CONSTITUTIONAL LAW — FIRST AMENDMENT — COMPELLED COMMERCIAL SPEECH — D.C. CIRCUIT HOLDS THAT FDA RULE MANDATING GRAPHIC WARNING IMAGES ON CIGARETTE PACKAGING AND ADVERTISEMENTS VIOLATES FIRST AMENDMENT. — *R.J. Reynolds Tobacco Co. v. Food & Drug Administration,* 696 F.3d 1205 (D.C. Cir. 2012).

In 2009, Congress granted the Food and Drug Administration (FDA) regulatory authority over tobacco products through the Family Smoking Prevention and Tobacco Control Act[1] (Tobacco Control Act). The Act requires, among other things, that the FDA issue a rule selecting "color graphics depicting the negative health consequences of smoking."[2] These graphic warnings, together with nine new textual warnings drafted by Congress, are required to appear on the top half of all cigarette packaging and on twenty percent of the area of print advertisements.[3] The tobacco industry swiftly launched legal challenges.[4] Recently, in *R.J. Reynolds Tobacco Co. v. FDA*,[5] a divided D.C. Circuit panel held that the FDA's final rule[6] violated the First Amendment.[7] The court's decision relied on a plausible but undesirably narrow interpretation of a key precedent that governs compelled commercial disclosures. This precedent did not preordain the majority's determination of the governmental interests at stake in the FDA's rule, or its analysis of the misleading or deceptive nature of the tobacco advertising targeted by the rule. A broader interpretation would have maintained principled limits on the government's ability to mandate commercial disclosures, while more faithfully honoring the commercial speech doctrine's central concern: that consumers' decisions "be intelligent and well informed."[8]

For nearly fifty years, the federal government has required some form of health warning on tobacco packaging and advertisements.[9] Congress passed the Tobacco Control Act in part to reform the warning language that had not been updated since 1984,[10] which Congress

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[1] Pub. L. No. 111-31, 123 Stat. 1776 (2009) (codified in scattered sections of 5, 15, and 21 U.S.C.).

[2] *Id.* § 201(a), 123 Stat. at 1845 (to be codified at 15 U.S.C. § 1333(d)).

[3] *Id.*, 123 Stat. at 1843 (to be codified at 15 U.S.C. § 1333(a)(2)).

[4] *See* Duff Wilson, *Tobacco Firms Sue to Block Marketing Law*, N.Y. TIMES, Sept. 1, 2009, at B1.

[5] 696 F.3d 1205 (D.C. Cir. 2012).

[6] Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628 (June 22, 2011) (codified at 21 C.F.R. pt. 1141 (2012)) [hereinafter Final Rule].

[7] *R.J. Reynolds*, 696 F.3d at 1208.

[8] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976).

[9] *See, e.g.*, Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282 (1965).

[10] *See* Comprehensive Smoking Education Act, Pub. L. No. 98-474, 98 Stat. 2200 (1984).

found insufficiently apprised consumers of the scope and severity of smoking's negative health consequences.[11] While certain segments of the population properly understand smoking's health risks and the content of the required warning labels, the FDA found that adolescents and people with less education significantly underestimate the dangers of smoking and fail to fully comprehend text-only warning messages.[12] Congress also found that "[v]irtually all new users of tobacco products are under the minimum legal age to purchase such products," and that "[t]obacco advertising and marketing contribute significantly to the use of nicotine-containing tobacco products by adolescents."[13] On June 22, 2011, the FDA issued its final rule with new text and image warning requirements for cigarette packaging and advertising.[14]

On August 16, 2011, five tobacco companies filed suit in the U.S. District Court for the District of Columbia against the FDA, claiming the graphic warning images rule violated the First Amendment and the Administrative Procedure Act.[15] On February 29, 2012, Judge Leon held that the rule violated the First Amendment by "unconstitutionally compelling speech."[16] Judge Leon first noted that "compelled speech is 'presumptively unconstitutional,'"[17] and is typically subjected to strict scrutiny. He acknowledged that exceptions exist in "the arena of compelled commercial speech"[18] and described the standard of review the Supreme Court set out in *Zauderer v. Office of Disciplinary Counsel*.[19] In *Zauderer*, the Court held that requirements to disclose factual commercial information would be subjected to something resembling rational basis review: to pass constitutional muster, the requirements must be "reasonably related to the State's interest in preventing deception of consumers."[20] Finding that the graphic warnings requirement was not akin to the disclosure in *Zauderer*, Judge Leon instead subjected the graphic warnings to strict scrutiny, which they did not survive.[21]

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[11] *See* Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 2, 123 Stat. 1776, 1776–81 (2009).

[12] *See* Required Warnings for Cigarette Packages and Advertisements, 75 Fed. Reg. 69,524, 69,531 (proposed Nov. 12, 2010) [hereinafter Proposed Rule].

[13] Tobacco Control Act § 2, 123 Stat. at 1777.

[14] *See* Final Rule, *supra* note 6.

[15] *See* R.J. Reynolds Tobacco Co. v. FDA, 845 F. Supp. 2d 266, 268 (D.D.C. 2012).

[16] *Id.* Judge Leon did not reach the plaintiffs' Administrative Procedure Act claim.

[17] *Id.* at 272 (quoting Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 830 (1995)).

[18] *Id.*

[19] 471 U.S. 626 (1985).

[20] *Id.* at 651.

[21] *R.J. Reynolds*, 845 F. Supp. 2d at 274.

The D.C. Circuit affirmed.[22] Writing for a divided panel, Judge Brown[23] endorsed the district court's conclusion but departed from its reasoning.[24] Declining to use the same analytical approach as the Sixth and Seventh Circuits,[25] Judge Brown held that *Central Hudson Gas & Electric Corp. v. Public Service Commission*,[26] which evaluated a suppression of commercial speech, provided the appropriate framework for evaluating those disclosures that fall outside of *Zauderer*'s bounds.[27] In reaching this conclusion, Judge Brown made a threshold determination that the FDA's rule advanced governmental interests other than "preventing deception of consumers," the interest that triggered less exacting review in *Zauderer*.[28] *Zauderer* applies, Judge Brown held, only when the government can show "a self-evident — or at least 'potentially real' — danger that an advertisement will mislead consumers."[29] Next, Judge Brown found that the graphic warnings failed to meet *Zauderer*'s standards for a second reason: the images "do not constitute . . . 'purely factual and uncontroversial' information or 'accurate statement[s].'"[30] Judge Brown argued that the warnings cannot be "purely factual" because they are also intended to elicit an emotional response.[31]

Judge Brown then proceeded to apply *Central Hudson*'s intermediate standard of review for restrictions on commercial speech.[32] Describing the record as containing not "a shred of evidence" that the graphic warning images would "reduc[e] the number of Americans who smoke,"[33] Judge Brown held that the FDA had failed to show that the rule would "directly advance" an interest in discouraging smoking.[34] The court then vacated the FDA's rule and remanded to the agency.[35]

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[22] *R.J. Reynolds*, 696 F.3d at 1208.

[23] Judge Brown was joined by Senior Judge Randolph.

[24] *See R.J. Reynolds*, 696 F.3d at 1217, 1221–22.

[25] In evaluating compelled commercial disclosures, the Sixth and Seventh Circuits limit the choice of framework to either the *Zauderer* standard or strict scrutiny. *See* Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 554 (6th Cir. 2012); Entm't Software Ass'n v. Blagojevich, 469 F.3d 641, 652 (7th Cir. 2006).

[26] 447 U.S. 557 (1980).

[27] *R.J. Reynolds*, 696 F.3d at 1217.

[28] *Id.* at 1213 (quoting Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985)) (internal quotation mark omitted).

[29] *Id.* at 1214 (quoting Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, 512 U.S. 136, 146 (1994)).

[30] *Id.* at 1216 (second alteration in original) (citation omitted) (quoting *Zauderer*, 471 U.S. at 651; Milavetz, Gallop & Milavetz, P.A. v. United States, 130 S. Ct. 1324, 1340 (2010)).

[31] *See id* at 1216–17.

[32] *Id.* at 1217–21; *see also* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980) (describing the four-factor analysis for commercial-speech restrictions).

[33] *R.J. Reynolds*, 696 F.3d at 1219.

[34] *Id.* (internal quotation marks omitted).

[35] *Id.* at 1222.

Judge Rogers dissented and would have held that *Zauderer* applied.[36] In her view, the graphic warnings "present[ed] factually accurate information" that "address[ed] misleading commercial speech," particularly in light of "the tobacco companies' history of deceptive advertising."[37] Faulting the majority for taking too narrow a view of the government's asserted interests,[38] Judge Rogers noted that the agency described its "primary goal" as "effectively convey[ing] the negative health consequences of smoking."[39] Judge Rogers criticized the argument that the images could not be factual because they evoked emotion, arguing that fact and emotion are not mutually exclusive and that the images' emotional salience was an indicator of how effectively the warnings conveyed facts.[40] In the alternative, Judge Rogers would have upheld the rule under *Central Hudson*.[41]

The majority's conclusions rested on three plausible but undesirably narrow formulations of *Zauderer*'s core inquiries: (1) whether a disclosure is motivated by a governmental interest in preventing deception of consumers; (2) whether the commercial speech in question is misleading; and (3) whether the speech's misleading nature or deceptive potential is self-evident or adequately supported by evidence. The court's answers to these questions were not inevitable; rather, they arose from a circumscribed reading of *Zauderer*. Such a limited understanding of how advertising can mislead or confuse consumers, and a narrowing of the means by which government may respond, effected a subtle but significant departure from "the principle that in commercial speech, more information is better than less."[42] Read more broadly, *Zauderer* allows compelled health disclosures in advertisements that ineffectively communicate a product's danger while presenting a misleading picture of its pleasurable or healthful use.

Regulations of commercial speech implicate a peculiar body of First Amendment law.[43] Generally, the amendment protects both those who wish to speak and those who wish to remain silent.[44] Yet for a time, the First Amendment was held not to apply to "purely commercial advertising."[45] In 1976, the Supreme Court for the first

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[36] *Id.* (Rogers, J., dissenting).

[37] *Id.*

[38] *See id.* at 1223.

[39] *Id.* at 1222 (quoting Final Rule, *supra* note 6, at 36,633) (internal quotation mark omitted).

[40] *See id.* at 1230–31.

[41] *See id.* at 1234–36.

[42] Judith L. Maute, *Scrutinizing Lawyer Advertising and Solicitation Rules Under Commercial Speech and Antitrust Doctrine*, 13 HASTINGS CONST. L.Q. 487, 507 (1986).

[43] *See, e.g.*, Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 2 (2000) (describing the commercial speech doctrine as "a notoriously unstable and contentious domain of First Amendment jurisprudence").

[44] *See, e.g.*, Wooley v. Maynard, 430 U.S. 705, 714 (1977).

[45] *E.g.*, Valentine v. Chrestensen, 316 U.S. 52, 54 (1942).

time explicitly held that commercial speech enjoys some constitutional protection,[46] but that protection is limited in accordance with commercial speech's "subordinate position" compared to core social and political speech.[47] The resulting "commercial speech doctrine" was anchored in the informational value that such speech provides consumers.[48] The central purposes of the commercial speech doctrine were to avoid "keep[ing] people in the dark"[49] and to ensure that "[t]he commercial marketplace . . . provides a forum where ideas and information flourish."[50] This foundation produced a jurisprudential preference for disclosure over suppression in commercial speech cases.[51] Accordingly, *restrictions* on commercial speech are generally subjected to intermediate scrutiny[52] while *mandated disclosures* are generally subjected to *Zauderer*'s more lenient "reasonable relationship" test.[53]

The *R.J. Reynolds* court circumscribed these principles in three ways. First, the court read *Zauderer* to require a governmental "interest in preventing deception of consumers"[54] and identified a different and disqualifying interest behind the FDA's rule: requiring "disclosure of the health and safety risks."[55] Interpreting these interests as distinct and incompatible was unnecessarily formalistic. Indeed, some courts have read *Zauderer*'s test to apply in all "commercial disclosure cases" and not to require an interest in preventing consumer deception.[56] But even without abandoning the view that *Zauderer* requires a particular interest in preventing deception, the court could have found that the FDA had such an interest here. If an advertisement is deceptive because it highlights a product's pleasurable use while obscuring its serious health risks, then requiring such a health disclosure and preventing such a deception are compatible (or even identical). This analysis is particularly applicable to tobacco, as decades of advertising have

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46 Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976).

47 Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978).

48 *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 563 (1980) ("The First Amendment's concern for commercial speech is based on the informational function of advertising.") (citing First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 783 (1978)).

49 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 503 (1996) (opinion of Stevens, J.).

50 Edenfield v. Fane, 507 U.S. 761, 767 (1993).

51 *See, e.g.*, Pearson v. Shalala, 164 F.3d 650, 657 (D.C. Cir. 1999) ("[T]he Court has . . . repeatedly point[ed] to disclaimers as constitutionally preferable to outright suppression.").

52 *See Cent. Hudson*, 447 U.S. at 573 (Blackmun, J., concurring).

53 *See, e.g.*, Conn. Bar Ass'n v. United States, 620 F.3d 81, 89 (2d Cir. 2010).

54 *R.J. Reynolds*, 696 F.3d at 1213 (internal quotation mark omitted).

55 *Id.*

56 *See, e.g.*, Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 115 (2d Cir. 2001) (applying *Zauderer* where interest was "protecting human health and the environment from mercury poisoning"); Pharm. Care Mgmt. Ass'n v. Rowe, 429 F.3d 294, 310 & n.8 (1st Cir. 2005) (applying *Zauderer* where state's asserted interest was "ensuring that its citizens receive the best and most cost-effective health care possible," *id.* at 310, and noting "we have found no cases limiting *Zauderer*" to potentially deceptive advertising, *id.* at 310 n.8).

minimized the health consequences of its use while portraying it as a pleasurable and even healthful activity.[57] In light of this history and the evidence that many consumers are unaware of the full scope and severity of smoking's health dangers, requiring "disclosure of the health and safety risks"[58] is more plausibly seen as consonant with "preventing deception of consumers" than as a wholly different interest.

Second, the court narrowly defined the category of speech included within *Zauderer*'s ambit. The court used the words "misleading" and "deceptive" to confine *Zauderer*'s reach, citing an absence of Supreme Court decisions applying *Zauderer* "to disclosure requirements not designed to correct misleading commercial speech."[59] On its own terms, *Zauderer* need not be limited to these two descriptors — *Zauderer* also referred to "manipulative"[60] and "confus[ing]"[61] as defective qualities that would place commercial speech under its reach. And in raising the question of the Supreme Court's treatment of *Zauderer* and compelled commercial disclosures, the court opened the door to a broader understanding of *Zauderer*'s applicability. In a case that served as a foundation for *Zauderer*,[62] the Supreme Court struck down a restriction on attorney advertising while noting that for "omissions that have the effect of presenting an inaccurate picture, the preferred remedy is more disclosure, rather than less."[63] In a case following *Zauderer*, Justice Stevens contrasted a prohibition on alcohol advertising to policies that "regulate[] commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or require[] the disclosure of beneficial consumer information," all of which justify relaxed scrutiny.[64] The *R.J. Reynolds* majority purported to find support for its reading of *Zauderer* in a dissenting opinion by Justice Souter in a related case.[65] But in defining *Zauderer*'s reach to in-

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[57] For decades, the tobacco industry misled the public about the health risks of its products in advertising and other public statements. *See, e.g.*, United States v. Philip Morris USA Inc., 566 F.3d 1095, 1106–07 (D.C. Cir. 2009) (per curiam). The Tobacco Control Act's findings stated that "[t]hrough advertisements . . . , tobacco has become . . . portrayed as an integral part of sports and the healthy lifestyle associated with rigorous sporting activity" and that "[t]obacco product advertising often misleadingly portrays the use of tobacco as socially acceptable and healthful to minors." Pub. L. No. 111-31, § 2, 123 Stat. 1776, 1778 (2009).

[58] *R.J. Reynolds*, 696 F.3d at 1213.

[59] *Id.*

[60] Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 649 (1985).

[61] *Id.* at 648.

[62] *See id.* at 629.

[63] Bates v. State Bar, 433 U.S. 350, 375 (1977).

[64] 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501 (1996) (opinion of Stevens, J.).

[65] *R.J. Reynolds*, 696 F.3d at 1213 (citing Glickman v. Wileman Bros. & Elliott, 521 U.S. 457, 491 (1997) (Souter, J., dissenting)).

clude "incomplete commercial messages,"[66] Justice Souter offered a broader category than just "deceptive" and "misleading" advertising.

The *R.J. Reynolds* court should have read *Zauderer* disclosures to include "beneficial consumer information" and "incomplete commercial messages" — fair descriptions, respectively, of the health risks depicted in the FDA's disclosure and of the nature of cigarette advertising absent effectively conveyed health information. Such an interpretation would not have placed the court in uncharted waters.[67] It also would have been more faithful to the "primary constitutional value" of commercial speech: "the circulation of accurate and useful information."[68]

Third, after narrowly construing *Zauderer*'s governmental interests and qualifying speech elements, the court did the same to *Zauderer*'s evidentiary requirements. Citing two Supreme Court cases, the court found that "*Zauderer* should be construed to apply *only* when the government *affirmatively demonstrates* that an advertisement threatens to deceive consumers."[69] But the cited cases advance broader criteria for a determination of where *Zauderer* applies. In *Ibanez v. Florida Department of Business and Professional Regulation*,[70] the state required an attorney featuring her Certified Financial Planner credential in an advertisement to include a disclaimer because the credential was "potentially misleading."[71] The Court struck down the requirement because the state could not identify a *single* potential harm or offer evidence of any kind that the advertisement could lead to "deception or confusion."[72] In *Milavetz, Gallop & Milavetz, P.A. v. United States*,[73] the Court upheld a mandatory disclaimer for a law firm advertising debt relief services.[74] Because the advertisement's failure to mention the possibility that a customer could have to file for bankruptcy was "inherently misleading," the government was not required to demonstrate the speech's potential for deception or confusion.[75]

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[66] *Glickman*, 521 U.S. at 491 (Souter, J., dissenting). *Glickman*'s majority did not take issue with Justice Souter's characterization.

[67] In a decision affirmed by a Second Circuit panel including now-Justice Sotomayor, a federal district court used *Zauderer* scrutiny to uphold a law requiring restaurants to disclose nutritional facts, and cited both the "beneficial consumer information" and "incomplete commercial messages" formulations. N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health, No. 08 Civ. 1000(RJH), 2008 WL 1752455, at *9 n.10, *10 (S.D.N.Y. Apr. 16, 2008), *aff'd*, 556 F.3d 114 (2d Cir. 2009).

[68] Post, *supra* note 43, at 28.

[69] *R.J. Reynolds*, 696 F.3d at 1214 (second emphasis added).

[70] 512 U.S. 136 (1994).

[71] *Id.* at 146 (internal quotation marks omitted).

[72] *Id.* Note also that here the Supreme Court alluded to a broader interpretation of *Zauderer*'s "deception" element by referring to it as "deception or confusion."

[73] 130 S. Ct. 1324 (2010).

[74] *Id.* at 1341.

[75] *Id.* at 1340. The *Milavetz* Court derived this conclusion directly from *Zauderer*: "When the possibility of deception is as self-evident as it is in this case, we need not require the State to 'conduct a survey of the . . . public before it [may] determine that the [advertisement] had a tendency

Ibanez and *Milavetz* point to a broader reading of *Zauderer*'s evidentiary requirement. If the potential for consumer deception or confusion is not obvious, the government must offer something more than "[m]ere speculation or conjecture"[76] to "demonstrate that the harms it recites are real."[77] But if there is reason to believe that "the possibility of deception is . . . self-evident," the government's evidentiary burden is relaxed.[78] Given the tobacco industry's history of disseminating misleading information, and the evidence that the public underestimates the severity of smoking's health risks,[79] a plausible argument exists that cigarette advertising's potential to confuse is self-evident.[80] Regardless, the voluminous record produced by Congress and the FDA is incomparable to the "bare" record offered by the state in *Ibanez*.[81] If the court had remained unconvinced that cigarette advertising self-evidently has the potential to confuse, it could reasonably have found that the record showed that "a particular form or method of advertising has in fact been deceptive."[82] Either choice would have been more faithful to *Zauderer*'s role in the commercial speech doctrine.

The court's narrow reading of *Zauderer* impedes the government's ability to compel tobacco companies to disclose their product's deadly potential as they extol the pleasures of its use. It also weakens a critical tool for placing consumers on equal footing with large commercial interests,[83] and impairs one effort to address "perhaps the single most significant threat to public health in the United States."[84] A broader reading would serve these needs while better preserving the principle that commercial speech is protected for "the value to consumers of the information such speech provides."[85]

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to mislead.'" Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 652–53 (1985) (alterations in original) (quoting FTC v. Colgate-Palmolive Co., 380 U.S. 374, 391–92 (1965)).

[76] *Ibanez*, 512 U.S. at 143 (quoting Edenfield v. Fane, 507 U.S. 761, 770 (1993)) (internal quotation marks omitted).

[77] *Id.* at 145 (quoting *Edenfield*, 507 U.S. at 771).

[78] *Milavetz*, 130 S. Ct. at 1340 (omission in original) (quoting *Zauderer*, 471 U.S. at 652).

[79] *See, e.g.*, Final Rule, *supra* note 6, at 36,633 ("[E]vidence clearly demonstrates that many consumers lack adequate knowledge about the health risks of smoking.").

[80] *Cf.* Spirit Airlines, Inc. v. U.S. Dep't of Transp., 687 F.3d 403, 413 (D.C. Cir. 2012) (finding that the government was not required to produce evidence that advertisements obscuring the total price of airfare were misleading when, "based on experience and common sense, the 'likelihood of deception' . . . was 'hardly a speculative one'" (quoting *Milavetz*, 130 S. Ct. at 1340)).

[81] *Ibanez*, 512 U.S. at 148.

[82] *Zauderer*, 471 U.S. at 659 (quoting *In re* R.M.J., 455 U.S. 191, 202 (1982)) (internal quotation marks omitted).

[83] *See* Jennifer L. Pomeranz, *No Need to Break New Ground: A Response to the Supreme Court's Threat to Overhaul the Commercial Speech Doctrine*, 45 LOY. L.A. L. REV. 389, 403 (2012) ("[Without] the government's ability to require factual disclosures . . . commercial speech would only benefit the speaker and his economic interests.").

[84] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 161 (2000).

[85] *Zauderer*, 471 U.S. at 651.