

**UNLUCKY STRIKE: BIG TOBACCO'S FIRST  
AMENDMENT CHALLENGE TO THE FAMILY  
SMOKING PREVENTION AND TOBACCO  
CONTROL ACT**

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## **INTRODUCTION**

Joe Camel, the hip smoking camel of the 1980s and 1990s was created in 1974 by the British artist Nicholas Price.<sup>1</sup> In 1988, Joe Camel arrived in the United States to celebrate the seventy-fifth anniversary of R.J. Reynolds' Camel brand cigarettes.<sup>2</sup> By 1991, children aged five and six could identify Joe Camel almost as frequently as they could identify Mickey Mouse.<sup>3</sup> Due to outrage from public interest groups and pressure from an impending lawsuit challenging the targeting of minors in cigarette advertising, R.J. Reynolds voluntarily ended its Joe Camel campaign in 1997.<sup>4</sup>

The purpose of this Note is to analyze the recently passed Family Smoking Prevention and Tobacco Control Act (hereinafter "the Act") as it relates to the First Amendment rights of tobacco manufacturers and retailers. The Act was passed in order to curb the use of tobacco products by children and, therefore, gives the Food and Drug Administration (hereinafter "FDA") broad power to regulate tobacco manufacturers, distributors, and retailers in order to prevent children from becoming addicted to tobacco products.<sup>5</sup> On August 31, 2009, several tobacco companies filed suit against the FDA alleging First Amendment speech violations and seeking an injunction preventing the agency from enforcing several marketing and advertising restrictions.<sup>6</sup>

<sup>1</sup> Stuart Elliott, *The Media Business: Advertising; Camel's Success and Controversy*, N.Y. TIMES, Dec. 12, 1991, <http://www.nytimes.com/1991/12/12/business/the-media-business-advertising-camel-s-success-and-controversy.html>.

<sup>2</sup> *Id.*

<sup>3</sup> Paul M. Fischer et al., *Brand Logo Recognition by Children Aged 3 to 6 Years: Mickey Mouse and Old Joe the Camel*, 266 JAMA 3145, 3147 (1991).

<sup>4</sup> *Mangini v. R.J. Reynolds Tobacco Co.*, 875 P.2d 73, 74 (Cal. 1994) (holding that the state is not preempted by federal law from shielding minors from cigarette advertising); William Booth, *California Sends Joe Camel to an Early Retirement*, WASH. POST, Sept. 10, 1997, at A10; Yumiko Ono & Bruce Ingersoll, *RJR Retires Joe Camel, Adds Sexy Smokers*, WALL ST. J., July 11, 1997, at B1.

<sup>5</sup> Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, §§ 2, 3, 123 Stat. 1776, 1779, 1781-82 (2009).

<sup>6</sup> *Complaint for Declaratory Judgment and Injunctive Relief, Commonwealth Brands, Inc. v. United States*, 678 F. Supp. 2d. 512 (W.D. Ky. 2010) (No. 1:09CV-117-M) [hereinafter "Plaintiff's Complaint"]; see Editorial, *Big Tobacco Strikes Back*, N.Y. TIMES,

Part I of this Note will describe the background surrounding the development of the Act along with a brief history of tobacco regulation in the United States. Part II will examine the 2001 *Lorillard* decision, in which a tobacco company successfully challenged regulations that are strikingly similar to the regulations promulgated by the Act.<sup>7</sup> Part III will discuss the appropriate constitutional framework for analyzing restrictions on commercial speech. Part IV will address the current challenge to the Act, and Part V will demonstrate how several of the Act's provisions should be held unconstitutional because they impermissibly restrict commercial speech.

## I. BACKGROUND

### a. *FDA v. Brown & Williamson Tobacco Corp*

In 1996, the FDA issued "Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents."<sup>8</sup> Although the agency had never before regulated tobacco products,<sup>9</sup> it asserted jurisdiction over nicotine as a drug based on the Food, Drug, and Cosmetic Act (hereinafter "FDCA"), which grants the FDA the authority to regulate drugs and drug delivery devices.<sup>10</sup> The FDA then promulgated a series of restrictions restraining tobacco advertising and marketing in order to substantially reduce the availability of these products to children and adolescents.<sup>11</sup> Restrictions included: a prohibition against free samples, a prohibition against self-service displays, restriction of advertising to black-and-white text only, a prohibition against outdoor advertisements within 1000 feet of public

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Sept. 7, 2009, <http://www.nytimes.com/2009/09/07/opinion/07mon1.html>.

<sup>7</sup> *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).

<sup>8</sup> *Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents*, 61 Fed. Reg. 44,396 (Aug. 28, 1996).

<sup>9</sup> John Schwartz, *Smoke, Letters and Documentation; Tobacco Companies Swamp FDA With Final Comments on Regulation*, WASH. POST, Jan. 3, 1996, at A20; see also *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (holding that Congress had not granted the FDA jurisdiction to regulate tobacco products).

<sup>10</sup> Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 301 (1938); *Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents*, 61 Fed. Reg. at 44,397; Marlene Cimon, *Cigarette Regulation Plan Challenged; Tobacco: Five Major Companies Along with Pro-Smoker, Advertising and Trade Groups Claim FDA Has No Jurisdiction Over Product*, L.A. TIMES, Jan. 3, 1996, at A11.

<sup>11</sup> *Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents*, 61 Fed. Reg. at 44,397-400.

playgrounds and schools, a prohibition against advertising in publications not geared toward adults, and a prohibition against tobacco manufacturers sponsoring athletic, musical, artistic or other social or cultural events.<sup>12</sup>

In *FDA v. Brown & Williamson Tobacco Corp.*,<sup>13</sup> the tobacco industry challenged these regulations on both jurisdictional and First Amendment grounds.<sup>14</sup> The Supreme Court held that Congress had not given the FDA authority under the FDCA to regulate tobacco products.<sup>15</sup> The Court struck down the regulations, stating that “an administrative agency’s power to regulate in the public interest must always be grounded in a valid grant of authority from Congress . . . we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop.”<sup>16</sup> Thus, the Supreme Court did not reach the constitutional issue in 2000.

*b. Family Smoking Prevention and Tobacco Control Act*

President Obama signed the Family Smoking Prevention and Tobacco Control Act into law on June 22, 2009.<sup>17</sup> The Act is a Congressional response to the Court’s holding in *FDA v. Brown & Williamson Tobacco Corp.*; the intent is to give the FDA the express jurisdiction it lacked in 1996.<sup>18</sup> The Act adopts the proposed 1996 “Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents,” along with some new provisions, and states that these regulations are consistent

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<sup>12</sup> *Id.* at 44,617-18.

<sup>13</sup> *Brown & Williamson Tobacco Corp.*, 529 U.S. 120.

<sup>14</sup> *Id.* at 129-30.

<sup>15</sup> *Id.* at 142. The FDCA requires that the FDA refuse to approve a drug if it is not “safe and effective for its intended purpose.” *Id.* (summarizing 21 U.S.C. § 355 (1938)). Therefore, if tobacco products were considered under the FDA’s jurisdiction, the FDA would be required to remove them from the market. *Id.* at 135.

<sup>16</sup> *Brown & Williamson Tobacco Corp.*, 529 U.S. at 161. Because the Court determined that FDA regulation of tobacco products was beyond the scope of the FDCA, it did not reach the First Amendment challenge. *Id.*

<sup>17</sup> Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009); see also Press Release, Matthew Myers, President, Campaign for Tobacco-Free Kids, RJR, Other Tobacco Companies go to Court to Evade Regulation by FDA (Sept. 1, 2009), available at <http://www.reuters.com/article/pressRelease/idus156603+01-Sep-2009+PRN20090901>.

<sup>18</sup> § 3, 123 Stat. at 1781. The FDA is recognized as the “primary Federal regulatory authority with respect to the manufacture, marketing, and distribution of tobacco products.” *Id.*

with the First Amendment.<sup>19</sup> Congress found that adopting the regulations will “directly and materially advance the Federal Government’s substantial interest in reducing the number of children and adolescents who use cigarettes and smokeless tobacco,”<sup>20</sup> and that the regulations are “narrowly tailored to restrict those advertising and promotional practices which are most likely to be seen or heard by youth and most likely to entice them into tobacco use.”<sup>21</sup>

The Act includes several important additions to the 1996 Regulations. For example, by June 22, 2011, the FDA must issue regulations requiring graphic color warnings on tobacco product packages to show the harmful effects tobacco products can have on the body.<sup>22</sup> The additional regulations also state that beginning September 22, 2009, cigarettes may no longer contain artificial flavoring other than menthol.<sup>23</sup> Another important component of the Act is the banning of any new modified risk tobacco product, as well as prohibiting the labeling of tobacco products as “light,” “mild,” or “low tar.”<sup>24</sup> Despite the seemingly severe restrictions on the tobacco industry, it is important to note that Congress did not give the FDA unlimited power to regulate the tobacco industry.<sup>25</sup> The FDA does not have the power to ban tobacco

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<sup>19</sup> *Id.* § 2.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* § 201. See also Joe Borlik, *Disturbing Images Coming to U.S. Cigarette Packages*, CENT. MICH. LIFE (Sept. 9, 2009), <http://www.cm-life.com/2009/09/09/disturbing-images-coming-to-u-s-cigarette-packages/> (describing the images that potential warning labels could include, such as images of black teeth and rotting lungs).

<sup>23</sup> *Id.* § 101.

<sup>24</sup> § 101, 123 Stat. at 1812. “The term ‘modified risk tobacco product’ means any tobacco product that is sold or distributed for use to reduce harm or the risk of tobacco-related disease associated with commercially marketed tobacco products.” *Id.*

<sup>25</sup> The Act is an example of Congressional delegation of legislative authority to the FDA. In 1935, the U.S. Supreme Court held that trade associations/agencies cannot be considered legislative bodies simply because they had familiarity with the problem of their industry. “Such a delegation of legislative power is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress.” *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935). Although *A.L.A. Schechter Poultry Corp.* has never been formally overruled, subsequent cases have held that as long as there are some guidelines given by Congress, delegation of legislative power is not unconstitutional. *E.g.*, *Whitman v. Am. Truckers Ass’n, Inc.*, 531 U.S. 457, 458 (2001) (finding that where Congress sets out intelligible guiding principles, there is no constitutional violation). Some commentators have criticized the downfall of the non-delegation doctrine, claiming that “[d]elegation allows legislators to claim credit for benefits which a regulatory statute promises yet escape the blame for the burdens it will impose,

products entirely, nor can the FDA require the reduction of nicotine levels in tobacco products to zero.<sup>26</sup>

The stated purpose of the Act is to achieve the public health goal of curbing tobacco use by adolescents.<sup>27</sup> After performing extensive research, Congress found that the United States is currently in a public health crisis due to tobacco use and the fact that advertising has more of an influence on children than adults.<sup>28</sup> Additionally, Congress found that reducing tobacco use by minors by just fifty percent would prevent over 10,000,000 children from becoming regular smokers and would save \$75,000,000,000 in reduced health care costs.<sup>29</sup> The Congressional findings also note that tobacco manufacturers make false and misleading statements regarding modified risk products, and that the government has a compelling interest in “ensuring that statements about modified risk tobacco products are complete, accurate, and relate to the overall disease risk of the product.”<sup>30</sup>

*c. Pre-Existing Tobacco Regulation*

Even prior to 1996, federal regulations rigorously limited how and where tobacco products could be advertised, sold, and used. Beginning in 1971 with the Federal Cigarette Labeling and Advertising Act, it became illegal for cigarettes and little cigars to be advertised on “any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission.”<sup>31</sup> This provision effectively banned the advertisement of tobacco products on the radio or television. Another federal regulation requires a conspicuous warning statement to be placed on all tobacco products, such as “SURGEON GENERAL’S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy.”<sup>32</sup> In 1992, the federal

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because they do not issue the laws needed to achieve those benefits.” DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 10 (1993).

<sup>26</sup> §101, 123 Stat. at 1803.

<sup>27</sup> *Id.* § 2.

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

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> 15 U.S.C.A. § 1335 (West 2011). Little cigars are smoke products that resemble cigarettes and are wrapped in tobacco leaves. Julia Cartwright, *Little Cigar Consumption on the Rise, While Cigarette Use Declines*, AM. LEGACY FOUND. (Feb. 4, 2009, 6:54 PM), <http://www.reuters.com/article/pressRelease/idus275857+04-Feb-2009+PRN20090204>.

<sup>32</sup> 15 U.S.C.A. § 1333(a)(1) (West 2011).

government passed a law making a grant available to states contingent on the banning of the sale of tobacco products to minors.<sup>33</sup> Other current federal regulations include taxes on cigarettes and a prohibition against smoking in or around federal buildings.<sup>34</sup>

There are also restrictions at the state level. Just over half of all states have enacted some form of smoke-free law prohibiting smoking in public places such as workplaces, restaurants and bars.<sup>35</sup> New Jersey enacted the New Jersey Smoke-Free Air Act in 2006, banning smoking in all bars and restaurants, but not on beaches or in city parks.<sup>36</sup> New York passed a similar law in 2003, banning smoking in bars and restaurants, on public transportation, and in indoor arenas.<sup>37</sup> Both New York and New Jersey allow for local municipalities to regulate smoking more stringently than the state law provides.<sup>38</sup> For example, New York City recently passed a controversial law banning smoking in city parks and on public beaches.<sup>39</sup> In September 2009, Mayor Michael Bloomberg publicly stated that the City intended to make it “as difficult and as expensive to smoke as we possibly can.”<sup>40</sup> In May 2009, North Carolina, a state with a rich history of tobacco cultivation, banned smoking in all restaurants and bars.<sup>41</sup>

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<sup>33</sup> 42 U.S.C.A. § 300x-26 (West 2011). Minors in this instance are persons under the age of eighteen. *Id.*

<sup>34</sup> 27 C.F.R. § 40.23 (2009); Protecting Federal Employees and the Public From Exposure to Tobacco Smoke in the Federal Workplace, 73 Fed. Reg. 78,360 (Dec. 22, 2008).

<sup>35</sup> The Associated Press, *Halfway There, Smoking Ban Movement Sets Sights on Rest of Nation*, CHARLESTON GAZETTE, Jan. 21, 2007, at 7B.

<sup>36</sup> N.J. STAT. ANN. § 26:3D-58 (West 2006).

<sup>37</sup> N.Y. PUB. HEALTH LAW § 1399-O (McKinney 2008).

<sup>38</sup> “The provisions of this act shall supersede any other statute...concerning smoking in an indoor public place...except for those provisions of a municipal ordinance which provide restrictions on or prohibitions against smoking equivalent to, or greater than, those provided under this act.” N.J. STAT. ANN. § 26:3D-63. “Nothing herein shall be construed to restrict the power of any county, city, town, or village to adopt and enforce additional local law, ordinances, or regulations which comply with at least the minimum applicable standards set forth in this article.” N.Y. PUB. HEALTH LAW § 1399-R (McKinney 2011).

<sup>39</sup> See, e.g., Editorial, *Too Much of a Good Thing*, N.Y. TIMES, Feb. 4, 2011, <http://www.nytimes.com/2011/02/05/opinion/05sat4.html>.

<sup>40</sup> David Seifman, *Anti-smoking Mike Dubious of ‘Cig-arrests’*, N.Y. POST, Sept. 16, 2009, [http://www.nypost.com/p/news/local/anti\\_smoking\\_mike\\_dubious\\_of\\_cig\\_8dqwzXpJdbOAX1pWxsAICJ](http://www.nypost.com/p/news/local/anti_smoking_mike_dubious_of_cig_8dqwzXpJdbOAX1pWxsAICJ).

<sup>41</sup> N.C. GEN. STAT. ANN. § 130A-496 (West 2010); Univ. of N.C. at Chapel Hill, *Tobacco Farming the Old Way*, LEARN NC, <http://www.learnnc.org/lp/editions/nchist-newsouth/4386> (last visited Feb. 25, 2011).

In addition to government regulation of conduct and product usage, the tobacco industry voluntarily ceased certain advertising and marketing practices in a November 1998 Master Settlement Agreement with the Attorneys General of forty-six states.<sup>42</sup> In exchange for the settlement of lawsuits against the tobacco industry, the manufacturers agreed to cease targeting children in the advertisement and promotion of tobacco products.<sup>43</sup> Additionally, tobacco companies agreed to refrain from lobbying against legislation aimed at reducing youth smoking, and also contributed funds to set up a National Foundation to support programs aimed at reducing youth tobacco usage.<sup>44</sup>

At a press conference discussing the Master Settlement Agreement, the Attorney General of Massachusetts, Scott Harshbarger, announced that he was planning to propose additional consumer protection regulations in the future.<sup>45</sup> Harshbarger intended to further restrict the advertising and sales practices of tobacco companies in order to reduce “the incidence of cigarette smoking and smokeless tobacco use by children under legal age.”<sup>46</sup> These additional regulations imposed on tobacco companies by Massachusetts were met with constitutional challenges in *Lorillard Tobacco Co. v. Reilly*.

## **II. LORILLARD TOBACCO CO. V. REILLY: A SUCCESSFUL CHALLENGE TO TOBACCO REGULATIONS**

In January 1999, just three months after the Master Settlement Agreement was signed, Massachusetts Attorney General Harshbarger

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<sup>42</sup> Participating manufacturers included Brown & Williamson, Lorillard, Philip Morris, and R.J. Reynolds. See, e.g., *Master Settlement Agreement*, ST. OF CAL. DEPARTMENT OF JUST. – OFF. OF THE ATT’Y GEN., <http://www.ag.ca.gov/tobacco/pdf/lmsa.pdf> (last visited May 5, 2011) [hereinafter MSA]. Beginning in 1994, forty-six states filed suit against the tobacco industry attempting to recover Medicaid and other public health expenses caused by smoking-related illnesses. See, e.g., Robin Miller, Annotation, *Validity, Construction, Application and Effect of Master Settlement Agreement (MSA) Between Tobacco Companies and Various States, and State Statutes Implementing Agreement; Use and Distribution of MSA Proceeds*, 25 A.L.R. 6th 435 (2005). On November 23, 1998, the MSA was entered into wherein the tobacco manufacturers agreed to limit certain marketing and advertising practices, as well as promote programs aimed at reducing youth smoking. *Id.*

<sup>43</sup> MSA, *supra* note 43, at 14. Tobacco companies would no longer use cartoons in advertisements, sponsor events targeted at children, distribute free samples except at adult-only events, pay media companies to reference their products when not directed at adults, or give gifts in consideration of tobacco purchase without requiring proof of age. *Id.*

<sup>44</sup> *Id.* at 25.

<sup>45</sup> *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 533 (2001).

<sup>46</sup> *Id.* at 533.



promulgated a series of regulations that were broader than the scope of the settlement.<sup>47</sup> The regulations included a ban on outdoor advertising within 1000 feet of any public playground or school, a prohibition against indoor advertisements located lower than five feet from the ground, and restrictions on certain retail sales practices.<sup>48</sup> The restrictions applied to cigarettes, smokeless tobacco, and cigars.<sup>49</sup>

Tobacco manufacturers challenged the regulations on the basis that they were pre-empted by the Federal Cigarette Labeling and Advertising Act (hereinafter “FCLAA”), and were unconstitutional on First Amendment free speech grounds.<sup>50</sup> The Supreme Court found that since the FCLAA applies exclusively to cigarettes, the FCLAA pre-empted the state law as it applied to cigarettes only.<sup>51</sup> Therefore, although the Court did not address the constitutionality of the cigarette provisions, it did have the opportunity to analyze the provisions relating to smokeless tobacco and cigars for compliance with the First Amendment.<sup>52</sup>

The Court evaluated the regulations for constitutional soundness using the four-part test for commercial speech stated in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*:<sup>53</sup>

- (1) The speech must concern lawful activity and not be misleading;
  - (2) The government interest must be substantial;
  - (3) The regulation must directly advance the government interest;
- and

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<sup>47</sup> *Id.* at 533-34.

<sup>48</sup> The restrictions also prohibited indoor advertising visible from the outside and advertising in an enclosed stadium. The regulated retail sales practices included banning self-service displays of cigarettes and smokeless tobacco, as well as forcing retailers to place cigarettes and smokeless tobacco in areas that are not accessible to consumers. Many of these regulations are identical or similar to the provisions of the 1996 FDA regulations, and the current Act. Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396, 44,399 (Aug. 28, 1996); 940 MASS. CODE REGS. 21.04 (2000); *e.g.*, *Lorillard Tobacco Co.*, 533 U.S. at 534-35.

<sup>49</sup> 940 MASS. CODE REGS. 21.02, 22.02 (2000); *e.g.*, *Lorillard Tobacco Co.*, 533 U.S. at 534-36.

<sup>50</sup> *Lorillard Tobacco Co.*, 533 U.S. at 532.

<sup>51</sup> *Id.* at 553.

<sup>52</sup> *Id.* The Court noted that the cigarette petitioners only raised pre-emption challenges as to the outdoor advertising and indoor advertising restrictions, but not the sales practices restrictions. Therefore, the Court evaluated the retail sales practices for constitutional soundness for cigarettes as well as cigars and smokeless tobacco. *Id.*

<sup>53</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

(4) The regulation can not be more extensive than necessary to accomplish the government interest.<sup>54</sup>

The Court recognized that there had been some debate in the past over whether commercial speech should even be treated separately from regular speech, as restrictions on regular speech are subject to strict scrutiny.<sup>55</sup> The tobacco companies argued for the application of strict scrutiny instead of the *Central Hudson* framework, but the Court ultimately found that there was no need to break new ground; *Central Hudson* provided an “adequate basis for decision.”<sup>56</sup> The Court held that regulations on outdoor and indoor advertising were unconstitutional, while the direct regulations on sales practices were constitutional.<sup>57</sup>

Both sides conceded the first two prongs of *Central Hudson* with regard to both the indoor and outdoor advertising: the advertising concerned lawful activity and was not misleading, and the government had a substantial interest in preventing the use of tobacco products by minors.<sup>58</sup> The third prong of the *Central Hudson* test states that regulations must “directly and materially advance the government interest” and that “this burden is not satisfied by mere speculation or conjecture.”<sup>59</sup> The State put forth the studies that the FDA had conducted for the proposed regulations in 1996.<sup>60</sup> In those studies, the FDA found that the adolescent years are when most smokers first use tobacco products and that advertising plays a central role in this decision.<sup>61</sup> The Court determined that the State provided “ample documentation of the problem with underage use of smokeless tobacco

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<sup>54</sup> *Lorillard Tobacco Co.*, 533 U.S. at 554 (citing *Cent. Hudson Gas & Elect. Corp.*, 447 U.S. at 566).

<sup>55</sup> *Id.* The *Central Hudson* Court developed a separate framework for analyzing commercial speech because of the “distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.” *Id.*

<sup>56</sup> *Id.* at 554-55. Justice Thomas’ concurrence in this case argues that strict scrutiny should apply where the government seeks to restrict truthful speech in order to suppress ideas it conveys. *Id.* at 572 (Thomas, J., concurring).

<sup>57</sup> *Id.* at 566-67, 569.

<sup>58</sup> *Id.* at 555.

<sup>59</sup> *Id.*

<sup>60</sup> *Lorillard Tobacco Co.*, 533 U.S. at 557.

<sup>61</sup> *Id.* at 557-58. The FDA studies only included cigarettes and smokeless tobacco. The Attorney General also produced evidence of the rising use of cigars by minors and the link between advertising and youth cigar use. *Id.* at 560.

and cigars” with respect to outdoor advertising.<sup>62</sup> Given the strong connection between advertising and youth smoking, the Court held that the proposed regulations would, in fact, advance the state goal.<sup>63</sup> Therefore, the third prong of *Central Hudson* was satisfied.

Despite satisfying the first three prongs, the Court determined that the outdoor regulations did not satisfy the fourth prong and were therefore invalid.<sup>64</sup> The fourth step requires a reasonable fit between the means and the ends of the scheme.<sup>65</sup> The Court explained that “the governmental interest in protecting children from harmful materials . . . does not justify an unnecessarily broad suppression of speech addressed to adults.”<sup>66</sup> A complete ban on the communication of truthful speech about a lawful product to adult consumers violates the Constitution because the tobacco retailers have a right to convey this information and adult smokers have the right to hear it.<sup>67</sup> Here, the extensive reach of the regulations would end up preventing advertising completely in major metropolitan areas of Massachusetts, as the 1000-foot radii around playgrounds and schools would likely overlap and cover entire cities.<sup>68</sup> Additionally, the 1000-foot requirement was seemingly arbitrary and chosen only because that was what the FDA had intended to do in 1996.<sup>69</sup> Moreover, the Court noted that “the impact of a restriction on speech will undoubtedly vary from place to place. The FDA’s regulations would have had widely disparate effects nationwide.”<sup>70</sup>

The indoor advertising requirements met a similar fate. Although the first two prongs of the *Central Hudson* test were met, both the third and fourth prongs of the test were violated.<sup>71</sup> The goal of preventing minors from having access to tobacco products was purported to be directly advanced by the five-foot requirement, which forced retailers to ensure that any indoor advertising was always higher than five feet from

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<sup>62</sup> *Id.* at 561.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Lorillard Tobacco Co.*, 533 U.S. at 564. *See also* *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 (1983) (“The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.”).

<sup>67</sup> *Lorillard Tobacco Co.*, 533 U.S. at 564.

<sup>68</sup> *Id.* at 562.

<sup>69</sup> *Id.* at 562-63.

<sup>70</sup> *Id.* at 563.

<sup>71</sup> *Id.* at 566.

the ground.<sup>72</sup> This height requirement intended to keep tobacco advertisements out of the typical viewing range of children,<sup>73</sup> however, the Court criticized this particular method because many minors are taller than five feet, and even if they are not, they can still see the advertisement when they look up.<sup>74</sup> Therefore, the regulation did not directly advance any legitimate government interest.

The indoor advertising regulations also failed the fourth prong because the regulation did not reasonably fit the goal of preventing children from using tobacco.<sup>75</sup> The Court found other less-restrictive alternatives that would prevent youth-targeted tobacco advertisements, such as preventing floor-level, candy-like displays.<sup>76</sup> Although the burden imposed on commercial speech by the indoor regulations would be very small, there is no “*de minimis* exception for a speech restriction that lacks sufficient tailoring or justification.”<sup>77</sup> The restriction on height was an unconstitutional restriction of the tobacco companies’ First Amendment rights.<sup>78</sup>

Although the restrictions on advertising were invalidated by the Court, the sales practices restrictions were upheld as constitutionally permissible direct regulation on conduct.<sup>79</sup> There was a disagreement between the District Court and the Court of Appeals as to whether restrictions on the physical location of tobacco products implicate any speech interest at all.<sup>80</sup> The Supreme Court found that the question did not need to be answered because even if speech interests were implicated by the restriction on product displays, these particular regulations did not violate the First Amendment.<sup>81</sup> The first two prongs of *Central Hudson* were satisfied, as with the indoor and outdoor advertising restrictions.<sup>82</sup> The regulations passed the third prong of the test because unattended displays of tobacco products give minors access

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<sup>72</sup> *Id.*

<sup>73</sup> *Lorillard Tobacco Co.*, 533 U.S. at 566.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 567.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Lorillard Tobacco Co.*, 533 U.S. at 569.

<sup>80</sup> *Id.* at 568. The District Court found that there was no speech interest involved, whereas the Circuit Court determined that self-service displays do have “some communicative commercial function.” *Id.*

<sup>81</sup> *Id.* at 569.

<sup>82</sup> *Id.*

to cigarettes, cigars, and/or smokeless tobacco without having to show proof of age.<sup>83</sup> Prohibiting self-service displays is a successful way to ensure that children will not have direct access to handling tobacco products. Finally, the fourth prong of the test was satisfied because the regulations “leave open ample channels of communication [and] . . . do not significantly impede adult access to tobacco products.”<sup>84</sup> Adult smokers are still able to ask sales personnel for the tobacco product so that they can inspect the product prior to purchase.<sup>85</sup>

*Lorillard* sets up an important framework for any evaluation of the Act because it demonstrates how the Supreme Court will likely evaluate the First Amendment challenge by the tobacco industry. Additionally, since one of the challenged provisions in the Act is identical to the outdoor advertising restriction struck down by the Court in 2001, *Lorillard* is extremely relevant because it shows how the Supreme Court dealt with the exact regulation at issue.<sup>86</sup>

### III. IS CENTRAL HUDSON STILL THE APPROPRIATE TEST?

In 1976, the Supreme Court determined that the special nature of commercial speech allowed states to regulate potentially deceptive speech more stringently than other forms of speech.<sup>87</sup> However, it also recognized for the first time that commercial speech is, in fact, entitled to some form of First Amendment protection.<sup>88</sup> The Court decided *Central Hudson* in 1980, promulgating a four-part test for the constitutionality of commercial speech, and since then several justices, particularly Justice Clarence Thomas, have criticized the test. In Justice Thomas’s opinion, as well as the opinions of several others, when the government is attempting to regulate to keep truthful information from reaching the public, there should be no difference between non-

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Lorillard Tobacco Co.*, 533 U.S. at 570.

<sup>86</sup> The Act adopts the 1996 regulations that were proposed by the FDA. Congress directed the FDA to modify these regulations in light of the Supreme Court’s decision in *Lorillard Tobacco Co. Family Smoking Prevention and Tobacco Control Act*, Pub. L. No. 111-31, § 102, 123 Stat. 1776, 1831 (2009).

<sup>87</sup> *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 772 (1976) (“The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.”).

<sup>88</sup> *Id.* at 763 (“[A] particular consumer’s interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day’s most urgent political debate.”).

commercial and commercial speech.<sup>89</sup> “[Where] the government’s asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace, the *Central Hudson* test should not be applied because such an interest is *per se* illegitimate. . . .”<sup>90</sup> Those sharing Justice Thomas’ opinion argue that strict scrutiny, rather than *Central Hudson*, should apply because there is no “basis for asserting that ‘commercial’ speech is of ‘lower value’ than non-commercial speech.”<sup>91</sup> In response, the government argues that a regulation on speech that “promotes socially harmful activities” should be subject to a lesser standard than *Central Hudson* and should be given highly deferential treatment.<sup>92</sup> In the past, the Court has uniformly rejected both arguments, refusing to “break new ground” where the *Central Hudson* test provides an adequate test upon which to make a decision.<sup>93</sup>

Although *Central Hudson* appears to remain the appropriate test to determine the constitutionality of commercial speech, over the past two decades the test has not always been applied consistently. The Supreme Court has, over time, given less deference to the government and has come closer to a strict scrutiny test for commercial speech. It is useful to briefly visit several cases in order to determine how a court is likely to apply the *Central Hudson* analysis to the Act at issue.

*a. 1986: Deference to the Government*

In 1986, in *Posadas v. Tourism Co. of Puerto Rico*, the Supreme Court upheld a Puerto Rican restriction on the advertisement of casinos, finding that it satisfied the *Central Hudson* test.<sup>94</sup> The Games of Chance Act of 1948 was amended in 1972 to state that, “no gambling room shall be permitted to advertise or otherwise offer their facilities to the

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<sup>89</sup> See *Greater New Orleans Broad. Ass’n v. United States*, 527 U.S. 173, 197 (1999) (Thomas, J., concurring).

<sup>90</sup> *Id.*

<sup>91</sup> 44 *Liquormart v. Rhode Island*, 517 U.S. 484, 522 (1996) (Thomas, J., concurring); see also *Greater New Orleans Broad. Ass’n*, 527 U.S. at 197 (Thomas, J., concurring); *Posadas v. Tourism Co. of P.R.*, 478 U.S. 328, 350 (1986) (Brennan, J., dissenting).

<sup>92</sup> *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 482 n.2 (1995) (finding that there should be no exception to the *Central Hudson* standard regardless of the allegedly harmful activity being advertised).

<sup>93</sup> *E.g.*, *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 368 (2002).

<sup>94</sup> *Posadas*, 478 U.S. at 331.

public of Puerto Rico.”<sup>95</sup> A lower court narrowed the interpretation of the statute to mean that the only advertising that was prohibited was advertising aimed to attract Puerto Rican residents, not advertising aimed at tourists, even if it would incidentally reach residents.<sup>96</sup> The Supreme Court thus based their evaluation of the regulation upon the narrowed construction.<sup>97</sup>

As a threshold matter, the Court determined that the advertising aimed at Puerto Rican residents concerned a lawful activity and was not misleading, and therefore satisfied *Central Hudson*’s first prong.<sup>98</sup> The Court found that the government satisfied prong two because it had a substantial interest in reducing gambling among citizens in order to promote the health, safety, and welfare of its citizens.<sup>99</sup> Prong three was fulfilled because the Court found it reasonable that a reduction in advertising would result in reduced demand for gambling.<sup>100</sup> The *Posadas* Court applied a seemingly low standard for the government to meet here; no substantive proof was required so long as the legislature had a subjectively reasonable belief that the restrictions would reduce gambling.<sup>101</sup> Prong four, requiring a reasonable fit between the means and the goal, was also satisfied due to the narrowing construction that the lower court had given the statute.<sup>102</sup> In addition to stating that the regulations passed constitutional muster, the Court made the controversial statement that if the legislature has the authority to completely ban an activity, as they did with gambling, then included

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<sup>95</sup> *Id.* at 332 (citing P.R. LAWS ANN. tit. 15, § 77 (1948) (amended 1972)).

<sup>96</sup> *Id.* at 334-35. This interpretation has been codified by Puerto Rico. “It shall be illegal for any holder of a gambling license or his/her agents or employees to advertise or offer any gambling room to the public in any other way, *except when the publicity is directed to the foreign tourists and not to the residents of Puerto Rico. Provided, however, [t]hat an advertisement directed to the foreign tourists shall not be illegal should it incidentally reach the residents of Puerto Rico.*” P.R. LAWS ANN. tit. 15, § 77 (emphasis added).

<sup>97</sup> *Posadas*, 478 U.S. at 339.

<sup>98</sup> *Id.* at 340-41.

<sup>99</sup> *Id.* at 341.

<sup>100</sup> *Id.* at 341-42. The Court also stated that prong three was further proven by the fact that the appellant chose to litigate the case all the way to the Supreme Court. If advertising did not reduce demand, then there would be no need to challenge restrictions on it. *Id.* at 342.

<sup>101</sup> *Id.* at 341-42.

<sup>102</sup> *Id.* at 343 (“The narrowing constructions of the advertising restrictions announced by the Superior Court ensure that the restrictions will not affect advertising of casino gambling aimed at tourists, but will apply only to such advertising when aimed at the residents of Puerto Rico.”).

within that power is necessarily the lesser power to restrict advertising.<sup>103</sup> The *Posadas* Court gave the state broad power to regulate commercial speech even where the state did not show any substantive proof that the restrictions would achieve the acknowledged legitimate goal. Additionally, the Court would be even more deferential to the government where they had the power to completely ban the activity that was being advertised. After *Posadas*, so long as the subject of the speech was an activity that the State could directly regulate, it was not unconstitutional to restrict, or even prohibit advertising.

*b. 1990s: Trend Toward Stricter Application of Central Hudson*

*i. 44 Liquormart v. Rhode Island*

In 1996, Rhode Island's ban on advertising the price of liquor was struck down as an impermissible restriction on commercial speech in *44 Liquormart v. Rhode Island*.<sup>104</sup> In only ten years, the Court made a dramatic shift toward viewing government restrictions on commercial speech with more scrutiny. In the plurality opinion, the Court stated that there are special concerns that arise where the government "suppres[ses] commercial speech in order to pursue a non-speech related policy."<sup>105</sup> This decision distinguished between two types of commercial speech regulations: regulations that protect the public against bad sales practices and regulations that prevent information from reaching the public.<sup>106</sup> In the first instance, the "purpose of the regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review."<sup>107</sup> However regarding the second type of regulation, where there is a limitation put on truthful speech that is not related to consumer protection, but is instead aimed at preventing information from reaching the public, "there is far less reason to depart from the rigorous review that the First Amendment generally demands."<sup>108</sup> The Court held that the second type of speech restriction is based on an impermissible government motive to

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<sup>103</sup> *Posadas*, 478 U.S. at 346. This was in response to appellant's argument that if gambling is legal, then the government should not be allowed to restrict advertising to reduce demand for a legal activity. *Id.*

<sup>104</sup> *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996).

<sup>105</sup> *Id.* at 500.

<sup>106</sup> *Id.* at 501.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*



protect the public from “respond[ing] irrationally” to truthful information.<sup>109</sup> The First Amendment requires that the public be able to assess the value of this type of information without government interference.<sup>110</sup>

Before applying the *Central Hudson* test, the Court noted that the Rhode Island advertising ban fell within this second form of speech restriction, and that “speech prohibitions of this type rarely survive constitutional review.” Similarly, it is also clear that the advertising provisions of the Act fall within this same category of speech restriction. These provisions are an attempt by the federal government to prevent truthful information about tobacco products from reaching the American adult public in order to pursue a non-speech related policy, lowering the smoking rate in the United States. The Act does not focus on bad sales practices, but rather on limiting the way in which truthful, non-misleading information can reach the public.

As a threshold matter in *44 Liquormart*, the Court accepted that the restricted speech, the advertisement of liquor prices, was truthful and non-misleading speech about a lawful product.<sup>111</sup> The asserted state interest here was temperance, a reduction in alcohol consumption.<sup>112</sup> There was no discussion regarding the validity of this state interest; rather the Court moved directly to prong three after some clarification of Rhode Island’s intentions.<sup>113</sup> Therefore, in 1996, courts were mostly deferring to legislatures regarding the permissible objective prong.

The Court then broke away from the deferential standard set out in *Posadas* by requiring actual proof of a direct advancement of the state goals in order to satisfy the third prong. “A commercial speech regulation may not be sustained if it provides only ineffective or remote support for the government’s purpose. . .the State bears the burden of showing not merely that its regulation will advance its interest, but also that it will do so ‘to a material degree.’”<sup>114</sup> Here, a mere rational belief on the part of the legislature was not enough to pass *Central Hudson*’s

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<sup>109</sup> *Id.* at 503.

<sup>110</sup> *44 Liquormart*, 517 U.S. at 497 (“it is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.” (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 770 (1976))).

<sup>111</sup> *Id.* at 504.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 504 n.14.

<sup>114</sup> *Id.* at 505. (quoting *Edenfield v. Fane*, 507 U.S. 761, 771 (1993)).

prong three as it did in *Posadas*. “Such speculation certainly does not suffice when the State takes aim at accurate commercial information for paternalistic ends.”<sup>115</sup> As Rhode Island did not introduce any actual evidence proving that its prohibition would significantly reduce alcoholism and alcohol consumption, its regulations failed the third prong.<sup>116</sup>

Finally, the Court found that the regulations failed *Central Hudson*’s fourth prong because it was clear that there were other options available to the state that did not involve an impermissible restriction on speech.<sup>117</sup> The Court listed a myriad of alternatives, from increased taxation to educational campaigns.<sup>118</sup> Most notably, the Court rejected the *Posadas* reasoning that the power to ban necessarily includes the power to restrict speech.<sup>119</sup> “Contrary to the assumption made in *Posadas*, we think it quite clear that banning speech may sometimes prove far more intrusive than banning conduct.”<sup>120</sup> Although the speech related to a “vice” activity, which could be directly outlawed, the Court found that the restrictions on speech still needed to pass constitutional muster under the fourth *Central Hudson* prong, as there is no vice exception to the First Amendment.<sup>121</sup> Where there are direct regulations available to attain a state goal, a restriction on speech instead is impermissible.<sup>122</sup>

This stricter interpretation of the *Central Hudson* test is a great departure from the more deferential standard promulgated by the *Posadas* Court. In his concurrence, Justice Thomas stated that the “stricter, more categorical interpretation of the fourth prong of *Central Hudson*. . . could, as a practical matter, go a long way toward [his] position.”<sup>123</sup> Justice Thomas agreed with the outcome of the decision, that the government may not aim to keep consumers ignorant in order to decrease demand for legal products, but he did not necessarily think the

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<sup>115</sup> *Id.* at 507.

<sup>116</sup> *44 Liquormart*, 517 U.S. at 506.

<sup>117</sup> *Id.* at 507.

<sup>118</sup> *Id.*

<sup>119</sup> “[W]e are now persuaded that *Posadas* erroneously performed the First Amendment analysis.” *Id.* at 509.

<sup>120</sup> *Id.* at 511.

<sup>121</sup> *Id.* at 514; *see also* *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 482 n.2 (1995).

<sup>122</sup> *44 Liquormart*, 517 U.S. at 524.

<sup>123</sup> *Id.* (Thomas, J., concurring). *See, e.g.*, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 572 (2001) (Thomas, J., concurring); *Greater New Orleans Broad. Ass’n, v. United States* 527 U.S. 173, 197 (1999) (Thomas, J., concurring).

*Central Hudson* analysis was necessary in order to reach this result.<sup>124</sup>

ii. Greater New Orleans Broadcasting Ass'n v. United States

The Court had an opportunity to apply *44 Liquormart* to a new set of facts in 1999 in *Greater New Orleans Broadcasting Ass'n v. United States*.<sup>125</sup> The restriction at issue in that case was a federal statute preventing radio broadcasters from carrying advertisements for private casino gambling.<sup>126</sup> The Fifth Circuit held that under *Posadas*, gambling was a vice activity that could be banned altogether by the legislature, therefore, the power to restrict speech was necessarily included within the broader power to ban.<sup>127</sup> While a petition for certiorari was pending, the Court decided *44 Liquormart*.<sup>128</sup> Thus, the Fifth Circuit's decision was reversed and the case was remanded so that the *Central Hudson* test would be applied more strictly, consistent with the recent developments.<sup>129</sup> The Supreme Court later granted a new petition for certiorari after the Fifth Circuit held that the restrictions directly advanced a state interest and were no more extensive than necessary to serve that interest, thereby satisfying prongs three and four of *Central Hudson*.<sup>130</sup>

The Supreme Court found that the restrictions satisfied prong one, as the speech was not misleading and it concerned private casino gambling, which was a lawful activity in the particular states.<sup>131</sup> The asserted government interests in promulgating these restrictions were twofold: reducing the social costs associated with gambling and assisting states that prohibit gambling entirely.<sup>132</sup> Although the Court ultimately held that these interests satisfied prong two because they could be considered to be substantial, it took a close look at the state's motives and stated that that the characterization of these motives as substantial was "by no means self evident," because the social costs of gambling are sometimes outweighed by other policy considerations.<sup>133</sup>

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<sup>124</sup> *44 Liquormart*, 517 U.S. at 525-26.

<sup>125</sup> *Greater New Orleans Broad. Ass'n*, 527 U.S. 173.

<sup>126</sup> *Id.* at 176 (discussing 18 U.S.C § 1304 (1948)).

<sup>127</sup> *Id.* at 182.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 182-83.

<sup>131</sup> *Greater New Orleans Broad. Ass'n*, 527 U.S. at 184.

<sup>132</sup> *Id.* at 185.

<sup>133</sup> *Id.* at 186.

Prior to this decision, it was rare for the Court to question the legitimacy of a government interest; the fact that the Court questioned the motive behind the state interest suggests a further step towards a much stricter application of the *Central Hudson* analysis.

The *Greater New Orleans Broadcasting Ass'n* Court found that these restrictions failed prongs three and four because they did not directly advance the government interest, and because they were overbroad and inconsistent.<sup>134</sup> The Court did not accept the assertion that the reduction of advertising would reduce overall demand for gambling because there were other types of non-private casinos (such as casinos on Indian reservations)<sup>135</sup> that could still advertise.<sup>136</sup> The ultimate effect of the regulation would “merely channel gamblers to one casino rather than another.”<sup>137</sup> Additionally, the Court found that the statute failed prong four because it was “so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it.”<sup>138</sup> There can be no reasonable fit between a government interest and the means used to implement it where the statute is, at some points, inconsistent or unrelated to the asserted interest.<sup>139</sup> This was an issue with this statute because it prohibited broadcasters from playing advertisements for private casinos, but advertisements by tribal casinos, non-profit casinos, government-operated gambling, and “occasional and ancillary” commercial casinos were exempt.<sup>140</sup> Finally, the Court also found several alternatives to speech restrictions that would help the government achieve its goals, such as controls on casino admissions, betting limits, or licensing requirements.<sup>141</sup> The overarching theme of the Court’s decision was that the Government had adopted an inconsistent policy that sacrificed too much legitimate commercial speech to be within constitutional bounds.<sup>142</sup>

*c. Recent Decisions: Continuing Trend Toward Strict Scrutiny*

A more recent decision explicitly held that speech regulation must

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<sup>134</sup> *Id.* at 188-89.

<sup>135</sup> *Id.* at 187 n.5.

<sup>136</sup> *Id.* at 189.

<sup>137</sup> *Greater New Orleans Broad. Ass'n*, 527 U.S. at 189.

<sup>138</sup> *Id.* at 190.

<sup>139</sup> *Id.* at 192-93.

<sup>140</sup> *Id.* at 190.

<sup>141</sup> *Id.* at 192.

<sup>142</sup> *Id.* at 194-95.

be a last resort in order to attain government objectives.<sup>143</sup> In *Thompson v. Western States Medical Center*, the Supreme Court invalidated provisions of the Food and Drug Administration Modernization Act that restricted advertisements promoting compounded drugs.<sup>144</sup> By 2002, the *Central Hudson* test was firmly established as the correct analytical framework for commercial speech cases as reflected by the fact that neither party challenged its application by requesting a more lenient or more stringent standard.<sup>145</sup> Although the Court noted that several of its members had previously questioned the appropriateness of *Central Hudson*, there was no need to create a new framework where the current one provides an “adequate basis for decision;”<sup>146</sup> it cited to both *Lorillard* and *Greater New Orleans Broadcasting Ass’n* as examples of recent decisions applying *Central Hudson*.<sup>147</sup>

As with the prior cases, prongs one and two were satisfied in this case because the speech was not misleading, was related to lawful activity, and the government interest in public safety was substantial.<sup>148</sup> The government was concerned that if compound drug advertising were allowed, new drugs could enter the market without FDA approval.<sup>149</sup> It argued that the restrictions met prong three (direct advancement of the public safety goal) because pharmacists would not be able to market compounded drugs on a large scale.<sup>150</sup> The Court allowed the government’s explanation to suffice here, despite the fact that it relied on some unsupported assumptions about the requirement for large-scale advertising in order to successfully market a drug.<sup>151</sup> This was not a step back toward the direction of *Posadas*, however. The Court only allowed the assumption because it found that, regardless of prong three, the

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<sup>143</sup> *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002).

<sup>144</sup> Food and Drug Administration Modernization Act, 21 U.S.C. § 353(a) (1998); *id.* Drug compounding is a process that is taught in pharmacy schools whereby a doctor or pharmacist combines or alters medications in order to tailor them to specific patient needs. *See Thompson*, 535 U.S. at 360-61.

<sup>145</sup> *Thompson*, 535 U.S. at 367.

<sup>146</sup> *Id.* at 368.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 368-69.

<sup>149</sup> *Id.* at 371.

<sup>150</sup> *Id.*

<sup>151</sup> “Assuming it is true that drugs cannot be marketed on a large scale without advertising, the FDAMA’s prohibition on advertising compounded drugs might indeed ‘directly advance[e]’ the Government’s interests.” *Thompson*, 535 U.S. at 371 (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980)).

restrictions were invalid because they failed prong four: “. . .the Government has failed to demonstrate that the speech restrictions are ‘not more extensive than is necessary to serve [those] interest[s].’”<sup>152</sup>

In order to satisfy prong four, the government must prove that there was no other way to achieve its interests other than by restricting speech.<sup>153</sup> Here, there was no evidence that the government ever considered any alternatives other than the restriction on advertising.<sup>154</sup> After the Court listed several non-speech related regulations that would directly accomplish the government’s goal, such as compounding only in response to a prescription, it invalidated the statute.<sup>155</sup> This decision firmly rejected the idea that “government has an interest in preventing the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with the information.”<sup>156</sup> Therefore, going forward, a fear that the public will make bad choices is not a sufficient justification for preventing the dissemination of truthful information.

*d. Future Predictions for Central Hudson Analysis*

Despite the fact that the *Central Hudson* test has been criticized in the past, it is likely that courts will apply a strict version of *Central Hudson* to commercial speech cases in the future, as no alternative legal analytical framework has been as extensively developed. This is the appropriate test because it sets a middle ground for commercial speech. On one hand, the government has an interest in ensuring that people are not misled as they enter into commercial transactions. However, the government may not have paternalistic motives in its regulation of commercial speech. The First Amendment guarantees that adult citizens have the right to personally evaluate truthful information about lawful products.<sup>157</sup> The *Central Hudson* test allows courts to balance the interests of the government against the interests of the public.

Although Justice Thomas proposed several times that *Central*

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<sup>152</sup> *Id.* (citing *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 373.

<sup>155</sup> *Id.* at 377.

<sup>156</sup> *Id.* at 374.

<sup>157</sup> *E.g.*, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 571 (2001) (“so long as the sale and use of tobacco is lawful for adults, the tobacco industry has a protected interest in communicating information about its products and adult customers have an interest in receiving that information.”).

*Hudson* has no role where the government is aiming to suppress information about a lawful product, and instead such restrictions should be *per se* invalid,<sup>158</sup> the Supreme Court has not yet explicitly thrown out the *Central Hudson* test in favor of such a theory. Instead, a court will closely scrutinize the regulation and a strict interpretation of *Central Hudson* in line with *Thompson* will be used to evaluate the First Amendment challenge to the Family Smoking Prevention and Tobacco Control Act. If the Act's regulations are found to be paternalistic, ineffective, or overbroad, then they will fail the *Central Hudson* test and should therefore be held unconstitutional.

#### **IV. BIG TOBACCO'S CURRENT CHALLENGE TO THE FAMILY SMOKING PREVENTION AND TOBACCO CONTROL ACT**

On August 31, 2009, two of the three largest American tobacco companies filed suit against the government in the United States District Court for the Western District of Kentucky.<sup>159</sup> Plaintiffs in this challenge included R.J. Reynolds, the second largest tobacco seller in the country and the maker of Camel cigarettes,<sup>160</sup> and Lorillard, the third largest tobacco seller and the maker of Newport cigarettes.<sup>161</sup> Noticeably absent from the lawsuit was Philip Morris, the largest tobacco company in the United States and the maker of Marlboro cigarettes.<sup>162</sup> Upon first glance, it is surprising that the largest tobacco company did not challenge the highly restrictive laws; however, upon closer inspection of the Act, the reasoning becomes clear: the FDA is unlikely to approve any new tobacco products, thus locking in the market share and eliminating competition for the current number one company.<sup>163</sup> This also explains why R.J. Reynolds and Lorillard are fighting so hard to prevent the advertising restrictions from being put into effect. If new products will not be approved, it is even more important for these companies to be

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<sup>158</sup> See, e.g., *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 197 (1999) (Thomas, J., concurring); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 518 (1996) (Thomas, J., concurring).

<sup>159</sup> *Commonwealth Brands, Inc. v. United States*, 678 F. Supp. 2d. 512 (W.D. Ky. 2010); *Big Tobacco Strikes Back*, *supra* note 6.

<sup>160</sup> Duff Wilson, *A Vote Nears for a Tobacco Bill That Philip Morris Can Live With*, N.Y. TIMES, Apr. 1, 2009, <http://query.nytimes.com/gst/fullpage.html?res=9C00E4DD123CF932A35757C0A96F9C8B63>.

<sup>161</sup> The Associated Press, *2 Tobacco Giants File Suit to Block Marketing Rules*, NORTH JERSEY.COM (Sept. 1, 2009), <http://www.northjersey.com/news/56479952.html>.

<sup>162</sup> Wilson, *supra* note 160.

<sup>163</sup> *Id.*

able to contact existing adult smokers to convince them to switch brands. Thus, the relief requested in the Complaint was a declaratory judgment that the soon-to-be-implemented regulations are unconstitutional.<sup>164</sup> Additionally, the plaintiffs sought preliminary and permanent injunctions preventing the FDA from enforcing the allegedly unconstitutional provisions of the Act.<sup>165</sup>

The plaintiffs did not challenge the Act in its entirety. Rather, the Complaint pointed to ten specific provisions of the Act that the plaintiffs found objectionable and unconstitutional because they eliminate the few arenas tobacco companies have left to communicate with adult consumers.<sup>166</sup> On January 4, 2010, the Western District of Kentucky found that two of the challenged provisions of the Act violate plaintiffs' First Amendment rights.<sup>167</sup> Judge Joseph H. McKinley, Jr. ruled that the FDA could not enforce the ban against color and graphics or the restriction against making statements that suggest tobacco products are less harmful due to compliance with FDA regulations.<sup>168</sup>

*a. Ban on Color and Graphics*

The Act's ban on the use of color and graphics directed the FDA to re-issue the 1996 regulation that limited advertisements to black text on a white background (or vice versa).<sup>169</sup> This was supported by a Congressional finding that "text only requirements. . . will help reduce underage use of tobacco products," and the government had argued in the past that the industry had "exploited adolescents' vulnerability to imagery."<sup>170</sup> The court accepted plaintiffs' argument that images of their

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<sup>164</sup> Plaintiff's Complaint, *supra* note 6, at 8.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 12. The tobacco companies specifically challenge the Act's: (1) ban on using color or images in advertising; (2) mandated warnings on tobacco packages; (3) ban on truthful statements regarding modified risk tobacco products; (4) ban on outdoor advertising; (5) ban on brand name sponsorship of events; (6) ban on brand name merchandise; (7) ban on references to the FDA; (8) ban on product samples; (9) ban on joint product marketing; and (10) ban on promotions offering gifts in consideration of the purchase of tobacco products. *Id.* at 13-29.

<sup>167</sup> *Commonwealth Brands, Inc. v. United States*, 678 F. Supp. 2d 512, 525-26, 535 (W.D. Ky. 2010).

<sup>168</sup> *See id.*; Michael Felberbaum, *Judge OKs Color, Graphics in Ads*, HERALD SUN (Durham), Jan. 5, 2010, [http://www.heraldsun.com/view/full\\_story/5445168/article-Judge-OKs-color--graphics-in-ads](http://www.heraldsun.com/view/full_story/5445168/article-Judge-OKs-color--graphics-in-ads).

<sup>169</sup> Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 201, 123 Stat. 1776, 1843 (2009).

<sup>170</sup> *Id.* § 2; *United States v. Philip Morris U.S.A, Inc.*, 449 F. Supp. 2d 1, 571 (D.D.C.



brand symbols and use of color communicate important information about their product to adults.<sup>171</sup> Interestingly, the court did not make any specific mention of the *Central Hudson* prongs, yet it is evident from the opinion that this regulation failed prongs three and four. Banning the use of all symbols and colors would not directly advance the government interest in preventing children from smoking because there was no evidence to support the fact that all images and colors encourage children to smoke.<sup>172</sup> Judge McKinley stated that “there is no suggestion in any of the literature cited by the government that symbols such as National’s Beech-Nut chewing tobacco insignia. . .[or] the color of Lorillard’s Newport menthol cigarette packaging. . .are a part of what Congress found to be problematic associative advertising techniques aimed at minors.”<sup>173</sup> Thus, the government did not meet its burden of showing that the ban on color and graphics would materially advance its interest in preventing children from smoking.

The ban on color and graphics also failed prong four of the *Central Hudson* test. Here, the judge quoted from *Central Hudson*: “[t]he regulatory technique may extend only as far as the interest it serves. The State cannot regulate speech that poses no danger to the asserted state interest. . .nor can it completely suppress information when narrower restrictions on expression would serve its interest as well.”<sup>174</sup> The court ruled that even if there was a direct connection between some graphics and color and youth smoking, the ban was a “blanket ban” and was overbroad.<sup>175</sup> Less restrictive alternatives exist to prevent advertisements targeting children, such as only banning colors and images that have a special appeal to children.<sup>176</sup> Therefore, the District Court found the black and white text only advertising requirement to be unconstitutional.<sup>177</sup>

*b. Ban on Statements Regarding FDA Approval*

The District Court also struck down the provision of the Act that

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2006).

<sup>171</sup> *Commonwealth Brands, Inc.*, 678 F. Supp. 2d at 525.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 565 (1980)).

<sup>175</sup> *Id.* at 525-26.

<sup>176</sup> *Id.*

<sup>177</sup> *Commonwealth Brands, Inc.*, 678 F. Supp. 2d at 526.

bans any mention of the FDA regulation of tobacco.<sup>178</sup> The ban was on any statement made by anyone, express or implied, directed to consumers, that products were safer because the FDA regulated them.<sup>179</sup> The court did not need to evaluate this regulation through the *Central Hudson* lens because it found that the ban regulated more than just commercial speech.<sup>180</sup> Plaintiffs successfully argued that “almost any public comment on these ‘product standards’ . . . could be construed as an ‘implied’ statement that they made Plaintiffs’ products ‘less harmful.’”<sup>181</sup> The court agreed that journalists, doctors, scientists, and politicians have an interest in commenting on the FDA regulations and that it is “without question that the ban applies to more than just commercial speech and must satisfy strict scrutiny.”<sup>182</sup> The problematic issue for Judge McKinley was that Congress did not limit this provision to speech by tobacco companies. Therefore, federal law prohibited other professionals from publicly commenting on the FDA regulations. Because the government did not even attempt to put forth enough evidence to satisfy strict scrutiny, the regulation was ruled unconstitutional.<sup>183</sup>

Although Judge McKinley overturned two provisions of the Act, he upheld the other eight challenged provisions.<sup>184</sup> On March 5, 2010, the tobacco companies filed an appeal from the order upholding the challenged provisions,<sup>185</sup> and three days later, the government filed an appeal from the order preventing the FDA from enforcing the two overturned provisions.<sup>186</sup> Therefore, the Sixth Circuit will have the opportunity to evaluate all ten challenges to determine whether the Act violates the First Amendment rights of the tobacco companies.

## V. UNDER CENTRAL HUDSON, SEVERAL ACT PROVISIONS

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<sup>178</sup> *Id.* at 535.

<sup>179</sup> 21 U.S.C. § 331(tt), amended by Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 103, 123 Stat. 1776, 1834 (2009).

<sup>180</sup> *Commonwealth Brands, Inc.*, 678 F. Supp. 2d at 535.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> See generally *Commonwealth Brands, Inc. v. United States*, 678 F. Supp. 2d 512 (W.D. Ky. 2010).

<sup>185</sup> Plaintiffs’ Joint Notice of Appeal, *Commonwealth Brands, Inc. v. United States*, 678 F. Supp. 2d 512 (W.D. Ky. 2010) (No. 1:09-cv-117-M).

<sup>186</sup> Defendants’ Notice of Appeal, *Commonwealth Brands, Inc. v. United States*, 678 F. Supp. 2d 512 (W.D. Ky. 2010) (No. 1:09-cv-117-M).

**SHOULD BE HELD UNCONSTITUTIONAL**

Based on the analysis discussed in Part IV, the District Court came to the correct conclusions regarding the ban on color and graphics and the ban on statements regarding FDA approval. The ban on color and graphics fails the *Central Hudson* test because there is no clear connection between all color and images in advertising and youth smoking, and because it is overbroad in scope. Similarly, the injunction against enforcing the ban on statements regarding FDA approval was properly granted, since it fails the fourth prong of *Central Hudson*. Although the court did not evaluate this regulation under the commercial speech lens, it is apparent that even if it had, it would have failed. While the government's goal of preventing false claims of "FDA approval" in advertisements would be met, the regulation was not narrowly tailored. It was more extensive than necessary to accomplish government goals, as it targeted any statement, made by anyone, express or implied, if it was directed at consumers.<sup>187</sup>

The regulations published by the FDA on March 19, 2010 address the ban on color and graphics, but ignore the ban on statements regarding FDA approval.<sup>188</sup> Due to the pending litigation, the FDA has stated that it will not exercise its enforcement discretion against companies who continue to use color and graphics until the issue has been resolved in court.<sup>189</sup> The fact that no regulations were issued regarding compliance with the ban on statements concerning FDA approval suggests that the FDA is not pursuing enforcement of this provision at this time. Interestingly, the Draft Guidance for Industry published by the FDA's Center for Tobacco Products states that the regulations only apply to manufacturers, retailers, and distributors.<sup>190</sup> Thus, even when the regulations are limited to regulating tobacco companies, and therefore potentially come close to compliance with the First Amendment, the FDA may choose to proceed with caution in that

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<sup>187</sup> 21 U.S.C. §331(tt), amended by Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 301, 123 Stat. 1776, 1834 (2009).

<sup>188</sup> 21 C.F.R. § 1140.32 (2010).

<sup>189</sup> CTR. FOR TOBACCO PRODS., FOOD & DRUG ADMIN., DRAFT GUIDANCE FOR INDUSTRY: COMPLIANCE WITH REGULATIONS RESTRICTING THE SALE AND DISTRIBUTION OF CIGARETTES AND SMOKELESS TOBACCO TO PROTECT CHILDREN AND ADOLESCENTS 3 (June 2010), available at <http://www.fda.gov/downloads/TobaccoProducts/GuidanceComplianceRegulatoryInformation/UCM214424.pdf>.

<sup>190</sup> *Id.* at 4-5.

area.

The remainder of this Note will suggest that four specific provisions that were not overturned by the District Court should have been struck down: the ban on outdoor advertising, the ban on brand name sponsorship, and the bans on product samples and gifts. The regulations on product samples and gifts are so similar that they are discussed together. All four of these regulations clearly fail the *Central Hudson* analysis as it has been applied over the past decade.

*a. Ban on Outdoor Advertising*

The ban on outdoor advertising within 1000 feet of a public school or playground should be struck down by the Sixth Circuit, as the exact same provisions have already been held to be invalid in *Lorillard*.<sup>191</sup> In fact, Judge McKinley stated that the ban is “indistinguishable from the Massachusetts’ ban the Supreme Court struck down in *LorillardFalse*”<sup>192</sup> However, because Congress instructed the FDA to issue regulations to go into effect on June 22, 2010,<sup>193</sup> Judge McKinley concluded that plaintiffs’ challenge to the ban was not yet ripe in this instance as it was only January.<sup>194</sup> Interestingly, the FDA issued regulations on March 19, 2010 that reserved its decision on implementing the 1000-foot rule for a future time.<sup>195</sup> The agency is requesting comments and data that may have been developed since 1996 that will assist them in determining whether the 1000-foot rule complies with *Lorillard*.<sup>196</sup>

In *Lorillard*, the Supreme Court held that the restriction failed prong four because the regulation was more extensive than necessary to serve the asserted interest.<sup>197</sup> Justice O’Connor stated that this regulation

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<sup>191</sup> *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 562 (2001).

<sup>192</sup> *Commonwealth Brands, Inc. v. United States*, 678 F. Supp. 2d 512, 535 (W.D. Ky. 2010).

<sup>193</sup> Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 102, 123 Stat. 1776, 1831 (2009).

<sup>194</sup> *Commonwealth Brands, Inc.*, 678 F. Supp. 2d at 535-36. Judge McKinley quoted *Renne v. Geary*, 501 U.S. 312, 320 (1991), which stated that plaintiffs alleging a First Amendment violation must “demonstrate a live dispute involving the actual or threatened application of [a statute or policy] to bar particular speech.” *Id.*

<sup>195</sup> Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco To Protect Children and Adolescents, 75 Fed. Reg. 13,225, 13,226 (Mar. 19, 2010) (to be codified at 21 C.F.R. pt. 1140).

<sup>196</sup> *Id.*

<sup>197</sup> *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 565 (2001); see also *supra* Part II.

was overbroad and demonstrated a lack of tailoring as it would “have widely disparate effects nationwide.”<sup>198</sup> The Kentucky District Court agreed that a ban on outdoor advertising within 1000 feet of a school or playground was unconstitutional,<sup>199</sup> yet because the FDA had not yet issued the regulations, the plaintiffs had no immediate injury.<sup>200</sup>

The research and information that the FDA receives will heavily influence the outcome of this challenge. It does not appear likely that it will pass constitutional muster, unless the rule is more closely tailored to locations where children are present. In order to fit within the modern strict interpretation of *Central Hudson’s* fourth prong, the regulation may not be more extensive than necessary; in other words, the government must prove that there was no other way to achieve its interest.<sup>201</sup> Simply banning tobacco advertisements on school grounds or at public playgrounds appears to be the best way to achieve this goal without impeding on the rights of the tobacco companies. A 1000-foot radius rule covers far too much territory to remain within constitutional boundaries, especially in urban areas.

*b. Ban on Brand Name Sponsorship*

Another provision that should be held unconstitutional is the ban on brand name sponsorship. This regulation has no exceptions and applies to all events, even a vague category of “social or cultural events.”<sup>202</sup> The Kentucky District Court concluded that there was a reasonable fit between the means and the ends of the sponsorship ban.<sup>203</sup> The FDA has promulgated regulations prohibiting tobacco companies from using their brand names to sponsor any athletic event, musical event, artistic event, social or cultural event, or any type of entry in any event.<sup>204</sup> A higher court should find that this is unconstitutional, and

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<sup>198</sup> *Lorillard Tobacco Co.*, 533 U.S. at 563.

<sup>199</sup> *Commonwealth Brands, Inc.*, 678 F. Supp. 2d at 535-36.

<sup>200</sup> *Id.* at 536.

<sup>201</sup> *See* *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 371-72 (2002).

<sup>202</sup> Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396, 44,527 (Aug. 28, 1996), *reissued by* Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 102, 123 Stat. 1776, 1830 (2009) (stating that the FDA is directed to re-issue the regulations promulgated by the Secretary of Health and Human Services in 1996); *see* *Commonwealth Brands, Inc.*, 678 F. Supp. 2d at 526.

<sup>203</sup> *Commonwealth Brands, Inc.*, 678 F. Supp. 2d at 527.

<sup>204</sup> 21 C.F.R. § 1140.34 (2010).

therefore unenforceable, due to the overwhelming evidence that the ban is a sweeping, overbroad regulation on the tobacco companies' right to communicate with adult consumers.

Even if the FDA is able to satisfy prong three of *Central Hudson* by demonstrating that brand name sponsorship of events where children are present has a direct correlation to children smoking, it will be unable to show that there is a connection between sponsorship of adult-only events and youth smoking. If sponsorships of adult-only events never reach children, the FDA will not be able to present substantive proof that these events have any effect on children. Next, prong four of the *Central Hudson* test requires a close fit between the end goal and the means used to achieve it.<sup>205</sup> There is a clear lack of tailoring with this blanket ban on all sponsorship of any type of event, as it prohibits speech that will never reach children.<sup>206</sup> For example, the Newport cigarette brand sponsors a private, invitation-only blackjack tournament in Las Vegas each year.<sup>207</sup> The tournament has no impact on minors, as minors are not even permitted to enter the casino where the tournament is held, yet that sponsorship would be banned under the Act.<sup>208</sup> *Lorillard* suggested that a uniform and broad prohibition on communication would be invalid unless the government can demonstrate the necessity of the ban as it relates to their interest.<sup>209</sup> Although the FDA has an interest in protecting children, this does not justify an "unnecessarily broad suppression of speech addressed to adults."<sup>210</sup> An appellate court should find that the ban on sponsorship violates the First Amendment rights of the plaintiffs.

### *c. Bans on Product Samples and Gifts*

The FDA blanket bans on product samples and gift promotions should both reach a similar fate, as the restrictions are not narrowly tailored to further the government goal of protecting minors. The

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<sup>205</sup> *E.g.*, *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 188 (1999).

<sup>206</sup> Others have criticized this provision of the Family Smoking Prevention and Tobacco Control Act for the same reason stated herein. See Elaine Stoll, Student Article, *The Family Smoking Prevention and Tobacco Control Act and the First Amendment: Why a Substantial Interest in Protecting Public Health Won't Save Some New Restrictions on Tobacco Advertising*, 65 *Food & Drug L.J.* 873, 897 (2010).

<sup>207</sup> Plaintiff's Complaint, *supra* note 6, at 25.

<sup>208</sup> *Id.*

<sup>209</sup> *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 563 (2001).

<sup>210</sup> *Reno v. ACLU*, 521 U.S. 844, 875 (1997).

District Court did not find a commercial speech interest implicated here because the distribution of product samples and the rewarding of tobacco purchasers is conduct that can be directly regulated without involving the First Amendment.<sup>211</sup> This is incorrect, however, because advertising extends beyond print ads and billboards. Advertising can also include enticing lawful prospective consumers by letting them try products before purchase, as well as rewarding loyal consumers by awarding prizes for purchase. Tobacco companies have the right to communicate information about their products through these alternative methods and the *Central Hudson* framework should apply.

It is possible that these restrictions could pass the third prong of *Central Hudson* because they are arguably effective at keeping tobacco products and merchandise out of the hands of children; if products are not given away, there is no chance that a child could come into contact with them. These bans fail the fourth prong of the *Central Hudson* test, however, because they are overbroad and restrict too much communication with legal users. Both product samples and gift promotions are currently strictly limited to adult smokers and extraordinary measures are taken to ensure that minors are excluded.<sup>212</sup> However, the FDA promulgated bans on both of these practices in a purported attempt to protect children from being targeted by tobacco advertisements. The ban against promotions giving gifts in consideration of tobacco purchases has no exceptions and is thus not tailored at all to serve any governmental goal.<sup>213</sup> The ban on product

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<sup>211</sup> *Commonwealth Brands, Inc. v. United States*, 678 F. Supp. 2d 512, 538-39 (W.D. Ky. 2010).

<sup>212</sup> For example, Lorillard's "Newport Pleasure Goods" program allows adult smokers to collect UPC labels from cigarettes and send them to the company in exchange for prizes. All participants must be able to affirmatively demonstrate that they are at least twenty-one years of age in order to participate. Plaintiff's Complaint, *supra* note 6, at 29. The website for Newport Pleasure Goods requires smokers to become members. NEWPORT PLEASURE GOODS, <http://www.newport-pleasure.com/index.aspx> (last visited May 5, 2011). In order to become a member, a smoker must first enter his or her birthday, and then fill out a registration form that includes the last four digits of a social security number, as well as a driver license number so that the company can verify that all members are over age twenty-one. *Id.* (follow "Click Here To Sign Up" link). This is in stark contrast to websites that sell alcohol. For example, a customer can buy beer from the Saranac Brewery and have it shipped to them, so long as state law permits shipment of beer. *My Saranac*, MOTT BREWING COMPANY, <http://mysaranac.com/index.html> (last visited May 5, 2011). The only age verification in this process is the requirement that the person who signs for the package must be twenty-one years old. *Frequently Asked Questions & Answers*, MOTT BREWING COMPANY, <http://mysaranac.com/SiteFAQs.asp> (last visited May 5, 2011).

<sup>213</sup> Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless

samples does contain an exception for smokeless tobacco: product samples of smokeless tobacco can be distributed, but only in facilities that do *not* serve alcohol.<sup>214</sup> This is inconsistent with the government's purported goal of preventing youth smoking because it allows the distribution of product samples of smokeless tobacco, but interestingly only in areas where children *are* permitted, such as restaurants, and not in facilities that serve alcohol and only allow adults to enter, such as bars and nightclubs. As stated in *Greater New Orleans Broadcasting Ass'n*, a regulation that is so "pierced by exemptions and inconsistencies" cannot be upheld.<sup>215</sup> The Sixth Circuit should therefore invalidate these unlawful provisions.

#### **VI. SOLUTION: REDUCING THE SCOPE OF THE ACT.**

The stated goal of the Act is to reduce the use of tobacco products by children under the age of eighteen.<sup>216</sup> Congressional findings state that "such regulations are narrowly tailored to restrict those advertising and promotional practices which are most likely to be seen or heard by youth and most likely to entice them into tobacco use, while affording tobacco manufacturers and sellers ample opportunity to convey information about their products to adult consumers."<sup>217</sup> However, many of the regulations are over-broad and restrict more speech than necessary in order to reduce children's access to and demand for tobacco. A better solution is for the government to regulate tobacco products directly, instead of attempting to prevent advertising and marketing of legal products. Regulating speech must always be a last resort, not a first resort.<sup>218</sup> Alternative ways to achieve the goal of reducing youth smoking include criminalizing the underage possession of tobacco products, imposing greater penalties on those retailers who allow minors to purchase tobacco products, and creating educational programs to teach children about the dangers of tobacco use.

Next, any regulations imposed on the advertising or marketing of tobacco products should be strictly limited to those instances in which

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Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396, 44,527, *reissued* by Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 102, 123 Stat. 1776, 1830-31 (2009).

<sup>214</sup> § 102, 123 Stat. at 1831; 21 C.F.R. § 1140.16(d) (2010).

<sup>215</sup> *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 190 (1999).

<sup>216</sup> § 2, 123 Stat. at 1779.

<sup>217</sup> *Id.*

<sup>218</sup> *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002).



children are affected. Restrictions that prohibit advertising in bars, nightclubs, and casinos are not narrowly tailored because these places require proof of age in order to enter. Any advertising that takes place in adult-only facilities cannot be restricted in order to achieve the goal of reducing tobacco use by minors. In addition, direct marketing campaigns, such as the promotional gift programs that strictly verify participants' age, should be beyond the scope of the statute because they also do not reach children.

### **CONCLUSION**

The Family Smoking Prevention and Tobacco Control Act states that its goal is to reduce youth smoking, yet the Act actually attempts to target all smokers. Although Congress made it clear that the use of tobacco products was not completely banned, it then proceeded to cut off almost every way that tobacco manufacturers can communicate with adult smokers.

This Act sets a dangerous precedent for other "vice" products because it aims to prevent adults from making an educated decision as to what they want to be exposed. As the Supreme Court held that paternalistic goals are impermissible motives for restrictions on speech,<sup>219</sup> and that there is no "vice" exception to the First Amendment,<sup>220</sup> the government may not create speech barriers between tobacco companies and adult consumers. There must be a balance between the governmental interest in protecting children from health risks associated with tobacco use and the tobacco company's interest in running a business selling a legal product. The government must either completely outlaw tobacco, or remove the restrictions on advertising so that adults can weigh the risks of tobacco use for themselves. What the government may not do is allow a company to manufacture a legal product and then sabotage their efforts to run a business by violating their First Amendment rights.

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<sup>219</sup> *Id.* at 375.

<sup>220</sup> 44 *Liquormart v. Rhode Island*, 517 U.S. 484, 514 (1996).