First Amendment Challenges to the Family Smoking Prevention and Tobacco Control Act: Balancing Congress’ Interest in Preserving Public Health with the Tobacco Industry’s Right to Freely Communicate with Adult Smokers

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Cigarette smoking is the leading preventable cause of death in the United States, and tobacco use is responsible for roughly one in five deaths annually, or more than four hundred thousand deaths per year. According to the Institute of Medicine, “smoking-related deaths account for more deaths than AIDS, alcohol, cocaine, heroin, homicide, suicide, motor vehicle crashes, and fires combined.” Moreover, roughly eighty percent of U.S. adults, approximately forty-three million people, are cigarette smokers. Additionally, approximately 8.6 million Americans suffer from chronic illnesses related to smoking. Smoking increases the prevalence of cardiovascular and respiratory disease. Moreover, smokeless tobacco use negatively affects the health of many Americans.

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2 H.R. REP. NO. 111-58, pt. 1, at 2. Smoking harms almost every organ in the body, including the brain, eyes, mouth, lungs, heart, stomach, kidneys, and pancreas, causing many diseases and reducing the overall health of smokers. Id. Smoking can also adversely affect both the male and
of new tobacco users start using tobacco products when they are under the minimum legal age to purchase tobacco products. Each day, thirty-five hundred youths try a cigarette for the first time, and another one thousand children will become new, daily smokers. A shocking one-third of those who become daily smokers, including a third of the aforementioned children, will die prematurely as a result of their tobacco addiction. In addition to the staggering number of lives lost to tobacco each year, tobacco use costs the country ninety-six billion dollars in health care expenditures and ninety-seven billion dollars in lost productivity each year.

Although tobacco use has adverse health implications, historically, tobacco was one of the most unregulated consumer products available in the United States. For decades, tobacco products were exempt from the basic health and safety regulations that applied to other consumer products. The Food and Drug Administration ("FDA" or female reproductive system. See Smoking Damages Most Organs in Your Body, Patient Education Handout, Health System Nursing, The Ohio State University Medical Center, Oct., http://medicalcenter.osu.edu/PatientEd/Materials/PDFDocs/health-p/TobaccoTreatment/SmokingDamagesOrgans.pdf (Oct. 2009). Cancer, the second leading cause of death, was one of the first diseases found to have a causal link to smoking. H.R. REP. NO. 111-58, pt. 1, at 2. See Enduring the Tobacco Problem: A Blueprint for the Nation, INSTITUTE OF MEDICINE: Report Brief, May 2007, at 1; Family Smoking Prevention and Tobacco Control Act: Hearing on H.R. 1108 Before the Health Subcomm. of the H. Energy and Commerce Comm., 110th Cong. 2 (2007) (statement of Rep. Frank Pallone Jr., Chairman, Health Subcomm. of the H. Energy and Commerce Comm.).

See Robert Wood Johnson Foundation, President Gives FDA Tobacco Authority (June 22, 2009), http://www.rwjf.org/publichealth/product.jsp?id=44128. Cigarette smoking provides exorbitant costs to the health care system due to treating smoking-related illness and disease. Id. Moreover, individuals afflicted with smoking-related diseases are often incapacitated and unable to work and contribute to society, thus attributing for high lost productivity costs. Id. Exposure to secondhand smoke adds another ten billion dollars in medical costs and productivity losses in the U.S. each year. Id. See also H.R. REP. NO. 111-58, pt. 1, at 3-4.

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“the Agency”) is responsible for regulating products such as toothpaste and cereal, but prior to the enactment of the Family Smoking Prevention and Tobacco Control Act, the FDA did not regulate cigarettes or smokeless tobacco. Moreover, until recently, the FDA had no authority to regulate the cause of nicotine addiction; rather, the Agency was only provided with regulatory authority for over-the-counter and prescription smoking cessation drugs.

On July 22, 2009, President Barack Obama signed the Family Smoking Prevention and Tobacco Control Act (“Tobacco Control Act”) into law, providing the FDA extensive authority to regulate the manufacturing, marketing, and sale of tobacco products. Congress and public health advocates are optimistic that the newly enacted law, which aims to strengthen the nation’s regulation of tobacco products and restrict tobacco product marketing, will achieve its goals of protecting children from nicotine addiction and improving nationwide health care. Proponents of the law believe that the Tobacco Control Act’s marketing and advertising restrictions will play a significant role in decreasing tobacco use among adolescents. Congress’ strategy for reducing

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10 Family Smoking Prevention and Tobacco Control Act: Hearing on H.R. 1108 Before the Health Subcomm. of the H. Energy and Commerce Comm., 110th Cong. 2 (2007) (statement of Rep. Frank Pallone Jr., Chairman, Health Subcomm. of the H. Energy and Commerce Comm.). Until the enactment of the Family Smoking Prevention and Tobacco Control Act, tobacco products were virtually unregulated to protect public health. Id. They were exempt from important consumer protections, including ingredient disclosure, product testing, and restrictions on marketing to children. Id. See infra note 11 and accompanying text.


12 Id. See Robert Wood Johnson Foundation, President Gives FDA Tobacco Authority, supra note 6. The legislation represents the strongest action the U.S. has even taken to reduce tobacco use. Id.

13 See Robert Wood Johnson Foundation, President Gives FDA Tobacco Authority, supra note 6.

14 See infra note 193 and accompanying text.
tobacco use among youths through the Tobacco Control Act, however, may be hindered since provisions of the Act have already been challenged as violating tobacco companies’ First Amendment rights to advertise their products to adult users. While it is probable that the First Amendment challenges will come before the Supreme Court, the majority of the Tobacco Control Act’s provisions are likely to withstand any constitutional attack.

Part I of this note examines the history of regulating tobacco in the United States, including the FDA’s 1996 Tobacco Regulation, the tobacco companies’ challenge to the FDA tobacco rule, the subsequent Master Settlement Agreement, and Congress’ prior attempts to enact legislation to regulate tobacco products. Part II of this note discusses prior First Amendment challenges to past tobacco legislation and examines how courts have resolved these controversies. Part III of this note discusses Congress’ purpose in enacting the Tobacco Control Act, and analyzes the major provisions in the newly enacted law. Part IV explores the first legal challenge to the newly enacted legislation and scrutinizes the federal district court’s decision. The final section speculates how the First Amendment challenges to the law could be resolved on appeal and investigates what lies ahead for current and future tobacco legislation.

I. United States Federal Tobacco Legislation

In 1964, the United States Surgeon General’s Advisory Committee on Smoking and Health released a report that triggered the major public health movement against smoking. The central conclusion of the milestone report was that “cigarette smoking [was] a health hazard of sufficient importance in the United States to warrant appropriate remedial action.” Only seven days after the report was released, the Federal Trade Commission (“FTC”), the first government entity to respond to the

16 See MARTHA A. DERTHICK, UP IN SMOKE: FROM LEGISLATION TO LITIGATION IN TOBACCO POLITICS 10 (Congressional Quarterly Inc.) (2002) (providing a historical overview describing both the state and federal governments’ victories and failures in implementing tobacco legislation).
17 See DERTHICK, supra note 16, at 10. The Surgeon General Committee report stated, “in view of the continuing and mounting evidence from many sources, it is the judgment of the Committee that cigarette smoking contributes substantially to mortality from certain specific diseases and to the overall death rate.” Id. The panel reported statistically significant, and possibly causal, associations between smoking and esophageal cancer, bladder cancer, coronary artery disease, emphysema, peptic ulcers, and low birth weight. Id. The report also stated that men who smoked were, on average, about ten times as likely to die of lung cancer as those who did not smoke. Id.
Surgeon General’s report, began hearings to require health warnings on all cigarette packages and in all advertisements.\textsuperscript{18} Although cigarette companies argued that the FTC lacked the necessary rulemaking authority and that the issue was too important to be decided by an appointed regulatory commission, the FTC proceeded to publish its proposed rule in the \textit{Federal Register}, a step toward formal adoption.\textsuperscript{19} Ultimately the rule to require health warnings on all cigarette packages and in all advertisements never took effect; the FTC deferred to Congress’ request that the action be postponed while Congress addressed tobacco regulation.\textsuperscript{20}

The FTC’s proposed health warning rule was never adopted, but in the summer of 1965, Congress enacted the Federal Cigarette Labeling and Advertising Act (“FCLAA”), which required cigarette cartons and packs to carry the warning: “Caution: Cigarette Smoking May be Hazardous to Your Health.”\textsuperscript{21} While it would appear that opponents of smoking would have welcomed the law as a victory, nothing was further from the truth.\textsuperscript{22} Conversely, opponents of smoking viewed the FCLAA as a victory for cigarette manufacturers because the warning was weaker than critics of tobacco requested and applied only to packs and cartons, not to advertising, as the FTC rule would have required.\textsuperscript{23} Furthermore, Congress barred the FTC from implementing any measures pertaining to the regulation of cigarette advertising until July 1, 1969, when Congress’ own law would expire.\textsuperscript{24} Although Congress included ardent critics of

\textsuperscript{18} See DERTHICK, supra note 16, at 11-12. The FTC is one of a number of independent regulatory commissions in the federal government. \textit{Id.} at 11. It was first created by Congress in 1914, during the Wilson administration, to serve as a check on big business. \textit{Id.} In the spring of 1964, the FTC, without consulting Congress, began three days of hearings on a rule that would require a health warning. \textit{Id.} at 12. An attorney representing the cigarette industry appeared at the hearings and argued that the FTC lacked the necessary rulemaking authority and that the issue was too important to be decided by an appointed regulatory commission. \textit{Id.} The attorney asserted that the legislature, elected by the people, should determine whether to require health warnings. \textit{Id.}

\textsuperscript{19} See DERTHICK, supra note 16, at 12.

\textsuperscript{20} See DERTHICK, supra note 16, at 12. It was ultimately the FTC’s chairman who deferred to a request from the chairman of the House Interstate and Foreign Commerce Committee that action be postponed while Congress addressed the issue. \textit{Id.}


\textsuperscript{22} See DERTHICK, supra note 16, at 12-13. The \textit{New York Times} condemned the newly enacted law (“FCLAA”) as “a shocking piece of special interest legislation . . . a bill to protect the economic health of the tobacco industry by freeing it of proper regulation.” \textit{Id.} at 12-13.

\textsuperscript{23} See DERTHICK, supra note 16, at 13.

\textsuperscript{24} See DERTHICK, supra note 16, at 13. Congress’ moratorium on FTC rulemaking in regard to cigarette advertising was an uncharacteristic reprimand. \textit{Id.} The moratorium was most likely set in place as a result of Congress’ anger toward the agency for acting without consultation and
tobacco for decades, until the 1980s, the prevalence of power, both in the number of sympathetic members and in the committee positions they held, rested with the tobacco industry.\(^{25}\) Thus, Congress maintained almost sole control of the tobacco issue and kept it out of the hands of the regulatory agencies for the next two decades in order to ensure that the interests of the tobacco industry were protected.\(^{26}\) Most indicative of Congress’ position against tobacco regulation by federal agencies was the recurrent omission of tobacco products from new laws the legislature passed that regulated hazardous or toxic substances.\(^{27}\) Congress also refused to grant jurisdiction over cigarettes to the FDA despite requests from anti-smoking activists.\(^{28}\)

Although Congress kept the tobacco issue in its own hands until the late 1980s, it would be inaccurate to interpret Congress’ actions as completely in favor of the tobacco industry.\(^{29}\) Despite the aforementioned political interests, from the late 1960s until the early 1990s, Congress passed a number of laws that helped gradually pave the way for tobacco opponents.\(^{30}\) In addition, by the mid-1980s, the leadership in Congress had shifted to the detriment of the tobacco industry.\(^{31}\) Thus, the ongoing political power struggle between Big Tobacco conservatives and anti-tobacco liberals to create and implement tobacco legislation has emerged as an ongoing decade-long struggle for lawmakers.\(^{32}\)

because of Congress’ sensitivity to the tobacco industry’s interests. \textit{Id.}

\(^{25}\) See DERTHICK, \textit{supra} note 16, at 18.

\(^{26}\) See DERTHICK, \textit{supra} note 16, at 13.

\(^{27}\) See DERTHICK, \textit{supra} note 16, at 14. These new laws, which omitted tobacco products from regulation, included the Fair Packaging and Labeling Act of 1966; the Comprehensive Drug Abuse Prevention and Control Act of 1970; the Consumer Product Safety Act amendments in 1976; the Federal Hazardous Substances Act amendments in 1976; and the Toxic Substances Control Act of 1976. \textit{Id.} Congressional “bias” per se was ultimately why tobacco was exempt from government regulation for so long. \textit{Id.}

\(^{28}\) See DERTHICK, \textit{supra} note 16, at 14.

\(^{29}\) See DERTHICK, \textit{supra} note 16, at 15.

\(^{30}\) See DERTHICK, \textit{supra} note 16, at 15. These laws comprised three groups: laws designed to discourage tobacco use, excise taxes, and price support amendments. \textit{Id.} Congress also strengthened the tobacco warning label requirement in 1969 and again in 1984. \textit{Id.} The 1969 warning replaced the prior language “may be hazardous [to your health]” with “Cigarette Smoking Is Dangerous To Your Health.” \textit{Id.} (emphasis added). In 1984, Congress made the warnings even stronger, required that four different warnings be rotated, and mandated that each warning be preceded by the phrase “SURGEON GENERAL’S WARNING.” \textit{Id.}

\(^{31}\) See DERTHICK, \textit{supra} note 16, at 18-19 (noting how liberal Congressman Henry Waxman’s 1979 defeat of conservative Richard Preyer for the chairmanship of the Subcommittee on Health and the Environment of the House Commerce Committee was more damaging to Big Tobacco than probably any single piece of legislation).

\(^{32}\) See C. STEPHEN REDHEAD & VANESSA BURROWS, CONG. RESEARCH SERV., R40196, FDA
In August 1996, the Agency issued a final rule, the FDA 1996 Tobacco Rule, geared toward decreasing both underage smoking and the use of smokeless tobacco products.\textsuperscript{33} The purpose of the rule was to reduce minors’ ability to easily access tobacco products.\textsuperscript{34} The FDA’s Tobacco Rule prohibited: (1) the sale of cigarettes and smokeless tobacco to persons under the age of eighteen; (2) the distribution of free samples and the use of vending machines or self-service displays except where individuals are over the age of eighteen; (3) the sale of cigarettes in packs of less than twenty; (4) the sale and distribution of marketing items such as hats and t-shirts displaying cigarette brand names; and (5) sponsorship of musical events and sporting events.\textsuperscript{35} The FDA’s 1996 Tobacco Rule also required sellers to verify a purchaser’s age through photographic identification; it barred the use of advertising billboards and posters near schools and public playgrounds; it limited the content of the advertising and labeling viewed by minors to a black-and-white, text-only format; and it required each cigarette and smokeless tobacco package to include a label which stated, “Nicotine-Delivery Device for Persons 18 or Older.”\textsuperscript{36}

In order for the Agency to possess the necessary jurisdiction over cigarette and tobacco products to enact such a pressing law, supporters of the FDA’s 1996 Tobacco Rule were charged with the task of finding an appropriate federal law that authorized the Agency to regulate tobacco.\textsuperscript{37} Because all of the federal consumer protection laws passed in the 1960s and 1970s explicitly excluded tobacco from regulation, supporters of the FDA 1996 Tobacco Rule looked to the Agency’s statutory charter, the Federal Food, Drug, and Cosmetic Act (“FFDCA”), which is a statute that, in contrast, contained no such limiting provision.\textsuperscript{38} Thus, significantly, the Agency discovered a way to declare...
jurisdiction over tobacco products by determining that under the FFDCA’s definitions, nicotine is a drug, and cigarettes and smokeless tobacco are drug-delivery devices. After making the determination that tobacco products fall within the statutory definitions of both drugs and devices, the Agency further deduced that tobacco products are combination products. Because a provision in the FFDCA gives the Agency power to regulate products that “constitute a combination of a drug, device, or biologic product,” the Agency interpreted this provision as giving it the authority to choose whether to regulate combination products as drugs, devices, or biologic products. Thus, in the final FDA 1996 Tobacco Rule, the Agency decided to regulate tobacco products under the device provisions of the FFDCA because the device provisions offered the Agency greater regulatory latitude as compared to the drug provisions.

In response to the 1996 FDA Tobacco Rule, major tobacco companies filed a lawsuit, Coyne Beahm, Inc. v. FDA, against the Agency in federal district court in North Drug, and Cosmetic Act was enacted in 1938, it would not have occurred to Congress or to the tobacco industry at the time that any explicit provision protecting tobacco from regulation was necessary. See id. See REDHEAD & BURROWS, supra note 32, at 4. The FFDCA defines a drug, as “articles (other than food) intended to affect the structure or any function of the body.” 21 U.S.C. § 321(g)(1)(C) (2010). The FDA reviewed extensive scientific reports verifying nicotine’s effects on the body, including addiction, stimulation, and sedation. See REDHEAD & BURROWS, supra note 32, at 4. The FDA also concluded that cigarettes and smokeless tobacco are devices that send nicotine into the body. Id. Much like drugs, the FFDCA’s definition of medical devices includes items that the manufacturer intends to affect the structure and function of the body. Id. The definition of device is distinguished from a drug, as a device “does not achieve its primary intended purpose through chemical action.” 21 U.S.C. § 321(h).

Combination products have components that comprise both a drug and a device. Id. See REDHEAD & BURROWS, supra note 32, at 4. Combination products have components that comprise both a drug and a device. Id. See REDHEAD & BURROWS, supra note 32, at 4. 21 U.S.C. § 353(g) (2010) (defining Agency’s authority under the FFDCA); see REDHEAD & BURROWS, supra note 32, at 4.

The device provisions of the FFDCA offer a range of regulatory controls that apply to all devices. Id. In choosing to regulate tobacco products under the device provisions of the FFDCA, the FDA stated in its 1996 Rule that these mandatory regulatory controls in the FFDCA device provisions would apply to cigarettes and smokeless tobacco. Id. The mandatory controls under the FFDCA device provision include adulteration and misbranding provisions, labeling requirements, establishment registration, device listing and premarket notification, recordkeeping and reporting requirements, and good manufacturing requirements. Id. Additionally, the FFDCA gives the FDA inspection and recall authority for devices and requires the FDA to classify each device based on the degree of risk it poses to the user. Id.

Carolina. In *Coyne Beahm*, the tobacco manufacturers argued, and sought summary judgment, on the grounds that Congress expressly withheld jurisdiction to regulate tobacco products from the Agency and that the FFDCA does not permit the Agency to regulate tobacco products as “drugs” or “devices.” In addition to alleging the Agency exceeded its statutory authority, the companies also argued the Agency violated the First Amendment protection of commercial speech. The North Carolina federal district court ruled primarily in favor of the Agency, validating the Agency’s jurisdiction to regulate tobacco products. Although the court upheld the FDA 1996 Tobacco Rule’s access restrictions and labeling requirements, the court held the Agency did not have the authority to restrict tobacco advertising and promotion.

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44 *Id.* at 1379; see REDHEAD & BURROWS, supra note 32, at 5.
45 *Coyne Beahm*, 966 F. Supp. at 1379. The tobacco companies also challenged the Agency’s authority to regulate tobacco products when these products were marketed and sold without any explicit claims of a therapeutic or beneficial effect. *Id.* at 1392; see also REDHEAD & BURROWS, supra note 32, at 5. The companies believed that Congress intended for the structure-or-function definition of device in the FFDCA to “apply only to products that are marketed to provide some medical or other health benefit to users.” *Coyne Beahm*, 966 F. Supp. at 1392 (citing Plaintiffs’ Second Br. Supp. Mot. Summ. J. at 5). In rejecting this notion, the court asserted that the FFDCA’s definition of device expressly includes those products “intended to affect the structure or any function of the body of man or other animals” and gives no indication that the definition applies only to those devices with a medical benefit or purpose. *Id.*; 21 U.S.C. § 321(h) (2010).
46 *Coyne Beahm*, 966 F. Supp. at 1400. The companies argued that the tobacco rule’s advertising restrictions, which limited advertisements viewed by children to a black-on-white, text-only format, violated the First Amendment of the U.S. Constitution. *Id.*
47 *Id.* at 1380 (concluding neither the text nor the legislative history of the FFDCA shows clear congressional intent to withhold from the FDA the authority to regulate tobacco products). The court noted the Agency’s previous claims that it lacked jurisdiction to regulate tobacco products, Congress’ rejection of legislation designed to grant the Agency jurisdiction over tobacco, and the understanding of some Congressional members that the Agency lacked jurisdiction were not exceptional circumstances relevant to the determination of Congress’ intent with respect to FDA regulation. *Id.* at 1382-84. The court also found the FDA acted properly under the FFDCA when it classified nicotine as a drug and tobacco products as drug-delivery devices. *Id.* at 1388-97.
48 *Id.* at 1399-1400. The court permitted the two youth access provisions that had taken effect prior to its ruling to remain in effect, but the court delayed implementation of the FDA Tobacco Rule’s other provisions. See REDHEAD & BURROWS, supra note 32, at 6. The two youth access provisions of the FDA Tobacco Rule were (1) prohibiting the sale of tobacco products to individuals under age eighteen; and (2) requiring a photo ID as a condition of sale for all persons under age twenty-seven. See *id.* In rejecting the provisions of the 1996 Tobacco Rule that restricted tobacco advertising and promotion, the court determined that the authority of the Agency to regulate tobacco products as drugs or devices under the FFDCA did not further authorize it to put restrictions on the promoting and advertising of tobacco products under the Agency’s authority to regulate “sale” and “distribution.” *Coyne Beahm*, 966 F. Supp. at 1397-1400.
In 2000, the United States Supreme Court invalidated the 1996 FDA Tobacco Rule.\footnote{FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 126 (2000). See Brown & Williamson Tobacco Corp. v. FDA, 153 F.3d 155, 176 (4th Cir. 1998) (overturning the federal district court decision, Coyne Beahm, Inc. v. FDA, and holding that the FDA lacked the statutory authority to regulate tobacco products).} In \textit{FDA v. Brown \& Williamson Tobacco Corp.},\footnote{529 U.S. 120 (2000).} the Court held that the Agency does not have the authority under the FFDCA, named “FDCA” in the opinion, to regulate cigarettes and smokeless tobacco products as drug-delivery devices.\footnote{Brown \& Williamson, 529 U.S. at 126. The court concluded that “Congress has clearly precluded the FDA from asserting jurisdiction to regulate tobacco products.” \textit{Id.} The Court further asserted “such authority is inconsistent with the intent that Congress has expressed in the [FFDCA’s] overall regulatory scheme and in the tobacco-specific legislation that it has enacted subsequent to the [FFDCA].” \textit{Id.}} Given that the lawsuit involved an administrative agency’s construction of a statute that it administers, the Court applied the \textit{Chevron} test, which was established in \textit{Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.},\footnote{467 U.S. 837 (1984). \textit{Chevron} is the leading case on judicial review of agency interpretations of statutes. See REDHEAD \& BURROWS, supra note 32, at 7.} to review whether the Agency’s interpretation of the FFDCA was entitled to deference and presented a permissible construction of the law.\footnote{Brown \& Williamson, 529 U.S. at 132.} In \textit{Chevron}, the Court created a two-step test, commonly referred to as the \textit{Chevron} two-step, for judicial review of an agency’s interpretation of its own statute.\footnote{Chevron U.S.A. Inc., 467 U.S. at 842-43. Under \textit{Chevron}, a court must first ask, “whether Congress has directly spoken to the precise question at issue.” \textit{Id.} The second question is if Congress has not spoken directly to the precise question at issue and the statute is silent or ambiguous with respect to the specific issue, is the agency’s answer based on a permissible construction of the statute? \textit{Id.} at 843. If Congress has directly spoken to the question at issue, the inquiry ends; and the court “must give effect to the unambiguously expressed intent of Congress.” \textit{Id.} at 842-43. However, if Congress has not specifically addressed the precise question, a reviewing court must respect the agency’s construction of the statute as long as it is permissible. \textit{Id.} at 843.} Applying the first step of the \textit{Chevron} test, the Court found that Congress clearly “intended to exclude tobacco products from the FDA’s jurisdiction;” thus, there was no need to proceed to the second step of the test.”\footnote{Brown \& Williamson, 529 U.S. at 142. In reaching its conclusion, the Court determined that because tobacco is a dangerous product and because the FFDCA prohibits the marketing of products that have not been found to be safe and effective, the FFDCA would require the FDA to ban tobacco products if the agency had authority over these products. \textit{Id.} at 142-43. The Court articulated that a ban on tobacco would plainly contradict the congressional intent as expressed in the enactment of several pieces of tobacco-specific legislation. \textit{Id.} at 143. Congress enacted the tobacco-specific legislation with the understanding that tobacco products would}
Rule, the Court concluded that the Agency repeatedly denied possessing jurisdiction over tobacco.\textsuperscript{56} Congress also repeatedly rejected bills specifically drafted to give the Agency jurisdiction over tobacco products.\textsuperscript{57}

The Supreme Court’s decision in \textit{FDA v. Brown \& Williamson Tobacco Corp.} clarified that the Agency could only assert jurisdiction over tobacco products if Congress enacted legislation granting the Agency explicit statutory authority over such products.\textsuperscript{58} Reacting to the Supreme Court’s decision, lawmakers first drafted responsive language during the 105th Congress and included it in legislation geared toward implementing the 1997 proposed national tobacco settlement.\textsuperscript{59} The proposed legislation, S. 1415, sponsored by Senator John McCain, incorporated all the provisions of the FDA’s 1996 Tobacco Rule and included additional restrictions on marketing and advertising.\textsuperscript{60} The bill, which was primarily intended to implement the national tobacco settlement, was defeated on the Senate floor.\textsuperscript{61} The 107th Congress introduced several tobacco bills; continue to be marketed in the U.S. \textit{Id.} The Court also cited various tobacco-related regulatory statutes as evidence of Congress’ intent to create a distinct regulatory scheme for tobacco. \textit{Id.} See generally Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 (2010); Public Health Cigarette Smoking Act of 1969, 15 U.S.C. § 1331 (2010); Comprehensive Smokeless Tobacco Health Education Act of 1986, 15 U.S.C. § 4401 (2010); and Comprehensive Smoking Education Act, 15 U.S.C. § 1331 (2010).

\textsuperscript{56} \textit{Brown \& Williamson}, 529 U.S. at 143-56.

\textsuperscript{57} \textit{Id.} According to the tobacco companies, beginning in 1906 and as recently as 1993, Congress rejected any legislation designed to give the Agency jurisdiction over tobacco products. \textit{See} \textit{REDHEAD \& BURROWS}, supra note 32, at 7.

\textsuperscript{58} \textit{Brown \& Williamson}, 529 U.S. at 120. \textit{See also} \textit{REDHEAD \& BURROWS}, supra note 32, at 8.

\textsuperscript{59} \textit{See} \textit{REDHEAD \& BURROWS}, supra note 32, at 8. Forty-one states and Puerto Rico sued the tobacco industry in order to recover the costs of treating smoking-related diseases. \textit{See id.} The 1997 proposed national tobacco settlement was an agreement where the industry agreed to pay $368.5 billion over the first twenty-five years, and $15 billion a year thereafter to settle the state lawsuits. \textit{See id.} The 1997 tobacco settlement also proposed amending the FFDCA to classify tobacco products as Class II devices and give the FDA the authority to reduce or eliminate harmful compounds added to tobacco products. \textit{See id.}

\textsuperscript{60} \textit{See} \textit{REDHEAD \& BURROWS}, supra note 32, at 10-11. The McCain Bill would have added an additional chapter to the FFDCA for the regulation of tobacco products. \textit{See id.} at 11. Senator McCain proposed this new Chapter IX to establish a new legal authority within the FFDCA for regulating tobacco products, thus avoiding the safety and effectiveness standard which applies to the regulation of both drugs and devices. \textit{See id.} Under the new language, the Agency would have been required to show that any proposed tobacco regulation was appropriate for the protection of public health. \textit{See id.}

\textsuperscript{61} \textit{See} \textit{REDHEAD \& BURROWS}, supra note 32, at 10-11. Following the McCain legislation’s defeat and the demise of the national tobacco settlement proposal, the major cigarette companies continued negotiations with the states, and in 1998, the parties signed a contractual agreement, the Master Settlement Agreement (“MSA”), in order to settle lawsuits brought by numerous
however, none of the bills made any significant legislative progress.62

During the 108th Congress, Senators Mike DeWine and Ted Kennedy and Representatives Tom Davis and Henry Waxman first introduced the Family Smoking Prevention and Tobacco Control Act, but Congress ultimately defeated the Act in the 108th, 109th, and 110th sessions.63 While the House passed the Tobacco Control Act in the 110th Congress, the legislation saw no further congressional activity—and never made it to the Senate floor—presumably because the Secretary of Health and Human Services made it clear that the Bush administration would vehemently oppose, and veto, the legislation.64

II. First Amendment Challenge to State Tobacco Regulation

Due to Congress’ unsuccessful attempts at enacting federal legislation to regulate tobacco products, some states enacted their own tobacco regulations.65 The states against tobacco manufacturers. See id. at 10. The MSA did not consider the Agency’s authority over tobacco products. See Master Settlement Agreement, Website of the National Association of Attorneys General (NAAG), http://www.naag.org/backpages/naag/tobacco/msa/msa-pdf (last visited Nov. 22, 2010). In addition to requiring billions of dollars in payments to state governments, the MSA also embodied a new regime of tobacco regulation. See DERTHICK, supra note 16, at 3. The MSA banned transit and outdoor advertising, including billboards and signs or placards larger than a poster in arenas, stadiums, shopping malls, and video game arcades. See id. The agreement also disbanded the Tobacco Institute, the tobacco industry’s lobbying organization, and prohibited cigarette companies from lobbying against any of the terms of the MSA or challenging their constitutionality. See id. at 3-4.

62 REDHEAD & BURROWS, supra note 32, at 12.
63 See REDHEAD & BURROWS, supra note 32, at 13. The text of the Family Smoking Prevention and Tobacco Control Act (S. 2461, H.R. 4433) was introduced as an amendment to the American Jobs Creation Act of 2004 (H.R. 4520, P.L. 108-357). See id. The amendment passed on the Senate floor, but the House conferences ultimately rejected it during the conference on H.R. 4520. See id. The Family Smoking Prevention and Tobacco Control Act (S.666, H.R. 1376) was reintroduced in 2006; however, legislative action was not taken on either measure during the 109th Congress. See id. at 14. In the 110th Congress, the Tobacco Control Act (S. 625, H.R. 1108) was approved by the House Committee on Energy and Commerce and the full House passed H.R. 1108 in July, 2008. See id.
64 See REDHEAD & BURROWS, supra note 32, at 14.
65 See DERTHICK, supra note 16, at 21-24. By 1995, the Centers for Disease Control and Prevention (“CDC”) and the National Cancer Institute (“NCI”) discovered 1238 state laws that addressed tobacco control. See id. at 22. State tobacco regulations include laws that restrict smoking on government work sites, private work sites, and restaurants. See id. All states also have cigarette excise taxes, and a few states have even restricted cigarette advertising and enacted point-of-sale regulations. See id. at 23.
Master Settlement Agreement ("MSA") was a tobacco settlement agreement formulated by numerous states in an effort to restrict tobacco advertising.\textsuperscript{66} Former Massachusetts Attorney General Scott Harshbarger agreed to sign the MSA following its creation, but he also provided additional consumer protection regulations to restrict advertising and sales practices for tobacco products and to close the loop holes in the MSA.\textsuperscript{67} Manufacturers and sellers of cigarettes, smokeless tobacco products, and cigars ultimately challenged the Massachusetts regulations on the grounds that the regulations violated federal law and the First Amendment of the United States Constitution.\textsuperscript{68} In \textit{Lorillard Tobacco Co. v. Reilly},\textsuperscript{69} the Supreme Court struck down certain Massachusetts state restrictions on tobacco advertising as violating the First Amendment.\textsuperscript{70}

The First Amendment “protects commercial speech from unwarranted governmental regulation.”\textsuperscript{71} In assessing the constitutionality of the challenged advertising restrictions in \textit{Lorillard Tobacco Co.}, the Supreme Court applied its four-part test for evaluating the constitutionality of restrictions on commercial speech.\textsuperscript{72} This test was first established by the Court in \textit{Central Hudson Gas & Electric Corp. v. Public Service Comm’n of New York}.\textsuperscript{73} Under the \textit{Central Hudson} test, to obtain First Amendment

\begin{itemize}
\item 66 See Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 533 (2001). See supra note 61 and accompanying text.
\item 67 Lorillard Tobacco Co., 533 U.S. at 533-34. Attorney General Harshbarger used his authority as attorney general to promulgate comprehensive regulations governing the advertising and sale of cigarettes, smokeless tobacco, and cigars. \textit{Id.} at 533. Harshbarger’s purpose in enacting the regulations was to “close holes” in the Master Settlement Agreement and to prevent tobacco companies from making new customers out of Massachusetts’ children. \textit{Id.}
\item 68 \textit{Id.} at 532. The Massachusetts regulations had a broader scope than the Master Settlement Agreement, addressing advertising, sales practices, and members of the tobacco industry not covered by the MSA. \textit{Id.} at 534. The Massachusetts regulations created numerous restrictions on outdoor advertising, point-of-sale advertising, retail sales transactions, transactions by mail, sampling of products, promotions, and labels for cigars. \textit{Id.} at 534-35.
\item 69 533 U.S. 525, 533 (2001).
\item 70 See \textit{id.} at 565-71. In addition to the First Amendment claims, the Court held the Massachusetts regulations governing outdoor and point-of-sale cigarette advertising were preempted by Federal Cigarette Labeling and Advertising Act ("FCLAA"), Pub. L. No. 89-92, 79 Stat. 282 (1965), amended by 15 U.S.C. § 1331 (1966). \textit{Id.} at 551. Because the FCLAA’s preemption provision only applied to cigarettes, the Court was still required to evaluate the petitioners’ smokeless tobacco and cigar First Amendment challenges to Massachusetts’ outdoor and point-of-sale advertising restrictions. \textit{Id.} at 553.
\item 72 Lorillard Tobacco Co., 533 U.S. at 554.
\item 73 447 U.S. 557, 566 (1980) (holding that a regulation of New York Public Service Commission, which prohibits an electric utility from advertising to promote the use of electricity, violates the
protection, the commercial speech must first concern lawful activity and not be false or misleading. Second, a court must ask, “whether the asserted governmental interest is substantial.” If the first two questions lead to affirmative answers, the third inquiry for a court to determine is “whether the regulation directly advances the governmental interest asserted.” The fourth part of the test is “whether [the regulation] is not more extensive than necessary to serve [the governmental] interest.” If the government interest could be accomplished by a more limited restriction on commercial speech, the excessive restriction cannot survive.

In Lorillard Tobacco Co., the Court held that regulations prohibiting outdoor advertising of smokeless tobacco or cigars within one thousand feet of a school or playground violated the First Amendment. The Court asserted that the former Attorney General provided sufficient evidence of a problem with underage use of smokeless tobacco and cigars to justify the outdoor advertising regulation. However, the Court concluded that the regulation failed to satisfy the fourth prong of the Central Hudson test, and thus, the advertising prohibition was an unconstitutional restriction on commercial speech. The Court declared that the broad sweep of the outdoor advertising regulations demonstrated “that the Attorney General did not ‘carefully calculate the costs and benefits associated with the burden on speech imposed’ by the regulations.” Justice O’Connor emphasized “tobacco retailers and manufacturers have

First and Fourteenth Amendments). The Court in Central Hudson fashioned a test for commercial speech to determine if such speech is protected by the First Amendment. See id.

74 Id.
75 Id.
76 Id.
77 Id.
78 Central Hudson, 447 U.S. at 566. After the Central Hudson test was established, the Supreme Court elaborated on the difference between “reasonable fit” and a least restrictive alternative. See City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417 n.13 (1993). The Court articulated that “a regulation need not be ‘absolutely the least severe that will achieve the desired end’... but if there are numerous and obvious less-burdensome alternatives to the restriction... that is certainly a relevant consideration in determining whether the ‘fit’ between ends and means is reasonable.” Id.
80 Id. at 561.
81 Id. The fourth prong in the Central Hudson analysis requires “a reasonable fit between the means and ends of the regulatory scheme.” Id. The Court concluded that the Attorney General’s regulations failed to meet this standard. Id.
82 Id. (quoting Cincinnati, 507 U.S. at 417). The outdoor advertising regulations would have had a broad geographical reach by preventing advertising in eighty-seven percent to ninety-one percent of Boston, Worcester, and Springfield, Massachusetts. Lorillard Tobacco Co., 533 U.S. at 562. Moreover, “outdoor” advertising includes advertising inside a store if the advertising is visible
an interest in conveying truthful information about their products to adults, and adults have a corresponding interest in receiving truthful information about tobacco products.” Thus, the Court held that the Attorney General failed to demonstrate that the outdoor advertising regulations were not more extensive than necessary to advance the state’s substantial interest in preventing under age tobacco use.

Additionally, the Court held that regulations prohibiting indoor, point-of-sale advertising of smokeless tobacco and cigars, lower than five feet from the floor of a retail establishment, and located within 1,000 feet of a school or a playground, violated the First Amendment. The Court declared the rule did not pass part three of the Central Hudson test because the five-foot rule did not directly advance Massachusetts’ goal of preventing minors from using tobacco products by limiting their exposure to advertising. Therefore, the Court concluded that a blanket height restriction was an unconstitutional restraint on commercial speech in violation of the First Amendment.

III. The Family Smoking Prevention and Tobacco Control Act

A. The Need for Federal Legislation

Prior to the enactment of the Tobacco Control Act, there was a growing consensus among legislators and anti-smoking advocates that the tobacco industry

83 Id. at 564.
84 Id. See also Reno v. American Civil Liberties Union, 521 U.S. 844, 875 (1997) (explaining that the governmental interest in protecting children from harmful materials does not warrant an unnecessarily broad suppression of speech geared toward adults); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 73 (1983) (holding that purging all mailboxes of unsolicited, adult-oriented mail is wider in scope than the Constitution allows). The Court specifically articulated that “the level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox,” Bolger, 463 U.S. at 74.
85 See Lorillard Tobacco Co., 533 U.S. at 566 (explaining that the point-of-sale advertising regulations fail parts three and four of the Central Hudson test).
86 Id. at 566-67 (explaining that a regulation cannot be upheld “if it provides only ineffective or remote support for the government's purpose”). Justice O'Connor clarified the Court's position by stating, “not all children are less than five feet tall, and those who are certainly have the ability to look up and take in their surroundings.” Id. at 566.
87 See id. at 567. The Court determined that the blanket height restriction failed the third and fourth prongs of the Central Hudson test, as the restriction was more extensive than necessary to serve the government’s interest. Id.
escaped the type of ordinary product regulation that applies to most consumer products. Congress’ findings addressing tobacco use prior to the passage of the Tobacco Control Act illustrated the urgent need for tobacco regulation. Among these findings was evidence that exposure to tobacco advertising substantially increases the likelihood that children and adolescents will smoke. A 2008 National Cancer Institute (‘‘NCI’’) study found that ‘‘the evidence base indicates a causal relationship between tobacco advertising and increased levels of tobacco initiation and continued consumption,’’ and even minor exposure to tobacco advertising influences adolescents’ attitudes and perceptions towards smoking, as well as their intentions to smoke. Moreover, Congress deduced that less restrictive and less comprehensive approaches were not effective in reducing the percentage of youth smokers. Thus, Congress concluded that reasonable restrictions on the advertising and promotion of tobacco products would lead to a substantial decrease in the number of minors who tried smoking and subsequently became addicted.

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88 See H.R. REP. NO. 111-58, at 4 (2009) (discussing how the lack of federal tobacco legislation led to increased tobacco use and diminished the quality of public health in the U.S.).
90 See Pub. L. No. 111-31, sec. 2, 123 Stat. at 1776-1781; H.R. REP. NO. 111-58, at 15. A 2006 Archives of Pediatrics and Adolescent Medicine study found that tobacco marketing doubles the likelihood that children under age eighteen will become tobacco users. Id.
92 See Pub. L. No. 111-31, sec. 2 (31), 123 Stat. at 1779; H.R. REP. NO. 111-58, at 16. The Master Settlement Agreement, prior federal legislation and state efforts at reducing youth tobacco use have not been overwhelmingly successful. Id. The CDC found that the percentage of high school students who smoke increased from 21.9 percent in 2003 to 23 percent in 2005 and remains high. Id. State excise tax increases, prevention and cessation programs, and smoke free air laws should have lowered youth smoking rates to a greater degree than the current level. Id. See generally United States v. Philip Morris, USA Inc., 449 F. Supp. 2d 1 (D.D.C. 2006) (finding major U.S. cigarette companies dramatically increased their advertising and promotional spending to encourage youth to start smoking subsequent to the signing of the Master Settlement Agreement).
Throughout history, some tobacco products have been marketed as being less harmful than others, either because they had less of a substance understood to be harmful, such as tar, or because the product integrated a technological innovation, such as a filter, that claimed to reduce the harms associated with smoking.\footnote{See Ricardo Carvajal et al., \textit{The Family Smoking Prevention and Tobacco Control Act: An Overview}, 64 \textit{Food & Drug L.J.} 717, 726 (2009) (synthesizing the key provisions of Tobacco Control Act).} Congress recognized that the tobacco industry’s previous success in evading government regulation of its products enabled the industry to develop and market modified-risk tobacco products that did not significantly reduce risks to tobacco users.\footnote{See H.R. REP. NO. 111-58, at 3-4.} The marketing of some modified-risk tobacco products, however, increases harm to the overall population because individuals are confident that the “lower risk” tobacco products are better for their health.\footnote{See Carvajal et al., supra note 94, at 726.} As a result, some users are convinced they do not need to quit smoking to reduce their exposure to adverse health risks, while other non-users are encouraged to begin smoking.\footnote{See Carvajal et al., supra note 94, at 726.} Although tobacco companies claim modified-risk tobacco products reduce the risks involved with tobacco use, these claims are often misleading and unsubstantiated.\footnote{See Pub. L. No. 111-31, sec. 2 (37), 123 Stat. 1780. The term “modified-risk tobacco product” is defined as, “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.” Pub. L. No. 111-31, sec. 101(b), § 911(b)(1), 123 Stat. at 1812. The National Cancer Institute (“NCI”) found many smokers mistakenly believe that “low tar,” “mild,” and “light” cigarettes cause fewer health problems than other cigarettes. Pub. L. No. 111-31, sec. 2 (38), 123 Stat. 1780. The NCI also discovered that mistaken beliefs about the lower adverse health consequences of smoking “low tar” or “light” cigarettes can reduce the motivation to quit smoking entirely. \textit{Id.}} Recent studies indicate that there has been no reduction in risk on a population-wide basis from “low tar” and “light” cigarettes, and as noted above, these modified-risk tobacco products might actually increase the risk of tobacco use.\footnote{Pub. L. No. 111-31, sec. 2 (39), 123 Stat. 1780. While light cigarettes emit lower levels of tar and nicotine than regular-strength cigarettes, the NCI found that there is “no convincing evidence” that the introduction of low-yield products “resulted in an important decrease in the disease burden” among smokers. C. STEPHEN REDHEAD & VANESSA K. BURROWS, CONG. RESEARCH SERV., R40475, FDA TOBACCO REGULATION: THE FAMILY SMOKING PREVENTION AND TOBACCO CONTROL ACT OF 2009, 9 (2009). Moreover, many smokers who started smoking light cigarettes changed the way they smoked in order to maintain the desired nicotine intake. \textit{Id.} Thus, they smoked more intensely by inhaling more deeply, more often, and by covering the ventilation holes at the base of the filter. \textit{Id.} This smoking behavior exposed them to higher levels of tobacco toxins. \textit{Id.}} Thus, Congress concluded that permitting tobacco manufacturers to make unproven statements regarding modified-risk tobacco products whether express or
implied, even if accompanied by disclaimers, would be detrimental to public health.\textsuperscript{100}

\section*{B. Significant Provisions of the Family Smoking Prevention and Tobacco Control Act}

The Family Smoking Prevention and Tobacco Control Act amends the Federal Food, Drug and Cosmetic Act ("FFDCA") and enables the Secretary of Health and Human Services ("Secretary") to regulate tobacco products through the Agency.\textsuperscript{101} The Agency can now clearly assert jurisdiction over tobacco products since Congress itself enacted the legislation granting the Agency unambiguous authority over such products.\textsuperscript{102} To ensure that the Agency’s regulation of tobacco does not detract from its other responsibilities, the Tobacco Control Act establishes the Center for Tobacco Products, a separate division within the Agency, to implement the law.\textsuperscript{103} The law requires tobacco companies to disclose to the Secretary the brand and quantity of ingredients, compounds, substances, and additives that are added to the tobacco, paper, filter, or any other part of the tobacco product.\textsuperscript{104} Tobacco companies are also required

\textsuperscript{100} Pub. L. No. 111-31, sec. 2 (42), 123 Stat. at 1780. The FTC discovered that consumers have misinterpreted advertisements where one tobacco product is asserted to be less harmful than a comparable product, even where disclosures are present to provide clarification. Pub. L. No. 111-31, sec. 2 (41), 123 Stat. at 1780.

\textsuperscript{101} Pub. L. No. 111-31, sec. 101(b), § 901(c), 123 Stat. at 1787. A tobacco product is defined as any product “made or derived from tobacco that is intended for human consumption.” \textit{Id.} Tobacco leaves not in the possession of a tobacco manufacturer, producers of the tobacco leaf also not the manufacturer, and tobacco farms are excluded from the Agency’s reach. \textit{Id.} The Agency’s authority over tobacco products extends to all cigarettes, cigarette tobacco, roll-your-own tobacco, smokeless tobacco, and to any other tobacco products that the Secretary deems are subject to the Agency’s regulatory authority. Pub. L. No. 111-31, sec. 101(b), § 901(b), 123 Stat. at 1788.

\textsuperscript{102} See supra note 58 (referencing the Supreme Court’s decision that the Agency could only declare jurisdiction over tobacco products if Congress enacted specific legislation giving the Agency authority over tobacco).

\textsuperscript{103} Pub. L. No. 111-31, sec. 101(b), § 901(e), 123 Stat. at 1787. The Act required the establishment of the Center for Tobacco Products no later than ninety days after the enactment of the legislation. \textit{Id.} The Center for Tobacco Products, established by the Secretary of HHS, is required to report to the Commissioner of Food and Drugs in the same manner as the other agency centers within the Agency. \textit{Id.}

\textsuperscript{104} Pub. L. No. 111-31, sec. 101(b), § 904(a)(1), 123 Stat. at 1790. See also H.R. REP. NO. 111-58, pt. 1, at 35-36 (2009). The term “additive” is defined as:

any substance the intended use of which results or may reasonably be expected to result, directly or indirectly, in its becoming a component or otherwise affecting the characteristic of any tobacco product . . . except that such term does not include tobacco or a pesticide chemical residue in or on raw tobacco
to submit a description of the content, delivery, and form of nicotine in each tobacco product, as well as any documents created after the enactment of the Tobacco Control Act that address the health, toxicological, physiological, and behavioral effects of the tobacco products and their ingredients.\textsuperscript{105} In addition, three years following the law’s enactment, tobacco companies will be required to submit to the Secretary a list of components—including smoke constituents—that the Secretary identifies as harmful or potentially harmful to human health.\textsuperscript{106}

In addition to the disclosure requirements, the Tobacco Control Act requires the Agency to adjust current and future tobacco products by establishing new tobacco product standards to protect public health.\textsuperscript{107} In an effort to reduce the number of children and adolescents who smoke cigarettes, the new tobacco standards ban the manufacture and sale of flavored cigarettes.\textsuperscript{108} Although the law does not immediately ban the use of menthol in cigarettes, it authorizes the Secretary to ban or modify menthol cigarettes in the future based on emerging scientific evidence.\textsuperscript{109}

\textsuperscript{105}Pub. L. No. 111-31, sec. 101(b), § 904(a)(2), (a)(4), 123 Stat. at 1790. A “smoke constituent” is “any chemical or chemical compound in mainstream or sidestream tobacco smoke that either transfers from any component of the cigarette to the smoke or that is formed by the combustion or heating of tobacco, additives, or other component of the tobacco product.” Pub. L. No. 111-31, sec. 101(b), § 900(17), 123 Stat. at 1785.

\textsuperscript{106}Pub. L. No. 111-31, sec. 101(b), § 900 (1), 123 Stat. at 1784. Moreover, the term “brand” is defined as, “a variety of tobacco product distinguished by the tobacco used, tar content, nicotine content, flavoring used, size, filtration, packaging, logo, registered trademark, brand name, identifiable pattern of colors, or any combination of such attributes.” Pub. L. No. 111-31, sec. 101(b), § 900 (2), 123 Stat. at 1784.

\textsuperscript{107}Pub. L. No. 111-31, sec. 101(b), § 900 (1), 123 Stat. at 1784. The submission of health information is required of both current tobacco products and any tobacco products introduced onto the market after the enactment of the law. Id.

\textsuperscript{108}Pub. L. No. 111-31, sec. 101(b), § 907, 123 Stat. at 1799. Two years after the enactment of the law, a tobacco product manufacturer will be prohibited from using tobacco, including foreign grown tobacco that contains a pesticide chemical residue at a level greater than any tolerance applicable to domestically grown tobacco. Id.

\textsuperscript{109}Pub. L. No. 111-31, sec. 101(b), § 907(a)(1), 123 Stat. at 1799. The new tobacco standards prohibit a cigarette or any of its components from containing as a constituent or additive any artificial or natural flavor (other than tobacco or menthol) or any herb or spice (including strawberry, clove, grape, orange, cinnamon, vanilla, cocoa, cherry, etc.) that is a characterizing flavor of the tobacco product or smoke. Id. The Secretary has the authority to adopt tobacco product standards in addition to those enumerated in the Act if the Secretary finds that a tobacco product standard is appropriate for the protection of the public health. Pub. L. No. 111-31, sec. 101(b), § 907(a)(3), 123 Stat. at 1800.

\textsuperscript{109}Pub. L. No. 111-31, sec. 101(b), § 907(c), 123 Stat. at 1804. The Secretary will seek the input from an Advisory Committee on the impact of menthol cigarettes on adolescent, minority, and
While the FDA now has the authority to reduce nicotine yields if it deems the reduction appropriate for public health, the Agency is not allowed to require the complete elimination of nicotine in a tobacco product or to ban any class of tobacco products. Nevertheless, the Agency is mandated to strictly regulate modified-risk tobacco products under the direction of the new law. Furthermore, the Tobacco Control Act prohibits the marketing of these products without an approval order from the Agency. The Agency has the authority to issue an order approving marketing of a modified-risk tobacco product only for a specified period of time and only if the applicant shows that the product, as actually used, will “significantly reduce harm and the risk of tobacco-related disease to individual tobacco users,” as well as “benefit the health of the population as a whole.”

The Tobacco Control Act also gives the Agency specific authority to devise regulations restricting “the advertising and promotion of tobacco products consistent with, and to [the] full extent, permitted by the First Amendment of the Constitution.”

the general public health and then proceed forward on the basis of their recommendations. *Id.* Menthol cigarettes represent over one quarter of all cigarettes smoked in the U.S. *See* H.R. REP. NO. 111-58, at 20 (2009). In addition, seven out of ten African Americans who smoke use menthol cigarettes. *Id.* Due to the large number of Americans who smoke menthol, the disproportionate use of menthol cigarettes among African Americans, the racial and ethnic differences in lung cancer incidence, and the uncertainty about the potentially negative consequences of an immediate menthol ban, the Act ensures that menthol cigarettes are not banned until the Agency has the scientific evidence necessary to make the best decisions to protect public health. *Id.*

*110* Pub. L. No. 111-31, sec. 101(b), § 907(d)(3), 123 Stat. at 1803. The Agency is prohibited from banning all cigarettes, all smokeless tobacco products, all little cigars, all cigars other than little cigars, all pipe tobacco, or all roll-your-own products. *Id.*

*111* Pub. L. No. 111-31, sec. 101(b), § 911, 123 Stat. at 1812-15. Modified-risk tobacco products include tobacco products where the labeling or advertising represents that the product contains a lower risk of tobacco related disease or is less harmful than other tobacco products, contains a reduced level of substances or exposure to substances, or is free of substance. *Id.* Additionally, the law prohibits the use of descriptors on “reduced harm” products such as “light,” “mild,” and “low” on product labels or in advertising. *Id.*

*112* The application for approval to market a modified-risk tobacco product must include a description of the product’s advertising and labeling, the formulation and terms of use, sample labeling, data on actual use by consumers, and “all documents . . . relating to research findings conducted, supported, or possessed” by the manufacturer that pertain to “the effect of the product on tobacco-related diseases and health-related conditions.” *Id.*

*113* *Id.* The protocol for determining if a modified risk tobacco product benefits the health of the population as a whole requires taking into account both users of tobacco products and individuals who are not currently using tobacco. Pub. L. No. 111-31, sec. 101(b), § 911, 123 Stat. at 1812-15.

*114* Pub. L. No. 111-31, sec. 101(b), § 906(d), 123 Stat. at 1796. Permissive restrictions on the
Any violation of the Tobacco Control Act pertaining to the advertising, sale, or distribution of tobacco products is considered an unfair or deceptive act or practice under the Federal Trade Commission Act. Additionally, the newly enacted Tobacco Control Act amends the Federal Cigarette Labeling and Advertising Act, changing cigarette warning labels and advertisements by requiring conspicuous and more detailed product warnings. The new Act mandates cigarette health warnings to cover at least the top fifty percent of the front and rear panels of the cigarette package. In addition, the text on the cigarette warning labels and advertisements for tobacco products must be black on a white background or white on a black background. The Act also instructs advertising of tobacco products must be deemed appropriate for the protection of the public health. The finding whether a regulation on the advertising and promotion of tobacco products would be appropriate for the protection of the public health is decided by assessing “the risks and benefits to the population as a whole . . . taking into account the increased or decreased likelihood that existing users of tobacco products will stop using such products; and the increased or decreased likelihood that those who do not use tobacco products will start using such products.”

115 Pub. L. No. 111-31, sec. 101(b), § 914(a), 123 Stat. at 1820. Except where expressly provided, the Federal Trade Commission's authority to enforce the laws under its jurisdiction in regard to the advertising, sale, or distribution of tobacco is not limited by the Tobacco Control Act. Id. 116 Pub. L. No. 111-31, § 201, 123 Stat. at 1842-43. The Tobacco Control Act specifies nine new required warning labels, one of which must appear on cigarette packages and advertisements within one year of enactment of the legislation. Id. It will be unlawful to manufacture, package, sell, offer to sell, distribute, or import for sale or distribution in the U.S. any cigarette packages that do not contain one of the following warnings:

WARNING: Cigarettes are addictive; WARNING: Tobacco smoke can harm your children; WARNING: Cigarettes cause fatal lung disease; WARNING: Cigarettes cause cancer; WARNING: Cigarettes cause strokes and heart disease; WARNING: Smoking during pregnancy can harm your baby; WARNING: Smoking can kill you; WARNING: Tobacco smoke causes fatal lung disease in nonsmokers; or WARNING: Quitting smoking now greatly reduces serious risks to your health.


117 Pub. L. No. 111-31, § 201, 123 Stat. at 1843-44. Smokeless tobacco products are required to have health warnings covering at least thirty percent of each display panel on the package. Pub. L. No. 111-31, § 204, 123 Stat. at 1846-48. The Tobacco Control Act also grants the Secretary the authority to increase the required label coverage of smokeless tobacco products from thirty percent up to fifty percent of the front and rear panels of the package. Pub. L. No. 111-31, § 205, 123 Stat. at 1848-49.

the Agency to issue a rule requiring color graphic warning labels on cigarette packages within two years of the law’s enactment.\textsuperscript{119} Moreover, the Tobacco Control Act emphasizes that it is unlawful for any tobacco manufacturer, distributor, or retailer of cigarettes to advertise within the United States unless the advertisement conforms to the aforementioned warning label requirements.\textsuperscript{120}

Another significant provision in the Tobacco Control Act reinstates select provisions of the FDA’s 1996 Rule aimed at restricting tobacco marketing and sales to youth.\textsuperscript{121} In addition, the Tobacco Control Act fully funds the Agency’s tobacco regulation and activity through a user fee on tobacco manufacturers.\textsuperscript{122} The Tobacco Control Act also includes a provision that prohibits tobacco companies from making any statements that would mislead consumers into believing that tobacco is a product approved by the Agency.\textsuperscript{123} Finally, the newly enacted legislation sets forth provisions requiring judicial review of the various regulations to ensure that the Agency is taking

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\item \textsuperscript{119} Pub. L. No. 111-31, § 201(d), 123 Stat. at 1845. The graphics should depict the negative health consequences of smoking to accompany the text of the label warnings. \textit{Id.}
\item \textsuperscript{120} Pub. L. No. 111-31, § 201(b)(2), 123 Stat. at 1843. For press and poster requirements, the warning labels must cover at least twenty percent of an advertisement’s surface area and should appear in a conspicuous and prominent format and location at the top of each advertisement. \textit{Id.}
\item \textsuperscript{121} Pub. L. No. 111-31, § 102, 123 Stat. at 1830. In enacting the Tobacco Control Act, Congress directed the FDA to reissue the provision that prohibits the sponsorship of athletic, social, and cultural events “in the brand name” of a tobacco product. \textit{Id.; 21 C.F.R. § 897.34(c) (1997).} The Act also instructs the FDA to reissue the provision of the 1996 Rule that prevents a tobacco manufacturer from distributing promotional items such as baseball hats, t-shirts, and sporting goods that display the logo or name of a tobacco brand. Pub. L. No. 111-31, § 102, 123 Stat. at 1830; \textit{21 C.F.R. § 897.34(a) (1997).} Additionally, the Act revives the 1996 FDA Tobacco Rule provision which banned outdoor advertising within one-thousand feet of a school or playground. \textit{§ 102, 123 Stat. at 1830; 21 C.F.R. § 897.34(a) (1997).}
\item \textsuperscript{122} Pub. L. No. 111-31, § 919, 123 Stat. at 1826. The Secretary assesses a quarterly user fee among the manufacturers and importers of tobacco products based on the class of tobacco product and the company market share. \textit{Id.} at 1826-27.
\item \textsuperscript{123} 21 U.S.C. § 331(tt). The provision bans:

\begin{quote}
\textbf{[A]}ny express or implied statement or representation directed to consumers with respect to a tobacco product, in a label or labeling or through the media or advertising, that either conveys, or misleads or would mislead consumers into believing, that (1) the product is approved by the [FDA]; (2) the [FDA] deems the product to be safe for use by consumers; (3) the product is endorsed by the [FDA] for use by consumers; or (4) the product is safe or less harmful by virtue of (A) its regulation of inspection by the [FDA]; or (B) its compliance with regulatory requirements set by the Agency.
\end{quote}

\textit{Id.}
the most effective actions to reduce both the consumption of tobacco and the harm associated with continued tobacco use.124

IV. Big Tobacco’s First Amendment Challenges to the Federal Tobacco Law

A. Commonwealth Brands, Inc. v. United States

The enactment of the Family Smoking Prevention and Tobacco Control Act ignited an outcry by major tobacco companies who claimed that many provisions of the Tobacco Control Act placed unprecedented restrictions on their commercial free speech rights.125 Until the passage of the Tobacco Control Act, no governmental body had attempted to impose a group of speech restrictions of the size, scope, or detail as the speech restrictions laid out in the new federal tobacco law.126 The speech restrictions in the Tobacco Control Act constrain how the content, presentation, and placement of tobacco product information are displayed, thereby thwarting Big Tobacco’s ability to continue its current marketing scheme.127

In August 2009, Reynolds American, Lorillard Tobacco Company, and several other tobacco companies filed suit against the Agency in federal district court asserting that numerous provisions of the Tobacco Control Act violated their First Amendment Constitutional rights.128 In Commonwealth Brands, Inc. v. United States,129 the tobacco

124 Pub. L. No. 111-31, § 912, 123 Stat. at 1819-21. Any person that is adversely affected by an FDA regulation relating to performance standards or pre-market review may, within thirty days, file a petition for judicial review of such regulation with the U.S. Court of Appeals. Id. at 1819. The Tobacco Control Act also requires the Secretary to report to Congress within three years of enactment on how best to regulate, promote, and encourage the development of innovative products and treatments to better achieve total abstinence from tobacco use, reduce the overall consumption of tobacco, and reduce the harm associated with prolonged tobacco use. Pub. L. No. 111-31, § 918(b)(1), 123 Stat. at 1826.
127 See id. The Tobacco Control Act regulates the display of tobacco product information in various materials, including print ads, billboards, direct mail, point-of-sale advertising, sponsorships, and promotional merchandise. Id. See supra note 33 and accompanying text.
128 See Commonwealth Brands, Inc v. United States, 678 F. Supp. 2d 512, 519 (W.D. Ky. Jan. 5, 2010); see Kesmodel & Vranica, supra note 125. Reynolds American is the second largest tobacco manufacturer in the U.S. by sales. Kesmodel & Vranica, supra note 125. Lorillard Tobacco Company is also one of the leading tobacco giants in the U.S. and is the maker of Newport cigarettes. Id. Altria Group Inc., the maker of Marlboro cigarettes and the number one tobacco manufacturer in the U.S. by sales, did not participate in the lawsuit. Id. Altria Group, Inc. was
companies challenged provisions in the Tobacco Control Act including the Act’s ban on the use of any color or graphics on tobacco product labels or advertisements, the ban on tobacco brand-name event sponsorship and merchandise, and the nationwide ban on outdoor advertising within one thousand feet of a school or a playground. Additionally, the plaintiffs asserted the Tobacco Control Act’s provision precluding plaintiffs from mentioning the Agency’s regulation of tobacco products was unconstitutional. Moreover, the plaintiffs alleged that the Tobacco Control Act’s updated tobacco warning requirement burdened their commercial speech rights. Finally, the plaintiffs contended that the modified-risk tobacco products provisions are viewpoint-based restrictions on speech.

In Commonwealth Brands, Inc. v. United States, the court struck down only two provisions of the Tobacco Control Act and largely ruled in favor of the government. Applying the Central Hudson analysis for regulating commercial speech, the court concluded that the Tobacco Control Act’s ban on color and graphics on tobacco product labels and advertisements was too broad to satisfy the fourth prong of the Central Hudson inquiry, which requires the regulation seeking first amendment protection to be no more extensive than necessary to serve the governmental interest. Plaintiffs posited that images of their products’ packaging, plain brand symbols, and the occasional use of color on their packaging and advertisements are vital to communicating important commercial information about their products. The court rejected the government’s argument that any use of graphics or images in tobacco labels and advertising creates non-informative associations increasing the chance a minor would use a tobacco product. While the court agreed with the government’s
argument that Congress has a substantial interest in reducing tobacco use by minors, the court ultimately found that Congress could have exempted large categories of harmless images and colors from the all-inclusive ban. Thus, the court found the government’s “blanket ban” on all uses of graphics and colors in tobacco labels and advertising was a “uniformly broad sweep . . . [that] demonstrates a lack of tailoring” and violates plaintiffs’ commercial free speech rights.

The tobacco companies also prevailed when the court struck down the provision of the Tobacco Control Act prohibiting tobacco companies and other individuals from implying that a tobacco product is safer because it is regulated by the Agency. Plaintiffs argued that “almost any public comment on these ‘product standards,’ other than perhaps a comment denigrating them, could be construed as an ‘implied’ statement that they made plaintiffs’ products ‘less harmful,’ since that is, after all, their express purpose.” Plaintiffs also asserted that the provision fails to satisfy part four of the Central Hudson analysis because its “uniform breadth . . . reveals a lack of narrow tailoring and is over-inclusive.” The court recognized, for instance, that journalists, politicians, scientists, doctors, and various other groups and persons with media access have an interest in and are capable of making statements about the effect of the FDA regulation; such statements are targeted toward consumers pertaining to a tobacco product. Therefore, the ban on implying FDA approval goes beyond regulating commercial speech and must satisfy strict scrutiny to pass constitutional muster. Ultimately, the court determined that because the government had not even

associative advertising techniques aimed at minors.” The court also rejected the government’s argument that simple brand symbols can be replaced by text at no informational cost. See id. The court recognized that a symbol is often able to deliver the same message in a smaller space, thus providing more room for commercial speech. See Commonwealth Brands, Inc., 678 F. Supp. 2d at 525-26. Examples of harmless images and colors include: images that teach adult consumers how to use new tobacco products, graphics that only identify products and producers, and colors that communicate information about the nature of a product, as long as the colors and images have no special appeal to the youth audience. Id. at 525-26.

Id. at 522 (quoting Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 563 (2001)).

Id. at 534-35. Plaintiffs challenged the portion of the provision which bars any statement to a consumer that leads a consumer into believing the product is safe or less harmful because it is regulated or inspected by the FDA. Id. See supra note 123 and accompanying text.


Id.

Id.

Id. See id. The strict scrutiny standard of review requires that a statute be narrowly tailored to the government interest it promotes and that the government interest must be compelling. See id. This heightened level of scrutiny is applied when government regulations impact fundamental
attempted to justify the ban under strict scrutiny, and because the ban was unlikely to be justified under the stricter standard, the court found the provision in violation of the First Amendment.145

To the dismay of Big Tobacco, however, the court in Commonwealth Brands, Inc. v. United States upheld the majority of the challenged provisions of the landmark Tobacco Control Act.146 First, the court upheld the ban on corporate sponsorship of athletic, social, or cultural events using tobacco brand-names.147 Plaintiffs argued the ban on brand-name sponsorship was “unduly broad” because Congress made no effort to distinguish between marketing practices targeted toward adults and those directed at youth.148 Consequently, the plaintiffs asserted Congress could have achieved its goal in enacting this provision and restricting less speech if Congress followed the Master Settlement Agreement’s narrower rules regarding brand-name sponsorships.149 The court rejected the plaintiffs’ arguments and in reaching its conclusion, recognized that the Tobacco Control Act was enacted in part to strengthen the inadequate provisions in rights, and First Amendment content based restrictions require such heightened scrutiny. See U.S. v. Playboy Entm’t Grp., Inc. 529 U.S. 803, 804 (2000) (holding regulation aimed at banning sexually-oriented programming was a content based restriction on speech requiring heightened scrutiny).

See supra note 123 and accompanying text.

145 Commonwealth Brands, Inc., 678 F. Supp. 2d at 535. The Court was confident that the ban on implying FDA approval would not be justified under the strict scrutiny standard because:

[I]t is not clear why provisions (1)-(3) are insufficient to meet the government’s asserted interest in preventing misleading information being given to consumer . . . [f]or another thing, provision (4) does not seem to advance that interest, not least because it makes no exception for statements about products the FDA has already approved as modified risk.

Id. at 535 n.9. See supra note 123 and accompanying text.

146 See Commonwealth Brands, Inc., 678 F. Supp. 2d at 541 (concluding that all but two of the challenged provisions passed constitutional muster).

147 Id. at 526. Congress’ purpose in enacting the regulation was to prevent the tobacco industry from using event sponsorships as a means of associating tobacco use with exciting or fun events, such as car racing and rodeos. Id. Evidence has shown this is an associative technique that encourages adolescents to try tobacco products. Id.

148 Id. at 526. Plaintiffs assert that although the Master Settlement Agreement permits certain types of brand name sponsorships, including sponsored events in adult-only facilities, the Tobacco Control Act’s prohibition on brand-name event sponsorship would bar events such as Lorillard’s Newport Pleasure Draw blackjack tournament. Id. Plaintiffs further argue that prohibiting tobacco sponsorship of an adult-only blackjack tournament will not further Congress’ goal of reducing youth exposure to tobacco products because the tournament is restricted to an adult-only facility. See Commonwealth Brands, Inc., 678 F. Supp. 2d at 526.

149 Id. at 526. See supra notes 61-68 and accompanying text.
the Master Settlement Agreement. Thus, the court found there was a reasonable fit between the ends and means of the sponsorship ban, and it is therefore a constitutionally permissible restriction of commercial speech.

The court also upheld the Tobacco Control Act’s ban on the distribution of promotional items with the name or logo of a tobacco brand. Plaintiffs asserted that the provision violated their commercial free speech rights. They alleged the ban was more extensive than necessary to achieve Congress’ goal of reducing youth tobacco exposure because the ban prohibits plaintiffs from marketing their products by placing their brand name on any promotional items, including items disseminated exclusively to adult consumers in adult-only venues. The court explained that although certain merchandise, such as poker chips, are given solely to adult tobacco consumers, Congress found that “[t]here is no way to limit the distribution of these items to adults only.” Additionally, the court noted that even if adult-only intended promotional items were just distributed and retained by adults, adult wearers of the items would still serve as

150 Commonwealth Brands, Inc., 678 F. Supp. 2d at 526-27. Congress found the MSA inadequate because the Agreement does not apply to non-signatories (such as Plaintiff Conwood) and because the Agreement permits signatories to have one “brand name sponsorship” each year. Id. at 526-27. Because the MSA defines one “brand name sponsorship” as a single or multi-state series or tour, cigarette manufacturers have used auto-racing sponsorships, for example, to successfully circumvent both the ban on televised cigarette advertising and the intent of the MSA to shield youth from tobacco marketing. Id. (citing Morrison, M.A., et al., Inhaling and Accelerating: Tobacco Motor Sports Sponsorship In Televised Auto Races, 2000-2002, 15 SPORTS MARKETING QUARTERLY 7, 12 (2006)).

151 Id.

152 Id. at 528. Congress implemented this provision into the Tobacco Control Act because studies have demonstrated that brand-name merchandise influences smoking receptivity. Id. at 527. See supra note 121 and accompanying text.


154 Id. at 527. The tobacco manufacturer, Conwood, would be prohibited from using the Grizzly name or logo on poker chips despite the fact that the poker chips are distributed only to adult tobacco consumers in connection with their legal purchase of a tobacco product. Id.

155 Id. at 527 (quoting Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44526 (proposed August 28, 1996); 21 C.F.R. §§ 801, 803, 804, 807, 820, 897 (2010)). During the 1996 FDA rulemaking, the tobacco industry alleged that it was taking measures to ensure that only adults received promotional items, such as poker chips; however, evidence showed that “a substantial number of young people” had them. Commonwealth Brands, Inc., 678 F. Supp. 2d at 527 (citing Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44525-26 (proposed Aug. 28, 1996); 21 C.F.R. §§ 801, 803, 804, 807, 820, 897 (2010) (quoting a 1992 Gallup poll result indicating that close to half of adolescent smokers, and over a quarter of adolescent non-smokers, owned at least one tobacco-related promotional item)).
walking advertisements continuing to display the imagery, and adolescents would nevertheless be exposed to such unhealthy advertising.\textsuperscript{156} Thus, “[t]he Court conclude[d] that the Act’s ban on brand-name tobacco product merchandise is not more extensive than necessary to serve Congress’ substantial interest in reducing youth tobacco use by reducing youth possession of and exposure to branded merchandise.”\textsuperscript{157} 

In another success for the federal government, the court rejected the plaintiffs’ challenge that the Tobacco Control Act’s updated warning requirement was an unconstitutional burden on plaintiffs’ commercial speech and “unconstitutionally compelled Plaintiffs to disseminate the government’s anti-tobacco message.”\textsuperscript{158} Plaintiffs’ argument was based upon the notion that the public already understands the health risks associated with using tobacco products; therefore, the government’s only goal in enacting new product warnings must be to harass potential tobacco consumers with the government’s anti-tobacco message.\textsuperscript{159} The court rejected the plaintiffs’ assertion and cited extensive studies the government relied on in enacting the Tobacco Control Act, which indicated that the government’s true goal in requiring new warning labels was to ensure that the health risk message is actually seen by consumers.\textsuperscript{160} The 2007 Institute of Medicine (“IOM”) report, one study upon which the court extensively relied, proclaimed that the “basic problems with the U.S. warnings are that they are unnoticed and stale, and they fail to convey relevant information in an effective way.”\textsuperscript{161} The IOM report also emphasized that graphical warnings might be especially vital for

\textsuperscript{156} Id. at 528 (citing Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44526 (proposed August 28, 1996); 21 C.F.R. §§ 801, 803, 804, 807, 820, 897 (2010)). “Because [promotional items] penetrate the young persons’ world, they are very effective in creating the sense that tobacco use is widely accepted, which . . . is extremely important to children and adolescents.” Id. at 528 (quoting Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44526 (proposed August 28, 1996); 21 C.F.R. §§ 801, 803, 804, 807, 820, and 897 (2010)).

\textsuperscript{157} See id.

\textsuperscript{158} Id. at 528-30.

\textsuperscript{159} Id. at 530.

\textsuperscript{160} Commonwealth Brands, Inc., 678 F. Supp. 2d at 530. A study of tobacco warnings in magazine advertisements found that “more than [forty] percent of subjects did not even view the warning,” and that “an additional [twenty] percent looked at the warning but failed to actually read it.” Id. at 530 (quoting Family Smoking Prevention and Tobacco Control Act: Hearing on H.R. 1108 Before the House Subcommittee on Health of the Committee on Energy and Commerce, 110th Cong. 42 (2007) (testimony of Richard Bonnie)).

communicating with consumers with low levels of education, based on evidence that lower educated smokers “are less likely to recall health information in text-based messages than people with more education.”\textsuperscript{162} The court additionally rebuffed plaintiffs’ claim that the new warnings were too large and prominent.\textsuperscript{163} The court was confident that Congress gave significant reasons for the particular features of the warning requirement, namely Congress’ reliance and adherence to the guidelines agreed upon in the World Health Organization’s Framework Convention on Tobacco Control.\textsuperscript{164} Accordingly, the court found that the new warning requirement was sufficiently tailored to further the government’s substantial interest under the \textit{Central Hudson} inquiry, so the warning requirement is constitutionally valid.\textsuperscript{165}

In a significant departure from tobacco case law precedent, the court upheld the Tobacco Control Act’s ban on outdoor advertising within one thousand feet of a school or a playground.\textsuperscript{166} The plaintiffs argued that the outdoor advertising ban in the Tobacco Control Act is indistinguishable from the Massachusetts ban that the Supreme Court deemed unconstitutional in \textit{Lorillard Tobacco Co. v. Reilly}.\textsuperscript{167} While the court agreed that the Tobacco Control Act ban is identical to the Massachusetts ban, the court noted

\textsuperscript{162} ENDING THE TOBACCO PROBLEM, supra note 161, at 295.
\textsuperscript{163} See Commonwealth Brands, Inc., 678 F. Supp. 2d at 531 (noting the new warning is not too prominent because half of the cigarette packages, seventy percent of the smokeless tobacco packs, and eighty percent of the advertisements remain available for companies’ commercial speech). The International Tobacco Control Policy Evaluation Survey of a representative sample of more than eight thousand adult smokers from Canada, Australia, the U.S., and the U.K. found that people living in countries with more comprehensive health warnings were more likely to cite tobacco product packages as a source of health information. ENDING THE TOBACCO PROBLEM, supra note 161, at 294. The survey found that in Canada, where warning labels are required to contain graphic messages with pictorial content and cover the top fifty percent of each main label of the package, eight-five percent of Canadian respondents cited packages as a source of health information. \textit{Id.} at 293-94. Conversely, the survey noted that in the U.S., where the warning labels have been more discrete, only seven percent of U.S. smokers believed packages are a source of health information. \textit{Id.} at 294.
\textsuperscript{164} ENDING THE TOBACCO PROBLEM, supra note 161, at 294. The WHO’s Convention on Tobacco Control reached a consensus that tobacco warnings “shall be rotating,” “shall be large, clear, visible and legible,” “should be fifty percent or more of the principal display areas but shall be no less than thirty percent of the principal display areas,” and “may be in the form of or include pictures and pictograms.” \textit{Id.} at 294 (quoting WHO Framework Convention on Tobacco Control, WORLD HEALTH ORGANIZATION, 9-10 (Oct. 5, 2010), http://www.who.int/tobacco/framework/WHO_FCTC_english.pdf). See also supra note 117 and accompanying text.
\textsuperscript{165} See Commonwealth Brands, Inc., 678 F. Supp. 2d at 532.
\textsuperscript{166} \textit{Id.} at 535-36. See supra note 121 and accompanying text.
\textsuperscript{167} See Commonwealth Brands, Inc., 678 F. Supp. 2d at 535-36. See supra note 79 and accompanying text (discussing the Supreme Court’s holding in \textit{Lorillard Tobacco Co.}).
that before the outdoor advertising ban is implemented, Congress required the Secretary to “include such modifications [to the outdoor advertising ban], if any, that the Secretary determines are appropriate in light of governing First Amendment case law.” Language in the Tobacco Control Act required the Secretary to issue a final regulation on March 22, 2010, which was in compliance with the Administrative Procedure Act, and took effect on June 22, 2010. Accordingly, the court determined that the plaintiffs’ First Amendment challenge to the outdoor advertising ban was unripe.

Finally, the court found that the modified-risk tobacco product (“MRTP”) provisions did not constitute viewpoint-based restrictions on free speech. In its opinion, the court noted that unconstitutional viewpoint discrimination is the government’s prohibition of speech or expressive conduct solely because of its disapproval of the ideas and views the speech conveys. The Supreme Court articulated that “[a] regulation of speech that is motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest is the purest example of a ‘law . . . abridging the freedom of speech, or of the press.’” Thus, in Commonwealth Brands, Inc. v. United States, the court found the MRTP provisions did not constitute such a regulation that curtailed viewpoint speech. In enacting the MRTP provisions of the Tobacco Control Act, the government was not imposing a viewpoint, for instance, that smokeless tobacco products present less health risks than other tobacco products. Rather, the government was merely requiring tobacco manufacturers to follow a process of having their regulated products approved for sale as “modified-risk,” before making untested claims about the relative health

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169 Id. at 536.
170 Id. (citing Renne v. Geary, 501 U.S. 312, 320 (1991) (plaintiff 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”). Because the Secretary had not yet issued a final regulation regarding the outside advertising ban, the court avoided analyzing whether said ban violated the First Amendment. See id.
174 See id. (noting the objective criterion of the MRPT provision).
175 Id.
benefits of a particular product.\textsuperscript{176}

\textbf{B. The Road Ahead}

Although the court’s decision in \textit{Commonwealth Brands, Inc. v. United States} upheld the constitutionality of the majority of the challenged provisions in the Tobacco Control Act, the two provisions of the Tobacco Control Act that were deemed unconstitutional significantly pull apart the law and diminish its effectiveness.\textsuperscript{177} Consequently, it is likely that both the government and the tobacco companies will appeal the case to the United States Court of Appeals for the Sixth Circuit.\textsuperscript{178} On appeal, the Sixth Circuit will have to strike a delicate balance between preserving the public interest in preventing young people from smoking and the right of tobacco companies to freely communicate with adult smokers.\textsuperscript{179}

If appealed, the Sixth Circuit should uphold the district court’s decision to strike down the two provisions of the Tobacco Control Act that were deemed unconstitutional, as they are not narrow enough to pass prong four of the Supreme Court’s test for regulating commercial free speech.\textsuperscript{180} The Sixth Circuit will most likely agree with the district court’s decision to strike down the provisions prohibiting the use of color and graphics on advertisements and labels because while there is no question that company branding techniques, which incorporate graphics and colors, can appeal to youth audiences, the Act’s ban on color and graphics is overbroad in that it extends to labels and advertisements with both informational and non-informational value.\textsuperscript{181} The district court cited examples of harmless images and colors that Congress failed to

\textsuperscript{176} Id.


\textsuperscript{178} See Sorrel, \textit{Court Backs Some Tobacco Ad Bans, Nixes Others}, supra note 177 (predicting whether both parties will appeal the federal district court decision).


\textsuperscript{180} See \textit{Commonwealth Brands, Inc.}, 678 F. Supp. 2d at 520-21, 541 (articulating the standard of review and applying it to the holding).

\textsuperscript{181} See Sorrel, \textit{Court Backs Some Tobacco Ad Bans, Nixes Others}, supra note 177.
exempt from the ban, resulting in the provision failing to pass constitutional muster.\textsuperscript{182} However, if Congress was to re-draft the provision to ban only harmful images and colors, varying individuals’ interpretations as to what constitutes harm could pose new challenges with regard to how to define colors and images as harmful.\textsuperscript{183}

Regarding the Tobacco Control Act’s restrictions on claims concerning the effect of the Agency’s tobacco safety regulations, the Sixth Circuit is likely to find the provision unconstitutional because the broad language of the provision could ultimately have the unintended effect of silencing public discourse by physicians, politicians, and the media.\textsuperscript{184} Thus, the speech restriction on public discourse is not narrowly tailored enough to be found a permissible restriction on commercial speech.\textsuperscript{185}

Additionally, based upon the Supreme Court’s ruling in \textit{Lorillard Tobacco Co. v. Reilly}, holding a Massachusetts regulation prohibiting outdoor advertising to be unconstitutional, the Sixth Circuit should overturn the federal district court’s decision and strike down the provision in the Tobacco Control Act that bans outdoor advertising within one-thousand feet of all schools or playgrounds.\textsuperscript{186} The language in the Tobacco Control Act attempts to respond to the \textit{Lorillard} ruling by requiring new regulations to conform to governing First Amendment case law.\textsuperscript{187} While the provision recognizes that First Amendment controversies may arise, “there is no affirmative adjustment to the prohibited restriction [on outdoor advertising] and only an implicit acknowledgement of the First Amendment implications of the ruling.”\textsuperscript{188}

Moreover, in upholding the constitutionality of the ban on outdoor advertising, the federal district court appeared to side-step the substantive issue by noting that the Secretary could still make First Amendment appropriate modifications to provisions of

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\textsuperscript{182} See \textit{Commonwealth Brands, Inc.}, 678 F. Supp. 2d at 525-26.
\textsuperscript{183} See id. at 525-26.
\textsuperscript{184} See \textit{Sorrel, Court Backs Some Tobacco Ad Bans, Nixes Others, supra note 177}.
\textsuperscript{185} See \textit{Sorrel, Court Backs Some Tobacco Ad Bans, Nixes Others, supra note 177}.
\textsuperscript{186} See \textit{Lorillard Tobacco Co. v. Reilly}, 533 U.S. 525, 565-66 (2001) (implying that the advertising restrictions were overly broad). In writing the majority in \textit{Lorillard}, Justice O’Connor suggested that the advertising restrictions in the 1996 FDA rule were not sufficiently narrowly tailored to meet constitutional scrutiny. \textit{Id.} The provision in the Tobacco Control Act that bans outdoor advertising within one thousand feet of a school or playground is almost identical to the Massachusetts ban that was found unconstitutional by the Supreme Court. \textit{See id.} at 562.
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the Tobacco Control Act before their implementation.\textsuperscript{189} By April 2010, the Tobacco Control Act required the Agency to reissue the 1996 FDA Tobacco Rule, which included the ban on outdoor advertising.\textsuperscript{190} Therefore, because the Agency did not decline to reissue the outdoor advertising ban in its implementation of the 1996 FDA Tobacco Rule, but has delayed its implementation and issued a request for the submission of any comments and data regarding the outdoor advertising restrictions, the Sixth Circuit could still find the specific provision unconstitutional.\textsuperscript{191} It is important to note, however, that the Supreme Court’s decision in \textit{Lorillard Tobacco Company v. Reilly} was based primarily on a lack of evidence linking youth smoking to tobacco marketing allegedly geared toward adults only.\textsuperscript{192} Today, the link between youth smoking and tobacco advertising is much stronger.\textsuperscript{193} Therefore, the Sixth Circuit could find the outdoor advertising ban constitutional if the court is persuaded by more recent evidence that indicates the government’s restriction on commercial speech is narrowly tailored to meet constitutional scrutiny.\textsuperscript{194}

Except for the district court’s decision to uphold the constitutionality of the


\textsuperscript{192} See \textit{Tobacco Regulation Is Expected to Face a Free-Speech Challenge}, supra note 179.

\textsuperscript{193} See \textit{Tobacco Regulation Is Expected to Face a Free-Speech Challenge}, supra note 179. Numerous reports by the Institute of Medicine, the National Cancer Institute, the President’s Cancer Panel’s 2007 Report, numerous consumer surveys, and over a dozen peer-reviewed articles have found strong evidence that indicates a causal relationship between tobacco advertising and increased levels of youth tobacco initiation and continued consumption. See Brief for Campaign for Tobacco-Free Kids et al. as Amici Curiae Supporting Defendants at 6, \textit{Commonwealth Brands, Inc. v. United States}, 678 F. Supp. 2d 512 (W.D. Ky. 2010) (No. 1:09-CV-117-M). The tobacco industry has also been found to directly target adolescents in its advertising. \textit{Id.} at 5. The tobacco industry’s own documents show that the industry devoted “decades of research and development of strategic plans designed to capture the youth market.” \textit{Id.} (quoting NCI Monograph 19, at 157). See supra notes 4-5 and accompanying text.

outdoor advertising ban, the Sixth Circuit should adhere to the lower court’s decision in upholding the remainder of the challenged provisions of the Tobacco Control Act as constitutional. In Commonwealth Brands, Inc. v. United States, the plaintiffs argued that all the challenged speech-restrictions in the Tobacco Control Act violated First Amendment rights because there are numerous and less-burdensome alternatives to restrictions on commercial speech. The federal district court was correct when they determined that Congress exhausted all other less restrictive avenues that were aimed at reducing young people’s access to tobacco products and curbing the appeal of tobacco to adolescents.

Over the past few decades, various government jurisdictions have tried numerous less restrictive measures aimed at reducing tobacco use. However, many of these non-speech restrictions have fallen short because tobacco manufacturers have found creative ways to dodge restrictions and advertise to minors. As an example, in the Master Settlement Agreement, tobacco companies agreed to a ban on billboard advertising of cigarettes. However, after the ban went into effect, cigarette companies circumvented the ban by diverting their advertising budget from billboards to exterior store advertising. Similarly, it is important to recognize that if the appellate courts uphold the district court’s conclusion that the black and white text-only restrictions violate the First Amendment, yet maintain the district court’s determination that the other advertising restrictions in the Tobacco Control Act are constitutional, tobacco

196 Id. at 536-37. Examples of less-burdensome choices to the restriction of commercial speech include raising the legal age to purchase, possess, or consume tobacco products to age nineteen, improving penalties for underage tobacco use, and enforcing harsh policies pertaining to tobacco possession or use by anyone at schools. Id. at 537. See infra text accompanying note 204.
199 Id. at 7. Tobacco companies spend billions of dollars every year on advertising. Id. In 2006, tobacco companies spent $12.8 billion or $35 million each day. Id.
200 Id. at 7.
201 Id. Exterior store advertisements, which cover areas such as doors, windows, and gas station walls, have many of the same effects as billboards. See Brief for Campaign for Tobacco-Free Kids et al. as Amici Curiae Supporting Defendants at 7, Commonwealth Brands, Inc. v. United States, 678 F. Supp. 2d 512 (W.D. Ky. 2010) (No. 1:09-CV-117-M). The shift in the tobacco industry’s advertising budget is illustrated by the fact that in 2000, over eighty percent of tobacco manufacturers’ marketing budgets went to promotional programs and retail discount incentives, amounting to almost eight million dollars for the entire year. See Robert L. Rabin, Tobacco Control Strategies: Past Efficacy and Future Promise, 41 LOY. L.A. L. REV. 1721, 1758 (2008).
companies will likely shift all their marketing resources toward ensuring that tobacco packages are used as even greater vehicles for promotion. Therefore, there is a strong argument for upholding the provisions banning color and graphics, or the tobacco companies will increase the color and graphics on their advertisements and labels to circumvent the other prohibited advertising restrictions in the Tobacco Control Act.

The 2007 IOM report on reducing tobacco use in the United States concluded that while strengthening existing tobacco control measures, such as anti-smoking programs, excise taxes on cigarettes, and indoor smoking restrictions, would lead to some additional decline in smoking prevalence, the creation of more substantial and lasting restrictions on tobacco use could only come from stronger federal legislation. With this important endorsement from the IOM, Congress enacted the Tobacco Control Act. In Commonwealth Brands, Inc. v. United States, it appears that the federal district court relied on the IOM report’s underlying premise that there was a need for stronger federal regulation, as Congress already tried many other non-speech restrictions that were unsuccessful. Thus, Congress has provided sufficient evidence that the Tobacco Control Act’s provisions regulating speech are anything but a first resort. Moreover, because Congress has been unsuccessful in using non-speech restrictive alternatives in an effort to decrease youth tobacco use and increase overall nationwide health, the Sixth Circuit will most likely follow the lower court in finding that the majority of the challenged speech restrictions are not in violation of the First Amendment, as they are narrowly tailored and directly advance the government’s

203. See ENDING THE TOBACCO PROBLEM, supra note 161, at 289.
204. See generally ENDING THE TOBACCO PROBLEM, supra note 161.
205. See generally ENDING THE TOBACCO PROBLEM, supra note 161.
206. See Commonwealth Brands, Inc. v. United States, 678 F. Supp. 2d 512, 537-38 (W.D. Ky. Jan. 5, 2010) (asserting that Congress did not initially attack plaintiffs’ speech). Conversely, the court determined that “this is a case where Congress, after decades of implementing various measures that did NOT affect plaintiffs’ speech, decided to add label and advertising restrictions to its comprehensive regulation of the tobacco industry.” Id. at 538 (emphasis added). Examples of non-speech restrictive measures that Congress had already implemented included increasing the price of tobacco products, increasing penalties for adults who lawfully provide tobacco products to minors, and increasing support for interventions that address the personal and social factors that influence tobacco use. Id. at 537. See supra note 195-196 and accompanying text.
interest.208

Congress compiled overwhelming evidence indicating a causal relationship between tobacco advertising and increased levels of tobacco use, especially among children.209 The government also has substantive evidence that almost all new tobacco users begin as children and that millions of adults have been misled by the tobacco industry’s actions.210 In fact, over twelve million people in the United States died from smoking cigarettes since the first Surgeon General’s report on the dangers of smoking was issued in 1964.211 Thus, the overwhelming body of evidence suggests that stringent limits on commercial expression are vital to improving public health.212 The 2007 IOM report astutely distinguishes between promoting tobacco use and informing consumers about tobacco use.213 In analyzing this distinction, the report reaches a reasonable conclusion that the government’s significant interest in suppressing tobacco use is sufficient to trump any economic interest the tobacco manufacturers and retailers have in encouraging people to smoke.214 While some of the provisions of the Tobacco Control Act could be modified, such as the Act’s ban on color and graphics in tobacco advertisements and on labels, as long as the Agency “acts in a reasonable [and] scientific manner,” the majority of the federal statute will most likely prevail.215

209 See Brief for Campaign for Tobacco-Free Kids et al. as Amici Curiae Supporting Defendants at 6, Commonwealth Brands, Inc. v. United States, 678 F. Supp. 2d 512 (W.D. Ky. 2010) (No. 1:09-CV-117-M); see also supra note 193 and accompanying text.
211 Id. at 4. In 2005, the tobacco industry spent over thirteen billion dollars to attract and maintain users of tobacco products, increase tobacco consumption, and encourage individuals to think positively about tobacco use. See U.S. FOOD AND DRUG ADMINISTRATION CENTER FOR TOBACCO PRODUCTS, 2009-2010: INAUGURAL YEAR IN REVIEW, http://www.fda.gov/tobacco (last visited Nov. 22, 2010).
213 See ENDING THE TOBACCO PROBLEM, supra note 161, at 325-26. The report asserts that the First Amendment protects the interests of both buyers and sellers in conveying truthful, non-misleading information about a tobacco product to consumers, but it does not protect the interest of sellers in promoting the use of a product that the government has a substantial interest in limiting. Id.
214 See ENDING THE TOBACCO PROBLEM, supra note 161, at 325-26 (asserting that tobacco manufacturers and retailers’ economic interests in encouraging individuals to smoke have no constitutional value and should not receive constitutional protection).
215 See Sorrel, Tobacco Firms Lose Round in Court Over Ad Restrictions, supra note 177 (quoting
V. The Future of Tobacco Legislation

There is no question that the government’s interest in the “health, safety and welfare of its citizens” is substantial.\textsuperscript{216} Even the Supreme Court, in \textit{FDA v. Brown & Williamson Tobacco Corp.}, recognized that “one of the most troubling public health problems facing our Nation today” is the number of yearly deaths due to tobacco consumption.\textsuperscript{217} Opponents of the Tobacco Control Act argue that Congress’ true goal in enacting the law is not to decrease youth smoking; rather, the law is intended to make it virtually impossible for tobacco manufacturers and retailers to communicate with anyone.\textsuperscript{218} However, it is hard to accept this argument when the Tobacco Control Act was implemented with the primary goal of giving the Agency full authority to regulate all aspects of tobacco products, not merely the marketing provisions.\textsuperscript{219} If the government was only concerned with imposing advertising and marketing restrictions on tobacco products, they would not have established provisions to regulate tobacco product designs and characteristics, and modified-risk tobacco products.\textsuperscript{220} Although commercial speech is protected under the First Amendment, the Supreme Court has not held that commercial advertising restrictions automatically violate the First Amendment.\textsuperscript{221} Rather, the Court has determined that commercial speech is subject to a lower level of protection than the individual right to free speech or the freedom of association.\textsuperscript{222} Consequently, the Supreme Court adopted the \textit{Central Hudson} test, a more flexible test, because the Court concluded that from a constitutional standpoint, commercial free speech does not require application of the High Court’s

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\textsuperscript{216} Rubin v. Coors Brewing Co., 514 U.S. 476, 485 (1995) (noting health, safety, and welfare interest substantial enough to justify regulation of gambling advertising); \textit{see also} Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 525, 555 (2001) ("[n]one of the [tobacco company] petitioners contest[s] the importance of the State’s interest in preventing the use of tobacco products by minors").

\textsuperscript{217} Brown & Williamson Tobacco Corp., 529 U.S. 120, 125 (2000) (articulating that tobacco use is one of the most troubling public health problems facing our nation today and recognizing the thousands of premature deaths that occur each year as a result of tobacco use).

\textsuperscript{218} \textit{See Tobacco Regulation Is Expected to Face a Free-Speech Challenge, supra note 179; supra text accompanying notes 137-139.}

\textsuperscript{219} \textit{See Sorrel, Tobacco Firms Lose Round in Court Over Ad Restrictions, supra note 177.}


\textsuperscript{221} \textit{See Thompson v. Western States Med. Ctr., 535 U.S. 357, 373 (2002) (noting restriction on commercial speech can be justified, but not as a first resort).}

\textsuperscript{222} \textit{See id. at 387-88 (Breyer, J., dissenting).}
strictest speech-protective tests. The Central Hudson test recognizes that commercial speech is afforded First Amendment protection, but also acknowledges that the government often has a need to regulate commercial speech. Therefore, although courts require the government to validate the need for and relationship of its chosen restrictions to the government interest, the courts also give significant deference to the judgment of the legislature, “leaving it to governmental decision makers to judge what manner of regulation may best be employed.” As further justification for imposing a lower level of protection on commercial speech, the Court reasoned that restrictions on commercial speech do not typically suppress individual self-expression; they rarely interfere with the functioning of the democratic political process; and they frequently reflect a democratically determined government decision to regulate a commercial venture in order to protect the consumer, the public health, individual safety, or the environment. The majority of the advertising and marketing provisions in the Tobacco Control Act appear to pass the Supreme Court’s flexible test for determining if commercial speech restrictions are constitutionally valid.

While the Central Hudson test is undoubtedly the prevailing test for the regulation of truthful, non-misleading commercial speech, several criticisms of the test exist. Critics claim the test’s language is limited in application, as the test does not make further distinctions based on the content of the commercial message or the nature of the required government interest. Rather, the governmental interest, as articulated in the test, must only be “substantial.” In particular, Justice Stevens criticized the Central Hudson test because it purports to allow regulation of any speech brought forth in

223 Id. at 388 (Breyer, J., dissenting); see Central Hudson Gas & Electric Corp. v. Public Service Comm’n of New York, 447 U.S. 557, (1980) (setting forth four-part analysis).
225 Id. at 5 (quoting Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989)).
226 Thompson, 535 U.S. at 388 (Breyer, J., dissenting).
227 See generally Commonwealth Brands, Inc. v. United States, 678 F. Supp. 2d 512 (W.D. Ky. Jan. 5, 2010). The provisions restricting advertising and marketing of tobacco products are narrowly tailored to directly advance the government’s interest in reducing consumption of tobacco. Id. at 532. Further, there is significant evidence from the Institute of Medicine and other health organizations that Congress could not have achieved its health and safety objectives in significantly less restrictive ways. Id. at 530-31. See supra notes 78-80 and accompanying text.
228 See Commonwealth Brands, Inc., 678 F. Supp. 2d at 520-521; see Thompson, 535 U.S. at 378 (Breyer, J., dissenting).
230 Id.
a commercial context despite the content of the speech.\textsuperscript{231}

Although some of the Justices have found flaws in the \textit{Central Hudson} test, which could justify articulating a clearer standard specifically tailored to tobacco legislation, the creation of a novel commercial speech test solely for tobacco regulation is unlikely to become a reality.\textsuperscript{232} In \textit{Lorillard Tobacco Co. v. Reilly}, the government argued that tobacco is in essence \textit{sui generis}, and since it is so special due to the adverse health risks it poses on society, the application of normal First Amendment principles should be suspended when regulating tobacco.\textsuperscript{233} While the government in \textit{Commonwealth Brands, Inc. v. United States} could use this argument in their efforts to uphold the Tobacco Control Act’s ban on color and graphics in advertising and on labels, this argument is unlikely to persuade the appellate courts.\textsuperscript{234} The argument for a separate commercial speech test for tobacco regulations creates a slippery slope.\textsuperscript{235} Much like tobacco advertising, studies have shown that alcohol and fast food advertising also increase consumption and pose significant health risks to the public.\textsuperscript{236} Thus, if an appellate court exempts tobacco regulations from adhering to the \textit{Central Hudson} test, it would appear that laws restricting fast food and alcohol advertising would also become exempt from the \textit{Central Hudson} test.\textsuperscript{237} The Supreme Court crafted a flexible commercial speech test with the intention that courts would apply the test to challenged commercial speech regulations on a case by case basis.\textsuperscript{238} If \textit{Commonwealth Brands, Inc. v. United States} reaches the Supreme Court, the High Court will most likely follow the lead of the federal district court, and use the firmly established \textit{Central Hudson} test to determine whether the challenged advertising provisions of the Tobacco Control Act are constitutional.\textsuperscript{239}

\textsuperscript{231} \textit{See} Rubin \textit{v. Coors Brewing Co.}, 514 U.S. 476, 494 (1995), (Stevens, J., concurring). Justice Stevens articulated that “any description of commercial speech that is intended to identify the category of speech entitled to less First Amendment protection should relate to the reasons for permitting broader regulation: namely, commercial speech’s potential to mislead.” \textit{Id.}

\textsuperscript{232} \textit{Id.}


\textsuperscript{235} \textit{See Lorillard Tobacco Co.}, 533 U.S. at 586-90.

\textsuperscript{236} \textit{Id.} at 586-90.

\textsuperscript{237} \textit{Id.} at 586-90.


VI. Conclusion

There is no question the Tobacco Control Act is here to stay. Even if the tobacco companies are ultimately successful in their challenge of various marketing provisions, the Tobacco Control Act still grants the Agency the authority to regulate tobacco and imposes numerous restrictions on the manufacturing and sale of tobacco products.\(^{240}\) However, if the Sixth Circuit and United States Supreme Court were to find that all the advertising and marketing provisions in the Tobacco Control Act failed to pass constitutional muster, Congress and other public health advocates would have to resort to other strategies aimed at reducing tobacco use.\(^{241}\) One suggested alternative strategy would be to increase state and federal revenue for counter-advertising initiatives, particularly targeting the youth population.\(^{242}\) In the 1990s, California passed a law requiring an excise tax increase of twenty-five cents per cigarette package and included a provision in the law that required twenty percent of that revenue to be used for media counter-advertising.\(^{243}\) While counter-advertising ads were found to decrease the number of individuals who smoked, it remains to be seen whether the counter-advertising ads would be effective today.\(^{244}\) Since the youth culture today focuses much more on internet and computer-based activities, than was true a few years ago, broadcast media counter-advertising may not be as effective as it was two decades ago.\(^{245}\) However, counter-advertising tactics could be even more effective today if the ads were displayed on the internet.\(^{246}\) In addition to counter-advertising tactics, public health advocates and the government could enact stricter laws prohibiting false advertising of tobacco products.\(^{247}\)

Additionally, in attacking the Tobacco Control Act, opponents have gone so far as to suggest that the new law will ultimately lead to the prohibition of all tobacco products.\(^{248}\) Although the new law gives the Agency wide discretion to tax cigarettes

\(^{240}\) See Sorrel, Tobacco Firms Lose Round in Court Over Ad Restrictions, supra note 177.

\(^{241}\) See Sorrel, Tobacco Firms Lose Round in Court Over Ad Restrictions, supra note 177.

\(^{242}\) See Rabin, supra note 201, at 1763-66.

\(^{243}\) See Rabin, supra note 201, at 1763-64. Although studies indicated that the counter-advertising tactics did have an effect on reducing youth smoking, funding ultimately was allocated for other needs. Id. at 1763-64.

\(^{244}\) See Rabin, supra note 201, at 1765.

\(^{245}\) See Rabin, supra note 201, at 1765.

\(^{246}\) See Rabin, supra note 201, at 1765.

\(^{247}\) See ACLU Letter, supra note 188.

\(^{248}\) See FDA Regulation of Tobacco Ads Violates Free Speech, TOBACCO FACTS, Sept. 18, 2009, http://www.tobacco-facts.net/2009/09/fda-regulation-of-tobacco-ads-violates-free-speech (opining that since alcohol prohibition and marijuana prohibition both began with high taxes and
and even limit the amount of nicotine in tobacco products, the law explicitly prohibits an outright ban on tobacco. While the Tobacco Control Act may open the door to more restrictive tobacco laws in the future, the Agency is consumed for the moment with implementing this extensive and detailed law.

Congress collected overwhelming evidence that tobacco use created a public health crisis that both severely impacts public health and has immense economic costs in regard to health care expenditures and lost productivity. The passage of the Tobacco Control Act nicely complements the United States’ health care reform goals, particularly health care reform’s emphasis on preventive medicine and wellness. There seems no better time to implement a law that aims to reduce the number of youth who start smoking. The reduction in youth smokers will ultimately lead to a lower number of total smokers who are afflicted with smoking related diseases, thus lowering health care system costs because minimizing smoking related illnesses will also reduce the number of people utilizing hospital and physician services.

Although the Supreme Court has in the past few years granted more protection to commercial speech, tobacco advertisers have not received favorable outcomes in the new era of expanding commercial-speech protection. The passage of the Tobacco Control Act indicates that lawmakers will continue to target the regulation of tobacco advertising for years to come. If the parties in Commonwealth Brands, Inc. v. United States successfully reach the Supreme Court, the Court will have the option to articulate a specialized commercial speech test regarding the bounds of permissive regulation of tobacco advertising. Although it is unlikely that the High Court will craft a specialized commercial speech test for tobacco advertising in the near future, tobacco advertising restrictions may one day have the potential to lead to an even larger body of First Amendment case law with respect to commercial speech.

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249 Id.
250 See generally id.
251 See Brief for Campaign for Tobacco-Free Kids et al. as Amici Curiae Supporting Defendants at 5-6, Commonwealth Brands, Inc. v. United States, 678 F. Supp. 2d 512 (W.D. Ky. 2010) (No. 1:09 CV-117-M). Reducing youth tobacco use is crucial because, in large part due to nicotine addiction, young smokers do not “mature out” of using tobacco. Id. (citing IOM Report 58, 59). Based on nicotine’s strongly addictive nature, quitting is extremely difficult and can be accompanied by harsh withdrawal symptoms. Id.