SUPREME COURT OF THE UNITED STATES

No. 93–1631

ROBERT E. RUBIN, SECRETARY OF THE TREASURY, PETITIONER *v.* COORS BREWING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[April 19, 1995]

JUSTICE THOMAS delivered the opinion of the Court.

Section 5(e)(2) of the Federal Alcohol Administration Act of 1935 prohibits beer labels from displaying alcohol content. We granted certiorari in this case to review the Tenth Circuit's holding that the labeling ban violates the First Amendment because it fails to advance a governmental interest in a direct and material way. Because §5(e)(2) is inconsistent with the protections granted to commercial speech by the First Amendment, we affirm.

Respondent brews beer. In 1987, respondent applied to the Bureau of Alcohol, Tobacco and Firearms (BATF), an agency of the Department of the Treasury, for approval of proposed labels and advertisements that disclosed the alcohol content of its beer. BATF rejected the application on the ground that the Federal Alcohol Administration Act (FAAA or Act), 49 Stat. 977, 27 U. S. C. §201 *et seq*., prohibited disclosure of the alcohol content of beer on labels or in advertising. Respondent then filed suit in the District Court for the District of Colorado seeking a declaratory judgment that the relevant provisions of the Act violated the First Amendment; respondent

also sought injunctive relief barring enforcement of these provisions. The Government took the position that the ban was necessary to suppress the threat of "strength wars" among brewers, who, without the regulation, would seek to compete in the marketplace based on the potency of their beer.

The District Court granted the relief sought, but a panel of the Court of Appeals for the Tenth Circuit reversed and remanded. *Adolph Coors Co.* v. *Brady*, 944 F. 2d 1543 (1991). Applying the framework set out in *Central Hudson Gas & Electric Corp.* v. *Public Serv. Comm'n of N. Y.,* 447 U. S. 557 (1980), the Court of Appeals found that the Government's interest in suppressing alcoholic "strength wars" was "substantial." *Brady*, *supra*, at 1547–1549. It further held, however, that the record provided insufficient evidence to determine whether the FAAA's ban on disclosure "directly advanced" that interest. *Id*., at 1549–1551. The court remanded for further proceedings to ascertain whether a "`reasonable fit'" existed between the ban and the goal of avoiding strength wars. *Id*., at 1554.

After further factfinding, the District Court upheld the ban on the disclosure of alcohol content in advertising but invalidated the ban as it applied to labels. Although the Government asked the Tenth Circuit to review the invalidation of the labeling ban, respondent did not appeal the court's decision sustaining the advertising ban. On the case's second appeal, the Court of Appeals affirmed the District Court. *Adolph Coors Co.* v. *Bentsen*, 2 F. 3d 355 (1993). Following our recent decision in *Edenfield* v. *Fane,* 507 U. S. ___ (1993), the Tenth Circuit asked whether the Government had shown that the "`challenged regulation advances [the government's] interests in a direct and material way.'" 2 F. 3d, at 357 (quoting *Edenfield*, *supra*, at ___ (slip op., at 5–6). After reviewing the record, the Court of Appeals concluded that the Government had failed to demonstrate that the prohibition in any way prevented strength wars. The court found that there was no evidence of any relationship between the publication of factual information regarding alcohol content and competition on the basis of such content. 2 F. 3d, at 358–359.

We granted certiorari, 512 U. S. ___ (1994), to review the Tenth Circuit's decision that §205(e)(2) violates the First Amendment. We conclude that the ban infringes respondent's freedom of speech, and we therefore affirm.

Soon after the ratification of the Twenty-first Amendment, which repealed the Eighteenth Amendment and ended the Nation's experiment with Prohibition, Congress enacted the FAAA. The statute establishes national rules governing the distribution, production, and importation of alcohol and established a Federal Alcohol Administration to implement these rules. Section 5(e)(2) of the Act prohibits any producer, importer, wholesaler, or bottler of alcoholic beverages from selling, shipping, or delivering in interstate or foreign commerce any malt beverages, distilled spirits, or wines in bottles

> "unless such products are bottled, packaged, and labeled in conformity with such regulations, to be prescribed by the Secretary of the Treasury, with respect to packaging, marking, branding, and labeling and size and fill of container . . . as will provide the consumer with adequate information as to the identity and quality of the products, the alcoholic content thereof (*except that statements of, or statements likely to be considered as statements of, alcoholic content of malt beverages are prohibited unless required by State law* and except that, in case of wines, statements of alcoholic content shall be required only for wines containing more than 14 per centum of alcohol by volume), the net contents of the package, and the manufacturer or bottler or importer of the product." 27 U. S. C. §205(e)(2) (emphasis added).

The Act defines "`malt beverage[s]'" in such a way as to include all beers and ales. §211(a)(7).

Implementing regulations promulgated by BATF (under delegation of authority from the Secretary of the Treasury) prohibit the disclosure of alcohol content on beer labels. 27 CFR §7.26(a) (1994).[1] In addition to prohibiting numerical indications of alcohol content, the labeling regulations proscribe descriptive terms that suggest high content, such as "strong," "full strength," "extra strength," "high test," "high proof," "pre-war strength," and "full oldtime alcoholic strength." §7.29(f). The prohibitions do not preclude labels from identifying a beer as "low alcohol," "reduced alcohol," "non-alcoholic," or "alcohol-free." *Ibid.;* see also §7.26(b)–(d). By statute and by regulation, the labeling ban must give way if state law requires disclosure of alcohol content.

Both parties agree that the information on beer labels constitutes commercial speech. Though we once took the position that the First Amendment does not protect commercial speech, see *Valentine* v. *Chrestensen*, 316 U. S. 52 (1942), we repudiated that position in *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U. S. 748 (1976). There we noted that the free flow of commercial information is "indispensable to the proper allocation of resources in a free enterprise system" because it informs the numerous private decisions that drive the system. *Id*., at 765. Indeed, we observed that a "particular consumer's interest in the free flow of

[1]BATF has suspended §7.26 to comply with the District Court's order enjoining the enforcement of that provision. 58 Fed. Reg. 21228 (1993). Pending the final disposition of this case, interim regulations permit the disclosure of alcohol content on beer labels. 27 CFR §7.71 (1994).

commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Id*., at 763.

Still, *Virginia Board of Pharmacy* suggested that certain types of restrictions might be tolerated in the commercial speech area because of the nature of such speech. See *id*., at 771–772, n. 24. In later decisions we gradually articulated a test based on "`the "commonsense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.'" *Central Hudson Gas & Electric Corp.* v. *Public Serv. Comm'n of N. Y.,* 447 U. S. 557, 562 (1980) (quoting *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 455–456 (1978)). *Central Hudson* identified several factors that courts should consider in determining whether a regulation of commercial speech survives First Amendment scrutiny:

> "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.

We now apply *Central Hudson*'s test to §205(e)(2).[2]

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[2]The Government argues that *Central Hudson* imposes too strict a standard for reviewing §205(e)(2), and urges us to adopt instead a far more deferential approach to restrictions on commercial speech concerning alcohol. Relying on *United States* v. *Edge Broadcasting Co.*, 509 U. S. ___ (1993), and *Posadas de Puerto Rico Associates* v. *Tourism Co. of Puerto Rico,* 478 U. S. 328 (1986), the Government suggests that legislatures have broader

Both the lower courts and the parties agree that respondent seeks to disclose only truthful, verifiable, and nonmisleading factual information about alcohol content on its beer labels. Thus, our analysis focuses on the substantiality of the interest behind §205(e)(2) and on whether the labeling ban bears an acceptable

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latitude to regulate speech that promotes socially harmful activities, such as alcohol consumption, than they have to regulate other types of speech. Although *Edge Broadcasting* and *Posadas* involved the advertising of gambling activities, the Government argues that we also have applied this principle to speech concerning alcohol. See *California* v. *LaRue*, 409 U. S. 109, 138 (1972) (holding that States may ban nude dancing in bars and nightclubs that serve liquor).

Neither *Edge Broadcasting* nor *Posadas* compels us to craft an exception to the *Central Hudson* standard, for in both of those cases we applied the *Central Hudson* analysis. Indeed, *Edge Broadcasting* specifically avoided reaching the argument the Government makes here because the Court found that the regulation in question passed muster under *Central Hudson*. 509 U. S., at ___ (slip op., at 7). To be sure, *Posadas* did state that the Puerto Rican government could ban promotional advertising of casino gambling because it could have prohibited gambling altogether. 478 U. S., at 346. But the Court reached this argument only *after* it already had found that the state regulation survived the *Central Hudson* test. See *id*., at 340–344. The Court raised the Government's point in response to an alternative claim that Puerto Rico's regulation was inconsistent with *Carey* v. *Population Services Int'l,* 431 U. S. 678 (1977), and *Bigelow* v. *Virginia*, 421 U. S. 809 (1975). *Posadas*, *supra*, at 345–346.

Nor does *LaRue* support the Government's position. *LaRue* did not involve commercial speech about alcohol,

fit with the Government's goal. A careful consideration of these factors indicates that §205(e)(2) violates the First Amendment's protection of commercial speech.

The Government identifies two interests it considers sufficiently "substantial" to justify §205(e)(2)'s labeling ban. First, the Government contends that §205(e)(2) advances Congress' goal of curbing "strength wars" by beer brewers who might seek to compete for customers on the basis of alcohol content. According to the Government, the FAAA's restriction prevents a particular type of beer drinker—one who selects a beverage because of its high potency—from choosing beers solely for their alcohol content. In the Government's view, restricting disclosure of information regarding a particular product characteristic will decrease the extent to which consumers will select the product on the basis of that characteristic.

Respondent counters that Congress actually intended the FAAA to achieve the far different purpose of preventing brewers from making inaccurate claims concerning alcohol content. According to respondent, when Congress passed the FAAA in 1935, brewers did not have the technology to produce beer with alcohol levels within predictable tolerances—a skill that modern beer producers now possess. Further, respondent argues that the true policy guiding federal alcohol regulation is not aimed at suppressing strength wars. If such were the goal, the Government would not pursue the opposite policy with respect to wines and distilled spirits. Although §205(e)(2) requires BATF to promulgate regulations barring the disclosure of alcohol content on beer

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but instead concerned the regulation of nude dancing in places where alcohol was served. 409 U. S., at 114.

labels, it also orders BATF to *require* the disclosure of alcohol content on the labels of wines and spirits. See 27 CFR §4.36 (1994) (wines); §5.37 (distilled spirits).

Rather than suppressing the free flow of factual information in the wine and spirits markets, the Government seeks to control competition on the basis of strength by monitoring distillers' promotions and marketing. The respondent quite correctly notes that the general thrust of federal alcohol policy appears to favor greater disclosure of information, rather than less. This also seems to be the trend in federal regulation of other consumer products as well. See, *e.g.*, Nutrition Labeling and Education Act of 1990, Pub. L. 101–535, 104 Stat. 2353, as amended (requiring labels of food products sold in the United States to display nutritional information).

Respondent offers a plausible reading of the purpose behind §205(e)(2), but the prevention of misleading statements of alcohol content need not be the exclusive government interest served by §205(e)(2). In *Posadas de Puerto Rico Associates* v. *Tourism Co. of Puerto Rico,* 478 U. S. 328, 341 (1986), we found that the Puerto Rico Legislature's interest in promoting the health, safety, and welfare of its citizens by reducing their demand for gambling provided a sufficiently "substantial" governmental interest to justify the regulation of gambling advertising. So too the Government here has a significant interest in protecting the health, safety, and welfare of its citizens by preventing brewers from competing on the basis of alcohol strength, which could lead to greater alcoholism and its attendant social costs. Both panels of the Court of Appeals that heard this case concluded that the goal of suppressing strength wars constituted a substantial interest, and we cannot say that their conclusion is erroneous. We have no reason to think that strength wars, if they were to occur, would not produce the type of social

harm that the Government hopes to prevent.

The Government attempts to bolster its position by arguing that the labeling ban not only curbs strength wars, but also "facilitates" state efforts to regulate alcohol under the Twenty-first Amendment. The Solicitor General directs us to *United States* v. *Edge Broadcasting Co.,* 509 U. S. ___ (1993), in which we upheld a federal law that prohibited lottery advertising by radio stations located in States that did not operate lotteries. That case involved a station located in North Carolina (a nonlottery state) that broadcast lottery advertisements primarily into Virginia (a State with a lottery). We upheld the statute against First Amendment challenge in part because it supported North Carolina's antigambling policy without unduly interfering with States that sponsored lotteries. *Id*., at ___ (slip op., at 12–15). In this case, the Government claims that the interest behind §205(e)(2) mirrors that of the statute in *Edge Broadcasting* because it prohibits disclosure of alcohol content only in States that do not affirmatively require brewers to provide that information. In the Government's view, this saves States that might wish to ban such labels the trouble of enacting their own legislation, and it discourages beer drinkers from crossing state lines to buy beer they believe is stronger.

We conclude that the Government's interest in preserving state authority is not sufficiently substantial to meet the requirements of *Central Hudson*. Even if the Federal Government possessed the broad authority to facilitate state powers, in this case the Government has offered nothing that suggests that States are in need of federal assistance. States clearly possess ample authority to ban the disclosure of alcohol content—subject, of course, to the same First Amendment restrictions that apply to the Federal Government. Unlike the situation in *Edge Broadcasting*, the policies of some States do not

prevent neighboring States from pursuing their own alcohol-related policies within their respective borders. One State's decision to permit brewers to disclose alcohol content on beer labels will not preclude neighboring States from effectively banning such disclosure of that information within their borders.

The remaining *Central Hudson* factors require that a valid restriction on commercial speech directly advance the governmental interest and be no more extensive than necessary to serve that interest. We have said that "[t]he last two steps of the *Central Hudson* analysis basically involve a consideration of the `fit' between the legislature's ends and the means chosen to accomplish those ends." *Posadas*, *supra*, at 341. The Tenth Circuit found that §205(e)(2) failed to advance the interest in suppressing strength wars sufficiently to justify the ban. We agree.

Just two Terms ago, in *Edenfield* v. *Fane,* 507 U. S. ___ (1993), we had occasion to explain the *Central Hudson* factor concerning whether the regulation of commercial speech "directly advances the governmental interest asserted." In *Edenfield*, we decided that the Government carries the burden of showing that the challenged regulation advances the Government's interest "in a direct and material way." *Id*., at ___ (slip op., at 5). That burden "is not satisfied by mere speculation and conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id*., at ___ (slip op., at 9). We cautioned that this requirement was critical; otherwise, "a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression." *Ibid*.

The Government attempts to meet its burden by pointing to current developments in the consumer market. It claims that beer producers are already competing and advertising on the basis of alcohol strength in the "malt liquor" segment of the beer market.[3] The Government attempts to show that this competition threatens to spread to the rest of the market by directing our attention to respondent's motives in bringing this litigation. Respondent allegedly suffers from consumer misperceptions that its beers contain less alcohol than other brands. According to the Government, once respondent gains relief from §205(e)(2), it will use its labels to overcome this handicap.

Under the Government's theory, §205(e)(2) suppresses the threat of such competition by preventing consumers from choosing beers on the basis of alcohol content. It is assuredly a matter of "common sense," Brief for Petitioner 27, that a restriction on the advertising of a product characteristic will decrease the extent to which consumers select a product on the basis of that trait. In addition to common sense, the Government urges us to turn to history as a guide. According to the Government, at the time Congress enacted the FAAA, the use of labels displaying alcohol content had helped produce a strength war. Section 205(e)(2) allegedly relieved competitive pressures to market beer on the basis of alcohol content, resulting over the long term in beers with lower alcohol levels.

We conclude that §205(e)(2) cannot directly and materially advance its asserted interest because of the overall irrationality of the Government's

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[3]"`Malt liquor' is the term used to designate those malt beverages with the highest alcohol content . . . . Malt liquors represent approximately three percent of the malt beverage market." *Adolph Coors Co.* v. *Bentsen*, 2 F. 3d 355, 358, n. 4 (CA10 1993).

regulatory scheme. While the laws governing labeling prohibit the disclosure of alcohol content unless required by state law, federal regulations apply a contrary policy to beer advertising. 27 U. S. C. §205(f)(2); 27 CFR §7.50 (1994). Like §205(e)(2), these restrictions prohibit statements of alcohol content in advertising, but, unlike §205(e)(2), they apply only in States that affirmatively prohibit such advertisements. As only 18 States at best prohibit disclosure of content in advertisements, App. to Brief for Respondent 1a–12a, brewers remain free to disclose alcohol content in advertisements, but not on labels, in much of the country. The failure to prohibit the disclosure of alcohol content in advertising, which would seem to constitute a more influential weapon in any strength war than labels, makes no rational sense if the government's true aim is to suppress strength wars.

Other provisions of the FAAA and its regulations similarly undermine §205(e)(2)'s efforts to prevent strength wars. While §205(e)(2) bans the disclosure of alcohol content on beer labels, it allows the exact opposite in the case of wines and spirits. Thus, distilled spirits may contain statements of alcohol content, 27 CFR §5.37 (1994), and such disclosures are required for wines with more than 14 percent alcohol, 27 CFR §4.36 (1994). If combatting strength wars were the goal, we would assume that Congress would regulate disclosure of alcohol content for the strongest beverages as well as for the weakest ones. Further, the Government permits brewers to signal high alcohol content through use of the term “malt liquor.” Although the Secretary has proscribed the use of various colorful terms suggesting high alcohol levels, 27 CFR §7.29(f) (1994), manufacturers still can distinguish a class of stronger malt beverages by identifying them as malt liquors. One would think that if the Government sought to suppress strength wars by prohibiting numerical disclosures of alcohol

content, it also would preclude brewers from indicating higher alcohol beverages by using descriptive terms.

While we are mindful that respondent only appealed the constitutionality of §205(e)(2), these exemptions and inconsistencies bring into question the purpose of the labelling ban. To be sure, the Government's interest in combatting strength wars remains a valid goal. But the irrationality of this unique and puzzling regulatory framework ensures that the labeling ban will fail to achieve that end. There is little chance that §205(e)(2) can directly and materially advance its aim, while other provisions of the same act directly undermine and counteract its effects.

This conclusion explains the findings of the courts below. Both the District Court and the Court of Appeals found that the Government had failed to present any credible evidence showing that the disclosure of alcohol content would promote strength wars. In the District Court's words, "none of the witnesses, none of the depositions that I have read, no credible evidence that I have heard, lead[s] me to believe that giving alcoholic content on labels will in any way promote . . . strength wars." App. to Pet. for Cert. A–38. See also *Bentsen,* 2 F. 3d, at 359. Indeed, the District Court concluded that "[p]rohibiting the alcoholic content disclosure of malt beverages on labels has little, if anything, to do with the type of advertising that promotes strength wars." App. to Pet. for Cert. A–36.[4] As the FAAA's exceptions

[4]Not only was there little evidence that American brewers intend to increase alcohol content, but the lower courts also found that "in the United States . . . the vast majority of consumers . . . value taste and lower calories—both of which are adversely affected by increased alcohol strength." *Bentsen, supra,* at 359; accord, App. to Pet. for Cert. A–37.

and regulations would have counteracted any effect the labeling ban had exerted, it is not surprising that the lower courts did not find any evidence that §205(e)(2) had suppressed strength wars.

The Government's brief submits anecdotal evidence and educated guesses to suggest that competition on the basis of alcohol content is occurring today and that §205(e)(2)'s ban has constrained strength wars that otherwise would burst out of control. These various tidbits, however, cannot overcome the irrationality of the regulatory scheme and the weight of the record. The Government did not offer any convincing evidence that the labeling ban has inhibited strength wars. Indeed, it could not, in light of the effect of the FAAA's other provisions. The absence of strength wars over the past six decades may have resulted from any number of factors.

Nor do we think that respondent's litigating positions can be used against it as proof that the Government's regulation is necessary. That respondent wishes to disseminate factual information concerning alcohol content does not demonstrate that it intends to compete on the basis of alcohol content. Brewers may have many different reasons—only one of which might be a desire to wage a strength war—why they wish to disclose the potency of their beverages.

Even if §205(e)(2) did meet the *Edenfield* standard, it would still not survive First Amendment scrutiny because the Government's regulation of speech is not sufficiently tailored to its goal. The Government argues that a sufficient "fit" exists here because the labeling ban applies to only one product characteristic and because the ban does not prohibit all disclosures of alcohol content—it applies only to those involving labeling and advertising. In response, respondent suggests several alternatives, such as directly limiting the alcohol content of beers, prohibiting marketing efforts emphasizing high

alcohol strength (which is apparently the policy in some other Western nations), or limiting the labeling ban only to malt liquors, which is the segment of the market that allegedly is threatened with a strength war. We agree that the availability of these options, all of which could advance the Government's asserted interest in a manner less intrusive to respondent's First Amendment rights, indicates that §205(e)(2) is more extensive than necessary.

In sum, although the Government may have a substantial interest in suppressing strength wars in the beer market, the FAAA's countervailing provisions prevent §205(e)(2) from furthering that purpose in a direct and material fashion. The FAAA's defects are further highlighted by the availability of alternatives that would prove less intrusive to the First Amendment's protections for commercial speech. Because we find that §205(e)(2) fails the *Central Hudson* test, we affirm the decision of the court below.

It is so ordered.