WILL THE SUPREME COURT KNOCK TOBACCO ADVERTISING OUT OF THE PARK FOR GOOD?: THE COMMERCIAL SPEECH IMPLICATIONS OF THE FAMILY SMOKING PREVENTION AND TOBACCO CONTROL ACT

*Kate E. Wigginton**

* J.D., 2011, Seton Hall University School of Law; B.A., 2006, New York University. The author would like to specially thank Professor Mark Alexander for his guidance throughout the drafting of this Comment, Belinda Moon for her invaluable research assistance, and the Journal of Sports and Entertainment Law's membership for their tireless work with this Comment.

INTRODUCTION

The Family Smoking Prevention and Tobacco Control Act (the "Tobacco Control Act" or the "Act"), enacted on June 22, 2009, is anti-tobacco legislation that explicitly affects sports and entertainment sponsorships by banning all remaining tobacco-brand advertisements.[1] This legislation, although undoubtedly important, also raises significant constitutional questions. The Tobacco Control Act bars—through the Food and Drug Administration's (FDA) implementing regulations[2]—tobacco manufacturers from promoting their brands through sponsorship of "athletic, musical, artistic, or other social or cultural event[s]."[3] Although this legislation has been said to "serve[] as a crowning achievement of the efforts by anti-smoking advocates to stop individuals, notably teenagers, from starting the habit,"[4] the advertising restrictions contained in the bill may jeopardize sponsorships for sports and entertainment events and may be constitutionally suspect.[5] In fact, under the applicable standard for analyzing the constitutionality of commercial speech, the Tobacco Control Act may be found to be in violation of the First Amendment to the United States

1. Pub. L. No. 111–31, 123 Stat. 1776 (codified as amended in scattered sections of 21 U.S.C.A.).

2. Family Smoking Prevention and Tobacco Control Act of 2009 § 105(a)(1), 21 U.S.C.A. § 387f-1(a)(1) (2010) ("Not later than [six] months after the date of enactment of this Act, the Secretary of Health and Human Services . . . shall develop and publish a action plan to enforce restrictions . . . on promotion and advertising of menthol and other cigarettes to youth.").

3. 21 C.F.R. § 1140.34(c) (2010).

4. Mark Conrad, *The New Anti-Tobacco Legislation, Sports Events and Commercial Speech*, SPORTS LAW BLOG (June 24, 2009, 11:25 AM), http://sports-law.blogspot.com/2009/06/new-anti-tobacco-legislation-sports.html.

5. *Id.*

Constitution.[6]

Part I of this Comment will outline the Tobacco Control Act, focusing on the specific provisions relating to the regulation of tobacco advertising at sports and entertainment events as well as the goals of the legislation. Part II will discuss the history and progress of anti-tobacco legislation restricting advertising with a focus on the constitutional attacks and objections raised during the hearing phase of the Tobacco Control Act's ratification. Part III will discuss the history of commercial speech protections afforded under the First Amendment. Additionally, it will examine related case law applying the doctrine in various contexts, and will provide a detailed discussion of the prevailing framework for analyzing the constitutionality of regulations on commercial speech. Lastly, Part IV will apply the prevailing test outlined in Part III to the Tobacco Control Act to determine the likely result of a similar constitutional challenge brought before the Supreme Court.

I. THE FAMILY SMOKING PREVENTION AND TOBACCO CONTROL ACT

Under the Tobacco Control Act, Congress effectively gave the FDA regulatory power over tobacco products.[7] Although the purpose of the Act is to help curb adolescent tobacco use,[8] the adult tobacco market will suffer as a result of these broad regulations. The objective of the Act is primarily to prohibit tobacco companies from marketing and advertising their products in ways that appeal to children.[9] The "law [is] the first big federal step against smoking since the 1971 ban against tobacco advertising on television and radio and the

6. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or *abridging the freedom of speech, or of the press*; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." (emphasis added)).

7. TOBACCO CONTROL LEGAL CONSORTIUM, FEDERAL REGULATION OF TOBACCO: IMPACT ON STATE AND LOCAL AUTHORITY 1 (2009), http://publichealthlawcenter.org/sites/default/files/fda-1.pdf .

8. *See* Family Smoking Prevention and Tobacco Control Act of 2009, Pub. L. No. 111-31, § 3(2), 123 Stat. 1776, 1781 (2009).

9. *See generally* Emily P. Walker, *House Committee Approves Bill to Give FDA Tobacco Authority*, Post to *Washington Watch*, MEDPAGE TODAY (Mar. 4, 2009), http://www.medpagetoday.com/Washington-Watch/Washington-Watch/13126.

1988 rules against smoking on airline flights."[10] Indeed, the Act aims to curb "the use of tobacco by young people"[11] while "continu[ing] to permit the sale of tobacco products to adults."[12] To that end, however, the Tobacco Control Act significantly restricts the ability of tobacco producers to manufacture and distribute their products while simultaneously closing the door to sports and entertainment related tobacco sponsorships.[13]

A. Provisions of the Act Pertaining to Sports and Entertainment Events

Under the Tobacco Control Act, the FDA now has "wide-ranging authority to regulate tobacco product marketing," including the power to implement new regulations in the future.[14] In addition to the bans in sports and entertainment, the Act also prohibits outdoor advertising within 1000 feet of schools and playgrounds, free giveaways of any non-tobacco items, free samples, and the sale of cigarettes in packages that contain fewer than twenty cigarettes.[15] The Act also limits any outdoor and all point-of-sale tobacco advertising to black text on white background only—except in adult only facilities—advertising in publications with significant teen readership to black text on white background only, and audio-visual advertising to black text on white background visuals and spoken words.[16]

With respect to prohibitions on sports and entertainment events, section 102 of the Tobacco Control Act sets forth specific provisions aimed toward the advertising of tobacco products at these events.[17] Under these provisions, the Act bars tobacco manufacturers from promoting their brands

10. Duff Wilson, *Senate Approves Tight Regulation over Cigarettes*, N.Y. TIMES, June 11, 2009, http://www.nytimes.com/2009/06/12/business/12tobacco.html; *see also* TOBACCO CONTROL LEGAL CONSORTIUM, *supra* note 7, at 2 (noting that the Tobacco Control Act "[r]epresents the most sweeping action taken to date").

11. Family Smoking Prevention and Tobacco Control Act of 2009 § 3(2).

12. § 3(7).

13. *See generally* Pub. L. No. 111–31, 123 Stat. 1776 (codified as amended in scattered sections of 21 U.S.C.A.).

14. TOBACCO CONTROL LEGAL CONSORTIUM, *supra* note 7, at 17.

15. Family Smoking Prevention and Tobacco Control Act of 2009, Pub. L. No. 111-31, § 102(a)(2), 123 Stat. 1776, 1830–32; 21 C.F.R. § 897.30(b)

16. § 102(a)(2), § 897.30(b).

17. § 102(a)(2)(G); 21 C.F.R. § 1140.16(d)(1), (d)(3)(A)–(B) (2010).

through sponsorship of "athletic, musical, artistic, or other social or cultural event[s]."[18] These provisions also ban:

> [M]anufacturer[s], distributor[s], [and] retailer[s] [from] distribut[ing] or caus[ing] to be distributed any free samples of cigarettes, smokeless tobacco, or other tobacco products. . . [, and]
>
> . . . .
>
> manufacturer[s], distributor[s], or retailer[s] [from] distribut[ing] or caus[ing] to be distributed any free samples of smokeless tobacco
>
> > (A) to a sports team or entertainment group; or
> >
> > (B) to any football, basketball, baseball, soccer, or hockey event or any other sporting or entertainment event determined by the Secretary to be covered by this subparagraph.[19]

The Tobacco Control Act, does not, however, "prohibit a manufacturer, distributor, or retailer from distributing or causing to be distributed free samples of smokeless tobacco in a qualified adult-only facility."[20]

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18. 21 C.F.R. § 1140.34(c) (2010).

19. § 1140.16(d)(1), (d)(3)(i)–(ii); § 102(a)(2)(G)

20. § 1140.16(d)(2); § 102(a)(2)(G). For purposes of this section, the term "qualified adult-only facility" is defined as a facility or restricted area that:

> (i) requires each person present to provide to a law enforcement officer (whether on or off duty) or to a security guard licensed by a governmental entity government-issued identification showing a photograph and at least the minimum age established by applicable law for the purchase of smokeless tobacco; (ii) does not sell, serve, or distribute alcohol; (iii) is not located adjacent to or immediately across from (in any direction) a space that is used primarily for youth-oriented marketing, promotional, or other activities; (iv) is a temporary structure constructed, designated, and operated as a distinct enclosed area for the purpose of distributing free samples of smokeless tobacco in accordance with this subparagraph; and (v) is enclosed by a barrier that—(I) is constructed of, or covered with, an opaque material (except for entrances and exits); (II) extends from no more than 12 inches above the ground or floor (which area at the bottom of the barrier must be covered with material that restricts visibility but may allow airflow) to at least 8 feet above the ground or floor (or to the ceiling); and (III) prevents persons outside the qualified adult-only facility from seeing into the qualified adult-only facility, unless they make unreasonable efforts to do so; and (vi) does not display on its exterior—(I) any tobacco product advertising; (II) a brand name other than in conjunction with words for an area or enclosure to identify an adult-only facility; or (III) any combination of words that would imply to a reasonable observer that the manufacturer, distributor, or retailer has a sponsorship that would violate section 897.34(c).

§ 1140.16(d)(iii)(A)–(F)(iii); § 102(a)(2)(C)(i)–(vi).

B. Goals Purported to Be Targeted by the Tobacco Control Act

The aim of the Tobacco Control Act is to reduce adolescents' access to tobacco products and to diminish the appeal of these products to America's youth.[21] "The Congressional Budget Office estimated that the new law would reduce youth smoking by [eleven] percent and adult smoking by [two] percent over the next decade, in addition to reductions already achieved through other actions, like higher taxes and smoke-free indoor space laws."[22] The Act proposes to achieve this end by restricting the means by which tobacco companies advertise and market their products.[23]

Indeed, the drafters of the Act announced that its aim is to "ensure that the [FDA] has the authority to address issues of particular concern to public health officials, especially the use of tobacco by young people and dependence on tobacco."[24] Evincing the Act's aim of curbing the appeal of tobacco to adolescents is its ban of all outdoor tobacco advertisements within 1000 feet of schools and playgrounds and its bar of colorful advertisements and store window displays in favor of advertisements consisting solely of black and white text.[25]

Further bolstering the Tobacco Control Act's goals is section 105 regarding the enforcement action plan for advertising and promotion restrictions.[26] Specifically, this section mandates that a plan is to be developed and published "to enforce restrictions . . . on [the] promotion and advertising of menthol and other cigarettes *to youth*."[27] The "community assistance" subparagraph to section 105 additionally provides that "[a]t the request of communities seeking assistance to

21. Press Release, Office of the Press Sec'y, The White House, Fact Sheet: The Family Smoking Prevention and Tobacco Control Act of 2009 (June 22, 2009), *available at* http://www.whitehouse.gov/the_press_office/Fact-sheet-and-expected-attendees-for-todays-Rose-Garden-bill-signing/.

22. Wilson, *supra* note 10.

23. *Id.*; *see also* Walker, *supra* note 9 ("The FDA would also be able to prohibit companies from advertising their products in ways that appeal to kids—such as by adding clove or vanilla flavors —or labeling their smokes as "light" or "low tar," or with other phrases suggesting a healthier cigarette.").

24. Family Smoking Prevention and Tobacco Control Act of 2009, Pub. L. No. 111-31, § 3(2), 123 Stat. 1776, 1781 (2009).

25. §102(a)(2); 21 C.F.R. § 897.30(b).

26. Family Smoking Prevention and Tobacco Control Act of 2009, Pub. L. No. 111-31, § 105, 123 Stat. 1776, 1841 (2009).

27. § 105(a)(1) (emphasis added).

prevent *underage tobacco use*, the Secretary shall provide such assistance, including assistance with strategies to address the prevention of underage tobacco use in communities with a disproportionate use of menthol cigarettes *by minors*."[28] Lastly, when commenting on the promulgation of this Act, President Obama proudly announced that the Tobacco Control Act crowns a "decades-long effort to protect our children from the harmful effects of smoking."[29]

1. Legislative Findings in Support of the Tobacco Control Act's Goals

In support of the Tobacco Control Act, the 111th Congress provided—in section two of the Act—relevant findings aimed toward its purported goals.[30] Several examples of such findings enumerated in section two include paragraph four, which provides that "[v]irtually all new users of tobacco products are under the minimum legal age to purchase such products."[31] In fact, "[r]educing the use of tobacco by minors by [fifty] percent would prevent well over 10,000,000 of today's children from becoming regular, daily smokers, saving over 3,000,000 of them from premature death due to tobacco-induced disease."[32]

Similarly, paragraphs five and fifteen state that tobacco advertising and marketing efforts aimed toward attracting young people have contributed considerably to the use of tobacco products by adolescents.[33] Indeed, "[i]n 2005, the cigarette manufacturers spent more than $13,000,000,000 to attract new users, retain current users, increase current consumption, and generate favorable long-term attitudes toward smoking and tobacco use."[34] Importantly, paragraph

28. § 105(b)(2) (emphasis added).

29. *Obama Signs Sweeping Anti-Smoking Bill,* MSNBC.COM (June 22, 2009), http://www.msnbc.msn.com/id/31481823/from/ET/.

30. Family Smoking Prevention and Tobacco Control Act of 2009, Pub. L. No. 111-31, § 2, 123 Stat. 1776, 1776–81 (2009).

31. § 2(4).

32. § 2(14).

33. § 2(5), (15).

34. § 2(16); *see also* § 2(48) ("In August 2006 a United States district court judge found that the major United States cigarette companies dramatically increased their advertising and promotional spending in ways that encourage youth to start smoking subsequent to the signing of the Master Settlement Agreement (MSA) in 1998. USA v.

nineteen states that "[t]hrough advertisements during and sponsorship of sporting events, tobacco has become strongly associated with sports and has become portrayed as an integral part of sports and the healthy lifestyle associated with rigorous sporting activity."[35] With respect to other forms of entertainment, Congress posited that "[t]he use of tobacco products in motion pictures and other mass media glamorizes its use for young people and encourages them to use tobacco products."[36]

II. HISTORY OF PRIOR ANTI-TOBACCO LEGISLATION, SPORTS RELATED RESTRICTIONS AND LITIGATION, AND CONGRESSIONAL CHALLENGES TO THE ACT

The Tobacco Control Act is the culmination of a number of historical developments. A review of the Act's antecedents and the challenges that those legislative attempts triggered may prove instructive to the application of the commercial speech framework, described below, to the Tobacco Control Act.

A. Prior Anti-Tobacco Legislation Restricting Advertising

Although tobacco products have been promoted in the United States for over a century, it was not until the early 1960s that the government became cognizant of the health risks associated with tobacco use.[37] In 1964, the Surgeon General released an Advisory Committee Report on Smoking and Health that was founded on over 7000 scientific articles that "highlighted the deleterious health consequences of tobacco use."[38] The report revealed that cigarette smoking was "responsible for a [seventy] percent increase in the mortality rate of smokers over non-smokers" and was specifically linked with cancer and other diseases such as bronchitis, emphysema, and coronary heart disease.[39]

Philip Morris, USA, Inc., et al. (Civil Action No. 99-2496 (GK), August 17, 2006)").

35. § 2(19).

36. § 2(21); *see also* § 2(1), (6), (17), (21)–(28), (47).

37. *The Reports of the Surgeon General: The 1964 Report on Smoking and Health*, U.S. NAT'L LIBR. MED., http://profiles.nlm.nih.gov/ps/retrieve/Narrative/NN/p-nid/60 (last visited Feb. 14, 2011).

38. *Id.*

39. *Id.*

Commentators agree that this report had a significant impact on public attitudes toward tobacco use and subsequently enacted legislation.[40] In fact, "[a] Gallup Survey conducted in 1958 found that only [forty-four] percent of Americans believed smoking caused cancer, while [seventy-eight] percent believed so by 1968."[41]

In response to the Report warning that "cigarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action," Congress enacted a law in 1965 requiring warning labels on all cigarette packages distributed in the United States.[42] This law—the Cigarette Labeling and Advertising Act[43] (the "Cigarette Labeling Act")—enabled Congress to assume exclusive control over all aspects of cigarette promotion, labeling, and advertising, essentially precluding states from exercising any control."[44] Shortly thereafter, Congress announced that the Federal Communications Commission (FCC) would require all licensed television and radio to provide "a 'significant amount of time'—not equal time—to those who sought to present the case against cigarette smoking."[45] Relying "not only on the Fairness Doctrine[,][46] but on the obligation of stations to serve the 'public interest,'" the FCC limited this promulgation "to cigarettes, a product it held to be uniquely dangerous."[47] Consequently, on April 1,

40. *Id.*

41. *Id.*

42. *Id.*

43. Pub. L. No. 89-92, 79 Stat. 282 (codified as amended at 15 U.S.C. §§ 1331–1341 (2006)).

44. Eric D. Brophy, *Smoking Is Dangerous to Your Health: Especially If You Are a Sports Advertiser*, 8 SETON HALL J. SPORT L. 261, 265 (1998) (citing James C. Thorton, *The Liability of Cigarette Manufacturers for Lung Cancer: An Analysis of the Federal Cigarette Labeling and Advertising Act and Preemption of Strict Liability in Tort Against Cigarette Manufacturers*, 76 KY. L.J. 569, 575 (1987)).

45. Ronald Bayer, *Tobacco, Commercial Speech, and Libertarian Values: The End of the Line for Restrictions on Advertising?*, 92 AM. J. PUB. HEALTH 356, 356 (Mar. 2002), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1447076.

46. *Id.* The FCC developed the "Fairness Doctrine" which requires "publicly licensed television and radio stations to carry responses when they had taken positions on matters of public controversy." *Id.* (the "Fairness Doctrine" was adopted by the FCC in 1949 and mandated holders of broadcast licenses to present controversial issues to the public in a way that was (in the FCC's mind) honest, equitable and balanced). *Accord* 47 U.S.C § 301 (2006); Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969) (upholding the FCC's general *right* to enforce the Fairness Doctrine where channels were limited).

47. Bayer, *supra* note 45, at 356.

1970, the Public Health Cigarette Smoking Act[48] was signed into law by Richard Nixon and effectively banned the advertising of cigarettes on television and radio starting on January 2, 1971.[49]

In 1984, Congress amended the Cigarette Labeling Act to require companies to put one of four warning labels on the cigarette containers, including:

> (1) SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy; (2) SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks to Your Health; (3) SURGEON GENERAL'S WARNING: Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, and Low Birth Weight; or (4) SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.[50]

A few years later, the Comprehensive Smokeless Tobacco Health Education Act of 1986[51] extended the broadcast advertising ban to smokeless tobacco products.[52]

Surprisingly, in light of the onslaught of health reports issued regarding the inherent dangers associated with tobacco products, cancer victims did not bring a class action against tobacco manufacturers for injuries suffered as a result of tobacco use[53] until *Broin v. Philip Morris Cos.*[54] Following this suit, tobacco companies had to defend themselves in a large number of similar cases, and, in 1998, after the culmination of a great deal of effort, these cases ended in a Master Settlement Agreement (MSA) "involving more than [forty-six] states and the six largest tobacco companies."[55]

48. Pub. L. No. 91-222, 84 Stat. 87 (codified as amended at 15 U.S.C. §§ 1331–1339 (2006)).

49. Gene Borio, *Tobacco Timeline,* TOBACCO.ORG, http://www.tobacco.org/resources/history/Tobacco_Historynotes.html (last visited Feb. 14, 2011); *see also* 15 U.S.C. § 1335 ("After January 1, 1971, it shall be unlawful to advertise cigarettes and little cigars on any medium of electronic communication subject to the jurisdiction of the [FCC].").

50. Borio*, supra* note 49. *See generally* 15 U.S.C. §§ 1331–1341 (regarding Cigarette Labeling and Advertising Act).

51. Pub. L. 99-252, 100 Stat. 330 (codified as amended at 15 U.S.C. §§ 4401 *et seq.* (2006))

52. Borio*, supra* note 49.

53. Brophy, *supra* note 44, at 268–69.

54. 641 So. 2d 888 (Fla. Dist. Ct. App. 1994) (flight attendants brought suit against tobacco producers for alleged in-flight inhalation of second hand smoke causing injury).

55. David L. Hudson, Jr., *Advertising & First Amendment: Tobacco Ads*, FIRST AMENDMENT CTR., http://www.firstamendmentjournal.com/speech/advertising/topic.aspx?topic=tobacco_alcohol (last visited Feb. 12, 2011) (noting that the six largest

Indeed, "in the wake of insurmountable odds, the [tobacco] industry agreed" to pay billions of dollars in return for considerations, including agreements to settle nearly all litigation between parties.[56] The tobacco companies agreed to place a number of marketing and advertising restrictions on themselves. Examples of these self-imposed restrictions include the following:

- A ban on tobacco companies use of cartoon characters, such as "Joe Camel," to advertise their products
- A ban on targeting youth in the advertising, promotion, or marketing of tobacco products
- A ban on tobacco company sponsorships for concerts or other events with significant youth audiences, including team sporting events, such as football games
- A ban on using tobacco brand names on stadium and arena advertisements[57]

Interestingly, in response to these "self-imposed" restrictions, some commentators posited that, had these restrictions come in the form of legislation as opposed to a settlement agreement, they would be deemed unconstitutional.[58]

Lastly, in 2003, tobacco manufacturers, in conjunction with publishers from four large magazines, agreed to ban the placement of tobacco advertisements in school library editions of four publications.[59] These four magazines were *Time*, *People*, *Sports Illustrated*, and *Newsweek*.[60]

tobacco companies involved in the agreement included: Brown & Williamson Tobacco Co., Lorillard Tobacco, Philip Morris Companies Inc., R.J. Reynolds Tobacco Co., Commonwealth Tobacco and Liggett & Myers Tobacco Co.); Master Settlement Agreement, Nat'l Ass'n of Attorneys Gen., http://www.naag.org/backpages/naag/tobacco/msa/msa-pdf/MSA%20with%20Sig%20Pages%20and%20Exhibits.pdf/download.

56. *See* Master Settlement Agreement, *supra* note 55; Brophy, *supra* note 44, at 269; *see also* Hudson, *supra* note 55.

57. Hudson, *supra* note 55.

58. *See id.* (quoting Richard Samp, Chief Counsel of the Washington Legal Foundation, stating that "[m]any of the restrictions on advertising included in the settlement agreement could not be imposed legislatively because they would violate the First Amendment").

59. *Cigarettes Advertising in U.S.A.*, PARLIAMENT CIGARETTES ONLINE (Mar. 31, 2009), http://the-parliament-cigarette.blogspot.com/2009_03_29_archive.html.

60. *Id.*

B. Sports Advertising Restrictions and Related Litigation

Although enacted in the 1960s, tobacco companies did not challenge the Cigarette Labeling Act until 1995 when the Department of Justice brought its first civil suit against Madison Square Garden for failing to remove a Marlboro sign from the scorer's table.[61] The owners soon agreed to remove the advertisement, and both parties asserted that an NBA rule required the sign's removal.[62] The owners of Shea Stadium defended themselves against a similar suit, seeking removal of a Marlboro sign located below the scoreboard.[63] Shortly before the season commenced, the Mets switched the sign with a Sharp Electronics ad and noted that the Marlboro sign, in its new location, would "only get[] fleeting glimpses on [television]."[64]

Litigation, however, was not limited to New York. For example, in Michigan, the Detroit Tigers complied with demands to remove tobacco billboards in and around the stadium.[65] Similarly, in Boston, Fenway Park "owners were compelled by threats of federal sanction to remove a legendary Marlboro sign hanging above the stadium."[66] Then, in 1997, "[j]ust days before Super Bowl XXXI was to take place, the Justice Department's Office of Consumer Litigation sent a letter to Philip Morris attorneys requesting removal of [billboards containing tobacco advertisements], citing the extensive exposure of the signs during the Sugar Bowl."[67] Philip Morris removed the advertisements before the Justice Department brought any legal action.[68]

61. Brophy, *supra* note 44, at 270.

62. *Id.*; *see also* Richard Sandomir, *New Formations for Stadium Signs*, N.Y. TIMES, June 7, 1995, http://www.nytimes.com/1995/06/07/business/new-formations-for-stadium-signs.html?pagewanted=1 ("[A] courtside Marlboro sign was removed at the beginning of the season in compliance with a new National Basketball Association policy.").

63. Brophy, *supra* note 44, at 270.

64. Sandomir, *supra* note 62.

65. Brophy, *supra* note 44, at 270.

66. *Id.* at 270–71.

67. *Id.* at 271.

68. *Id.*

C. Challenges Voiced During the Legislative Enactment Process

During a hearing in front of the House of Representatives, Representative Stephen Buyer expressed the following concerns with respect to the Tobacco Control Act:

> While we all agree that steps need to be taken to help lessen the use of tobacco products by underage youth, we must not do so in ways that clearly violate the First Amendment. Unfortunately, the bill in front of us I believe fails to meet that test.
>
> The speech restrictions in this bill are clearly the most sweeping in the history of the United States for any legal product. Numerous top legal experts from every point of the political spectrum have looked at these provisions and declared that they will not meet First Amendment scrutiny.
>
> . . . .
>
> What we are doing in this body is two things: we are taking the [regulations] from the 1996 rule that the Supreme Court found unconstitutional and we are making them statutory, which means, attention to lawyers in America: you have an access and avenue right back to Federal Court immediately upon the President's signature of this legislation.
>
> . . . .
>
> In this case, it is commercial speech, and that is what we are doing. When we take the MSA . . . and also place these restrictions and then make them statutory, bang, we are right back to the Supreme Court. And I just find that very bothersome.
>
> . . . .
>
> . . . The paternalistic view that tobacco advertising must be restricted because consumers might find it pervasive is antithetical to the assumption on which the First Amendment is based.[69]

At the same hearing, Representative Ronald Paul added the following:

69. 155 CONG. REC. H6630 (daily ed. June 12, 2009) (statement of Rep. Buyer), 155 Cong Rec H 6630, at *6668 (LEXIS). *Accord id.* at *6653 (regarding the potential challenges to the Act, Representative Buyer stated: "So I would say to my good friend that as soon as this bill is signed into law, a couple of things are going to happen. Number one, the lawyers will make a run to the Federal courts, and the Supreme Court will be back sitting in judgment over the provisions on advertising restrictions, not only potential unconstitutional provisions on the First Amendment with regard to the regulation of commercial speech, but also in the Fifth Amendment with regard to whether it's a constitutional taking or not").

> One part of this bill that I find particularly bad, but it is pervasive in so much of what we do, about 100 years ago we took the First Amendment and freedom of speech and chopped it into two pieces. We have political speech. Of course we like that. We're in the business of politics. But we take commercial speech, and we put it over here, and we regulate the living daylights out of commercial speech. That's not a First Amendment. That's chopping freedom in half, and that just leads to more problems. But this will lead to prohibition, and it won't work. This will just give us a lot more trouble.[70]

The concerns voiced by these two representatives reflect the questions many tobacco regulators have regarding the constitutionality of restricting such commercial speech. These constitutional questions concern whether the act satisfies the requisite commercial speech framework articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.[71]

III. COMMERCIAL SPEECH AUTHORITY AND THE *CENTRAL HUDSON* FRAMEWORK

The specific provisions of the Tobacco Control Act that pertain to sports and entertainment advertising are the regulations of commercial speech. For over a quarter of a century, the Supreme Court of the United States has recognized that such speech is within the purview of the First Amendment,[72] with the caveat that the speech "must concern lawful activity and not be misleading,"[73] false, or deceptive.[74] Although the Court has recognized that "commercial speech receives a lower level of protection than other categories of expression," it has also clarified that commercial speech nevertheless receives substantial protection.[75] Indeed,

70. 155 CONG. REC. H6630 (daily ed. June 12, 2009) (statement of Rep. Paul), 155 Cong Rec H 6630, at *6655 (LEXIS).

71. 447 U.S. 557 (1980).

72. *See, e.g.*, Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 64 (1983); Linmark Assocs., Inc. v. Twp. of Willingboro, 431 U.S. 85, 91 (1977); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 759 (1976); Bigelow v. Virginia, 421 U.S. 809, 822–25 (1975); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 384 (1973).

73. *Central Hudson*, 447 U.S. at 566.

74. *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 638 (1985) (citing *Central Hudson*, 477 U.S. at 566); Friedman v. Rogers, 440 U.S. 1, 9–10 (1979).

75. Martin H. Redish, *Tobacco Advertising and the First Amendment*, 81 IOWA L. REV. 589, 591 (1996); *see also* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978)

commercial speech is vital to our society because it, "not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information."[76] Realizing the importance of commercial speech protections, the Supreme Court, in *Central Hudson*, articulated a four-prong analysis under which courts can examine whether the First Amendment protects a specific commercial expression.[77] Because the specific provisions policing sports and entertainment advertisements are regulations of commercial speech, they must satisfy the requirements set forth in *Central Hudson* to be considered constitutionally sound.[78]

A. Development of the Commercial Speech Doctrine

In *Bigelow v. Virginia*, the Supreme Court held that it was incorrect to assume that commercial speech lacked value in the "marketplace of ideas" or was not entitled to First Amendment protection.[79] One year later, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Supreme Court expanded the *Bigelow* holding and found that Virginia's overbroad ban on advertising the price of prescription drugs violated the First Amendment.[80] The Court reasoned as follows:

> Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.[81]

The Court elaborated as follows:

("[C]ommercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values.").

76. Ann K. Wooster, Annotation, *Protection of Commercial Speech Under First Amendment—Supreme Court Cases*, 164 A.L.R. FED. 1, § 2 (2000).

77. *Central Hudson*, 477 U.S. at 566.

78. *Id.*

79. 421 U.S. 809, 826 (1975).

80. 425 U.S. 748, 759–61 (1976).

81. *Id.* at 765.

> There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.[82]

Subsequent Supreme Court decisions recognized that commercial speech "occurs in an area traditionally subject to government regulation."[83] Indeed, one commentator has posited that "[t]he entire commercial speech doctrine . . . represents an accommodation between the right to speak and hear expression *about* goods and services and the right of government to regulate the sales *of* such goods and services."[84]

In acknowledging the "distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech,"[85] the Supreme Court promulgated a framework for analyzing regulations of commercial speech that is "substantially similar" to the test for "time, place, and manner restrictions."[86] The Supreme Court articulated this analysis, the *Central Hudson* four prong test,[87] as follows:

> For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask

82. *Id.* at 770.

83. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978) (citing *Va. State Bd. of Pharmacy*, 425 U.S. at 771 n.24).

84. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 499 (1996) (alterations in original) (quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 12–15, at 903 (2d ed. 1988)).

85. *Central Hudson*, 447 U.S. at 562 (quoting *Ohralik*, 436 U.S. at 455–56).

86. Bd. of Trs. v. Fox, 492 U.S. 469, 477 (1989). This idea of "time, place, and manner restrictions" refers to the notion that "[e]ven speech that enjoys the most extensive First Amendment protection may be subject to 'regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.'" HENRY COHEN, CONG. RESEARCH SERV., 95-815, FREEDOM OF SPEECH AND PRESS: EXCEPTIONS TO THE FIRST AMENDMENT 16 (2009) (quoting Frisby v. Schultz, 487 U.S. 474, 481 (1988)).

87. In *Central Hudson*, the Supreme Court was tasked with considering a regulation "completely" prohibiting electrical utilities from engaging in promotional advertising designed to stimulate demand for electricity. 447 U.S. at 558. Applying a four-part inquiry, the Court found that although the state interest in conservation of energy was substantial, and that there was "an immediate connection between advertising and demand for electricity," the regulation was nevertheless invalid because the commission failed to demonstrate that a more restrictive speech regulation would not have adequately served the State's interest. *Id.* at 566, 569–71.

> whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.[88]

Indeed, the first prong concerns "the informational function of advertising"—namely, under this prong, if the communication does not "accurately inform the public about lawful activity," it may be suppressed.[89] Under the second prong, if the speech is protected, the interest of the government in regulating and limiting it must be assessed—that is, the government "must assert a substantial interest to be achieved by restrictions on commercial speech."[90] Under the third prong, the restriction *cannot* be sustained "if it provides only ineffective or remote support for the [asserted] purpose."[91] Rather, the regulation must "directly advance" the governmental interest asserted under the second prong.[92] Finally, under the fourth prong, "if the governmental interest could be served as well by a more limited restriction on commercial speech, [an] excessive restriction[] cannot survive."[93]

Applying this framework in *44 Liquormart, Inc. v. Rhode Island*, the Supreme Court reversed the Fifth Circuit and held that a Rhode Island law prohibiting advertisement of the price of alcohol "in any manner whatsoever," except by tags or signs inside liquor stores, was impermissible under the First Amendment.[94] In applying the four-prong test, Justice Stevens asserted that the first prong was satisfied because "there [was] no question that Rhode Island's price advertising ban constitute[d] a blanket prohibition against truthful,

88. *Id.* at 566.

89. *Id.* at 563.

90. *Id.* at 564.

91. *Id.*

92. *Id.*; *see also* United States v. Edge Broad. Co., 509 U.S. 418, 427 (1993) (reiterating that "this question cannot be answered by limiting the inquiry to whether the governmental interest is directly advanced as applied to a single person or entity," instead the court must look to the aggregate effects).

93. *Central Hudson*, 447 U.S. at 564. This prong has been altered by courts and now instead of the "least restrictive means" test, a court must find a "reasonable fit" between means and ends, with the means "narrowly tailored to achieve the desired objective." Bd. of Trs. v. Fox, 492 U.S. 469, 476–80 (1989).

94. 517 U.S. 484, 516 (1996).

nonmisleading speech about a lawful product."[95] In addressing the second prong, the Court conceded that the government had a substantial interest in reducing alcohol consumption.[96] As for prong three, Justice Stevens asserted that, "speculation or conjecture" cannot "suffice when the State takes aim at accurate commercial information for paternalistic ends."[97] Indeed, Justice Stevens opined that, "without any findings of fact, or . . . any evidentiary support whatsoever, we cannot agree with the assertion that [a] price advertising ban will significantly advance the State's interest in promoting temperance."[98] With regard to the fourth prong, Justice Stevens found that Rhode Island had "alternative forms of regulation [available] that would not involve any restriction on speech [and] would be more likely to achieve the State's goal of promoting temperance."[99] Such alternatives included higher taxes, limited per capita purchases, and educational campaigns.[100] Consequently, the Court concluded that "even under the less than strict standard that generally applies in commercial speech cases, the State has failed to establish a 'reasonable fit' between its abridgment of speech and its temperance goal."[101] This decision is important because it provided guidance on future application of the fourth prong of the *Central Hudson* test.

B. Central Hudson *Analysis in the Tobacco Regulation Context*

The Supreme Court's opinion in *Lorillard Tobacco Co. v. Reilly*[102] is instructive in the tobacco regulation area. In that case, the Supreme Court rejected a set of anti-tobacco measures adopted by the State of Massachusetts designed to limit the reach of tobacco-related advertisements on young people.[103] In *Lorillard*—as is the case with the Tobacco Control Act—the purpose of the restrictions was to address

95. *Id.* at 504.
96. *Id.*
97. *Id.* at 507 (quoting Edenfield v. Fane, 507 U.S. 761, 770 (1993)).
98. *Id.* at 505.
99. *Id.* at 507.
100. *44 Liquormart*, 517 U.S. at 507.
101. *Id.* (quoting Bd. of Trs. v. Fox, 492 U.S. 469, 480 (1989)).
102. 533 U.S. 525 (2001).
103. *Id.* at 562–63, 565–66.

the access to and use of tobacco products by children under the legal age.[104] The Massachusetts regulation in question prohibited outdoor advertising of tobacco products within 1000 feet of a school or playground.[105] Evidence demonstrated that the 1000-foot rule would effectively bar outdoor advertising in as much as ninety-one percent of all land located in the State's largest cities.[106]

In applying the *Central Hudson* analysis,[107] the Court focused on the last two prongs related to the "relationship between the harm that underlies the State's interest and the means identified by the State to advance that interest."[108] In analyzing the third factor, Justice O'Connor asserted that the State had to demonstrate that its regulations advanced the asserted regulatory interest and reiterated that "mere speculation or conjecture" was insufficient.[109] Rather, the State must "demonstrate that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree."[110] The Court ultimately held, five to four,[111] that the State had met its burden under the third factor with respect to the advertising restrictions related to the 1000-foot rule for outdoor advertising.[112] The Court, however, determined that the Massachusetts restrictions conflicted with the fourth prong of the *Central Hudson* test.[113] The effect of the 1000-foot rule would "undoubtedly" vary from place to place and such a "uniformly broad sweep of the geographical limitation demonstrate[d] a lack of tailoring."[114] Notably, the Court also faulted the Massachusetts regulation because it barred signs of all shapes and sizes rather than

104. *Id.* at 564.

105. *Id.* at 561–62.

106. *Id.* at 562.

107. Interestingly, the Court cursorily declined an invitation to apply strict scrutiny to questions regarding commercial speech and to reject the *Central Hudson* framework. *See id.* at 554–55. Commentators, however, opine that the standard employed in cases such as *Lorillard* is "intermediate scrutiny-plus." *See* Conrad, *supra* note 4.

108. *Lorillard Tobacco Co.*, 533 U.S. at 555.

109. *Id.*

110. *Id.* (quoting Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 188 (1999)).

111. Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas represented the majority while Justices Stevens, Souter, Ginsburg, and Breyer representing the dissenting opinions.

112. *Lorillard Tobacco Co.*, 533 U.S. at 557–61.

113. *Id.* at 561.

114. *Id.* at 563.

focusing on signs that might appeal to adolescents in particular.[115]

Most recently, in *Commonwealth Brands, Inc. v. United States*, plaintiffs claimed that various provisions of the Tobacco Control Act violated their free speech rights under the First Amendment, their Due Process rights under the Fifth Amendment, and effected an unconstitutional taking under the Fifth Amendment.[116] Specifically, the plaintiffs argued that the restrictions on the use of color and imagery, brand-name event sponsorships, branded merchandise, and bans on outdoor advertising violated several constitutional provisions.[117] In ruling on cross-motions for summary judgment, the District Court for the Western District of Kentucky began by noting that both parties agreed that the *Central Hudson* framework is the appropriate test to apply where the statute regulates commercial speech.[118] Importantly, in *Commonwealth Brands*, the plaintiffs argued that because Congress made no attempt to differentiate between marketing practices directed at adults versus those directed at children, the ban on brand-name sponsorships at athletic, social, and cultural events was overly broad.[119] In support of this position, plaintiffs compared the MSA[120] and the Tobacco Control Act:

> [W]hile the [MSA] permits "specific types of brand name sponsorships, including those in adult-only facilities like bars and nightclubs," the Act's ban on brand-name event sponsorship would prohibit Lorillard's Newport Pleasure Draw blackjack tournament, which, they argue, will not advance Congress's goal since that tournament is "restricted to adult smokers" and held in an "adult-only facility" into which "minors are not allowed to enter."[121]

Simply put, plaintiffs argued that "because Congress could have achieved its goal by restricting less speech . . . the Act's ban is not narrowly tailored under *Central Hudson*."[122]

The court, however, rejected this contention and held that

115. *Id.*
116. 678 F. Supp. 2d 512 (W.D. Ky. 2010).
117. *Id.* at 521, 526.
118. *Id.* at 520.
119. *Id.* at 526.
120. For a detailed discussion of the MSA see *supra* Part II.A.
121. *Commonwealth Brands, Inc.*, 678 F. Supp. 2d at 526 (internal quotation omitted).
122. *Id.*

"the Act's ban is, in part, a reflection of Congress's view that the MSA is inadequate" because the MSA provides ways for tobacco manufacturers to "successfully circumvent both the ban on television cigarette advertising and the intent of the [MSA] not to target youth."[123] The court concluded by asserting that "[i]n light of this evidence, the [c]ourt believes that there is a reasonable fit between the ends and the means of the sponsorship ban."[124]

IV. APPLICATION OF THE *CENTRAL HUDSON* TEST TO THE TOBACCO CONTROL ACT

As a threshold matter, the Tobacco Control Act was seemingly drafted in anticipation of First Amendment challenges to its provisions restricting tobacco advertisements. For instance, the Act seemingly addresses the *Central Hudson* considerations by providing that:

> (31) The regulations . . . will directly and materially advance the Federal Government's substantial interest in reducing the number of children and adolescents who use cigarettes and smokeless tobacco and in preventing the life-threatening health consequences associated with tobacco use . . . . Less restrictive and less comprehensive approaches have not and will not be effective in reducing the problems addressed by such regulations . . . .
>
> (32) The regulations . . . impose no more extensive restrictions on communication by tobacco manufacturers and sellers than are necessary to reduce the number of children and adolescents who use cigarettes and smokeless tobacco and to prevent the life-threatening health consequences associated with tobacco use. Such regulations are narrowly tailored to restrict those advertising and promotional practices which are most likely to be seen or heard by youth and most likely to entice them into tobacco use, while affording tobacco manufacturers and sellers ample opportunity to convey information about their products to adult consumers.[125]

Although the framers of the Tobacco Control Act seemingly packed a *Central Hudson* analysis into its provisions, this part will expressly apply the four-prong test espoused in the preceding section to the Act in an attempt to determine the likely outcome of a potential constitutional

123. *Id.* at 526–27.

124. *Id.* at 527.

125. Family Smoking Prevention and Tobacco Control Act of 2009, Pub. L. No. 111-31, § 2(31)–(32), 123 Stat. 1776, 1779 (2009).

challenge.

A. Lawful Activity and Substantial Government Interest [Prongs One and Two]

As was the case in *Lorillard*, and many cases that preceded it, the Tobacco Control Act can easily satisfy the first two prongs of the *Central Hudson* analysis. Namely, under the first prong, the inquiry is merely whether the speech concerns lawful activity and is not misleading.[126] If the answer is no, the speech is not protected and may be regulated without violating the First Amendment because "there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity."[127] Conversely, if the answer is yes, prong two of the test dictates that the speech may be constitutionally regulated only if the government has a substantial interest in regulating the speech.[128] In this instance, the speech restricted by the Tobacco Control Act is entitled to First Amendment protection because it concerns lawful activity and is not misleading, thereby satisfying prong one; and second, the importance of the government's interest in preventing use of tobacco-related products by minors is irrefutable, thereby satisfying prong two. As the legislative findings substantiate, there is a palpable interest in preventing adolescent use of tobacco products, especially in light of the staggering statistical data regarding such use.[129] In fact, every day more than 3500 adolescents try a cigarette for the first time and another 1000 become new daily smokers, with one-third of these youth eventually dying prematurely as a result.[130] As in other instances, "the Supreme Court has steadfastly upheld restrictions on the First Amendment rights of children" aimed at their protection.[131]

126. *See* Cent. Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 563 (1980).

127. *Id.*

128. *Id.* at 564.

129. § 2(14).

130. *Family Smoking Prevention and Tobacco Control Act Is Necessary Federal Legislation*, NATIONAL NEWS (April 29, 2009), http://notobacco.wordpress.com/2009/04/29/family-smoking-prevention-and-tobacco-control-act-is-necessary-federal-legislation/.

131. Leonard J. Nannarone, *Move over Joe Camel: Governmental Attempts to Ban Tobacco Advertising*, 45 R.I. BUS. J. 11, 12 (1997).

B. Determining Whether the Act Directly Advances the Governmental Interest While Using the Most Restrictive Means [Prongs Three and Four]

As with a great deal of case law discussing commercial speech, the third and forth prongs of the *Central Hudson* test are extremely fact-sensitive and must be examined cautiously and oftentimes in conjunction with one another. As a threshold matter, the Supreme Court has reiterated "in applying the third prong . . . courts should consider whether the regulation, in its general application, directly advances the governmental interest asserted."[132] Indeed, as Justice O'Connor reminded in *Lorillard*, "mere speculation or conjecture" is insufficient, rather the government must "demonstrate that the harms it recites are real."[133] With respect to the fourth prong of the *Central Hudson* analysis, the government must demonstrate that the proposed restrictions on advertising would have an impact on adolescent smoking, and that the proposed restrictions are sufficiently tailored to preclude unnecessary intrusions on expressive freedom. To be sure, although the fourth prong does not explicitly require the government to adopt the precise method that advances regulatory objectives while simultaneously imposing the fewest speech restrictions, the means chosen must nonetheless be "narrowly tailored."[134]

C. Analysis and Proposed Amendment

In the legislative findings incorporated in the Tobacco Control Act, Congress has illustrated that there is not only a substantial government interest at stake but—statistically speaking—tobacco-related promotional efforts do in fact coincide with increases in adolescent tobacco use.[135] As a result of these findings, it seems likely that the restrictions in the Act would directly advance the governmental interest in curbing adolescent tobacco use, thus satisfying the third

132. COHEN, *supra* note 86, at 7 (citing United States v. Edge Broad., 509 U.S. 418, 427 (1993)).

133. *Id.* at 8 (quoting Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 188 (1999)).

134. Bd. Of Trs. v. Fox, 192 U.S. 469, 477–78 (1989).

135. Family Smoking Prevention and Tobacco Control Act of 2009, Pub. L. No. 111-31, § 2(5), (15), 123 Stat. 1776, 1777–78 (2009).

prong of *Central Hudson*.

These restrictions, however, are simply too broad to satisfy the fourth prong of the *Central Hudson* test.[136] To be sure, although there is a substantial government interest at stake, the provisions espoused in the Tobacco Control Act, restricting the means by which tobacco sponsors may advertise at sports and entertainment events are not sufficiently tailored to achieve the Act's purpose. As the Court in *Lorillard* warned:

> The State's interest in preventing underage tobacco use is substantial, and even compelling, but it is no less true that the sale and use of tobacco products by adults is a legal activity. We must consider that tobacco retailers and manufacturers have an interest in conveying truthful information about tobacco products. . . . As the State protects children from tobacco advertisements, tobacco manufacturers and retailers and their adult consumers still have a protected interest in communication.[137]

Similarly, Representative Stephen Buyer's argument during the enactment of the Tobacco Control Act is illustrative in this instance. There, he opined, "[c]hildren deserve to be protected from inappropriate or harmful material, but the government may not use the guise of protecting children to impose sweeping restrictions on information intended for adults."[138] One cannot simply call the Tobacco Control Act constitutionally sound merely because there is a tangible interest in protecting children from tobacco-related products. As the Court reminded in *Butler v. Michigan*, the government may not "reduce the adult population . . . to reading only what was fit for children."[139]

136. *See, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 561 (2001). Similarly, the fourth prong cannot be satisfied because the means implemented by Congress under this Act failed to exhaust other means to curb adolescent tobacco use. As discussed above, the 111th Congress's primary goal in promulgating the Tobacco Control Act was to reduce the sale and use of tobacco by specifically focusing on the sale of tobacco products to adolescents under eighteen. To achieve that end, however, rather than imposing a tax or sales restrictions on the retailing of tobacco products, the government has specifically attacked speech-related activities. The Supreme Court, however, has clarified that the Constitution requires that such restrictions on truthful-speech be implemented solely as a last resort. *See* Thompson v. W. States Med. Ctr., 535 U.S. 357, 373 (2002).

137. *Lorillard Tobacco Co.,* 533 U.S. at 564.

138. 155 CONG. REC. H6630 (daily ed. June 12, 2009) (statement of Rep. Buyer), 155 Cong. Rec. H 6630, at *6657 (LEXIS).

139. 352 U.S. 380, 383 (1957). *Accord* Bolger v. Youngs Drug Prod. Corp., 463 U.S. 60, 74 (1983) ("The level of discourse reaching a mailbox simply cannot be limited to

A review of the case law developed in the preceding part reveals that the Supreme Court has consistently struck down restrictions on speech that were significantly more limited in scope than the Tobacco Control Act. For instance, in *Rubin v. Coors Brewing Co.*, the Supreme Court invalidated a prohibition against listing alcohol content on beer labels, even though beer manufacturers were permitted to convey the same information to consumers via other channels.[140] Similarly, in *City of Cincinnati v. Discovery Network, Inc.*, the Supreme Court struck down restrictions on placing commercial handbills in news racks on city streets, even though publishers had numerous other means of distributing their handbills.[141] Lastly, in *Bolger v. Young Drug Products Corp.*, the Supreme Court struck down a ban on direct-mail advertising of contraceptives, even though manufacturers still had numerous other methods available to advertise their products.[142] In conjunction with the *Lorillard* decision, the case law cited above supports the proposition that the sweeping speech-related prohibitions espoused in the Tobacco Control Act simply cannot be deemed constitutional in light of Congress's failure to demonstrate that these restrictions are the least restrictive means of decreasing adolescent tobacco use. Indeed, as one commentator has noted, "a widespread ban [cannot] be justified on the grounds that it is designed to insulate minors from tobacco advertising."[143]

Simply put, the speech restrictions contained in the Tobacco Control Act prohibiting the use of any tobacco brand names at any cultural, sporting, charitable or other event are too expansive, and can be seen as nothing more than an attempt by Congress to "burn the house to roast the pig."[144] In order to be constitutionally sound, Congress should tailor the speech restrictions to those events that have a particular appeal to children. To be sure, the Tobacco Control Act as it stands today would ban tobacco advertisements and sponsorships from activities ranging from the opera to beach volleyball. Certainly, Congress cannot argue that an absolute ban on tobacco advertisements at these events is

that which would be suitable for a sandbox.").

140. 514 U.S. 476 (1995).

141. 507 U.S. 410 (1993).

142. 463 U.S. 60.

143. Redish, *supra* note 75, at 593.

144. *Butler*, 352 U.S. at 383.

constitutionally feasible because of the fact that children *may* attend these events.[145]

A more narrowly tailored approach to restricting tobacco advertisements would be to ban the posting of such advertisements in the camera's view at sports and entertainment events aired on television, thus decreasing children's exposure. Not surprisingly, statistical data illustrates that a greater percentage of the population watches sporting events on television as opposed to attending the actual events.[146] Indeed, in 2009, the Los Angeles Dodgers reported the highest total MLB attendance for the season with 3,761,669 fans attending its games—all season.[147] Compare that with the 106,500,000 viewers that reportedly watched the Super Bowl on their television this year.[148] The government, in this instance, is undoubtedly implementing a restriction that is unduly prejudicial to the adult attendees and the sports and entertainment sponsors if—statistically speaking—the number of adult attendees far exceeds that of attendees under the age of eighteen. Clearly, a restriction on the tobacco advertisements aired on television would more appropriately address Congress's concern with adolescent exposure to tobacco-related advertisements at these events.

Notably, the Tobacco Control Act seeks to prevent tobacco-related advertisements at the following sporting events: football, baseball, basketball, soccer, and hockey,[149] which represent the five sports most watched by teens on television. To be sure: approximately twenty-one percent of teens between the ages of twelve and eighteen reported watching football at least one time per month; approximately seventeen percent of teens reported watching basketball at least one time per month; approximately fifteen percent of teens

145. Although Congress attempted to address concerns of the speech-restrictions expansive reach by positing that even a single exposure by a child to tobacco-related advertising is effective in promoting tobacco-use, the Act fails to provide statistical data in support of this proposition.

146. 2009 MRI (Mediamark Research & Intelligence) Teenmark; Weighted by Population; Copyright © 2009, MRI All Rights Reserved [hereinafter Athletics Viewership] (on file with author).

147. *MLB 2009 Attendance Report*, ESPN, http://espn.go.com/mlb/attendance/_/year/2009 (last visited Mar. 31, 2011)

148. Paul Kennedy, *Good and Bad News for Soccer*, SOCCER AM. DAILY (Nov. 24, 2010), http://www.socceramerica.com/article/40537/good-and-bad-news-for-soccer.html.

149. *See* Family Smoking Prevention and Tobacco Control Act of 2009, Pub. L. No. 111-31, § 102, 123 Stat. 1776, 1830–33 (2009).

reported watching baseball at least one time per month; approximately seven percent of teens reported watching soccer at least one time per month; and approximately five percent of teens reported watching ice hockey at least one time per month.[150] As a result of these findings, to achieve the government's goal of reducing the amount of youth smokers while curing this constitutional infirmity, Congress should amend the Tobacco Control Act to provide that only sports watched by more than ten percent of teens at least once per month should not have any tobacco-related advertisements visible during the entirety of the sporting event. To be sure, a review of the statistics above demonstrates that the sports that are watched by more than ten percent of teens at least once a month are football, baseball, and basketball. As such, any tobacco-related advertisements allowed at sports' stadiums or events should be out of the camera's view so that the children are not exposed to these advertisements while watching their favorite pastimes. Notably, this was the Justice Department's goal in 1995 when they filed a federal suit against Philip Morris "charg[ing] that the premium placement of Marlboro signs [in camera view] was designed to circumvent a twenty-four-year-old ban on television cigarette advertising."[151] Consequently, "department officials said they hoped [they would reach an] agreement [that] would prod other tobacco companies into moving their ads out of camera range."[152]

Although the proposal above would still allow tobacco-related advertisements to be posted in appropriate areas at sporting events, Congress should maintain an absolute ban on advertisements at other activities commonly attended by children. For example, Congress should maintain an absolute ban on tobacco-related advertisements at activities geared toward adolescent attendance such as zoos and arcades. An ancillary issue that narrower future legislation needs to address should be the idea that children who idolize athletes and performers should not be able to see these tobacco images associated with such role models.

Utilizing a more systematic approach to regulating tobacco advertisements aimed toward an actual adolescent

150. Athletics Viewership, *supra* note 146.
151. Sandomir, *supra* note 62.
152. *Id.*

attendance would help alleviate the potentially prejudicial effects adult attendees and sports and entertainment sponsors suffer while simultaneously effectuating the government's interest in protecting the youth from an onslaught of tobacco advertisements at sports and entertainment events.

CONCLUSION

Although the Tobacco Control Act expressly states that it will only develop regulations to the extent permitted by the First Amendment,[153] the likelihood of a constitutional challenge to the Act, on the ground that it violates commercial speech rights, is palpable.[154] As is the case with a great deal of anti-tobacco legislation that preceded the Tobacco Control Act, it is essential to keep in mind that while the goal of curbing adolescent tobacco use is certainly a noble endeavor, the constitutional protections afforded to citizens of the United States remain paramount. The recently enacted Tobacco Control Act purports to reduce adolescent's access to tobacco products and to diminish the appeal of these products to the youth;[155] however, the Act provides a blanket ban on not only the distribution of tobacco products at all sports and entertainment events but explicitly bars tobacco manufacturers from promoting their brands through sponsorships of "athletic, musical, artistic, or other social or cultural event[s]."[156]

Importantly, these provisions regulating sports and

153. *See* Family Smoking Prevention and Tobacco Control Act of 2009, Pub. L. No. 111-31, § 2(30)–(32), 123 Stat. 1776, 1778–79 (2009); *see also* David Waldman, *Family Smoking Prevention and Tobacco Control Act: Daily Whip Line*, CONGRESS MATTERS (June 12, 2009, 8:00 AM), http://www.congressmatters.com/storyonly/2009/6/12/1114/-Family-Smoking-Prevention-and-Tobacco-Control-Act ("FDA would have authority to develop regulations that restrict the advertising and promotion of a tobacco product consistent with, and to the full extent permitted by, the [F]irst [A]mendment to the Constitution.").

154. *See, e.g.*, Wilson, *supra* note 10 ("The Association of National Advertisers says the act's 'unprecedentedly broad advertising restrictions' violate First Amendment protections for commercial speech. Legal experts say a court challenge on that ground is virtually certain."); TOBACCO CONTROL LEGAL CONSORTIUM, *supra* note 7, at 2 ("[T]he judicial system will almost certainly be asked to adjudicate whether any of the legislated advertising restrictions unconstitutionally interferes with free speech under the First Amendment.").

155. Press Release, *supra* note 21.

156. 21 C.F.R. § 1140.34(c) (2010).

entertainment advertisements are considered regulations of "commercial speech." To be sure, the United States Supreme Court has repeatedly accepted that such speech falls within the ambit of the First Amendment.[157] Realizing the importance of commercial speech protections, in *Central Hudson*, the Supreme Court espoused a four-prong analysis under which courts can examine whether a specific regulation of commercial speech is an unconstitutional encroachment on the First Amendment.[158] Under this analytical framework, the court must first determine whether the expression at issue concerns lawful activity that is not deceptive or misleading.[159] Namely, under this prong if the communication does not accurately inform the public about lawful activity it may be suppressed.[160] Second, the Court must ask whether the interest of the government in regulating and limiting the expression is substantial.[161] Third, the Court must determine whether the regulation proposed by the government directly advances the governmental interest.[162] Lastly, the Court must examine whether a more limited restriction on commercial speech could serve the governmental interest.[163]

In applying the *Central Hudson* test to the Tobacco Control Act, it is immediately evident that the first two prongs can be satisfied. Indeed, the speech sought to be regulated under the Act is lawful and not misleading and there is certainly a substantial governmental interest at stake in curbing adolescent's access to and use of tobacco products. Similarly, the third prong of the *Central Hudson* analysis can be satisfied because, as the legislative findings to the Act illustrate, there is a strong correlation between the advertising and promotional efforts of tobacco products and adolescent tobacco use.[164] Lastly, however, because the Tobacco Control Act provides for a blanket ban on tobacco-

157. *See infra*, Part III.

158. Cent. Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

159. *Id.* at 563

160. *Id.*

161. *Id.* at 564

162. *Id.*

163. *Id.*

164. Family Smoking Prevention and Tobacco Control Act of 2009, Pub. L. No. 111-31, § 2(14), 123 Stat. 1776, 1777 (2009).

related advertisements at a plethora of sports and entertainment events, the government would not be able to demonstrate that its interest could not be served just as well by a having more limited restrictions on commercial speech.

To cure this constitutional infirmity, the Tobacco Control Act should ban only those tobacco-related advertisements that television viewers of sports and entertainment events can see. Undeniably, more people—especially adolescents—are watching sports on television than attending actual sporting events. Consequently, if the true aim of the Tobacco Control Act is to curb adolescent tobacco use by restricting the advertisements they are exposed to, a ban on advertisements outside of the purview of the camera would serve as the least restrictive means of effectuating the government's interest. Simply put, because the speech restrictions contained in the Tobacco Control Act are too expansive, Congress should tailor them to ensure that the government's interest in reducing child tobacco use is directly advanced while simultaneously maintaining the rights of adult viewers and tobacco sponsors.