very goods and services on which they appear. The Chamber strongly supports the analysis adopted by the district court's decision below, because the Chamber is vitally interested in ensuring that government regulation of speech by commercial entities is properly confined within the bounds of the First Amendment. Simply put, businesses that are engaged in lawful commerce should not be subjected to government-mandated speaker- and content-based discrimination.

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to recipients or otherwise inconsistent with regulatory goals. By contrast, prescriptive regulation requires commercial enterprises to make affirmative statements or disclosures that regulators deem necessary to "balance" business messaging, or to provide additional information considered necessary for consumers to make sound decisions in purchasing and using securities, food, medicines, and other products or services. This case does not involve prohibitory regulation. Rather, the speaker here is required to convey graphic information of government creation that is intended to influence consumer opinion and behavior independent of, or in addition to, textual disclosures regarding product composition, use and potential consequences.

The Chamber supports the arguments that are being advanced by Plaintiffs-Appellees on the merits of Plaintiffs-Appellees' First Amendment challenge to the FDA regulations at issue, but submits this brief to address two additional points that are of particular concern to its members. *First*, for the reasons set forth below, in the wake of the Supreme Court's recent decision in *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011), the continuing vitality of the "intermediate scrutiny" test adopted in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), is doubtful. *Second*, even if *Central Hudson* retains validity in circumstances where the government has intervened to correct or amend a private commercial speaker's statements on the grounds that *the private speaker's* statements are objectively false or misleading by inclusion or omission, *Central Hudson* and its progeny do not remotely support the position that the government has advanced here. Instead, *Sorrell* compels the conclusion that the *Central Hudson* test is inadequate to protect the fundamental First Amendment interests that are put at risk by government efforts to influence consumer choice by engaging in speaker- and content-based discrimination and commandeering private packaging and marketing materials to convey government-mandated messages.

The Chamber has obtained the consent of all parties to the filing of this brief. Fed. R. App. P. 29(a). Pursuant to Fed. R. App. P. 29(c)(5), the Chamber

states that (1) no party's counsel has authored this *amicus curiae* brief in whole or in part; (2) no party or party's counsel has contributed money intended to fund the preparation or submission of this brief; and (3) no person other than the Chamber, its members and its counsel have contributed money intended to fund the preparation or submission of this brief.

## PRELIMINARY STATEMENT

Pursuant to the Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009) (the "Act"), the Secretary of Health and Human Services (the "Secretary"), acting through the Food and Drug Administration ("FDA"), has issued regulations that require cigarette manufacturers to place large color images on their packaging and advertising that are intended to illustrate the adverse health consequences of smoking. *See* 15 U.S.C. § 1333 Note; 76 Fed. Reg. 36,628 (June 22, 2011). Specifically, the Act requires that manufacturers apply nine different verbal "label [warning] statements" to "the top 50 percent of the front and rear panels" of cigarette packages and "at least 20 percent of the area of [cigarette] advertisement[s]" and that, not later than June 22, 2011, the Secretary issue "regulations that require color graphics depicting the negative health consequences of smoking to accompany the label statements . . . so that both the graphics and the accompanying label statements . . . appear within the specified area." 15 U.S.C. § 1333 Note. These requirements apply without regard to the content of any other statements made by the manufacturers in their packaging and advertisements.

Pursuant to the "color graphics" directive, the FDA solicited public comment and conducted a study to "test[] the relative effectiveness of . . . thirty-six proposed images." Br. of FDA (Dec. 12, 2011) ("Gov't Br.") at 13. The

study was designed to study the efficacy of graphic warnings relative to a text-only control, and to decide which nine of the thirty-six graphics to require in the Rule. Toward that end, the FDA purported to measure the "noticeability and readability" of the graphics with reference to, among other things, "emotional reactions" and "cognitive reactions" provoked by the graphics "and whether the warning was difficult to look at." *Id*. (quoting 76 Fed. Reg. at 36,696). The FDA asserted that the nine images it selected "were designed to correlate with [the] warning statements" and were "'generally consistent'" with graphic health warnings used in countries such as Australia, Canada and the United Kingdom. *Id*. at 20 (quoting 76 Fed. Reg. at 36,637, 36,647).

The Chamber supports reasonable government efforts to police fraud and misrepresentation in interstate commerce and, in sufficiently compelling circumstances, to require certain narrowly tailored disclosures that are objectively necessary to permit consumers to use lawfully marketed goods and services safely.[2] Beyond that, however, and regardless of the government's view on the

[2] Plaintiffs-Appellees are not challenging the *verbal* warning label statements that are mandated by the Act. For decades the tobacco industry has been subject to mandatory disclosure requirements relating to the known adverse health effects of smoking and the well-established risks associated with that activity. *See* Gov't Br. at 8-9. The industry has also been subjected to numerous restrictions on its ability to market tobacco products to the public through media and methods of its own choosing. For example, all television and radio advertising of cigarettes was banned in 1971, *see* Public Health Cigarette

intrinsic value of a seller's product or service, the First Amendment prohibits the government from compelling sellers to disseminate government messages designed to persuade consumers not to purchase the product or service at issue. Here, the mandatory pictorial disclosures at issue constitute an extraordinary imposition that does not pass muster under strict scrutiny because they (a) are expressly designed to provoke adverse emotional reactions and inspire fear above and beyond any factual disclosures related to the hazards associated with smoking; (b) are neither responsive to, nor designed to correct, any express or implied verbal or graphic representation made by the manufacturers; and (c) represent a radical departure from traditional government efforts to regulate speech insofar as they force commercial enterprises to disparage the very products that they are lawfully marketing. Whatever authority the government might have consistent with the First Amendment to require truthful and non-

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Smoking Act of 1969, Pub. L. No. 91-22, 84 Stat. 87 (1970), and since the early 1970s tobacco marketing and advertising has been subjected to numerous other restrictions. *See generally* Centers for Disease Control and Prevention, Smoking & Tobacco Use: Selected Actions of the U.S. Government Regarding the Regulation of Tobacco Sales, Marketing, and Use (excluding laws pertaining to agriculture or excise tax), available at www.cdc.gov/tobacco/data_statistics/by_topic/policy/legislation/index.htm (last visited Jan. 30, 2012).

Few if any commonly available consumer products have received similarly targeted regulatory attention. In the Chamber's view, however, it would be a profound mistake to permit this regulatory history to cloud the analysis of the First Amendment issues presented in this case.

misleading disclosures and, in sufficiently compelling circumstances, narrowly tailored warnings that are objectively necessary to make a lawful product or service safe (or less potentially dangerous) consistent with its intended use, the Chamber respectfully submits that the government has no legitimate authority to commandeer the space on the seller's packaging or advertising for the purpose of putting a thumb on the scale of consumer choice and persuading consumers not to buy the product or service.

The government appears to dispute that the pictorial disclosures at issue here constitute "compelled speech" and characterizes the graphics as garden-variety warnings of the type that should be approved under the *Central Hudson* test. But the Supreme Court's recent decision in *Sorrell* casts substantial doubt on the doctrinal underpinnings of *Central Hudson* and, in any event, the government has failed to identify *any* case in which the courts have relied upon *Central Hudson* to permit the government to run an emotive publicity campaign on valuable advertising and marketing space commandeered from private commercial enterprises. Furthermore, the principles that the government relies upon to justify the pictorial disclosures would support the compelled, private publication of government-mandated graphics to promote a wide variety of public agendas in a manner that violates fundamental First Amendment rights. For example, if the government's position is adopted, there is nothing to prevent

federal, state and local regulators from requiring any producer of a disfavored product or service to denigrate its own wares and foot the bill for the privilege. In the Chamber's view, while the government may lawfully use its own bully pulpit to steer consumer choice, the First Amendment does not permit the government to use compulsion to co-opt private speakers to campaign against their own interests.

## ARGUMENT

The First Amendment provides in pertinent part that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amend. I. For the reasons set forth below, the pictorial disclosures mandated by the Act and the FDA's implementing regulations are irreconcilable with this simple and straightforward command.

### I. THE SUPREME COURT'S RECENT DECISION IN *SORRELL* CASTS SUBSTANTIAL DOUBT ON THE CONTINUING VITALITY OF THE *CENTRAL HUDSON* TEST.

The government contends that the pictorial disclosures required by the Act easily past First Amendment muster because the *Central Hudson* "intermediate scrutiny" test affords regulators broad discretion to regulate speech by commercial enterprises. Gov't Br. at 25 (citing *Central Hudson*, 447 U.S. at 566). In the alternative, the government argues that the pictorial disclosures qualify for a more relaxed standard of review because the Act does not chill

speech, but merely "requires sellers to make accurate disclosures about their products." *Id.* (citing *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985)).[3] Under the government's view, regulators are free to identify a "substantial" governmental interest in controlling speech associated with virtually any commercial activity that plausibly implicates public health, safety or consumer welfare.[4]

Because the substantial interest and reasonable tailoring elements of the intermediate scrutiny test are susceptible to constructions (including the constructions that the government advocates here) that are unduly solicitous of regulatory judgments, the standard of review endorsed in *Central Hudson* has

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[3] Although the Court does not need to reach the question, the government is clearly wrong in asserting that the effective exclusion of the manufacturers from "the top 50 percent of the front and rear panels" of cigarette packages and "20 percent of the area of [cigarette] advertisement[s]," 15 U.S.C. § 1333 Note, does not "chill speech." As the government co-opts more and more of the medium, there is a concomitant, negative impact on the speaker's ability to communicate its own message.

[4] In *Central Hudson*, the Court summarized the intermediate scrutiny test as follows:

> For commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566.

undermined the First Amendment when it has been applied to grant federal, state and local officials excessive authority to use commercial speech regulation as a tool for pursuing regulatory goals. Reflecting growing discomfort with *Central Hudson*, the Court's recent decision in *Sorrell*, 131 S. Ct. at 2653, strongly suggests that a majority of the Court is on the cusp of embracing a revised approach to commercial speech regulation that is far less deferential to government regulation. In *Sorrell*, the Court invalidated a speaker- and content-specific Vermont law that restricted data use. Specifically, the Vermont law prohibited pharmaceutical manufacturers from taking advantage of prescriber-specific prescription information to target their marketing efforts and persuade physicians to prescribe more expensive, name-brand drugs instead of lower-cost, generic alternatives, even though the same information could be used by insurers and other proponents of generic drugs to engage in target marketing efforts calculated to persuade physicians to decrease their reliance on name-brand drugs.

Reasoning that the Vermont law was invalid regardless of whether the statute was analyzed under strict scrutiny or intermediate scrutiny,[5] the *Sorrell* Court held that the law unconstitutionally discriminated against specific speakers and content. Of particular note here, the Court echoed prior expressions of

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[5] *See Sorrell*, 131 S. Ct. at 2667 ("the outcome is the same whether a special commercial speech inquiry [*i.e.*, intermediate scrutiny] or a stricter form of judicial scrutiny is applied").

skepticism about the use of commercial speech regulation to modify lawful choice.[6] The Court specifically rejected the notion that commercial speech may be regulated consistent with the First Amendment on the ground that it is highly persuasive and induces listeners to make what government considers bad, albeit lawful, economic choices. Instead, the Court analogized limitations on truthful, non-misleading commercial speech to the suppression of political speech, and indicated that such limitations should be subjected to commensurately heightened First Amendment barriers:

> In an attempt to reverse a disfavored trend in public opinion, a State could not ban campaigning with slogans, picketing with signs, or marching during the daytime. Likewise the State may not seek to remove a popular but disfavored product from the marketplace by prohibiting truthful, nonmisleading advertisements that contain impressive endorsements or catchy jingles. That the State finds expression too persuasive does not permit it to quiet the speech or to burden its messengers.

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[6] In *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 487 (1996), the Court struck down a ban on price advertising for alcoholic beverages, with four Justices endorsing the view that an asserted governmental interest in "keep[ing] legal users of a product or service ignorant in order to manipulate their choices in the marketplace" is "*per se* illegitimate . . . and can no more justify regulation of 'commercial' speech than it can justify regulation of 'noncommercial' speech." This view was echoed in *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), which invalidated a federal statute that targeted "strength wars" by prohibiting beer manufacturers from disclosing alcoholic content on their labels. More recently, in *Thompson v. Western States Medical Center*, 535 U.S. 357, 374 (2002), the Court struck down an advertising ban on pharmacy-compounded drugs, reasoning that the government does not have a legitimate interest "in preventing the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with the information."

131 S. Ct. at 2671. The Court also rejected the notion that the government has a cognizable First Amendment interest in using speech regulation as a vehicle to direct consumer choice:

> Those who seek to censor or burden free expression often assert that disfavored speech has adverse effects. But the "fear that people would make bad decisions if given truthful information" cannot justify content-based burdens on speech. . . . "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."

*Id*. at 2670-2671 (citations omitted).

*Sorrell* strongly suggests that, if commercial speech is truthful and nonmisleading (and regardless of whether the speech has achieved that status at the speaker's initiative or by operation of government prohibitions or prescriptions), there is no principled basis to relegate it to second-class status for purposes of First Amendment analysis. Consistent with this reading of *Sorrell*, the *Central Hudson* "intermediate scrutiny" test can be overly solicitous of government regulation and incompatible with the recognition that truthful and nonmisleading commercial speech has great value in the marketplace of ideas. The First Amendment protects the right of businesses to engage in commercial speech to promote their goods and services as well as to engage in political speech to advocate for their interests. *See generally Citizens United v. Federal Election Commission,* 130 S. Ct. 876 (2010). Subjecting commercial speech

regulation to strict scrutiny review would restore doctrinal clarity to First Amendment jurisprudence without compromising the government's legitimate, compelling interest in issuing narrowly tailored directives in limited circumstances that are calculated to protect the commercial marketplace from fraud, deception, and serious threats to safety.

## II. EVEN IF *CENTRAL HUDSON* AND ITS PROGENY RETAIN VITALITY POST-*SORRELL*, THE *CENTRAL HUDSON* TEST DOES NOT REMOTELY SUPPORT THE COMPELLED DISPLAY OF GOVERNMENT GRAPHICS THAT ARE DESIGNED TO DETER PURCHASES OF THE LAWFULLY MARKETED PRODUCTS ON WHICH THEY APPEAR BY PROVOKING EMOTIONAL REACTIONS AND INSTILLING FEAR.

Even if the Supreme Court's decision in *Sorrell* is assumed not to augur the imminent or eventual abandonment of the *Central Hudson* intermediate scrutiny test for commercial speech, *Central Hudson* and its progeny do not provide any support for the compelled display of the pictorial disclosures at issue here, which are expressly designed to deter purchases of the lawfully marketed products on which they appear by provoking emotional reactions and instilling fear. *First*, the government's repeated suggestion that the application of strict scrutiny is inappropriate because the pictorial disclosures at issue do not constitute "compelled speech," *see* Gov't Br. at 4, 15, 20, 39, is puzzling, because the pictorial disclosures required by the Act are clearly involuntary and government-

composed.[7] The color graphics required by the Act and its implementing regulations lie at the extreme end of speech intervention: they preempt and dominate the marketing and advertising space that they occupy; they are symbolic, graphic images opposed by the manufacturers and open to broad interpretation by the consuming public; and they are expressly calculated to provoke emotional responses (including fear and discomfort) above and beyond the disclosure of any factual information regarding the health hazards associated with smoking.[8]

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[7] While the Chamber does not believe that the First Amendment permits the government-compelled imposition of any type of emotive graphics on private packaging and advertising, it is undisputed that some of the images at issue were manipulated to achieve the government's intended effect. As the district court noted, "the FDA does not dispute that 'some of the photographs were technologically modified to depict the negative health consequences of smoking.'" *R.J. Reynolds Tobacco Co. v. U.S. Food and Drug Admin.*, No. 11-1482, 2011 WL 5307391, at *11 n.12 (D.D.C. Nov. 7, 2011); *see also* Gov't Br. at 49-50.

[8] *See, e.g.*, H. Spence & R. Moinpour, *Fear Appeals in Marketing – A Social Perspective*, 36 Journal of Marketing 39, 40 (July 1972) ("Communications using fear appeals are designed to stimulate anxiety in an audience with the expectation that the audience will attempt to reduce this anxiety by adopting, continuing, discontinuing, or avoiding a specified course of thought or action."). The authors of the article noted that the FTC had expressed concern that fear appeals in advertising "may raise questions as to their fundamental fairness, their conformity with the traditional economic justifications for advertising as sources of information upon which a free and reasonably informed choice may be made and the extent to which such advertising is designed to exploit such fears . . . ." *Id.* at 41 (quoting *Federal Trade Commission News* (May 12, 1971)).

*Second*, the government's contentions that the pictorial disclosures constitute a garden-variety form of speech regulation that easily passes muster under the *Central Hudson* test, *see* Gov't Br. at 27-39, are meritless. While the *Central Hudson* test has been used to validate government regulation of messages *conceived and published by commercial speakers*, *Central Hudson* does not address compelled speech and certainly does not provide any support for the extraordinary notion that the government is free to commandeer private marketing and advertising space for the purpose of running an unattributed, emotive, and negative advertising campaign calculated to affirmatively *discourage* consumers from buying a product or service that is lawfully available in interstate commerce.[9]

Permitting the government to appropriate private marketing and advertising space to disseminate an advertising campaign of the government's making is anathema to the values protected by the First Amendment, because it both distorts the affected commercial speaker's message well beyond any corrections that are necessary to render the speaker's message truthful and non-misleading, and distorts the political process and reduces political accountability by obscuring the

[9] In this regard, the district court took the government to task for "repeatedly fail[ing] to answer this Court's question during oral argument about when the dissemination of purely factual, uncontroversial information crosses the line into advocacy." *R.J. Reynolds*, 2011 WL 5307391, at *11 n.19.

true source of the message. Government officials are, of course, free to use government resources to conduct public information campaigns and encourage citizens to eat right, drive safely and avoid engaging in risky behavior, and citizens can vote at the ballot box to signal whether they view such campaigns as prudent uses of tax dollars. As the Supreme Court has observed, however, the First Amendment does not permit the government to proscriptively or prescriptively hijack commercial speech "to prevent members of the public from making bad decisions." *Thompson*, 535 U.S. at 374.

*Third*, the compelled pictorial disclosures at issue here violate the lines drawn in *Central Hudson* and *Sorrell* in at least three fundamental respects. As a threshold matter, *Central Hudson* and its progeny do not recognize any legitimate governmental interest in regulating private commercial speech for the purpose of provoking an emotional reaction or instilling fear calculated to influence consumer choice. While government officials may be free to make emotional appeals to the public at government expense, the free speech rights of commercial entities cannot be co-opted for purely propagandistic purposes regardless of how well-reasoned or well-intentioned the government's purpose might be:

> Just as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views . . . . First Amendment values are at serious risk if the government can compel

> a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors . . . .

*United States v. United Foods, Inc.*, 533 U.S. 405, 410-11 (2001). The notion that the pictorial disclosures are an appropriate imposition because federal regulators are frustrated with the continued success of tobacco products in the marketplace, *see, e.g.*, Gov't Br. at 9, 29, 34-36, is a limitless principle that would permit regulators to impose public service advertisements on virtually any good or service marketed in interstate commerce in order to modify (or attempt to modify) consumer behavior.

Moreover, even under the intermediate scrutiny framework of *Central Hudson*, the pictorial disclosures cannot survive analysis because they are manifestly "more extensive than is necessary," 447 U.S. at 566, to serve the government's professed interest. By government mandate, tobacco products are already papered with mandatory, verbal warnings (not contested here) that starkly convey the health risks associated with smoking. Augmenting those warnings with symbolic, graphic images that have purportedly been tested for their emotive and fear-inspiring capacity is impermissible, because a graphic disclosure that appeals solely to human emotion with unknowable consequences is neither intelligible nor narrowly tailored regardless of whether the government has a legitimate interest in commandeering private enterprise to influence the lawful

exercise of consumer choice in a free market (which it does not). Nothing in the First Amendment's history or cases interpreting the First Amendment remotely suggests that the imposition of a government-mandated, counter-marketing campaign founded on impressionism and psychological studies of consumer behavior is compatible with the free speech guarantee.

Last but not least, the Supreme Court's decision in *Sorrell* emphatically rejects the notion that the government has the right to undermine persuasive commercial speech by altering the speaker's message to the government's liking, much less by overwhelming the message with a government-imposed message that states or implies, without attribution, "don't purchase this good or service." Similar to the federal government's expressed frustration with the efficacy of anti-smoking messages, the Vermont legislature in *Sorrell* was frustrated with the success of pharmaceutical company representatives in marketing name-brand drugs, and sought to handicap the companies by prohibiting their representatives from using prescriber-specific information that was widely available to others, including proponents of competing, non-identical generic drugs. Like the prohibition at issue in *Sorrell*, the pictorial disclosures at issue here have nothing to do with prohibiting tobacco companies from conveying false or misleading information about their products, and everything to do with influencing public opinion, tipping the playing field, and persuading consumers not to purchase

goods that the government deems a bad choice. Because the government cannot "burden[] a form of protected expression" on the ground that the expression is "too persuasive," *Sorrell*, 131 S. Ct. at 2672, the pictorial disclosures at issue fail First Amendment scrutiny.

**CONCLUSION**

For all these reasons, the Chamber of Commerce of the United States of America respectfully requests that the Court affirm the judgment of the district court.

January 30, 2012

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

The foregoing *amicus curiae* brief is in 14-point Times New Roman proportional font and contains 4,525 words, and thus complies with the type-face and volume limitations set forth in Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B). This certificate was prepared in reliance on the word count of the word-processing system (Microsoft Word) used to prepare this brief.

January 30, 2012

s/ John E. Barry

**CERTIFICATE OF SERVICE**

I hereby certify, pursuant to Fed. R. App. P. 25 and D.C. Circuit Rule 25, that on January 30, 2012, I caused the foregoing *amicus curiae* brief to be timely filed and served on all counsel of record by filing a copy of the brief with the Clerk through the Court's electronic docketing system and delivering paper copies of the brief to the Clerk's Office by hand.

s/ John E. Barry
John E. Barry