

## WHEN LIGHTNING STRIKES TWICE: E-CIGARETTES' USE OF TRADITIONAL CIGARETTE MARKETING PRACTICES

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### I. Introduction

In 2018, the National Youth Tobacco Survey reported more than three million youths, individuals under the age of eighteen, actively used electronic cigarettes (“e-cigarettes”).<sup>1</sup> By 2019, that number was greater than five million.<sup>2</sup> More than 10 percent of middle school students and 27 percent of high school students actively used e-cigarettes.<sup>3</sup> Curiosity was the most common cited reasons for active use

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<sup>1</sup> Andrea S. Gentzke et al., Vital Signs: Tobacco Product Use Among Middle and High School Students — United States, 2011–2018, 68 MORBIDITY & MORTALITY WKLY. REP. 157, 157 (2019) (reporting e-cigarettes to be the most commonly cited tobacco product currently used by 20.8 percent of high school students and approximately 5 percent of middle school students.), available at <https://www.cdc.gov/mmwr/volumes/68/wr/pdfs/mm6806e1-H.pdf>; *Vaporizers, E-Cigarettes, and other Electronic Nicotine Delivery Systems (ENDS)*, U.S. FDA, <https://www.fda.gov/tobacco-products/products-ingredients-components/vaporizers-e-cigarettes-and-other-electronic-nicotine-delivery-systems-ends> (last updated Sep. 17, 2020) [hereinafter “*Vaporizers, E-Cigarettes, and other ENDS*”] (many terms have been used to describe e-cigarettes, including vaporizers and hookah pens. The U.S. Food & Drug Agency (“FDA”) has collectively referred to e-cigarettes and its’ alternative terms as electronic nicotine delivery systems (ENDS).)

<sup>2</sup> Teresa W. Wang, Tobacco Product Use and Associated Factors Among Middle and High School Students — United States, 2019, 68 MORBIDITY & MORTALITY WKLY. REP. 1, 1, (2019) [hereinafter “Wang, Tobacco Product Use 2019”], available at <https://www.cdc.gov/mmwr/volumes/68/ss/pdfs/ss6812a1-H.pdf> (“E-cigarettes were the most commonly cited tobacco product currently used by 27.5 [percent] of high school students (4.1 million) and 10.5 [percent] of middle school students (1.2 million)[.]”); *but see* -Teresa W. Wang et al., E-cigarette Use Among Middle and High School Students — United States, 2020, 69 MORBIDITY & MORTALITY WKLY. REP. 1310, 1310 (2020), available at <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6937e1-H.pdf> (“In 2020, 19.6 [percent] of high school students (3.02 million) and 4.7 [percent] of middle school students (550,000) reported current e-cigarette use.”); *Get the Latest Facts on Teen Tobacco Use*, U.S. FDA, <https://www.fda.gov/tobacco-products/youth-and-tobacco/get-latest-facts-teen-tobacco-use> (last updated Jan. 13, 2021) (noting although the number of youths smoking e-cigarettes has decreased by 1.8 million in 2020, an alarming number of youths, 3.58 million or “20 percent of high school students and 5 percent of middle school students,” are still actively smoking e-cigarettes.).

<sup>3</sup> Wang, Tobacco Product Use 2019, *supra* note 2, at 1.

by both middle and high school students, with nearly 70 percent reporting exposure to e-cigarette marketing.<sup>4</sup> Of the five million documented youths, nearly one million reported “smoking” e-cigarettes daily and more than one million reported “smoking” e-cigarettes frequently.<sup>5</sup> The increase of youths using e-cigarettes came despite federal and state efforts to limit e-cigarette use, ongoing e-cigarette-related lung injuries, and risks for inhibited brain development and future tobacco use.<sup>6</sup>

In May 2016, the U.S. Food and Drug Administration (“FDA”) issued the “Deeming Rule,” which extended the FDA’s authorities to include e-cigarettes.<sup>7</sup> Prior to the issuance of the Deeming Rule, the FDA had no

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<sup>4</sup> Wang, Tobacco Product Use 2019, *supra* note 2, at 6-7.

<sup>5</sup> Wang, Tobacco Product Use 2019, *supra* note 2, at 5; Sean McMinn, *More Teens Than Ever Are Vaping. Here’s What We Know About Their Habits*, NPR (Nov. 6, 2019, 3:52 PM), <https://www.npr.org/sections/health-shots/2019/11/06/776397270/more-teens-than-ever-are-vaping-heres-what-we-know-about-their-habits>. Please note e-cigarettes are not technically “smoked” but are instead “vaped.” For the purposes of this comment, however, in comparing the marketing of e-cigarettes with the marketing of traditional cigarettes and its’ effects on youths in relation to the inhalation of nicotine, the term smoking will be used rather than vaping in order to illustrate their similarities rather than their differences. Benjamin Caleb Williams, *Are Vaping and Juuling the Same Thing?*, THE RECOVERY VILLAGE, <https://www.therecoveryvillage.com/teen-addiction/faq/are-vaping-and-juuling-the-same/> (last updated Nov. 6, 2020) (noting “[t]raditional cigarettes involve a nicotine-containing substance being burned and the smoke from that substance being inhaled into the lungs” whereas e-cigarettes involve a nicotine-containing substance being heated and the vapor from that substance being inhaled into the lungs.).

<sup>6</sup> Jody L. Sindelar, *Regulating Vaping – Policies, Possibilities, and Perils*, 382 NEW ENG. J. MED. e54 (2020), available at <https://www.nejm.org/doi/10.1056/NEJMp1917065> (noting state and federal policies have generally focused on minimum sales age laws and bans on flavored e-cigarettes.); *Quick Facts on the Risks of E-cigarettes for Kids, Teens, and Young Adults*, U.S. CDC, [https://www.cdc.gov/tobacco/basic\\_information/e-cigarettes/Quick-Facts-on-the-Risks-of-E-cigarettes-for-Kids-Teens-and-Young-Adults.html](https://www.cdc.gov/tobacco/basic_information/e-cigarettes/Quick-Facts-on-the-Risks-of-E-cigarettes-for-Kids-Teens-and-Young-Adults.html) (last updated Dec. 16, 2020) [hereinafter “*Quick Facts on the Risks of E-cigarettes*”] (noting most e-cigarettes contain nicotine, which “is highly addictive and can harm adolescent brain development[.]”); *Don’t Just Switch, Quit Tobacco For Good*, AMERICAN LUNG ASSOCIATION, <https://www.lung.org/quit-smoking/e-cigarettes-vaping/quit-dont-switch> (last updated Jul. 13, 2020) (“The fact is, e-cigarettes are tobacco products too” and “still produce a number of dangerous chemicals[.]” [which] “can cause irreversible lung damage, lung diseases—and even death.”); *Outbreak of Lung Injury Associated with the Use of E-Cigarette, or Vaping, Products*, U.S. CDC, [https://www.cdc.gov/tobacco/basic\\_information/e-cigarettes/severe-lung-disease.html](https://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html) (last updated Feb. 25, 2020) (“As of February 18, 2020, a total of 2,807 hospitalized [e-cigarette, or vaping, product use-associated lung injury] cases or deaths have been reported to CDC from all 50 states, the District of Columbia, and two U.S. territories . . . [s]ixty-eight deaths have been confirmed[.]”).

<sup>7</sup> OFFICE OF THE SURGEON GEN., US. DEPT. OF HEALTH AND HUM. SERVICES, *E-CIGARETTE USE AMONG YOUTH AND YOUNG ADULTS: A REPORT OF THE SURGEON GENERAL 17* (2016) [hereinafter “*E-CIGARETTE USE AMONG YOUTH AND YOUNG*”]

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authority to regulate the sale or marketing of e-cigarettes.<sup>8</sup> Although the Deeming Rule immediately restricted the sale of e-cigarettes to minors, the FDA deferred the enforcement of other provisions, such as the requirement for e-cigarette packaging and advertisement to include a nicotine warning, until 2018.<sup>9</sup> In 2018, in response to increasing regulatory pressures, e-cigarette manufacturers reduced the sale and marketing of e-cigarettes to youths.<sup>10</sup> Thus, prior to 2018, e-cigarette

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ADULTS”], available at [https://e-cigarettes.surgeongeneral.gov/documents/2016\\_SGR\\_Full\\_Report\\_non-508.pdf](https://e-cigarettes.surgeongeneral.gov/documents/2016_SGR_Full_Report_non-508.pdf).

<sup>8</sup> See *generally* Soterra, Inc. v. FDA, 627 F.3d 891, 898 (D.C. Cir. 2010) (“[T]he FDA cannot regulate customarily marketed tobacco products under the FDCA’s drug/device provisions[.]”).

<sup>9</sup> The Federal Response to the Epidemic of E-Cigarette Use, Especially Among Children, And the Food and Drug Administration’s Compliance Policy: Congressional Testimony Before the House Comm. on Oversight and Reform, Subcomm. On Economic and Consumer Policy (Dec. 4, 2019) (Statement of Mitch Zeller) [hereinafter “The Federal Response to the Epidemic of E-Cigarette Use”], available at <https://www.fda.gov/news-events/congressional-testimony/federal-response-epidemic-e-cigarette-use-especially-among-children-and-food-and-drug> (“To provide time for industry to come into compliance with some of the new regulatory requirements triggered by the final [D]eeming [R]ule, FDA announced an enforcement policy with staggered timeframes.”); *Vaporizers, E-Cigarettes, and other ENDS, supra* note 1 (“Beginning in 2018, all ‘covered’ tobacco products[] must bear the required nicotine addictiveness warning statement on product packages and advertisements.”).

<sup>10</sup> See, e.g., Press Release, FDA, Statement from FDA Commissioner Scott Gottlieb, M.D., on New Enforcement Actions and a Youth Tobacco Prevention Plan to Stop Youth Use of, and Access to, JUUL and Other E-cigarettes (April 24, 2018), <https://www.fda.gov/news-events/press-announcements/statement-fda-commissioner-scott-gottlieb-md-new-enforcement-actions-and-youth-tobacco-prevention> (announcing “several new actions and efforts . . . focused on stopping youth use of tobacco products, and in particular, e-cigarettes.”); Press Release, FDA, FDA Takes New Steps to Address Epidemic of Youth E-cigarette Use, Including a Historic Action Against More Than 1,300 Retailers and 5 Major Manufacturers for their Roles Perpetuating Youth Access (Sep. 12, 2018), <https://www.fda.gov/news-events/press-announcements/fda-takes-new-steps-address-epidemic-youth-e-cigarette-use-including-historic-action-against-more> (announcing “the FDA has taken a series of actions over the past several months to more immediately target the illegal sales of e-cigarettes to youth, as well as the kid-friendly marketing and appeal of these products. The FDA is stepping up those efforts indefinitely.”); Press Release, FDA, Statement from FDA Commissioner Scott Gottlieb, M.D., on Proposed New Steps to Protect Youth by Preventing Access to Flavored Tobacco Products and Banning Menthol in Cigarettes (Nov. 15, 2018), <https://www.fda.gov/news-events/press-announcements/statement-fda-commissioner-scott-gottlieb-md-proposed-new-steps-protect-youth-preventing-access> (announcing “[t]he FDA will pursue the removal from the market of those ENDS products that are marketed to children and/or appealing to youth.”); Terry Turner, *How JUUL Created A Teen Vaping Epidemic: Juul Models Aged Overnight, But FDA Called Juul’s ‘Switch’ Ads Illegal*, DRUGWATCH, <https://www.drugwatch.com/featured/juul-created-teen-vaping-epidemic/> (last updated Mar. 8, 2021) [hereinafter “Turner, *Juul Models Aged Overnight*”] (“By the summer of 2018, as regulatory pressure to stem the tide of teen vaping mounted, there was a tectonic shift in Juul’s marketing.”); Angelica LaVito, *Reynolds Tobacco Debuts E-cigarette Commercial, Tightens Online Vape Sales to Combat*

manufacturers were able to exploit the loose regulations on e-cigarette marketing to target youths and increase the appeal of tobacco and nicotine products to young people.<sup>11</sup>

Today, the number of e-cigarette lawsuits is rapidly increasing.<sup>12</sup> Many of these ever increasing lawsuits have been against JUUL e-cigarettes, alleging JUUL broke state false advertising laws prohibiting companies from making false, misleading, or deceptive statements.<sup>13</sup> Parents of teenagers have primarily brought these cases, arguing that JUUL marketed its products to attract youths by using flavors and social media to appeal to young people.<sup>14</sup> Worse, JUUL then failed to warn the youths their products were more potent and addictive than traditional cigarettes, rendering youths unaware that JUUL products contained high levels of nicotine.<sup>15</sup>

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*Teen Use*, CNBC (last updated Mar. 4, 2019), <https://www.cnbc.com/2019/03/04/reynolds-tobacco-debuts-e-cigarette-commercial-tightens-online-sales.html> (“Reynolds American tobacco is tightening restrictions to buy its Vuse e-cigarettes online and running a national ad campaign to try to position itself as a leader in combating underage use amid a federal crackdown on teen vaping.”).

<sup>11</sup> Mark A. Gottlieb, *Regulation of E-Cigarettes in the United States and Its Role in a Youth Epidemic*, 6 PUB. HEALTH ADVOC. INST. NE. U. SCH. L. 1, 1 (2019) [hereinafter “Gottlieb, *Regulation of E-Cigarettes*”], available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6463025/>; Jamie Ducharme, *JUUL Once Looked Too Big to Fail. Lawsuits and Federal Regulations Are Changing That*, TIME (Nov. 6, 2019), <https://time.com/5713970/juul-lawsuits-regulations-bans/> [hereinafter “Ducharme, *JUUL Once Looked Too Big to Fail*”]; see also Harold J. Farber & Kevin E. Nelson, *Public Policy to Protect Children From Tobacco, Nicotine, and Tobacco Smoke*, 136 AM. ACAD. PEDIATRICS 998, 1002 (2015) [hereinafter “Farber, *Public Policy*”], available at <https://pediatrics.aappublications.org/content/136/5/998> (noting the need for federal legislation.).

<sup>12</sup> Terry Turner, *E-Cigarette Lawsuits*, DRUGWATCH: JUUL AND E-CIGARETTES, <https://www.drugwatch.com/e-cigarettes/lawsuits/> (last updated Mar. 30, 2021) [hereinafter “Turner, *E-Cigarette Lawsuits*”].

<sup>13</sup> Catherine Ho, *Mounting Lawsuits Against Juul Reminiscent of Early Tobacco Litigation*, S.F. CHRON. (last updated Apr. 22, 2019) [hereinafter “Ho, *Mounting Lawsuits*”], <https://www.sfchronicle.com/business/article/Mounting-lawsuits-against-JUUL-reminiscent-of-13783089.php>; but see, e.g., Turner, *E-Cigarette Lawsuits*, *supra* note 12 (at least one wrongful death suit has been filed against JUUL.).

<sup>14</sup> Turner, *E-Cigarette Lawsuits*, *supra* note 12; Ho, *Mounting Lawsuits*, *supra* note 13.

<sup>15</sup> *Here’s Why Juul Is More Addictive Than Other E-Cigarettes*, HARTFORD HEALTHCARE (Nov. 15, 2018), <https://hartfordhealthcare.org/services/cancer-care/news/news-detail?articleId=17562> (“The nicotine aerosolized in e-liquid ‘pods’ is highly addictive, especially for the developing brains of adolescents, with Juul having twice the nicotine content of the average e-cig. The more nicotine, the more potent and the quicker someone will become addicted.”); see also Mateusz Jankowski et al., *E-Cigarettes are More Addictive than Traditional Cigarettes—A Study in Highly Educated Young People*, 16 INT’L J. ENVTL. RESEARCH & PUB. HEALTH 2279, \*1 (2019), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6651627/> (suggesting “e-cigarettes may have a higher addictive potential than smoked cigarettes among young adults.”).

This comment will address the long and well-documented history of traditional cigarette marketing practices aimed at enticing youths. It will then compare the similarities between banned and illegal traditional cigarette marketing practices and the marketing practices of e-cigarette manufacturers prior to official federal regulation.

Part II of this comment will focus on the government's interest in restricting the marketing of tobacco and nicotine products targeting youths. Part III will focus on the history of traditional cigarette regulation, explaining why certain suits may be pre-empted by federal law against e-cigarette manufactures. Part IV will focus on the rise of e-cigarettes, including previous and current e-cigarette government regulations. Part V will focus on the various suits that may still be available for the parents of youths targeted by the marketing of e-cigarette manufactures. Finally, Part VI will specifically focus on the marketing of JUUL e-cigarettes, which may have directed its marketing at youths and may have caused early-stage addiction with the intent to keep youths hooked on their products as adults. Although this Comment proposes that all of these e-cigarette manufacturers have participated in similar practices, it will largely focus on the marketing practices of JUUL specifically in relation to the emerging trend of suits against it.<sup>16</sup>

## II. Government Interest in Restricting Marketing Aimed at Young People

There is little debate as to whether the government has sufficient authority to issue regulations regarding tobacco and nicotine products.<sup>17</sup> Among consumer products, tobacco and nicotine products

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<sup>16</sup> See Regine Haardörfer et. al, *The Advertising Strategies of Early E-cigarette Brand Leaders in the United States*, 3 TOBACCO REGULATORY SCI. GRP. 222-31, \*5 (2017) [hereinafter "Haardörfer, *Advertising Strategies of Early E-cigarette Brand Leaders*"], available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5789794/> (comparing e-cigarette marketing strategies of Njoy, Blu, Vuse, and MarkTen, several of which appeal to youths and young adults.); see also Jennifer Maloney, *Reynolds American Gains on Juul by Marketing Vaping as Cool Again*, TWSJ (Aug. 17, 2020, 2:13 PM) [hereinafter "Maloney, *Reynolds American Gains on Juul*"], <https://www.wsj.com/articles/reynolds-american-gains-on-juul-by-marketing-vaping-as-cool-again-11597688033> ("Unit sales of Reynolds' Vuse e-cigarettes are surging, fueled by price promotions, TV spots, billboards and social-media posts. The brand is hiring musicians and artists for videos[,] . . . using models as young as 25[,] and is marketing on social media with music and images aimed at younger adults—practices that Juul stopped two years ago after being accused by critics of targeting teens.").

<sup>17</sup> See generally OFFICE OF THE SURGEON GEN., US. DEPT. OF HEALTH AND HUM. SERVICES, *THE HEALTH CONSEQUENCES OF SMOKING – 50 YEARS OF PROGRESS: A REPORT OF THE SURGEON GENERAL* 33 (2014) [hereinafter "THE HEALTH CONSEQUENCES OF SMOKING"], available at

are unique.<sup>18</sup> They are the only consumer products that cause “disease and premature death when used exactly as intended.”<sup>19</sup> Although the long-term effects of using e-cigarettes are not well-documented due to e-cigarettes recency to the market, the effect of nicotine is.<sup>20</sup> Nicotine “has been around long enough to be known as toxic and has been linked to tumor growth, increase in blood pressure and cardiovascular disease, and a deleterious effect on brain development.”<sup>21</sup> In 1988, the United States Surgeon General compared the addictiveness of nicotine to that of cocaine and heroin.<sup>22</sup> Although an argument may be made that e-cigarettes are still a healthier alternative to traditional cigarettes, there is no question that e-cigarettes are still addictive and dangerous nicotine products.<sup>23</sup>

Precedent establishes that the government has an obligation to create regulations that restrict the access to, and the promotion of,

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[https://www.ncbi.nlm.nih.gov/books/NBK179276/pdf/Bookshelf\\_NBK179276.pdf](https://www.ncbi.nlm.nih.gov/books/NBK179276/pdf/Bookshelf_NBK179276.pdf); see, e.g., Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44396 (August 28, 1996) [hereinafter “Final Rule”].

<sup>18</sup> See generally Final Rule, *supra* note 17, at 44403.

<sup>19</sup> Farber, *Public Policy*, *supra* note 11, at 999.

<sup>20</sup> Chad M. Zimlich, *What Is A Cigarette? Electronic Cigarettes and the Tobacco Master Settlement Agreement*, 50 WAKE FOREST L. REV. 483, 497 (2015) [hereinafter “Zimlich, *What Is A Cigarette?*”]; see generally THE HEALTH CONSEQUENCES OF SMOKING, *supra* note 17, at 30-31, 107-138 (providing an in-depth review of the health consequences of nicotine.).

<sup>21</sup> Zimlich, *What Is A Cigarette?*, *supra* note 20, at 497.

<sup>22</sup> THE HEALTH CONSEQUENCES OF SMOKING, *supra* note 17, at 30.

<sup>23</sup> Compare Caitlin Notley et al., *The Unique Contribution of E-cigarettes for Tobacco Harm Reduction in Supporting Smoking Relapse Prevention*, 15 HARM REDUCTION J. 1, 1 (2018) [hereinafter “Notley, *The Unique Contribution of E-cigarettes*”], available at <https://harmreductionjournal.biomedcentral.com/articles/10.1186/s12954-018-0237-7> (“Our data demonstrates that e-cigarettes may be a unique harm reduction innovation for smoking relapse prevention. E-cigarettes meet the needs of some ex-smokers by substituting physical, psychological, social, cultural and identity-related aspects of tobacco addiction.”), with Simon Chapman et al., *The Gateway Effect of E-cigarettes: Reflections on Main Criticisms*, 21 NICOTINE & TOBACCO RES. 695, 695 (2018) [hereinafter “Chapman, *The Gateway Effect*”], available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6468127/> (noting concerns of youths using e-cigarettes are strengthened by “studies showing that e-cigarettes can serve as a gateway to later cigarette smoking among nicotine-naive youth.”); see also *Smoking & Tobacco Use: About Electronic Cigarettes (E-Cigarettes)*, U.S. CDC, [https://www.cdc.gov/tobacco/basic\\_information/e-cigarettes/about-e-cigarettes.html](https://www.cdc.gov/tobacco/basic_information/e-cigarettes/about-e-cigarettes.html) (last updated Nov. 16, 2020) [hereinafter “*About Electronic Cigarettes*”] (noting both “[e]-cigarettes have the potential to benefit adults who smoke . . . if used as a complete substitute for regular cigarettes and other smoked tobacco products” and “[m]ost e-cigarettes contain nicotine, which has known health effects[,]” and aerosols that may “contain substances that harm the body.”).

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tobacco and nicotine products to youths.<sup>24</sup> The earlier a youth begins smoking, the greater the ultimate risk of smoking-related disease becomes.<sup>25</sup> Even infrequent use of tobacco or nicotine products can result in symptoms of nicotine dependence.<sup>26</sup> Youths are both mentally and physically more vulnerable than adults to the addictive nature of nicotine and the serious health risks of smoking.<sup>27</sup> Additionally, youths are not fully capable of understanding the serious health risks that may result from active use of tobacco or nicotine products or may not believe that the risks of negative consequences apply to them.<sup>28</sup> These negative consequences can include “addiction, priming for use of other addictive substances, reduced impulse control, deficits in attention and cognition, and mood disorders.”<sup>29</sup>

Youths suffering from addiction “lose their freedom to choose whether or not to use the products as adults.”<sup>30</sup> Data suggests that individuals who do not start smoking as a youth are unlikely to ever begin.<sup>31</sup> Comparatively, nearly 90 percent of nicotine-dependent adults became addicted prior to their eighteenth birthday.<sup>32</sup> “[B]ecause nicotine addiction is a pediatric disease, the choice to start smoking is not being made by adults, but by [youths] who constitute a most vulnerable population.”<sup>33</sup> In 2014, the United States Surgeon General’s Report stated that nearly half a million adults will die prematurely as a result of tobacco and nicotine products.<sup>34</sup> But based on the current trajectory, over five million youths would die prematurely as adults.<sup>35</sup> At that time, nearly 7 percent of middle school students and approximately 23 percent of high school students reported actively used tobacco and nicotine products.<sup>36</sup> By 2019, more than 12 percent

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<sup>24</sup> Final Rule, *supra* note 17, at 44418 (“[A]bundant evidence shows that nicotine is addictive and that children are not equipped to make a mature choice about using tobacco products, . . . children under age 18 must be protected from this addictive substance.”).

<sup>25</sup> See Final Rule, *supra* note 17, at 44399.

<sup>26</sup> Wang, Tobacco Product Use 2019, *supra* note 2, at 8.

<sup>27</sup> E-CIGARETTE USE AMONG YOUTH AND YOUNG ADULTS, *supra* note 7, at vii (finding that compared with grown adults, the brains of youths are “more vulnerable to the negative consequences of nicotine exposure.”); see also Final Rule, *supra* note 17, at 44398.

<sup>28</sup> Final Rule, *supra* note 17, at 44398.

<sup>29</sup> E-CIGARETTE USE AMONG YOUTH AND YOUNG ADULTS, *supra* note 7, at vii.

<sup>30</sup> Final Rule, *supra* note 17, at 44398.

<sup>31</sup> Final Rule, *supra* note 17, at 44399.

<sup>32</sup> Farber, *Public Policy*, *supra* note 11, at 999.

<sup>33</sup> Final Rule, *supra* note 17, at 44418.

<sup>34</sup> THE HEALTH CONSEQUENCES OF SMOKING, *supra* note 17, at 11.

<sup>35</sup> THE HEALTH CONSEQUENCES OF SMOKING, *supra* note 17, at 12.

<sup>36</sup> THE HEALTH CONSEQUENCES OF SMOKING, *supra* note 17, at 742.

of middle school students and 31 percent of high school students actively use tobacco and nicotine products, including e-cigarettes.<sup>37</sup>

Evidence has demonstrated that the most effective way to change the current trajectory is to limit the access to, and attractiveness of, tobacco and nicotine products to youths.<sup>38</sup> Manufacturers, however, are aware of youths well-documented vulnerabilities and have a history of targeting youths for the purpose of exploiting these vulnerabilities.<sup>39</sup> Not only are youths more vulnerable to the negative consequences of nicotine exposure, but they tend to be more impressionable and therefore vulnerable to the sophisticated marketing techniques employed by the smoking industry.<sup>40</sup> In 1994, the U.S. Surgeon General reported, “Cigarette advertising appears to affect [youth’s] perceptions of the pervasiveness, image, and function of smoking. Since misperceptions in these areas constitute psychosocial risk factors for the initiation of smoking, cigarette advertising appears to increase young people’s risk of smoking.”<sup>41</sup> The frequency and normality of tobacco or nicotine product use that youths are exposed to, such as seeing friends and family smoke, or seeing smoking portrayed in film or online, is associated with increased acceptability of said product use and

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<sup>37</sup> Wang, Tobacco Product Use 2019, *supra* note 2, at 1 (reporting “about 1 in 3 high school students (4.7 million) and about 1 in 8 middle school students (1.5 million) are current tobacco users.”).

<sup>38</sup> See Final Rule, *supra* note 17, at 44399; see also E-CIGARETTE USE AMONG YOUTH AND YOUNG ADULTS, *supra* note 7, at 5 (suggesting national and state actions, including preventing youths access to e-cigarettes and regulating “e-cigarette marketing likely to attract youth[s.]”).

<sup>39</sup> Donald W. Garner & Richard J. Whitney, *Protecting Children from Joe Camel and His Friends: A New First Amendment and Federal Preemption Analysis of Tobacco Billboard Regulation*, 46 EMORY L. J. 479, 532-42 (1997) [hereinafter “Garner, *Protecting Children from Joe Camel*”] (“The tobacco companies [were] acutely aware of the need to continuously entice young customers and this obviously figure[d] prominently in their marketing decisions. . . . For example, [in] 1973 [R.J. Reynolds Tobacco Company’s] Assistant Director of Research and Development . . . candidly stated, ‘(r)ealistically, if our Company is to survive and prosper, over the long-term we must get our share of the youth market.’ The memo proceeded to discuss how to reach out to the ‘pre-smoker’ or ‘learner’ with ‘youth’ brands’ of cigarettes.”).

<sup>40</sup> Final Rule, *supra* note 17, at 44398.

<sup>41</sup> OFFICE OF THE SURGEON GEN., U.S. DEPT. OF HEALTH AND HUM. SERVICES, PREVENTING TOBACCO USE AMONG YOUNG PEOPLE: A REPORT OF THE SURGEON GENERAL 9 (1994) [hereinafter “PREVENTING TOBACCO USE AMONG YOUNG PEOPLE 1994”], available at <https://www.cdc.gov/mmwr/PDF/rr/rr4304.pdf>; see also generally THE HEALTH CONSEQUENCES OF SMOKING, *supra* note 17, at 12 (“The evidence is sufficient to conclude that advertising and promotional activities by the tobacco companies cause the onset and continuation of smoking among adolescents and young adults.”).



the risk of actively using them among youths.<sup>42</sup> Such techniques are designed to encourage youths to associate tobacco and nicotine products with marketing themes, such as normalcy, glamour, and independence.<sup>43</sup> So long as manufacturers continue to successfully create lifelong addictions in young people, society has little chance to reduce the current trajectory of smoking-related illnesses.<sup>44</sup>

Although this comment will focus on the dangers of e-cigarette marketing in relation to nicotine addiction, it should be noted that the dangers of e-cigarettes are not limited to nicotine. First, youths who smoke e-cigarettes may be more likely to use traditional cigarettes or other tobacco products.<sup>45</sup> Second, liquid nicotine poisoning is rising throughout the nation, particularly among young people.<sup>46</sup> Liquid nicotine, which is used in e-cigarettes, is a neurotoxin and can be extremely dangerous if consumed or absorbed through the skin.<sup>47</sup> Additionally, the concentration of liquid nicotine varies widely between different e-cigarette products, which causes discrepancies between labeled and measured nicotine content.<sup>48</sup> Third, “[b]ecause the Food

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<sup>42</sup> Sheena Hudson & George Thomson, *Policymakers and the Example of Smoking to Children: A Qualitative Study*, 9 *TOBACCO INDUCED DISEASES* 2011 1, 1 (2011), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3037299/>.

<sup>43</sup> Final Rule, *supra* note 17, at 44398; *GROWING UP TOBACCO FREE: PREVENTING NICOTINE ADDICTION IN CHILDREN AND YOUTHS* 119-21 (Barbara S. Lynch & Richard J. Bonnie eds., National Academies Press 1994) [hereinafter “*GROWING UP TOBACCO FREE*”].

<sup>44</sup> Final Rule, *supra* note 17, at 44399.

<sup>45</sup> Chapman, *The Gateway Effect*, *supra* note 23, at 695; *see also* *E-CIGARETTE USE AMONG YOUTH AND YOUNG ADULTS*, *supra* note 7, at 11 (noting concerns “that the availability of e-cigarettes with sweet flavors will facilitate nicotine addiction and simulated smoking behavior—which will lead to the use of conventional tobacco products[.]”); Wang, *Tobacco Product Use 2019*, *supra* note 2, at 5 (noting “among students who reported current use of two or more tobacco products, 17.2 [percent] reported current use of e-cigarettes and cigars, 13.3 [percent] reported current use of e-cigarettes and cigarettes, and 9.8 [percent] reported current use of e-cigarettes and smokeless tobacco.”).

<sup>46</sup> *E-CIGARETTE USE AMONG YOUTH AND YOUNG ADULTS*, *supra* note 7, at 119 (“The liquids in both e-cigarettes and the containers used to refill them can cause nicotine poisoning. Consequences of nicotine intoxication in the e-liquid include nausea, vomiting, headaches, dizziness, and diarrhea at low doses; seizures; tachycardia; abdominal pain; confusion; and even death[.]”); *E-CIGARETTE USE AMONG YOUTH AND YOUNG ADULTS*, *supra* note 7, at 120 (finding “a dramatic increase in exposures through 2014” with 51 percent of calls to poison control centers involving the exposure of children, five years old or younger, to e-cigarettes.).

<sup>47</sup> *E-CIGARETTE USE AMONG YOUTH AND YOUNG ADULTS*, *supra* note 7, at 119.

<sup>48</sup> *E-CIGARETTE USE AMONG YOUTH AND YOUNG ADULTS*, *supra* note 7, at 100 (“E-liquids typically contain nicotine, although in more widely variable concentrations than those found in conventional cigarettes.”); *E-CIGARETTE USE AMONG YOUTH AND YOUNG ADULTS*, *supra* note 7, at 120 (“Although labels may indicate the concentrations of nicotine, such labels can be incomplete, confusing, or inaccurate, and some bottles have not been labeled at all. Of most concern, some bottles of e-cigarette refill liquids labeled ‘no

and Drug Administration (“FDA”) has not begun its review of any e-cigarette or its ingredients, nor has [the] FDA issued any standards on the products, e-cigarette composition and effects vary.”<sup>49</sup> Studies, however, have found, in addition to nicotine, the following toxic chemicals and metals in e-cigarettes:

Propylene glycol – a common additive in food; also used to make things like antifreeze, paint solvent, and artificial smoke in fog machines[.] Carcinogens- chemicals known to cause cancer, including acetaldehyde and formaldehyde[.] Acrolein – a herbicide primarily used to kill weeds, can cause irreversible lung damage[.] Diacetyl – a chemical linked to [an irreparable] lung disease called bronchiolitis obliterans aka “popcorn lung[.]” Diethylene glycol – a toxic chemical used in antifreeze that is linked to lung disease[.] Heavy metals such as nickel, tin, lead[.] Cadmium – a toxic metal found in traditional cigarettes that causes breathing problems and disease[.] Benzene – a volatile organic compound (VOC) found in car exhaust[.] Ultrafine particles that can be inhaled deep into the lungs[.]<sup>50</sup>

In 2014, a study found that e-cigarette devices with a higher voltage level can increase aerosol production, nicotine delivery, and increase the levels of some toxic chemicals by more than twenty thousand percent.<sup>51</sup> At a higher voltage level, the levels of generated formaldehyde in e-cigarettes were nearly identical to the levels generated in traditional cigarettes.<sup>52</sup>

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nicotine’ have been found to contain significant amounts of that substance[.]” (internal citations omitted)).

<sup>49</sup> *What’s In An E-Cigarette*, AMERICAN LUNG ASSOCIATION, <https://www.lung.org/quit-smoking/e-cigarettes-vaping/whats-in-an-e-cigarette> (last updated Jul. 13, 2020).

<sup>50</sup> *Id.*

<sup>51</sup> COMMITTEE ON THE REVIEW OF HEALTH EFFECTS OF ELECTRONIC NICOTINE DELIVERY SYSTEMS, NATIONAL ACADEMIES OF SCIENCES, ENGINEERING, AND MEDICINE, PUBLIC HEALTH CONSEQUENCES OF E-CIGARETTES 187 (Kathleen Stratton et al. eds., 2018) (finding by “increasing the voltage from 3.2 V to 4.8 V resulted in an increase from [four] to more than [two-hundred] times in the levels of formaldehyde, acetaldehyde, and acetone.”).

<sup>52</sup> *Id.*

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### III. History of Tobacco Regulation<sup>53</sup>

In 1965, in response to emerging public health research, Congress passed the Federal Cigarette Labeling and Advertising Act (“FCLAA”) to regulate the tobacco market and to keep consumers informed about the health risks of tobacco use.<sup>54</sup> The FCLAA sought to increase consumer knowledge of nicotine-related health risks by requiring a warning label on traditional cigarette packaging reading: “Caution: Cigarette Smoking May Be Hazardous to Your Health.”<sup>55</sup> Although a step in the right direction, the FCLAA failed to regulate tobacco advertising that targeted youths.<sup>56</sup>

Throughout the 1990s, various parties attempted to remedy the FCLAA’s failure to regulate tobacco advertising aimed at youths. In 1992, anti-smoking legal advocates in California’s state court brought suit against Reynolds Tobacco Company (“Reynolds”) alleging Reynolds marketing practices targeted youths.<sup>57</sup> At that time, the Journal of American Medical Association reported Joe Camel, Reynolds’ mascot for its Camel cigarettes brand, was as familiar to youths as Mickey Mouse.<sup>58</sup> The California District Court found the targeting of youth’s theory to be cognizable under state false advertising laws.<sup>59</sup> In response, Reynolds appealed the California District Court’s decision, arguing the state law was preempted by FCLAA.<sup>60</sup> As the California Supreme Court noted, Reynolds claimed only the federal government could prevent tobacco advertisements urging youths to smoke, regardless of how blatant.<sup>61</sup> “[I]f it had used billboards depicting Old Joe Camel stating in huge block letters, ‘Kids, be the first in your fourth grade class cool enough to smoke Camels’ . . . California could do nothing about it[.]”<sup>62</sup> In 1994, in response to Reynolds appeal, the California Supreme Court held the FCLAA did

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<sup>53</sup> See generally THE HEALTH CONSEQUENCES OF SMOKING, *supra* note 17, at 15-42 (providing an in depth fifty year history of tobacco regulation in the U.S.).

<sup>54</sup> THE HEALTH CONSEQUENCES OF SMOKING, *supra* note 17, at 23-24; see also Lauren H. Greenberg, *The “Deeming Rule” the FDA’s Destruction of the Vaping Industry*, 83 BROOK. L. REV. 777, 780 (2018) [hereinafter “Greenberg, *The Deeming Rule*”].

<sup>55</sup> THE HEALTH CONSEQUENCES OF SMOKING, *supra* note 17, at 23-24; Greenberg, *The Deeming Rule*, *supra* note 54, at 780.

<sup>56</sup> Greenberg, *The Deeming Rule*, *supra* note 54, at 781.

<sup>57</sup> See generally *Mangini v. R.J. Reynolds Tobacco Co.*, 875 P.2d 73, 75 (Cal. 1994).

<sup>58</sup> Paul M. Fischer, et al., *Brand Logo Recognition by Children Aged 3 to 6 Years; Mickey Mouse and Old Joe the Camel*, 256 J. AM. MED. ASSOC., 3145, 3147 (1991).

<sup>59</sup> *Magnani*, 875 P.2d at 75 (citing Business and Professions Code section 17200).

<sup>60</sup> *Id.* at 76.

<sup>61</sup> *Id.* at 79.

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

not preempt state false advertising claims.<sup>63</sup> “The predicate duty is to not engage in unfair competition by advertising illegal conduct or encouraging others to violate the law.”<sup>64</sup> In the three years that followed the Joe Camel campaign, youth smoking of Camel’s “increased from 0.5 percent to 32 percent.”<sup>65</sup>

In 1994, four states collectively also brought suit against traditional cigarette manufacturers, “demanding compensation for Medicaid and other medical costs for smoking-related diseases and damage.”<sup>66</sup> At that time, numerous studies suggested that youths who own tobacco promotional items to be more likely to become smokers.<sup>67</sup> One such study found that “among sixth through twelfth graders, smoking was four times greater for the [youths] who owned promotional items.”<sup>68</sup> In 1994, the U.S. Surgeon General reported, “Cigarette advertising appears to affect [youth’s] perceptions[,]” which “constitute psychosocial risk factors for the initiation of smoking[.]”<sup>69</sup> In response, the traditional cigarette manufacturers claimed “smokers were responsible for their own health and well-being.”<sup>70</sup>

In 1996, the FDA issued the “Final Rule” regulations.<sup>71</sup> The FDA had concluded that “advertising regulations were necessary to curb the appeal of cigarettes to [youths] and to curb the demand and illegal underage use of tobacco products.”<sup>72</sup> At that time, 88 percent of “seventh graders had been exposed to some kind of tobacco advertising.”<sup>73</sup> Additionally, a study by MTV found that about 25 percent of music videos and 89 percent of movies featured some sort of tobacco use.<sup>74</sup> The FDA asserted that it had collected enough evidence

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<sup>63</sup> *Id.* at 83; but see generally *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (overruling *Mangini v. R.J. Reynolds Tobacco Co.* and allowing for generalized, public advertising unless in conflict with federal law).

<sup>64</sup> *Magnani*, 875 P.2d at 80.

<sup>65</sup> Bradley S. Greenberg & Sarah F. Rosaen, *Television and Young People: Violence, Sex, Booze, and Greed*, 3 MICH. ST. L. REV. 857, 872-73 (2005) [hereinafter “Greenberg, *Television and Young People*”].

<sup>66</sup> Greenberg, *The Deeming Rule*, *supra* note 54, at 781.

<sup>67</sup> Greenberg, *Television and Young People*, *supra* note 65, at 872.

<sup>68</sup> Greenberg, *Television and Young People*, *supra* note 65, at 872.

<sup>69</sup> PREVENTING TOBACCO USE AMONG YOUNG PEOPLE 1994, *supra* note 41, at 9.

<sup>70</sup> Greenberg, *The Deeming Rule*, *supra* note 54, at 781.

<sup>71</sup> Michael Hoefges, *Protecting Tobacco Advertising Under the Commercial Speech Doctrine: The Constitutional Impact of Lorillard Tobacco Co.*, 8 COMM. L. & POL’Y 267, 288 (2003) [hereinafter “Hoefges, *Protecting Tobacco Advertising*”]; see generally Final Rule, *supra* note 17.

<sup>72</sup> Hoefges, *Protecting Tobacco Advertising*, *supra* note 71, at 288 (citing Final Rule, *supra* note 17, at 44465-69).

<sup>73</sup> Greenberg, *Television and Young People*, *supra* note 65, at 872.

<sup>74</sup> Greenberg, *Television and Young People*, *supra* note 65, at 871-72.

to establish that implementing advertising regulations would directly and materially advance its goal of reducing underage tobacco use.<sup>75</sup> In particular, the FDA concluded that its review of relevant social science research allowed the conclusion that “expert opinion, surveys and studies provide sufficient support for the inference that advertising does play a material role in [youth’s] tobacco use.”<sup>76</sup> The Supreme Court, however, ultimately ruled the FDA did not have the legal authority to regulate tobacco.<sup>77</sup>

In 1998, and in response to the Supreme Court’s decision, Congress introduced three bills with the purpose of providing the FDA with the legal authority to regulate tobacco.<sup>78</sup> With the three bills pending Congressional approval, the four largest cigarette companies at the time—Philip Morris USA, R. J. Reynolds, Brown & Williamson, and Lorillard—entered into the largest civil litigation settlement in U.S. history, known as the Master Settlement Agreement (“MSA”).<sup>79</sup> “In exchange for Medicaid lawsuit settlements and a release of private tort liability,”<sup>80</sup> traditional cigarette manufacturers agreed to pay more than two-hundred billion dollars to the states.<sup>81</sup> Additionally, the manufacturers agreed to strict restrictions on the sale and marketing of cigarettes, similarly to many of the regulations of the Final Rule.<sup>82</sup>

The MSA provided targeted youths with “Permanent Relief” by prohibiting advertisements associated with youth exposure.<sup>83</sup> Advertisements prohibited under the MSA included: “Outdoor

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<sup>75</sup> Final Rule, *supra* note 17, at 44500.

<sup>76</sup> Final Rule, *supra* note 17, at 44474, 44488.

<sup>77</sup> See *FDA v. Brown & Williamson Tobacco Corp.*, 529 US 120, 160 (2000) (“To find that the FDA has the authority to regulate tobacco products, one must not only adopt an extremely strained understanding of “safety” as it is used throughout the Act ... but also ignore the plain implication of Congress’ subsequent tobacco-specific legislation.”).

<sup>78</sup> Hoefges, *Protecting Tobacco Advertising*, *supra* note 71, at 291-92.

<sup>79</sup> Greenberg, *The Deeming Rule*, *supra* note 54, at 781; see generally *Master Settlement Agreement*, PUB. HEALTH L. CENTER 5-6 (last visited Apr. 5, 2021) [hereinafter “*Master Settlement Agreement*”], available at <http://publichealthlawcenter.org/sites/default/files/resources/master-settlement-agreement.pdf>.

<sup>80</sup> Greenberg, *The Deeming Rule*, *supra* note 54, at 781.

<sup>81</sup> *15 Years Later, Where Did All The Cigarette Money Go?*, NPR (Oct. 13, 2013, 5:52 PM), <https://www.npr.org/2013/10/13/233449505/15-years-later-where-did-all-the-cigarette-money-go>.

<sup>82</sup> Hoefges, *Protecting Tobacco Advertising*, *supra* note 71, at 289, 292 (comparing the Final Rule’s proposed ban of outdoor advertising for cigarettes within one-thousand feet of schools and public playgrounds with the MSA’s restriction of outdoor and transit advertising and tobacco brand name sponsorships for concerts and athletic contests.).

<sup>83</sup> See generally *Master Settlement Agreement*, *supra* note 79, at § III.

Advertising” and “Transit Advertising;”<sup>84</sup> the use of cartoons;<sup>85</sup> free samples and gifts;<sup>86</sup> brand-name sponsorship of concerts, athletic events, or any other youth events;<sup>87</sup> as well as any media that may reach the public, including “any motion picture, television show, theatrical production or other live performance, live or recorded performance of music, commercial film or video, or video game[.]”<sup>88</sup> Even generalized advertising that markets cigarettes to an audience even partially composed of young people would be a direct violation of the MSA.<sup>89</sup>

In 2009, to fill a variety of legislative gaps, Congress passed the Family Smoking Prevention and Tobacco Control Act (“Tobacco Control Act”).<sup>90</sup> “This legislation went beyond simple labeling requirements and disclosure by ensuring that certain tobacco products complied with federal and state regulations and were not sold to [youths].”<sup>91</sup> The Tobacco Control Act required stricter product warning labels and required manufacturers to support any claim that their product “specifically was of modified risk or reduced harm to the public relative to other dangerous nicotine products” with sufficient scientific evidence to secure FDA approval.<sup>92</sup> More importantly, Congress recognized the significant contribution tobacco advertising and marketing had on promoting the use of addictive nicotine-containing tobacco products on youths.<sup>93</sup> In response, Congress granted the FDA broad authority “to address issues of particular concern to public health officials, especially the use of tobacco by [youth’s] and dependence on tobacco,” and “to

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<sup>84</sup> *Master Settlement Agreement*, *supra* note 79, at § III(d).

<sup>85</sup> *Master Settlement Agreement*, *supra* note 79, at § III(b).

<sup>86</sup> *Master Settlement Agreement*, *supra* note 79, at § III(g)-(h).

<sup>87</sup> *Master Settlement Agreement*, *supra* note 79, at § III(c).

<sup>88</sup> *Master Settlement Agreement*, *supra* note 79, at § III(e).

<sup>89</sup> *Master Settlement Agreement*, *supra* note 79, at § III(a) (“No Participating Manufacturer may take any action, directly or indirectly, to target Youth within any Settling State in the advertising, promotion or marketing of Tobacco Products, or take any action the primary purpose of which is to initiate, maintain or increase the incidence of Youth smoking within any Settling State.” (emphasis added)); *see, e.g.*, *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 11 Cal. Rptr. 3d 317, 345 (Cal. Ct. App. 2004), as modified on denial of reh’g (Mar. 19, 2004) (holding Reynolds violated the MSA where Reynolds’ policy allowed for advertising in magazines with 50 percent, 33 percent, and 25 percent of youth readership when only 10 percent of the population is made up of teenagers.).

<sup>90</sup> *See generally* Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009) [hereinafter “Tobacco Control Act”].

<sup>91</sup> Greenberg, *The Deeming Rule*, *supra* note 54, at 781-82; Tobacco Control Act, *supra* note 90, at § 3(2) (describing the purpose of the Tobacco Control Act is to provide the FDA with the authority to address “the use of tobacco by young people[.]”).

<sup>92</sup> Greenberg, *The Deeming Rule*, *supra* note 54, at 782; Tobacco Control Act, *supra* note 90, at § 911, 1812.

<sup>93</sup> Tobacco Control Act, *supra* note 90, at § 2(5), 1777.

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regulate the levels of tar, nicotine, and other harmful components of tobacco products.”<sup>94</sup> But, although it was the intention of the Tobacco Control Act to reduce nicotine exposure and addiction among youths, Congress failed to address every class of nicotine-containing products, “namely those that were relatively new to the market.”<sup>95</sup> Underestimating the availability of alternatives to traditional tobacco products, Congress limited the Tobacco Control Act to a variety of different groups of tobacco products, such as cigarettes, menthol, and chewing tobacco, and failed to include their alternatives, such as cigars, hookah tobacco, and e-cigarettes.<sup>96</sup>

#### IV. The History of E-Cigarette Regulation

In 2006, e-cigarettes were first introduced to the United States market.<sup>97</sup> Currently, the e-cigarette market contains over four-hundred brands, including large cigarette companies such as Reynolds American Incorporated and Lorillard Incorporated.<sup>98</sup> Although e-cigarettes have many variations, the general design is consistent between brands.<sup>99</sup> A modern e-cigarette is a cylindrical or rectangular casing with a battery-operated atomizer and contains a liquid solution typically made up of a solvent for nicotine and flavoring chemicals.<sup>100</sup> “The liquid is heated to create an aerosol that the user inhales.”<sup>101</sup>

Although e-cigarettes have been suggested as healthier alternatives to traditional cigarettes, e-cigarette companies have refrained from expressly holding out their products as smoking

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<sup>94</sup> Tobacco Control Act, *supra* note 90, at § 3(2), 3(5) 1776.

<sup>95</sup> Greenberg, *The Deeming Rule*, *supra* note 54, at 783.

<sup>96</sup> Greenberg, *The Deeming Rule*, *supra* note 54, at 782; *see generally* Tobacco Control Act, *supra* note 90, at § 911, 1827.

<sup>97</sup> *Historical Timeline of Vaping & Electronic Cigarettes*, CASSA, <https://casaa.org/education/vaping/historical-timeline-of-electronic-cigarettes/> (last visited Apr. 5, 2021) (locating earliest import ruling in the U.S. Customs and Border Protection website); *see also* E-CIGARETTE USE AMONG YOUTH AND YOUNG ADULTS, *supra* note 7, at 10 (noting the first commercial e-cigarette was developed in 2003 and was first introduced to the Chinese market in 2004.).

<sup>98</sup> E-CIGARETTE USE AMONG YOUTH AND YOUNG ADULTS, *supra* note 7, at 14 (noting a 2014 study “placed the number of brands at 466[,” including “[a]ll the major tobacco companies (e.g., Reynolds American, Altria[, Philip Morris International, Imperial Tobacco, and British American Tobacco.]”).

<sup>99</sup> E-CIGARETTE USE AMONG YOUTH AND YOUNG ADULTS, *supra* note 7, at 3.

<sup>100</sup> E-CIGARETTE USE AMONG YOUTH AND YOUNG ADULTS, *supra* note 7, at 11.

<sup>101</sup> *Vaporizers, E-Cigarettes, and other ENDS*, *supra* note 1.

cessation devices.<sup>102</sup> Had e-cigarette manufacturers marketed themselves as smoke cessation devices, they would have had to obtain FDA approval to market their products, which would require verification of any health claims.<sup>103</sup> Instead, e-cigarettes initially intended to imitate a traditional cigarette in order to attract users, without making health-related claims.<sup>104</sup> Thus, e-cigarette manufacturers successfully created a largely unregulated marketplace for their products.<sup>105</sup>

In 2008, approximately two years after the introduction of e-cigarettes into the United States market, the FDA made its first attempt to regulate e-cigarettes.<sup>106</sup> The FDA initially tried to classify e-cigarettes under its drug and device authority.<sup>107</sup> But, in response, an e-cigarette company challenged the FDA's authority and in 2010, the U.S. Court of Appeals for the D.C. Circuit held e-cigarettes to be a tobacco product not subject to the FDA's drug and device authority.<sup>108</sup> As the D.C. Circuit

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<sup>102</sup> E-CIGARETTE USE AMONG YOUTH AND YOUNG ADULTS, *supra* note 7, at 164 (noting e-cigarette brands in 2012 "were significantly more likely than those [between 2013 = 2014] to (a) claim that their products were healthier . . . and (b) indirectly claim their products were effective for smoking cessation through testimonials and other methods[.]"); *About Electronic Cigarettes*, *supra* note 23 ("E-cigarettes have the potential to benefit adults who smoke . . . if used as a complete substitute for regular cigarettes and other smoked tobacco products[.]").

<sup>103</sup> See *Sottera, Inc. v. Food & Drug Admin.*, 627 F.3d 891, 898 (D.C. Cir. 2010) (finding the FDA may have regulated e-cigarettes under Food, Drug, and Cosmetic Act ("FDCA") if the e-cigarette manufacturers had marketed their products for therapeutic purposes.).

<sup>104</sup> E-CIGARETTE USE AMONG YOUTH AND YOUNG ADULTS, *supra* note 7, at 11 ("First-generation e-cigarettes were often similar in size and shape to conventional cigarettes, with a design that also simulated a traditional cigarette in terms of the colors used . . . As e-cigarettes have become more popular, their designs have become more diverse[.]"); Notley, *The Unique Contribution of E-cigarettes*, *supra* note 23, at 7 ("E-cigarettes were enjoyed due to the habitual aspects of vaping that mirrored previous smoking behaviour.").

<sup>105</sup> Gottlieb, *Regulation of E-Cigarettes*, *supra* note 11, at 2; Ducharme, *JUUL Once Looked Too Big to Fail*, *supra* note 11; see also E-CIGARETTE USE AMONG YOUTH AND YOUNG ADULTS, *supra* note 7, at 15 ("The plethora of unregulated advertising is of particular concern, as exposure to advertising for tobacco products among youth is associated with cigarette smoking in a dose-response fashion").

<sup>106</sup> Gottlieb, *Regulation of E-Cigarettes*, *supra* note 11, at 2.

<sup>107</sup> Gottlieb, *Regulation of E-Cigarettes*, *supra* note 11, at 1 ("The logic of the FDA's defense was pretty straightforward: these are products intended to affect the structure or function of the body that require approval as new drugs in order to be sold.").

<sup>108</sup> See generally *Soterra, Inc. v. FDA*, 627 F.3d 891, 898 (D.C. Cir. 2010) ("[T]he Tobacco Act gives the FDA broad regulatory authority over tobacco products, including, for instance, authority to impose restrictions on their sale, and on the advertising and promotion of such products, . . . to regulate the mode of manufacture of tobacco products, . . . and to establish standards for tobacco products . . . [T]he FDA cannot regulate customarily marketed tobacco products under the FDCA's drug/device provisions[.]").



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stated in its opinion, the Tobacco Control Act was written to address the regulatory gap, rejecting the FDA's attempt to regulate conventional cigarettes using its drug and device authority.<sup>109</sup> The FDA responded that it would not appeal the D.C. Circuit's decision and would instead propose regulations of e-cigarettes under its tobacco product regulatory authority.<sup>110</sup>

In late April 2014, the agency began the long process of attempting to fill the regulatory gap by proposing rules that will govern e-cigarettes, the result of which is often referred to as the "Deeming Rule."<sup>111</sup> But as noted by several members in Congress, between the issuance of the D.C. Circuit's opinion and the proposal of the Deeming Rule, e-cigarette advertising increased by approximately 1,500 percent.<sup>112</sup> Eight of the nine most commonly sold e-cigarette brands had promoted their products through sponsored or sampling events and seven of the nine aired television or radio advertisements during events and programs with youth viewership.<sup>113</sup> E-cigarette sales had gone "from only a few million dollars per quarter in 2010 to more than \$170 million in the last quarter of 2014."<sup>114</sup> In 2015, JUUL introduced its e-cigarette to the market.<sup>115</sup>

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<sup>109</sup> *Sottera*, 627 F.3d at 897.

<sup>110</sup> Letter from Lawrence R. Deyton, Dir., Center for Tobacco Products, & Janet Woodcock, Dir., Center for Drug Evaluation and Research, to stakeholders (Apr. 25, 2011) (on file with Am. Ass'n of Pub. Health Physicians).

<sup>111</sup> Gottlieb, *Regulation of E-Cigarettes*, *supra* note 11, at 2; E-CIGARETTE USE AMONG YOUTH AND YOUNG ADULTS, *supra* note 7, at 17.

<sup>112</sup> Vaporized: E-Cigarettes, Advertising, and Youth, LEGACY at 8 (May 1, 2014), available at <https://escholarship.org/uc/item/7cq84675> ("Spending on e-cigarette advertising has also risen sharply, increasing from \$5.6 million in 2010 to \$82.1 million in 2013, across all media channels.").

<sup>113</sup> Staffs of Richard J. Durbin et al., *Gateway to Addiction?: A Survey of Popular Electronic Cigarette Manufacturers and Targeted Marketing to Youth*, COMMITTEE ON ENERGY & COM.: DEMOCRATS at 4 (Apr. 14, 2014), available at [https://www.merkley.senate.gov/imo/media/doc/Durbin\\_eCigarette%20Survey.pdf](https://www.merkley.senate.gov/imo/media/doc/Durbin_eCigarette%20Survey.pdf).

<sup>114</sup> E-CIGARETTE USE AMONG YOUTH AND YOUNG ADULTS, *supra* note 7, at 152. Total e-cigarette sales grew from \$10,487,711 in 2010 to \$636,184,918 in 2014. E-CIGARETTE USE AMONG YOUTH AND YOUNG ADULTS, *supra* note 7, at 153; OFFICE OF THE SURGEON GEN., US. DEPT. OF HEALTH AND HUM. SERVICES, E-CIGARETTE USE AMONG YOUTH AND YOUNG ADULTS: APPENDIX 4.4 A4.4-2, A4.4-5 (2016) [hereinafter "APPENDIX 4.4"], available at [https://www.cdc.gov/tobacco/data\\_statistics/sgr/e-cigarettes/pdfs/2016\\_SGR\\_App\\_4-4\\_508.pdf](https://www.cdc.gov/tobacco/data_statistics/sgr/e-cigarettes/pdfs/2016_SGR_App_4-4_508.pdf).

<sup>115</sup> Nitasha Tiku, *Startup Behind The Lambo Of Vaporizers Just Launched An Intelligent E-Cigarette*, THE VERGE (Apr. 21, 2015, 8:00 AM), <https://www.theverge.com/2015/4/21/8458629/pax-labs-e-cigarette-juul>; Julie Creswell & Shelia Kaplan, *How Juul Hooked A Generation on Nicotine*, N.Y. TIMES (last updated Feb. 12, 2020), <https://www.nytimes.com/2019/11/23/health/juul-vaping-crisis.html>.

In 2016, the Deeming Rule went into effect and extended the FDA's "authority over all products meeting the definition of a tobacco product[.]"<sup>116</sup> Under the Deeming Rule, the FDA now had authority over:

[E]-cigarettes and their components and parts (e.g., nicotine cartridges), but also to such products as cigars, pipe tobacco, nicotine gels, waterpipe/hookah tobacco, and dissolvables not already regulated as smokeless tobacco products. The Deeming Rule subjects e-cigarettes to Tobacco Control Act provisions, including: [p]rohibitions on adulterated and misbranded products; [r]equired disclosure of existing health information, including lists of ingredients and documents on health effects; [r]equired registration of manufacturers; [r]equired disclosure of a list of all tobacco products, including information related to labeling and advertising; [p]remarket review of new tobacco products. . . ; restrictions on products marketed with claims about modified risk. . . [m]inimum age restrictions to prevent sales to minors; [r]equirements to include a nicotine warning; and [p]rohibitions on vending machine sales, unless in a facility that never admits youth.<sup>117</sup>

Although the Deeming Rule immediately restricted the sale of e-cigarettes to minors, the FDA deferred the enforcement of other provisions, such as the requirement to include a nicotine warning, until 2018.<sup>118</sup> Thus, in 2018, for the first time, the FDA officially required nicotine warnings on e-cigarette ads and product packaging.<sup>119</sup> At this time, JUUL's annual e-cigarette sales alone totaled approximately 1.7 billion dollars.<sup>120</sup>

In April 2018, in response to the "irresponsible practices of the manufacturers, who have targeted youths in their marketing of [e-cigarettes,]" the FDA created the Youth Tobacco Prevention Plan.<sup>121</sup> Under this plan, the FDA required e-cigarette manufactures to submit

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<sup>116</sup> E-CIGARETTE USE AMONG YOUTH AND YOUNG ADULTS, *supra* note 7, at 17.

<sup>117</sup> E-CIGARETTE USE AMONG YOUTH AND YOUNG ADULTS, *supra* note 7, at 17.

<sup>118</sup> The Federal Response to the Epidemic of E-Cigarette Use, *supra* note 9; *Vaporizers, E-Cigarettes, and other ENDS*, *supra* note 1.

<sup>119</sup> *Vaporizers, E-Cigarettes, and other ENDS*, *supra* note 1.

<sup>120</sup> *JUUL Market Share in 2019: Dominating the US E-cigarette Market*, TECHNAVIO BLOG (Aug. 16, 2019), <https://blog.technavio.com/blog/juul-market-share-dominating-e-cigarettes-market>.

<sup>121</sup> Ned Sharpless, *How FDA is Regulating E-Cigarettes*, U.S. FDA, <https://www.fda.gov/news-events/fda-voices/how-fda-regulating-e-cigarettes> (last updated Sep. 10, 2019).

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documents on its marketing alongside research on the effects of its products.<sup>122</sup> As of September 2019, the FDA has issued forty letters to companies for misleading labels that specifically mimicked products appealing to youths, such as “juice boxes, candy, cookies, and kid-friendly cereals.”<sup>123</sup>

## V. Pursuing Claims Based on Marketing and Advertisements

E-cigarette litigation is varied and still in its early stages, but the number of e-cigarette lawsuits is rapidly increasing.<sup>124</sup> Lawsuits are emerging against both e-cigarette manufacturers and tobacco companies, including British American Tobacco—which markets four e-cigarettes including Vuse and Vype—and Imperial Brands—which markets Blu e-cigarettes.<sup>125</sup> The vast majority of suits, however, have targeted JUUL specifically, which currently accounts for 75 percent of e-cigarette sales in the United States.<sup>126</sup> The actions consist of both class action lawsuits and individual personal injury cases.<sup>127</sup> As of July 22, 2020, the number of lawsuits had grown to 758 from around the United States, which were combined into a multidistrict litigation.<sup>128</sup>

These lawsuits are severely limited in scope because federal law pre-empts certain claims that would otherwise be successful against e-cigarette manufacturers. For example, claims alleging that an e-cigarette does not perform as safely as an ordinary consumer would expect may be federally pre-empted.<sup>129</sup> In *Colgate v. JUUL Labs, Inc.*,<sup>130</sup> plaintiffs brought suit for various state law violations related to JUUL’s advertising and labelling of its e-cigarettes, the court held that claims for “failure to disclose risk” and for conduct prior to promulgation of the FDA rule to be completely pre-empted.<sup>131</sup> But claims based on product label mislabeling dosage of nicotine and advertisements of company’s product are not pre-empted under the Tobacco Control Act.<sup>132</sup> The court

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<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> Turner, *E-Cigarette Lawsuits*, *supra* note 12.

<sup>125</sup> Turner, *E-Cigarette Lawsuits*, *supra* note 12.

<sup>126</sup> Turner, *E-Cigarette Lawsuits*, *supra* note 12.

<sup>127</sup> Turner, *E-Cigarette Lawsuits*, *supra* note 12.

<sup>128</sup> Turner, *E-Cigarette Lawsuits*, *supra* note 12.

<sup>129</sup> *See, e.g.*, *Colgate v. JUUL Labs, Inc.*, 345 F. Supp. 3d 1178, 1196 (N.D. Cal. 2018).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

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

noted the Tobacco Control Act contains a subsection labeled “EXCEPTION” that specifically states the preemption clause does not apply to “the advertising and promotion of, or use of, tobacco products by individuals of any age[.]”<sup>133</sup> Accordingly, claims arising for JUUL’s failure to warn about the “potency and addictiveness” of its products may not be pre-empted by the Tobacco Control Act.<sup>134</sup>

Thus, many of the pending suits allege JUUL violated false advertising laws that prohibit companies from making false, misleading, or deceptive statements.<sup>135</sup> Many of these cases were brought by parents of teenagers arguing that JUUL marketed its products to youths using flavors and social media to appeal to youths.<sup>136</sup> Further, these parents allege that JUUL failed to warn their teens that their products were more potent and addictive than traditional cigarettes, rendering youths unaware that JUUL products contained abnormally high levels of nicotine.<sup>137</sup> In response to these allegations, Juul has denied targeting youths through its marketing.<sup>138</sup>

False advertising claims are a “patchwork of statutory, regulatory, and self-regulatory authorities responsible for policing false advertising in the United States.”<sup>139</sup> The definition of false advertising and the burdens of proof necessary to prove such claims differ depending on the statutory cause of action, such as if the claim is brought under the Federal Trade Commission (“FTC”) Act, the federal Lanham Act, or state false advertising statutes.<sup>140</sup> Federal false advertising claims under the

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<sup>133</sup> *Id.* at 1190 (quoting 21 U.S.C.A. § 387p(2)(B)).

<sup>134</sup> *Id.*

<sup>135</sup> Ho, *Mounting Lawsuits*, *supra* note 13; Turner, *E-Cigarette Lawsuits*, *supra* note 12 (“Many lawsuits claim Juul’s marketing targets minors, and the company denies this.”).

<sup>136</sup> Turner, *E-Cigarette Lawsuits*, *supra* note 12; Ho, *Mounting Lawsuits*, *supra* note 13.

<sup>137</sup> Turner, *E-Cigarette Lawsuits*, *supra* note 12.

<sup>138</sup> Turner, *E-Cigarette Lawsuits*, *supra* note 12; *but see* Sheila Kaplan, *Juul Bought Ads Appearing on Cartoon Network and Other Youth Sites, Suit Claims*, N.Y. TIMES (Feb. 12, 2020) [hereinafter “Kaplan, *Juul Bought Ads Appearing on Cartoon Network*”], <https://www.nytimes.com/2020/02/12/health/juul-vaping-lawsuit.html> (“JUUL rejected an initial marketing proposal by a marketing firm . . . that would have branded it as a technology company with a target audience of adult smokers.”).

<sup>139</sup> The Law of Advertising, Marketing and Promotions § 2.02 (Oct. 2020) (Lexis+) [hereinafter “The Law of Advertising”].

<sup>140</sup> The Law of Advertising, *supra* note 139; Gregory Klass, *False Advertising Law and New Private Law*, in THE OXFORD HANDBOOK OF NEW PRIVATE LAW 3-4 (Andrew Gold et al. eds., Apr. 2020) [hereinafter “Klass, *False Advertising Law*”], available at <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=3274&context=facpub>; *see generally* 15 U.S.C. § 45 (section 5(a) of the FTC Act covers misleading or untruthful statements, unsubstantiated claims, and any advertisement that causes substantial, unavoidable consumer injury without offsetting benefits to consumers or competition.); *see also* 15 U.S.C. § 55(a)(1) (“The term ‘false advertisement’ means an advertisement, other than labeling, which is misleading in a material respect[.]”); 15

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FTC or Lanham Act, however, are unavailable to consumers.<sup>141</sup> Accordingly, consumers must bring their false advertising causes of action under state law, which are often very similar to the FTC and Lanham Act—both generally prohibiting: “[f]alse, unfair, or deceptive practices.”<sup>142</sup>

For example, in California claims against JUUL for false advertising have been brought under both the California Unfair Competition Law (“UCL”) and the California False Advertising Law (“FAL”).<sup>143</sup> But it is worth noting that although both the UCL and FAL cover false advertising claims, UCL claims are significantly broader in scope.<sup>144</sup> For instance, the FAL may only be violated if the defendant “knows the advertising is false or misleading or in the exercise of reasonable care should know it to be.”<sup>145</sup> In contrast, the UCL may be violated regardless of a defendant’s intent.<sup>146</sup> Under the UCL, “unfair competition shall ... include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising[.]”<sup>147</sup> An act is unfair if it: (1) offends public policy; (2) is immoral, unethical, oppressive, or unscrupulous; or (3) causes substantial injury to consumers.<sup>148</sup> Regardless of whether a state false advertising statute is broad, such as the UCL, or narrow, such as the FAL, it is generally unnecessary to prove whether e-cigarette manufacturers intended to target youths with their advertisements. For instance, the FAL may only be violated if the defendant “knows the advertising is false or misleading or *in the exercise of reasonable care should know it to be.*”<sup>149</sup>

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U.S.C. § 1125(a)(1)(B) (The Lanham Act prohibits false or misleading statements that “misrepresent[] the nature, characteristics, qualities or geographic origin of . . . goods, services, or commercial activities.”).

<sup>141</sup> Klass, *False Advertising Law*, *supra* note 140, at 3.

<sup>142</sup> The Law of Advertising, *supra* note 139; *but see generally* *Consumer Protection in the States: Appendix C*, NATIONAL CONSUMER LAW CENTER (2018), available at <https://www.nclc.org/images/pdf/udap/udap-appC.pdf> (noting while the substantive law is often very similar, state courts vary broadly in their interpretation of similar statutes and consumer protection varies accordingly.).

<sup>143</sup> *See, e.g.*, In re JUUL Labs, Inc., Mktg., Sales Practices, & Products Liab. Litig., 19-MD-02913-WHO, 2020 WL 6271173 (N.D. Cal. Oct. 23, 2020) (alleging fraud under both California UCL and FAL); *see generally* Cal. Bus. & Prof. Code § 17200; Cal. Bus. & Prof. Code § 17500.

<sup>144</sup> William A. Stern, Bus. & Prof. C. § 17200 Practice 4:1 (Mar. 2021) (Westlaw) [hereinafter “Stern, § 17200 Practice 4:1”].

<sup>145</sup> *Id.*

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

<sup>147</sup> Cal. Bus. & Prof. Code § 17200.

<sup>148</sup> *Colgate v. JUUL Labs, Inc.*, 402 F. Supp. 3d 728, 758-60 (N.D. Cal. 2019).

<sup>149</sup> Stern, § 17200 Practice 4:1, *supra* note 144 (emphasis added).

Since 1965, the United States government has regulated the tobacco market to keep consumers informed about the health risks of tobacco use.<sup>150</sup> In 2008, a year before Congress passed the Tobacco Control Act, the FDA made its first attempt to regulate the marketing of e-cigarettes.<sup>151</sup> In 2010, an e-cigarette manufacturer challenged the FDA's assertion of regulatory authority and won.<sup>152</sup> In 2014, the FDA proposed the initial draft of the Deeming Rule.<sup>153</sup> In 2016, the Deeming Rule went into effect and in 2018 the FDA, for the first time, officially required nicotine warnings on e-cigarette ads and product packaging.<sup>154</sup>

Between 2010 and 2018, e-cigarette manufacturers, knowing their victory was temporary and that federal oversight inevitable, aggressively marketed their products, effectively racing to addict as many youths as possible before the FDA's regulatory authority could be extended over the e-cigarette market. In the five years between the FDA's first attempt to regulate the e-cigarette market and the initial draft of the Deeming Rule e-cigarette sales increased from about from \$10 million to over \$600 million.<sup>155</sup> Worse, e-cigarette use among middle-school and high-school students tripled.<sup>156</sup> In 2014, the American Academy of Pediatrics reported 29 percent of ninth and tenth graders surveyed had smoked e-cigarettes.<sup>157</sup> The report concluded that "e-cigarettes are recruiting medium-risk [youths], who otherwise would be less susceptible to tobacco product use[.]"<sup>158</sup> In 2015, after fifty years of attempted government regulation of the marketing of tobacco and nicotine products, JUUL first introduced its e-cigarette to

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<sup>150</sup> Greenberg, *The Deeming Rule*, *supra* note 54, at 780.

<sup>151</sup> Gottlieb, *Regulation of E-Cigarettes*, *supra* note 11, at 2; *see also* Sottera, Inc. v. FDA, 627 F.3d 891 (D.C. Cir. 2010) (deciding whether the FDA has the authority to regulate e-cigarettes under the FDCA or Tobacco Control Act).

<sup>152</sup> *See generally* Soterra, Inc., 627 F.3d at 898 ("[T]he FDA cannot regulate customarily marketed tobacco products under the FDCA's drug/device provisions[.]").

<sup>153</sup> *See* Deeming Tobacco Products To Be Subject to the Federal Food, Drug, and Cosmetic Act, 79 Fed. Reg. 23141 (proposed April 25, 2014) (to be codified at 21 C.F.R. 1100, 1140, 1143) [hereinafter "Deeming Rule"].

<sup>154</sup> The Federal Response to the Epidemic of E-Cigarette Use, *supra* note 9; *Vaporizers, E-Cigarettes, and other ENDS*, *supra* note 1.

<sup>155</sup> E-CIGARETTE USE AMONG YOUTH AND YOUNG ADULTS, *supra* note 7, at 153; APPENDIX 4.4, available *supra* note 114, at A4.4-2, A4.4-5.

<sup>156</sup> Rebecca E. Bunnell et al., Intentions to Smoke Cigarettes Among Never-Smoking US Middle and High School Electronic Cigarette Users: National Youth Tobacco Survey, 2011-2013, 16 MORBIDITY & MORTALITY WKLY. REP. 228, 230 (2014), available at <https://academic.oup.com/ntr/article/17/2/228/2857952> (noting youths use of e-cigarette increased from an estimated 79,000 thousand users in 2011 to over 263,000 in 2014.).

<sup>157</sup> Thomas A. Wills et al., *Risk Factors for Exclusive E-cigarette Use and Dual E-cigarette Use and Tobacco Use in Adolescents*, 135 PEDIATRICS e43, e43 (2015).

<sup>158</sup> *Id.*

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the market and launched its multimillion-dollar “Vaporized” advertising campaign.<sup>159</sup>

The history of tobacco and nicotine product manufacturers targeting youths through its advertisements and the substantial injuries nicotine consistently causes youths has been well-documented.<sup>160</sup> It is unnecessary to prove whether e-cigarette manufacturers intended to target youths with their advertisements. JUUL, and other e-cigarette manufacturers, replication of traditional cigarette advertisement strategies effectively proves that either: (1) they purposefully mirrored such strategies for the purpose of replicating their success in targeting and addicting youths; or (2) in exercising reasonable care they should have known such strategies would effectively target youths through half a century of research, legislation, and lawsuits. Thus, anyone who purposefully or negligently mirrored the banned advertisements of traditional cigarette manufactures, which have been well-established to have targeted youths, to sell any product that contains nicotine is inherently guilty of false advertisement.

## VI. Comparing Traditional Cigarette and E-Cigarette Marketing and Advertisements

In the 1970s, it was estimated the average person saw between five hundred to one-thousand six hundred advertisements per day.<sup>161</sup> Today, this estimate has increased to between six-thousand to ten-thousand ads per day.<sup>162</sup> Increased youth exposure to traditional cigarette or e-cigarette advertisements has been associated with “an increased probability of use among youth.”<sup>163</sup> In 2016, the National Youth Tobacco Survey reported a notable increase in middle and high

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<sup>159</sup> Ducharme, *JUUL Once Looked Too Big to Fail*, *supra* note 11; *see generally* THE HEALTH CONSEQUENCES OF SMOKING, *supra* note 17, at 15-42.

<sup>160</sup> *See generally* THE HEALTH CONSEQUENCES OF SMOKING, *supra* note 17; Final Rule, *supra* note 17; *see also* Garner, *Protecting Children from Joe Camel*, *supra* note 39, at 532-42 (“The tobacco companies [were] acutely aware of the need to continuously entice young customers and this obviously figure[d] prominently in their marketing decisions.”).

<sup>161</sup> Sam Carr, *How Many Ads Do We See A Day In 2021?*, PPC PROJECT (Feb. 15, 2021), <https://ppcprotect.com/how-many-ads-do-we-see-a-day/>.

<sup>162</sup> *Id.*

<sup>163</sup> THE HEALTH CONSEQUENCES OF SMOKING, *supra* note 17, at 815; *see also* Robert K. Jackler et al., *JUUL Advertising Over its First Three Years on the Market*, STAN. U. SCH. MED. 1, 35 (2019) [hereinafter “Jackler, *JUUL Advertising*”] (noting a direct correlation between probability of youth use of e-cigarettes and “the number of channels of e-cigarette advertising[.]”), available at [http://tobacco.stanford.edu/tobacco\\_main/publications/JUUL\\_Marketing\\_Stanford.pdf](http://tobacco.stanford.edu/tobacco_main/publications/JUUL_Marketing_Stanford.pdf).

school students exposure to e-cigarette advertisements.<sup>164</sup> Sources of exposure included television, websites, social media, retail stores, magazines, and newspapers.<sup>165</sup>

Although neither the MSA nor the Tobacco Control Act addressed the marketing and advertisements of e-cigarettes, the relief provided under both were intended to decrease the incident of nicotine exposure and addiction in youths.<sup>166</sup> Thus any violation made by an e-cigarette manufacturer of either the MSA or the Tobacco Control Act would be indicative of dangerous marketing practices and conduct with a well-documented effect on youths.

#### A. “OUTDOOR” AND “TRANSIT” ADVERTISING

The MSA banned the use of “Outdoor Advertising” and “Transit Advertisements.”<sup>167</sup> Under the MSA, “Outdoor Advertising” included billboards, signs in arenas, stadiums, shopping malls, and arcades,<sup>168</sup> whereas “Transit Advertisements” included any advertisement placed on or inside of private or public vehicles that were used to transport individuals, as well as the areas “within any bus stop, taxi stand, transportation waiting area, train station, airport[,] or any similar location.”<sup>169</sup> From 1985 to 2005, spending on outdoor advertising increased 67 percent, growing from a \$2.1 billion industry to \$3.5 billion.<sup>170</sup> “More permanent than magazine advertising, and seen over and over again by youths, billboard ads expose [youths] repeatedly to

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<sup>164</sup> Kristy Marynak et al., *Exposure to Electronic Cigarette Advertising Among Middle and High School Students — United States, 2014–2016*, 67 *MORBIDITY & MORTALITY WKLY. REP.* 294, 294 (2010) [hereinafter “Marynak, *Exposure to Electronic Cigarette Advertising*”], available at <https://www.cdc.gov/mmwr/volumes/67/wr/pdfs/mm6710a3-H.pdf> (“Overall, exposure to e-cigarette advertising from at least one source increased each year during 2014–2016 (2014: 68.9 [percent], 18.3 million; 2015: 73.0 [percent], 19.2 million; 2016: 78.2 [percent], 20.5 million).”); *but see* Wang, *Tobacco Product Use 2019*, *supra* note 2, at 7 (“Overall, 69.3 [percent] of [youths] reported exposure to e-cigarette marketing specifically[.]”).

<sup>165</sup> Marynak, *Exposure to Electronic Cigarette Advertising*, *supra* note 164, at 294.

<sup>166</sup> *See generally* *Master Settlement Agreement*, *supra* note 79, at § III; *Tobacco Control Act*, *supra* note 90, at § 3(5), 1782.

<sup>167</sup> *Master Settlement Agreement*, *supra* note 79, at § III(d).

<sup>168</sup> *Master Settlement Agreement*, *supra* note 79, § II(ii).

<sup>169</sup> *Master Settlement Agreement*, *supra* note 79, § II(xx).

<sup>170</sup> Molly M. Scott, et. al, *Alcohol and Tobacco Marketing: An Evaluation of Compliance with Restrictions on Outdoor Ads*, 35 *AM. J. PREVENTATIVE MED.* 203–209 (2008) [hereinafter “Scott, *Alcohol and Tobacco Marketing*”], available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2920147/>.



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pro-tobacco messages and give the erroneous impression that smoking is pervasive and normative.”<sup>171</sup>

[I]n a media environment where consumers freely choose among internet, television, radio, etc., outdoor advertising offers a medium that is difficult for consumers to avoid. Studies of perception indicate that attention is automatically diverted to large visual stimuli, which frequently influence people, whether or not they are even aware of the images. As a result, individuals typically have little insight as to how visual images influence subsequent unhealthy behaviors like drinking and smoking.<sup>172</sup>

“Historically, the alcohol and tobacco industries have been the biggest purchasers of outdoor advertising space.”<sup>173</sup> In 1989, the tobacco industry was the highest spending industry for outdoor advertising, with approximately 1 million billboards in the United States allocated to tobacco and alcohol products.<sup>174</sup> “Advertising through the use of outdoor billboards and transit system signs accounted for 9.6 percent of all tobacco marketing expenditures in 1991.”<sup>175</sup> After the MSA, however, which outlawed the use of all billboards and transit benches to promote tobacco use, the tobacco industry’s general purchases of outdoor advertising space steeply decreased.<sup>176</sup>

The effect of “Outdoor Advertising” and “Transit Advertising” on youths is well-documented. “When [youths] are constantly and involuntarily bombarded with seductive messages appearing on neighborhood billboards that promote a lifelong addiction, not only is their health endangered, but their right to be free from having adult choices foisted upon them is not so subtly infringed.”<sup>177</sup>

Billboard ads are inherently intrusive. They undermine individual autonomy by robbing the individual of the choice whether to receive the message. By foisting an extraordinarily dangerous message and an adult choice upon [youths],

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<sup>171</sup> GROWING UP TOBACCO FREE, *supra* note 43, at 112.

<sup>172</sup> Scott, *Alcohol and Tobacco Marketing*, *supra* note 170, at 2.

<sup>173</sup> Scott, *Alcohol and Tobacco Marketing*, *supra* note 170, at 2 (“Together [alcohol and tobacco] accounted for nearly a quarter of all expenditures on outdoor advertising in 1985.”).

<sup>174</sup> GROWING UP TOBACCO FREE, *supra* note 43, at 112.

<sup>175</sup> GROWING UP TOBACCO FREE, *supra* note 43, at 112.

<sup>176</sup> Scott, *Alcohol and Tobacco Marketing*, *supra* note 170, at 2, 6.

<sup>177</sup> Garner, *Protecting Children from Joe Camel*, *supra* note 39, at 4.

tobacco billboard ads violate [youths'] liberty, innocence, and autonomy. The tobacco companies commercially molest [youths] first mentally, then physically by inculcating their messages within vulnerable and impressionable minds that are too immature to defend against them.<sup>178</sup>

Despite the well-known effect of billboard ads on youths and the MSA's ban on the use of "Outdoor Advertising" and "Transit Advertising" of traditional cigarettes, in June 2015, as part of its "Vaporized" advertising campaign, JUUL advertised on brightly colored twelve-unit billboard displays young men and women using JUUL's e-cigarettes over Times Square in New York City.<sup>179</sup> The billboard, which displayed animated gifs of "attractive and fashionably casual young models[,] was reminiscent of traditional cigarette Time Square animated billboards.<sup>180</sup> Additionally, JUUL launched "a number of 'pop-up JUUL bars' in Los Angeles, New York City, and the Hamptons."<sup>181</sup> These "pop-up JUUL bars" were mobile shipping containers that toured the country and were part of JUUL's "creative design to build [']The JUUL Vapor Lounge,['] a modern, inviting, and unique sampling experience for consumers inside a modified shipping container[,]... [which] creat[ed] a bright, open-air environment that lit up the city street."<sup>182</sup> Although these "pop-up JUUL bars" may not be traditional advertising "placed on or inside of private or public vehicles ... used to transport individuals," these bars certainly consisted of "Outdoor Advertisement" and may even be considered a "transportation waiting area" or a "similar location" in violation of the MSA.<sup>183</sup>

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<sup>178</sup> Garner, *Protecting Children from Joe Camel*, *supra* note 39, at 11.

<sup>179</sup> *Colgate v. JUUL Labs, Inc.*, 345 F. Supp. 3d 1178, 1184 (N.D. Cal. 2018); *see generally Cigs vs eCigs JUUL*, SRITA, [http://tobacco.stanford.edu/tobacco\\_main/images\\_pods.php?token2=fm\\_pods\\_st685.php&token1=fm\\_pods\\_img37924.php&theme\\_file=fm\\_pods\\_mt068.php&theme\\_name=JUUL&subtheme\\_name=Times%20Square](http://tobacco.stanford.edu/tobacco_main/images_pods.php?token2=fm_pods_st685.php&token1=fm_pods_img37924.php&theme_file=fm_pods_mt068.php&theme_name=JUUL&subtheme_name=Times%20Square) (last visited Apr. 17, 2021) [hereinafter "*Cigs vs eCigs*"].

<sup>180</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 17 ("Animated tobacco billboards in Time Square have a long history. A block long Camel Cigarette billboards (1941-1966) puffed impressive 'smoke rings' made of steam followed by an illuminated Joe Camel (1989-1994), Marlboro, Winston, Kool and others.").

<sup>181</sup> *Colgate v. JUUL Labs, Inc.*, 345 F. Supp. 3d 1178, 1184 (N.D. Cal. 2018).

<sup>182</sup> *JUUL & BeCore*, BOXMAN STUDIOS, <http://boxmanstudios.com/portfolio/juul-vapor-lounge/> (last visited Feb. 9, 2021).

<sup>183</sup> *Master Settlement Agreement*, *supra* note 79, at § III(d); *see also Master Settlement Agreement*, *supra* note 79, at § II(ii), (xx).

## B. TRADITIONAL PRINT ADVERTISING

Although prior to the MSA tobacco print advertising, such as newspapers and magazines, was down, “expenditures on tobacco advertising in print media [continued] to be substantial[.]”<sup>184</sup> Between 1995 and 1998, before the MSA, traditional print ads advertising youth brands, “brands smoked by more than 5 [percent]” of eighth grade, tenth grade, and twelfth grade smokers, in youth-oriented magazines “increased by 3.7 [percent] from \$56.4 million to \$58.5 million.”<sup>185</sup> Traditional print media could offer greater exposure than transit ads.<sup>186</sup>

Not long after the MSA went into effect in 1998, the National Association of Attorneys General (“NAAG”) “became concerned with advertisements that tobacco companies were placing in magazines that appeared to target youth through the use of cartoon like images.”<sup>187</sup> In *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*,<sup>188</sup> in response to these concerns, twenty-two states and Guam brought an enforcement proceeding against Reynolds, which at the time claimed it “would only restrict advertising in magazines that had over 50 [percent] youth readership.”<sup>189</sup> Although Reynolds “subsequently lowered the bar as low as 25 [percent] youth readership, the [California] court found the advertisements constituted a violation of the MSA’s prohibition on youth targeting[.]”<sup>190</sup> The California Court of Appeals held even at 25 percent Reynolds had violated the MSA because Reynolds could advertise its’ products using alternative magazines to avoid targeting

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<sup>184</sup> GROWING UP TOBACCO FREE, *supra* note 43, at 111.

<sup>185</sup> Marvin E. Goldberg, et al., *The Role of Tobacco Advertising and Promotion: Themes Employed in Litigation by Tobacco Industry Witnesses*, 15 TOBACCO CONTROL 54, 62 (2006), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2563582/> (defining youth-oriented magazines as magazines with “at least 15 [percent] of their readers or at least two million of their readers” between the ages of twelve and seventeen.).

<sup>186</sup> Scott, *Alcohol and Tobacco Marketing*, *supra* note 170, at 6 (“Eye-tracking studies have found that, on average, pedestrians view small outdoor advertisements like transit benches 6–7 times, totaling around 5 seconds at each exposure—almost equivalent to the views generated by traditional print media.”).

<sup>187</sup> Zimlich, *What Is A Cigarette?*, *supra* note 20, at 501.

<sup>188</sup> 11 Cal. Rptr. 3d 317 (Ct. App. 2004).

<sup>189</sup> Zimlich, *What Is A Cigarette?*, *supra* note 20, at 501; *see Lockyer*, 11 Cal. Rptr. 3d at 342 n.18 (“We are unwilling to preclude ourselves from advertising in publications which have more than a certain number of ‘readers’ who are under the age of 18 when that number is less than 50 percent of ‘readers.’”).

<sup>190</sup> Zimlich, *What Is A Cigarette?*, *supra* note 20, at 501; *see generally Lockyer*, 11 Cal. Rptr. 3d at 344 (“In March 2001 on the date the People filed this lawsuit against Reynolds, Reynolds announced a policy of not advertising in any magazine having a youth composition over 25 percent[.]”); *Lockyer*, 11 Cal. Rptr. 3d at 345 (holding Reynolds violated the MSA where Reynolds’ policy allowed for advertising in magazines with 50 percent, 33 percent, and 25 percent of youth readership when only 10 percent of the population is made up of teenagers.).

youths while still effectively targeting young adult smokers, which were the readers Reynolds claimed to be targeting.<sup>191</sup>

The effect of traditional print advertising on youths is also well-documented. “Use of media channels frequented by underage youth, such as teen magazines, has long been prohibited in the U.S. for tobacco products.”<sup>192</sup> Despite the well-known effect of print ads on youths and the ability of e-cigarette manufacturers to use different magazines to avoid targeting youths, between “2010 and 2014, e-cigarettes were the second most advertised product in magazines behind cigarettes.”<sup>193</sup> In 2016, the National Youth Tobacco Survey reported nearly 25 percent of youths had been exposed to an e-cigarette advertisement in a newspaper or magazine.<sup>194</sup> In June 2015, as part of its “Vaporized” advertising campaign, JUUL purchased an advertisement on the front spread of VICE magazine.<sup>195</sup> Founded in 1994, “VICE is the world’s preeminent youth media company and content creation studio.”<sup>196</sup> Until 2018, at which time JUUL re-focused its advertising, the VICE magazine cover issue was JUUL’s only traditional print advertisement.<sup>197</sup>

### C. ONLINE ADVERTISING AND SOCIAL MEDIA MARKETING

E-cigarette brands have relied heavily on the internet to market their message and to create a sense of normalcy around their products.<sup>198</sup> Although the MSA did not specifically address online or social media advertising, under the MSA traditional cigarette

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<sup>191</sup> *Lockyer*, 11 Cal. Rptr. 3d at 323 (“Reynolds could have modified its existing advertising policies and practices and created alternative media advertising schedules to reduce the exposure of magazines containing Reynolds’s advertising to youth while retaining a reasonably good exposure to young adult smokers.”).

<sup>192</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 33.

<sup>193</sup> Lauren Collins, *E-Cigarette Marketing and Communication: How E-Cigarette Companies Market E-Cigarettes and the Public Engages with E-cigarette Information*, 21 NICOTINE & TOBACCO RES. 14, 15 (Jan. 2019) [hereinafter “Collins, *E-Cigarette Marketing and Communication*”], available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6610165/>.

<sup>194</sup> Marynak, *Exposure to Electronic Cigarette Advertising*, *supra* note 164, at 294 (noting an overall decrease in youth exposure to e-cigarette advertising for newspapers and magazines.).

<sup>195</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 16.

<sup>196</sup> *Case Study/VICE*, BRANDWATCH (2017), available at [https://www.brandwatch.com/wp-content/uploads/2017/01/0000-\\_-Vice-Case-Study.pdf](https://www.brandwatch.com/wp-content/uploads/2017/01/0000-_-Vice-Case-Study.pdf).

<sup>197</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 16-17.

<sup>198</sup> Marynak, *Exposure to Electronic Cigarette Advertising*, *supra* note 164, at 294 (noting from 2014 to 2016, youth exposure to e-cigarette advertisements via the Internet remained consistent (approximately 40 percent)); *but see* Wang, *Tobacco Product Use 2019*, *supra* note 2, at 6 (in 2019, youth exposure to e-cigarette advertisements via the Internet had risen to approximately 60 percent).

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manufacturers were prohibited from making any payments to have its products appear in any media that may be displayed to the public.<sup>199</sup> Online and social media marketing combines the advantages of “Transit Advertisements,” interactive print advertising, and traditional cigarette print and media advertising themes.<sup>200</sup> Individually, the effect each has on youths has been well documented.

Online and social media advertisements are akin to “Transit Advertisements,” advertisements placed in areas of high traffic, which are inherently intrusive.<sup>201</sup>

When displayed multiple times at a single site, small format ads can take up similar amounts of space as billboards but are located at eye-level for pedestrians. Eye-tracking studies have found that, on average, pedestrians view small outdoor advertisements like transit benches 6–7 times, totaling around 5 seconds at each exposure—almost equivalent to the views generated by traditional print media. In addition, small ads lead more directly to a sales conversion if located near a business where a transaction can occur.<sup>202</sup>

Compared to the six to seven times the average individual views a small outdoor advertisement, individuals on average spend approximately four hours online every day.<sup>203</sup> Of the average four hours, approximately two hours and twenty-four minutes are spent on social media sites alone.<sup>204</sup> The most commonly cited reason for marketing a product through social media is increased exposure.<sup>205</sup> Additionally, social networks offer marketers “[i]mproved *traffic*, lead generation,

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<sup>199</sup> *Master Settlement Agreement*, *supra* note 79, § III(e).

<sup>200</sup> The use of traditional cigarette marketing themes is discussed *infra* Section VI.D.

<sup>201</sup> Garner, *Protecting Children from Joe Camel*, *supra* note 39, at 11.

<sup>202</sup> Scott, *Alcohol and Tobacco Marketing*, *supra* note 170, at 6-7.

<sup>203</sup> Joseph Johnson, *North America: Daily Internet Usage Per Capita 2011-2021*, STATISTA (Jan. 7, 2021), <https://www.statista.com/statistics/645644/north-america-daily-time-per-capita-internet/> (noting the average time spent is expected to rise to five hours in 2021).

<sup>204</sup> *Average Time Spent Daily on Social Media (Latest 2020 Data)*, BROADBANDSEARCH, <https://www.broadbandsearch.net/blog/average-daily-time-on-social-media> (last visited Apr. 5, 2021) (but please note that the average time spent on social media in North America was only two hours and six minutes).

<sup>205</sup> *The Ultimate List of Marketing Statistics for 2021*, HUBSPOT, <https://www.hubspot.com/marketing-statistics> (last visited Apr. 5, 2021).

and growing fan loyalty[.]”<sup>206</sup> In 2018, 89 percent of teens were online either “almost constantly” or “several times a day.”<sup>207</sup>

Online and social media advertisements are interactive. Although exposure of traditional print advertisements in newspapers and magazines and “Transit Advertisements” were comparable, newspapers and magazines advertisements offered more for young readers than simply exposure.<sup>208</sup> Magazine and newspaper advertisements offered youths *interactivity*.<sup>209</sup> Print ads would often combine with interactive promotions, for example, magazine ads could feature promotional giveaways of non-cigarette paraphilia, such as calendars, lighters, and T-shirts.<sup>210</sup> These ads would inform youths “to be on the lookout for additional information about these offers at point-of-sale locations.”<sup>211</sup> These *interactive* promotions had a notable appeal to youths.<sup>212</sup>

Compared to the limited ability of traditional advertisement to *interact* with youths, online sites and social media offers a far broader ability to directly interact with individuals.<sup>213</sup> More specifically, social

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<sup>206</sup> *Id.* (emphasis added).

<sup>207</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 33.

<sup>208</sup> Scott, *Alcohol and Tobacco Marketing*, *supra* note 170, at 6 (“Eye-tracking studies have found that, on average, pedestrians view small outdoor advertisements like transit benches 6–7 times, totaling around 5 seconds at each exposure—almost equivalent to the views generated by traditional print media.”); GROWING UP TOBACCO FREE, *supra* note 43, at 111.

<sup>209</sup> GROWING UP TOBACCO FREE, *supra* note 43, at 111.

<sup>210</sup> GROWING UP TOBACCO FREE, *supra* note 43, at 111 (noting these giveaways were often “associated with ‘cash coupon’ catalogue offers.”).

<sup>211</sup> *See, e.g.*, Matthew G. Kirkpatrick, *Electronic Cigarette Retailers Use Pokémon Go to Market Products*, 26 TOBACCO CONTROL e145-e147 (2017), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5501764/> (reviewing the use of interactive, augmented reality gaming for e-cigarette marketing purposes in response to the popularity of the interactive, augmented reality game Pokémon Go. For example, in July 2016, Joyetech, an e-cigarette manufacturer sent a promotional email “urging its customers to post ‘a picture of your Pokemon and Joyetech device’ to Facebook for a chance to win a new e-cigarette device[.]”); Ryan Mac, *More Women Than Men Are Playing ‘Pokémon GO’—By A Lot*, FORBES (July 26, 2016, 3:47 PM), <https://www.forbes.com/sites/ryanmac/2016/07/26/more-women-than-men-are-playing-pokemon-go-by-a-lot/?sh=133cef0e13dc> (noting Pokémon Go has a 22 percent youth participation).

<sup>212</sup> GROWING UP TOBACCO FREE, *supra* note 43, at 111 (noting although the number of tobacco ads per magazine issue declined in both men’s and women’s magazines, “the number remained relatively stable in those magazines having substantial . . . youth readerships.”).

<sup>213</sup> 10 *Statistics That Prove Interactive Content Is the Future of Digital Marketing*, OUTGROW, <https://outgrow.co/blog/interactive-content-future> (last visited Apr. 5, 2021); Kristen Herhold, *How People Interact on Social Media in 2019*, THE MANIFEST (Jan. 17, 2019), <https://themanifest.com/social-media/how-people-interact-social-media> [hereinafter “Herhold, *How People Interact on Social Media*”] (emphasis added) (noting

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media interaction has become part of the average person's everyday routine.<sup>214</sup> Importantly, the average person typically interacts with "other people's content more often than posting their own."<sup>215</sup> For businesses, even common interactions on social media, such as referring a friend, "can positively affect important marketing outcomes such as new customer acquisition and sales."<sup>216</sup> Thus, social media has become a well-established medium for customer acquisition.<sup>217</sup>

Today, social media is used to achieve diffusion of a marketed message beyond the company branded social media account.<sup>218</sup> The goal of unpaid, organic, social media marketing "is to stimulate conversation about their product to encourage creation of a community who will contribute favorable user generated comments."<sup>219</sup> For example, hashtags are free and effective means of "mingling brand advertising messages with large audiences."<sup>220</sup> Through related hashtags, e.g., "#juul", companies can direct their messages to interested parties who know the hashtag "to be popular among their peer group and use it to post their unrelated material to enhance its visibility."<sup>221</sup> In contrast, the use of unrelated hashtags, e.g., #goldenglobes, #nyc, #mothersday, allow companies to direct their messages and display their "advertisements to a potentially vast audience who have not yet indicated any interest in their products."<sup>222</sup>

The focus on online and social media advertising to target youths is well-documented. Ads are tailored to their targets.<sup>223</sup> Traditional media channels, such as magazines, newspapers, radio, and television, are used to target Baby Boomers and Gen X individuals, those born prior to 1980.<sup>224</sup> Millennials, or those born between 1980 and 1994, "are

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nearly 86 percent of people "use social media at least once per day, and 30 [percent] like, share, or post content on social media more than [ten] times per day.").

<sup>214</sup> Herhold, *How People Interact on Social Media*, *supra* note 213.

<sup>215</sup> Herhold, *How People Interact on Social Media*, *supra* note 213 ("People also tend to go to social media more times than they actually post content; experts call this the '90-9-1 rule.' This rule states that 90 percent of the time, people are likely just consuming content; 9 percent of the time, people are interacting with content; and only 1 percent of the time, people are sharing content.).

<sup>216</sup> Gil Appel et al., *The Future of Social Media In Marketing*, 48 J. ACAD. MARKETING SCI. 79-80 (2020), available at <https://link.springer.com/article/10.1007/s11747-019-00695-1>.

<sup>217</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 34.

<sup>218</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 34.

<sup>219</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 34.

<sup>220</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 34.

<sup>221</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 34.

<sup>222</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 34.

<sup>223</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 33.

<sup>224</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 33.

known to be tech savvy and were the first consumer age group to heavily use social media.”<sup>225</sup> Millennials are effectively targeted by graphic content, such as videos or animations.<sup>226</sup> Gen Z, present day middle and high school students, “have never experienced the world without the internet and live immersed in social media, most often viewed on mobile phones.”<sup>227</sup> Thus, in order to advertise to today’s youth it is “critical to implement mobile and social-first strategies” on numerous youth-oriented social networks and sites.<sup>228</sup> “[T]he number of channels of e-cigarette advertising exposure increase[s] the probability of use among youth[s].”<sup>229</sup> In fact, multiple studies have indicated “that exposure to e-cigarette advertising on social networking sites among youth who had never used e-cigarettes increases the likelihood of subsequent e-cigarette use.”<sup>230</sup>

In contest with MSA’s general ban on advertisements that may target youths, “directly or indirectly,”<sup>231</sup> e-cigarette manufacturers have marketed their products aggressively to youths through online advertisements, social media networks, and emails. E-cigarette marketing on websites frequented by youths or through social media with a large youth following is akin to traditional cigarette advertisements placed in magazines.<sup>232</sup> In *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, where an enforcement proceeding was brought against Reynolds for advertising traditional cigarettes in magazines that had over 25 percent youth readership, the California Court of Appeals held Reynolds had violated the MSA because “Reynolds could implement alternative advertising schedules using different magazines to avoid targeting youth while maintaining effective targeting of young adult smokers[,]” which was the audience Reynolds claimed to target.<sup>233</sup> Thus, in reviewing e-cigarette manufacturers use of online advertisements, social media networks, and emails, the sole question of

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<sup>225</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 33.

<sup>226</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 33.

<sup>227</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 33.

<sup>228</sup> *Say Hello to Gen Z*, MINDSTREAM MEDIA GROUP, <https://mindstreammediagroup.com/beyond-millennials-how-to-market-to-generation-z/> (last visited Apr. 5, 2021) (noting youths tend to be “active on multiple social networks and uses each one for different activities.”).

<sup>229</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 35.

<sup>230</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 35 (“Use of media channels frequented by underage youth, such as teen magazines, has long been prohibited in the US for tobacco products.”).

<sup>231</sup> *Master Settlement Agreement*, *supra* note 79, at § III(a).

<sup>232</sup> See generally Jackler, *JUUL Advertising*, *supra* note 163, at 33.

<sup>233</sup> *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 11 Cal. Rptr. 3d 317, 322, 329 (Ct. App. 2004).



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substance should be whether the manufacturers could have used different websites with lower youth viewership to “avoid targeting youth while maintaining effective targeting of young *adult* smokers.”<sup>234</sup>

### 1. *Online Advertising*

JUUL, and other e-cigarette manufacturers, used websites and apps that effectively targeted youths by placing e-cigarette ads on websites with high youth viewership. A 2014 study found between the years of 2012 and 2013 that e-cigarette advertisements were placed on sites with younger audiences more often than traditional cigarette advertisements.<sup>235</sup> The data showed e-cigarette ads had been placed on sites with up to a 35 percent youth viewership.<sup>236</sup> In comparison, these youth oriented sites, such as music/entertainment sites, only had up to a 34 percent young adult viewership, individuals between the ages of eighteen and twenty-four.<sup>237</sup>

In 2020, the Massachusetts attorney general alleged JUUL purchased ad space on numerous youth-focused websites, including “Nickelodeon, the Cartoon Network, Seventeen magazine, and educational and games sites for middle school and high school students.”<sup>238</sup> The list of sites included: basic-mathematics.com, coolmath.com, math-aids.com, mathplayground.com, mathway.com, onlinemathlearning.com, purplemath.com, socialstudiesforkids.com, collegeconfidential.com, allfreekidscrafts.com, hellokids.com, kidsgameheroes.com, dailydressupgames.com, didigames.com, forhergames.com, games2girls.com, girlgames.com, and girlsgogames.com.<sup>239</sup> At this time, the attorney general’s investigation is ongoing. But should the attorney general’s accusations prove true, there is no question that these youth-focused websites, including Nickelodeon, Cartoon Network, and hellokids.com, can be reasonably presumed to have youth viewership greater than 50 percent.

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<sup>234</sup> *Id.* at 329 (emphasis added).

<sup>235</sup> Amanda Richardson et al., *Tobacco on the Web: Surveillance and Characterisation of Online Tobacco and E-Cigarette Advertising*, 24 *TOBACCO CONTROL* 341, 345 (2014), available at <https://tobaccocontrol.bmj.com/content/tobaccocontrol/24/4/341.full.pdf> (finding a 10.5 percent youth exposure online to e-cigarette ads compared to a 8.5 percent of traditional cigarette exposure.).

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> Kaplan, *Juul Bought Ads Appearing on Cartoon Network*, *supra* note 138.

<sup>239</sup> Kaplan, *Juul Bought Ads Appearing on Cartoon Network*, *supra* note 138.

## 2. Social Media Networks

JUUL used social media networks that effectively targeted youths by placing e-cigarette ads and endorsements on social media networks with high youth viewership. Social media networks and hashtags, in combination with user-generated videos have been extensively used by JUUL. In 2015, as part of its “Vaporized” advertising campaign, JUUL spent over a million dollars on advertising campaigns on Twitter, Instagram, and YouTube.<sup>240</sup> In its first three years, JUUL created at least twenty-five JUUL-specific hashtags to promote its products.<sup>241</sup> In 2018, a single JUUL hashtag, #juul, was connected with a total of 260,866 posts and had over a quarter of a million followers on Instagram.<sup>242</sup> At one point, #juul was featured on an average of 877 posts per day.<sup>243</sup> But #juul’s followers were easily “dwarfed by the multitudes of YouTube videos,” including eleven videos with over one million views and 109 videos with over one hundred thousand views.<sup>244</sup> These videos were permeated with postings by youths.<sup>245</sup> Studies have estimated only about 10 percent of traditional cigarette smokers were “among the age group of those most heavily frequenting JUUL’s social media advertising channels, highlighting that JUUL’s promotional efforts are notably misaligned with its professed purpose.”<sup>246</sup>

In 2018, after intense regulatory scrutiny, JUUL shut down its social media accounts and deleted their online ads.<sup>247</sup> But despite JUUL’s

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<sup>240</sup> Colgate v. JUUL Labs, Inc., 345 F. Supp. 3d 1178, 1184-85 (N.D. Cal. 2018); see Angelica LaVito, *Popular E-Cigarette Juul’s Sales Have Surged Almost 800 Percent Over The Past Year*, CNBC (last updated Sep. 11, 2018, 2:24 PM), <https://www.cnbc.com/2018/07/02/juul-e-cigarette-sales-have-surged-over-the-past-year.html>.

<sup>241</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 26.

<sup>242</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 18, 26.

<sup>243</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 23.

<sup>244</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 19.

<sup>245</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 19; Charlotte Otremla, *Gen Z in 2020: How to Advertise to the New Digital Natives*, BIDTELLECT (Jan. 2020), <https://bidtellect.com/2020/01/gen-z-digital-advertising-2020/> (video is the primary method to create engagement across devices); Michelle Ybarra, *The Influence of Social Media on Teen Use of E-Cigarettes*, PSYCHOLOGY TODAY (Mar. 21, 2019) [hereinafter “Ybarra, *The Influence of Social Media*”], <https://www.psychologytoday.com/us/blog/connected/201903/the-influence-social-media-teen-use-e-cigarettes> (noting in 2013, “almost 30,000 videos showing people vaping were available on YouTube, and more than 100 million views were reported.”).

<sup>246</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 2, 33 (“The JUUL founders have portrayed their company as wholly focused upon rescuing millions of adult smokers.”).

<sup>247</sup> Terry Turner, *How JUUL Created A Teen Vaping Epidemic: Juul’s Stealth Campaign Keeps Ads Circulating*, DRUGWATCH, <https://www.drugwatch.com/featured/juul-created-teen-vaping-epidemic/> (last updated Mar. 8, 2021) [hereinafter “Turner, *Juul’s Stealth Campaign Keeps Ads Circulating*”].

cessation of active advertising, youths have continued to post using company-created hashtags, effectively becoming JUUL's continued "marketing arm."<sup>248</sup> A recent study found that after 2018, JUUL's presence on Instagram continued to expand aggressively with seven of its most popular accounts having more than 2.5 million followers each.<sup>249</sup> In 2019, despite shutting down its social media accounts and abandoning its paid advertising, "the average number of daily posts with [JUUL] related hashtags tripled."<sup>250</sup> These hashtags are still active today, where "you'll find tons of pictures of [youths] using their Juul, holding five Juuls in their mouth, or [using e-cigarettes] with friends or saying which flavor is their favorite."<sup>251</sup>

### 3. Direct Emails

JUUL used direct emails to target youths to advertise discounted starter kits. In 1991, direct mail efforts were large undertakings.<sup>252</sup> Despite the difficulty, however, direct mail promotions and coupons were the tobacco industry's largest marketing expenditure.<sup>253</sup> At the time, all five of the major traditional cigarette manufacturers actively compiled mailing lists of millions of individuals.<sup>254</sup> Included on these lists were an estimated 1.6 million youths.<sup>255</sup> But at the time "the tobacco companies has no mechanism for purging [youths] from their lists."<sup>256</sup> These direct mail promotions, such as discounts or coupons, were noted to have a special appeal to youths because "youths have less disposable income and are more price-sensitive than adults[.]"<sup>257</sup>

Current lawsuits against JUUL have included claims of direct marketing targeting youths through their email addresses, even after they failed age verification.<sup>258</sup> Since 2015, JUUL has marketed its products on a regular basis through email regularly advertising

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<sup>248</sup> *Id.*

<sup>249</sup> Ybarra, *The Influence of Social Media*, *supra* note 245.

<sup>250</sup> Turner, *Juul's Stealth Campaign Keeps Ads Circulating*, *supra* note 247.

<sup>251</sup> Turner, *Juul's Stealth Campaign Keeps Ads Circulating*, *supra* note 247.

<sup>252</sup> GROWING UP TOBACCO FREE, *supra* note 43, at 113.

<sup>253</sup> GROWING UP TOBACCO FREE, *supra* note 43, at 113.

<sup>254</sup> GROWING UP TOBACCO FREE, *supra* note 43, at 113 (noting in 1993, Philip Morris had 26 million people on its mailing list.).

<sup>255</sup> GROWING UP TOBACCO FREE, *supra* note 43, at 113.

<sup>256</sup> GROWING UP TOBACCO FREE, *supra* note 43, at 113.

<sup>257</sup> GROWING UP TOBACCO FREE, *supra* note 43, at 113.

<sup>258</sup> Hollie Silverman & Dave Alsup, *At Least Five Lawsuits Have Been Filed Against E-Cigarette Company JUUL This Week for Allegedly Targeting Minors*, CNN (last updated Nov. 19, 2019, 11:35 AM) [hereinafter "Silverman, *At Least Five Lawsuits Have Been Filed*"], <https://www.cnn.com/2019/11/19/health/juul-washington-california-lawsuits/index.html>.

discounts for starter kits.<sup>259</sup> Unlike the traditional cigarette manufacturers, who at the time had no mechanism for purging youths from their lists, JUUL claims it employed a strict system that prohibited youths, those under the age of twenty-one, from purchasing JUUL products via their website.<sup>260</sup> But despite JUUL's claims regarding its strict system, their website did not in effect prevent youths from purchasing JUUL products. In 2018, to test the efficacy of its website, five youths "attempt[ed] to purchase JUUL products from the company website."<sup>261</sup> Although all five students were initially rejected after uploading their demographic data, "within a day each received a follow up e-mail notice that read "Welcome to JUUL."<sup>262</sup> Shortly thereafter, all five students received numerous emails from JUUL, "including a discount coupon to buy a starter kit."<sup>263</sup> In 2020, the Massachusetts Attorney General alleged JUUL even shipped e-cigarettes directly to consumers who used their high school student email addresses.<sup>264</sup> The complaint included an email sent by a JUUL customer service email address, advising a youth on how to circumvent age restrictions.<sup>265</sup>

#### D. USE OF TRADITIONAL CIGARETTE THEMES

The psychological appeal of colors and images of traditional cigarette ad designs on youths is well-documented.<sup>266</sup> Youths are more likely to notice, and be persuaded by, peripheral cues, such as colors, vibrant imagery, and attractive models.<sup>267</sup> "Studies have shown that four-color advertisements significantly increase attention and recall relative to two color or black- and white- advertisements."<sup>268</sup> In

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<sup>259</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 22.

<sup>260</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 22.

<sup>261</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 22-23.

<sup>262</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 23.

<sup>263</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 23.

<sup>264</sup> Kaplan, *Juul Bought Ads Appearing on Cartoon Network*, *supra* note 138 ("Juul allowed more than 1,200 accounts to be established for Massachusetts consumers using school email addresses, including email addresses associated with high schools in Beverly, Malden and Braintree and shipped its products to recipients with obviously fabricated names, like 'PodGod.'").

<sup>265</sup> Kaplan, *Juul Bought Ads Appearing on Cartoon Network*, *supra* note 138.

<sup>266</sup> GROWING UP TOBACCO FREE, *supra* note 43, at 119; *see also* Final Rule, *supra* note 17, at 44468 ("Evidence from social psychology and marketing research shows image-based advertising, such as that employed by the cigarette and smokeless tobacco industry, is particularly effective with young people, and that the information conveyed by imagery is likely to be more significant to young people than information conveyed by other means in the advertisement.").

<sup>267</sup> Hoefges, *Protecting Tobacco Advertising*, *supra* note 71, at 290-91 (citing Final Rule, *supra* note 17, at 44468).

<sup>268</sup> Final Rule, *supra* note 17, at 44467.

comparison, a 2015 review of 171 e-cigarette magazine ads found 89.9 percent of the ads were full-page advertisements, 92.6 percent of the ads “placed the product in a way that drew attention to it[,]” and 85.2 percent of the ads used six or more colors, “which the authors noted increases the attention-grabbing ability of the ads.”<sup>269</sup>

Traditional cigarette ads used such colors, imagery, and models to create themes designed to attract youths.<sup>270</sup> The resemblance of JUUL’s ads to traditional cigarette advertisements has been universally recognized.<sup>271</sup> In 2015, JUUL launched its “Vaporized” advertising campaign, which published and posted ads in Times Square, VICE Magazine, and on Twitter, Instagram, and Facebook.<sup>272</sup> JUUL described the theme of the campaign, which featured casually dressed models in their 20s, as “dynamic energy.”<sup>273</sup> As the Stanford Research Into the Impact of Tobacco Advertising (“SRITA”) noted, however, “[t]he vivid color scheme of [“]Vaporized[“] advertisements closely resemble[d] that of Natural American Spirit Cigarettes, a leading [traditional cigarette manufacturer] youth brand.”<sup>274</sup>

<sup>269</sup> E-CIGARETTE USE AMONG YOUTH AND YOUNG ADULTS, *supra* note 7, at 159.

<sup>270</sup> GROWING UP TOBACCO FREE, *supra* note 43, at 119-121 (noting traditional tobacco ad designs were designed around six themes: (1) independence; (2) rite of passage to adulthood; (3) success; (4) relaxing in social situations; (5) normative; and (6) safe.).

<sup>271</sup> E-CIGARETTE USE AMONG YOUTH AND YOUNG ADULTS, *supra* note 7, at 15 (“The advertising and marketing of e-cigarette products has engendered skepticism among public health professionals and legislators, who have noted many similarities to the advertising claims and promotional tactics used for decades by the tobacco industry to sell conventional tobacco products.”); E-CIGARETTE USE AMONG YOUTH AND YOUNG ADULTS, *supra* note 7, at 163 (“Although the marketers of e-cigarettes have made claims that differ from those made for conventional cigarettes ... a content analysis of e-cigarette marketing and the observations of tobacco marketing surveillance systems point to several similarities, including the use of young, attractive models; lifestyle claims; and celebrities.”); see generally Richard Feloni, *The New E-Cigarette Ads Look Exactly Like Old-School Cigarette Promos*, BUS. INSIDER (Nov. 5, 2013, 3:35 PM) [hereinafter “Feloni, *The New E-Cigarette Ads*”], <https://www.businessinsider.com/democrats-link-e-cigarette-ads-to-older-promos-2013-11>; see also *Cigs vs eCigs*, *supra* note 179; see also Haardörfer, *Advertising Strategies of Early E-cigarette Brand Leaders*, *supra* note 16, at \*5 (comparing e-cigarette marketing themes of Njoy, Blu, Vuse, and MarkTen.).

<sup>272</sup> See generally Jackler, *JUUL Advertising*, *supra* note 163, at 1, 16, 17.

<sup>273</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 7; see also Kathleen Chaykowski, *The Disturbing Focus Of Juul’s Early Marketing Campaigns*, FORBES (Nov. 16, 2018 2:38 PM), <https://www.forbes.com/sites/kathleenchaykowski/2018/11/16/the-disturbing-focus-of-juuls-early-marketing-campaigns/?sh=3f08e46814f9> [hereinafter “Chaykowski, *The Disturbing Focus*”] (“A ‘Vaporized’ video ad show[ed] a young woman twirling her hair and dancing to club-like music. Other[] models strike[d] playful poses and smile[d] in bright lipstick... One print ad feature[d] a model with a long, high ponytail, styled like teen pop megastar Ariana Grande[.]”).

<sup>274</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 7 (noting as part of SRITA’s research, the program collects and publishes a “web repository of tobacco advertising” to support scholarly research and to inform legislators of the tobacco industry’s promotional

In early 2016, JUUL transitioned its theme to align more closely to those of traditional cigarette advertisements.<sup>275</sup> A recent study by SRITA in reviewing JUUL's transitioned themes noted:

Clear references exist to both historical and contemporary tobacco advertising themes. Contemporary examples include the coloration of American Spirit, the playful twenty somethings of Newport (Alive with Pleasure), the relaxed poses of Camel (Pleasure to Burn), the stylish smoking of Virginia Slims ("You've Come a Long Way Baby"), among many others.<sup>276</sup>

In a direct interview with SRITA, JUUL co-founder James Monsees admitted that the 2016 designs of JUUL's advertising had been "informed" by traditional cigarette advertisements and that the SRITA's web repository of traditional cigarette advertisements had been "quite useful to them."<sup>277</sup> SRITA has since classified JUUL's 2016 theme ads into six familiar themes, four of which parallel traditional cigarette themes.<sup>278</sup>

1. *Commonplace Activities, Events, Social Spaces, or Mind-Sets*

Traditional cigarette ads associated cigarettes with commonplace activities, events, social spaces, or mind-sets.<sup>279</sup> Traditional cigarette advertising would link its product with "routine social activities and transition points in the daily work-play cycle. For example, cigarettes are depicted as going with a coffee break, an after-work drink, and time off."<sup>280</sup> In contrast, a central message of JUUL advertising has been *pleasure/relaxation*.<sup>281</sup> JUUL employed slogans to "implant[] the notion that every period of relaxation should be accompanied by JUUL[.]" including "Enjoy a JUUL moment," "Cozy up with JUUL," and "Enjoy

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activities.); *see generally About SRITA, SRITA, [http://tobacco.stanford.edu/tobacco\\_main/mission.php](http://tobacco.stanford.edu/tobacco_main/mission.php) (last visited Apr. 17, 2021).*

<sup>275</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 27.

<sup>276</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 27 ("The SRITA website [currently] includes [eighty-two] comparisons between JUUL and historical cigarette advertisements[.]").

<sup>277</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 27.

<sup>278</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 9 (noting JUUL ad designs were designed around six themes: (1) pleasure/relaxation; (2) socialization/romance; (3) economics; (4) flavors; (5) style/identity; and (6) holidays/seasons.).

<sup>279</sup> GROWING UP TOBACCO FREE, *supra* note 43, at 120.

<sup>280</sup> GROWING UP TOBACCO FREE, *supra* note 43, at 120.

<sup>281</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 9.

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yourself, you earned it,” which portrays JUUL “as a reward, a special treat you deserve” after a long day.<sup>282</sup>

### 2. *Relaxing/Social and Sexual Sophistication*

Traditional cigarette ads associated cigarettes with “relaxing in social settings” and “sophistication in social and sexual relations.”<sup>283</sup> Traditional cigarette manufacturers advertising linked its product “with a sense of carefree belonging” to reassure youths “at a time of identity construction when social relations are extremely important and teens often feel awkward in social situations.”<sup>284</sup> In contrast, central messages of JUUL advertising have focused on *socialization/romance*.<sup>285</sup> JUUL advertisements frequently portrayed youths using JUUL e-cigarettes as a social activity, depicting friends smoking together, or would associate JUUL with romance, such as “couple[s], face to face, mingling their exhaled vapor[.]”<sup>286</sup>

### 3. *Social Status*

Traditional cigarette ads associated cigarettes with social status.<sup>287</sup> The traditional cigarette brands that often had been the most successful with youths had been those that used models to “depict success, sophistication, and self-reliance” or supported cultural events to create the impression that cigarettes were “socially acceptable to successful people who patronize the arts and have a high quality of life.”<sup>288</sup> At the time, it was common for the tobacco industry to pay celebrities to appear in their ads or to pay the media industry to portray celebrities using their product in movies or on television.<sup>289</sup>

In contrast, a central message of JUUL advertising has been *style/identity*.<sup>290</sup> JUUL advertisements frequently used “stylish and attractive models of a type youthful consumers would like to emulate” and promoted its products through its “pop-up JUUL bars” and sampling events using free samples and gifts.<sup>291</sup>

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<sup>282</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 9.

<sup>283</sup> GROWING UP TOBACCO FREE, *supra* note 43, at 120.

<sup>284</sup> GROWING UP TOBACCO FREE, *supra* note 43, at 120.

<sup>285</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 10.

<sup>286</sup> Jackler, *JUUL Advertising* *supra* note 163, at 10.

<sup>287</sup> GROWING UP TOBACCO FREE, *supra* note 43, at 120.

<sup>288</sup> GROWING UP TOBACCO FREE, *supra* note 43, at 120.

<sup>289</sup> Zimlich, *What Is A Cigarette?*, *supra* note 20, at 491-92.

<sup>290</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 14.

<sup>291</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 14; *Master Settlement Agreement*, *supra* note 79, § III(g)-(h). From the launch of the “Vaporized” campaign in July 2015 until October 2017, after the Deeming Rule went into effect, JUUL’s Twitter account

The events were always free and featured popular bands such as CHAPMAN, illumanti AMS, Mary Kwok and others. Other events were movie nights held on rooftops. One Los Angeles event, managed by Cinespia, was an all night “slumber party” held in Hollywood’s Forever Cemetery featuring movies such as: Can’t Hardly Wait, SCREAM, and Cruel Intentions.<sup>292</sup>

These sampling events “were youth-oriented entertainment events” with the primary purpose to distribute free samples of JUUL to a youthful audience who were “stylized on the #vaporized theme with a definite youthful and rock music theme.”<sup>293</sup> Attractive young girls in colorful brand shirts served as hosts, distributing the free samples.<sup>294</sup> Some images from the events show a youthful audience in their twenties, “in poses reminiscent of teen behavior, such as wearing a hat on backwards, while holding a skateboard, or a girl with purple hair[.]”<sup>295</sup>

At these sampling events, celebrities were often given special treatment.<sup>296</sup> For celebrity guests, JUUL had a VIP lounge prepared for “a more exclusive experience and gifting suite.”<sup>297</sup> Celebrities visiting the VIP lounge would receive free samples of JUUL and could “choose to have their samples custom-engraved on site.”<sup>298</sup> JUUL would then post online photos of celebrities using JUUL, such as Nicholas Cage, Elijah Wood, Dan Reynolds, and Tyler Glen at the Sundance Film Festival.<sup>299</sup> JUUL even paid “influencers,” social-media celebrities with a large number of followers, to promote their product to their social media networks.<sup>300</sup>

In 2015, JUUL’s primary focus was to find “youthful influencers” who would “accept gifts of JUUL products, to try out their various flavors, and then to popularize their products among their peers” online.<sup>301</sup> The popularity of JUUL’s online communities were in part due

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posted numerous invitations to such free sample events. “Repeatedly after October 24, 2017 JUUL tweeted the following: ‘FDA regulations prohibit manufacturers from providing free samples of nicotine and nicotine related products.’” Jackler, *JUUL Advertising*, *supra* note 163, at 6.

<sup>292</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 6.

<sup>293</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 5.

<sup>294</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 5.

<sup>295</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 5.

<sup>296</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 7.

<sup>297</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 7.

<sup>298</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 7.

<sup>299</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 6.

<sup>300</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 1.

<sup>301</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 1.



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to its influencers, who would promote the product by posting photos and videos of themselves using JUUL.<sup>302</sup> “[JUUL’s] prolific presence on youth consumed social media channels, enhanced by company paid influencers, undoubtedly sustained the craze and furthered its attaining a fevered pitch.”<sup>303</sup> These influencers were directly compensated by JUUL to promote its product without ever revealing their relationship with JUUL to their followers.<sup>304</sup>

#### 4. Health

Traditional cigarette ads associated cigarettes with health.<sup>305</sup> “Healthiness has been a manifest theme in cigarette ads for at least [sixty] years. Images of healthy smokers offer reassurance to would-be quitters. Such imagery undermines the effects of public health programs to inform the public of the hazards of tobacco use and to discourage youths from initiating smoking.”<sup>306</sup> Although not considered a parallel theme by SRITA, SRITA notes JUUL ads’ efficiency in communicating a reduced harm message to youths by not emphasizing health and cessation claims.<sup>307</sup> “Despite JUUL’s claims that it is meant as an alternative to smoking, less than one-third of one [percent] of [JUUL’s] tweets mentioned using JUUL to quit smoking.”<sup>308</sup> Rather JUUL used its other themes to emphasize positive experiences, such as *flavor*.<sup>309</sup>

Traditional cigarette manufacturer’s history of using flavors to target youths is also well-documented.<sup>310</sup> “Flavors have been used for decades to attract youth to tobacco products and to mask the flavor and harshness of tobacco[.]”<sup>311</sup> In response, Congress banned the use of characterizing flavors, except menthol and tobacco, in the Tobacco Control Act in 2009.<sup>312</sup> Despite the Tobacco Control Act’s ban of

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<sup>302</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 34.

<sup>303</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 36.

<sup>304</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 1.

<sup>305</sup> GROWING UP TOBACCO FREE, *supra* note 43, at 121.

<sup>306</sup> GROWING UP TOBACCO FREE, *supra* note 43, at 121.

<sup>307</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 35.

<sup>308</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 35.

<sup>309</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 11.

<sup>310</sup> E-CIGARETTE USE AMONG YOUTH AND YOUNG ADULTS, *supra* note 7, at 11 (“Industry documents show that tobacco companies marketed flavored little cigars and cigarillos to youth[s] . . . to facilitate their uptake of cigarettes[.]”).

<sup>311</sup> E-CIGARETTE USE AMONG YOUTH AND YOUNG ADULTS, *supra* note 7, at 11.

<sup>312</sup> E-CIGARETTE USE AMONG YOUTH AND YOUNG ADULTS, *supra* note 7, at 11; *see generally* Tobacco Control Act, *supra* note 90, at § 907(a)(1)(A), 1799 (banning the use of flavors “including strawberry, grape, orange, clove, cinnamon, pine- apple, vanilla, coconut,

characterizing flavors, however, e-cigarette manufacturers have marketed their products aggressively to youths using child-friendly flavors.<sup>313</sup> In 2016, the National Youth Tobacco Survey reported 39 percent of young e-cigarette users said they vaped because their friends or family did the same.<sup>314</sup> But 31 percent suggested that they vaped because of the availability of child-friendly flavors.<sup>315</sup> These fruit and candy flavors directly increased the appeal of tobacco products to young people.<sup>316</sup> E-cigarettes even included local anesthetic properties, such as menthol, to decrease the natural harshness of the tobacco smoke and make it easier for youths to inhale the smoke deeply.<sup>317</sup>

Since JUUL's inception, "flavors have played a central role in JUUL marketing."<sup>318</sup> In line with other e-cigarette manufacturers, JUUL placed special emphasis on sweet and fruity flavors.<sup>319</sup> JUUL's "emphasis upon dessert flavors is clear: 'Have a sweet tooth, try bruule.'"<sup>320</sup> In 2020, the vast majority of youths who smoked e-cigarettes used a flavored variety.<sup>321</sup> The most popular flavors among high school students were "fruit (73.1 [percent]), mint (55.8 [percent]), menthol (37.0 [percent]), and candy, desserts, or other sweets (36.4 [percent])."<sup>322</sup> In 2019, research was published in the medical journal JAMA showing mint to be the most popular flavor among JUUL users between the ages of ten and twelve.<sup>323</sup>

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licorice, cocoa, chocolate, cherry, or coffee, that is a characterizing flavor of the tobacco product or tobacco smoke.").

<sup>313</sup> James Tsai, Reasons for Electronic Cigarette Use Among Middle and High School Students — National Youth Tobacco Survey, United States, 2016, 27 MORBIDITY & MORTALITY WKLY. REP. 196, 196 (2018), available at <https://www.cdc.gov/mmwr/volumes/67/wr/pdfs/mm6706a5-H.pdf>.

<sup>314</sup> *Id.*

<sup>315</sup> *Id.* at 198; see also E-CIGARETTE USE AMONG YOUTH AND YOUNG ADULTS, *supra* note 7, at 164 ("The marketing of candy and fruit flavors may be one of the reasons that e-cigarettes appeal to youth. Young adults (18–24 years of age) are more likely to use flavored tobacco products than are adults in the next age group (25–34 years of age)" (internal citations omitted)).

<sup>316</sup> Farber, *Public Policy*, *supra* note 11, at 1003; see also *Quick Facts on the Risks of E-cigarettes*, *supra* note 6 ("A study from 2013–2014 showed that most youth who use e-cigarettes first start with a flavored variety, and flavors are the primary reason youth report using e-cigarettes.").

<sup>317</sup> Farber, *Public Policy*, *supra* note 11, at 1000.

<sup>318</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 11.

<sup>319</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 11.

<sup>320</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 11.

<sup>321</sup> *Quick Facts on the Risks of E-cigarettes*, *supra* note 6 (noting 82.9 percent of youths "who reported using e-cigarettes used flavored varieties.").

<sup>322</sup> *Quick Facts on the Risks of E-cigarettes*, *supra* note 6 (emphasis added).

<sup>323</sup> Silverman, *At Least Five Lawsuits Have Been Filed*, *supra* note 258.

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The use of such flavors has misled youths regarding the relative safety of e-cigarettes, with a vast number of youths unaware that e-cigarettes contained nicotine.<sup>324</sup> In a focus group in 2015, youths between the ages of twelve and seventeen described e-cigarettes as a “reduced risk cigarette ‘for kids.’”<sup>325</sup> In contrast with its use of attractive models, vibrant colors, and distracting imagery, JUUL’s “Vaporized” advertising campaign included only a small print warning, which was positioned against low-contrast backgrounds.<sup>326</sup> Many of JUUL’s online advertisements initially included no warnings on the dangers of their product, despite the risks associated with its use of young models and influencers.<sup>327</sup>

In 2019, the FDA sent JUUL a warning letter after the agency determined that JUUL had marketed its products as modified risk tobacco products without an appropriate FDA order in effect.<sup>328</sup> The FDA found that JUUL’s labeling, advertising, and other activities created a reasonable expectation to consumers that JUUL e-cigarettes:

- 1) present a lower risk of tobacco-related disease or are less harmful than one or more other commercially marketed tobacco products; 2) contain a reduced level of a substance or present a reduced exposure to a substance; and/or 3) do not contain or are free of a substance or substances.<sup>329</sup>

The FDA’s warning letter including several statements made by JUUL or its agents, including statements made during the July 2019

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<sup>324</sup> *JUUL E-Cigarettes Gain Popularity Among Youth, But Awareness of Nicotine Presence Remains Low*, TRUTH INITIATIVE (Apr. 18, 2018), <https://truthinitiative.org/press/press-release/juul-e-cigarettes-gain-popularity-among-youth-awareness-nicotine-presence>; see also Collins, *E-Cigarette Marketing and Communication*, *supra* note 193, at 15 (noting studies conducted between 2010 and 2015 found that, in comparison to traditional cigarettes, e-cigarettes “were presented as healthier, less expensive, more socially acceptable, unhindered by smoke-free policies, and more environmentally friendly.”).

<sup>325</sup> Collins, *E-Cigarette Marketing and Communication*, *supra* note 193, at 16.

<sup>326</sup> See, e.g., Chaykowski, *The Disturbing Focus*, *supra* note 273.

<sup>327</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 25 (noting from June 2015 to April 7, 2016, the approximate length of JUUL’s multimillion-dollar “Vaporized” advertising campaign, JUUL’s promotional emails contained no mention of nicotine. JUUL’s Twitter feed contained no mention of nicotine until October 6, 2017. On November 26, 2015, the words “Intended for adult smokers only” first appeared in a JUUL promotional email. These warnings would continue to appear sporadically until April 7, 2016.).

<sup>328</sup> Press Release, FDA, FDA Warns JUUL Labs for Marketing Unauthorized Modified Risk Tobacco Products, Including in Outreach to Youth (Sep. 9, 2019), <https://www.fda.gov/news-events/press-announcements/fda-warns-JUUL-labs-marketing-unauthorized-modified-risk-tobacco-products-including-outreach-youth>.

<sup>329</sup> *Id.*

Congressional hearing regarding JUUL.<sup>330</sup> Per that testimony, a JUUL agent speaking with students during a school presentation stated that JUUL e-cigarettes were “totally safe,” a “safer alternative to cigarettes,” “better for [youths] to use,” and “99 [percent] safer than cigarettes.”<sup>331</sup> The FDA’s warning letter also referenced a “Letter from the CEO” JUUL had posted on its website, which stated “[JUUL’s] simple and convenient system incorporates temperature regulation to heat nicotine liquid and deliver smokers the satisfaction that they want without the combustion and the harm associated with it.”<sup>332</sup> In 2019, after a “House Oversight Committee hearing focused on [JUUL’s] marketing, the FDA warned the company to stop unlawfully marketing its e-cigarettes as healthier than cigarettes[.]”<sup>333</sup>

## VII. Conclusion

In 2018, as regulatory pressures intensified, JUUL reduced its online marketing and re-focused its advertising on its new theme, “Make the Switch.”<sup>334</sup> JUUL has since deleted the entire inventory of JUUL communications from its initial “Vaporized” marketing campaign as well as a large portion of its social media history.<sup>335</sup> “In July 2018, a JUUL spokesperson indicated that the company has worked with social media companies to remove youth-oriented content with some 4000 such posts removed from Instagram and Facebook.”<sup>336</sup> JUUL halted much of the youth-oriented marketing practices first used in 2015, and replaced the younger models with “older models, primarily middle aged or older, and included numerous testimonial videos on Instagram, Facebook, and Twitter.”<sup>337</sup> In response to the allegations, JUUL has denied targeting youths through its marketing.<sup>338</sup>

The cases brought by parents of teenagers against JUUL directly mirror the cases of the 1990s against traditional cigarette

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<sup>330</sup> *Id.*

<sup>331</sup> *Id.*

<sup>332</sup> *Id.*

<sup>333</sup> Ducharme, *JUUL Once Looked Too Big to Fail*, *supra* note 11.

<sup>334</sup> Turner, *Juul Models Aged Overnight*, *supra* note 10.

<sup>335</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 19.

<sup>336</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 19.

<sup>337</sup> Jackler, *JUUL Advertising*, *supra* note 163, at 16; *see also* Turner, *Juul Models Aged Overnight*, *supra* note 10.

<sup>338</sup> Turner, *E-Cigarette Lawsuits*, *supra* note 12; *but see* Kaplan, *Juul Bought Ads Appearing on Cartoon Network*, *supra* note 138.

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manufactures.<sup>339</sup> In violation of state false advertising laws, JUUL knowingly misrepresented their e-cigarettes and concealed various potentially harmful ramifications of using their product, including nicotine addiction. Worse, JUUL repeated the conduct of traditional cigarette manufacturers by purposefully targeting youths and knowingly marketing e-cigarette products in a manner that traditional cigarette manufacturers have been barred from for decades. JUUL has repeated history and engaged in the exact type of behavior that put the traditional cigarette industry at risk. In a side-by-side comparison of traditional Marlboro and JUUL ads, those of JUUL “evoke[] many of the same colors, shapes and packaging design as the Marlboro advertisements.”<sup>340</sup> In fact, some e-cigarette ads are almost exact copies of cigarette ads from the 1930s, ‘50s, and ‘60s.<sup>341</sup>

Before entering into the MSA in 1998, traditional cigarette manufacturers exploited youths both mentally and physically by “inculcating their messages within vulnerable and impressionable minds that are too immature to defend against them.”<sup>342</sup> Despite the fact that the sale of tobacco products to youths was illegal in all fifty States, traditional cigarette manufacturers extensive marketing campaigns were still able to appeal to and successfully hook youths.<sup>343</sup> For decades, traditional cigarette manufacturers’ marketing campaigns were immensely successful “until indoor smoking bans, documents unveiled in tort litigation, whistleblower accounts regarding the industry’s

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<sup>339</sup> Ho, *Mounting Lawsuits*, *supra* note 13 (“The batch of lawsuits . . . could mark the beginnings of a legal strategy similar to the one used by lawyers, state attorneys general and the federal government in the 1990s[.]”); *compare* Mangini, 7 Cal. 4th at 1060 (alleging Reynolds used Old Joe Camel, a cartoon character, in its advertising campaign and disseminated products such as matchbooks, store exit signs, scrip, mugs, and soft drink can holders advertising Camel cigarettes to target adolescents), *with* Colgate v. JUUL Labs, Inc., 345 F. Supp. 3d 1178, 1184-85 (N.D. Cal. 2018) (alleging JUUL used advertisements featured young men and women on a number of social media platforms including Twitter, Instagram, and Facebook to target adolescents), *and* Chaykowski, *supra* note 273 (“Many of Juul’s early live events were [] youth-oriented, . . . identif[ying] at least 25 Juul sampling events between June and December 2015 in major U.S. cities such as New York, Miami and Las Vegas, whose ‘primary purpose was to distribute free samples of Juul devices and flavor pods to a youthful audience to help establish JUUL in the vapor marketplace[.]’ . . . Some of Juul’s events were music- and cinema-themed . . . as well as rooftop movie nights . . . Juul events often featured bands popular among youth, such as electronic DJs Illuminati AMS and Mary Kwok, as well as vibrant lounge decor that look more fitting for a party for teens than one for adults.”).

<sup>340</sup> Ho, *Mounting Lawsuits*, *supra* note 13.

<sup>341</sup> *See generally* Feloni, *The New E-Cigarette Ads*, *supra* note 271.

<sup>342</sup> Garner, *Protecting Children from Joe Camel*, *supra* note 39, at 11.

<sup>343</sup> Final Rule, *supra* note 17, at 44397.

deceptive tactics, and other factors coalesced to make smoking much less attractive.”<sup>344</sup>

As if in an encore performance, before 2016, e-cigarette manufacturers introduced and marketed their products with virtually no federal oversight, exploiting youths both mentally and physically.<sup>345</sup> These e-cigarette manufacturers took advantage of the technical lapse in oversight to market their products aggressively towards youths before imminent federal regulations and bans could coalesce to make e-cigarettes less attractive.<sup>346</sup> Although these e-cigarette manufacturers were effectively racing against the clock, they knew they had the advantage. The effect of traditional cigarette advertising on youths is well-documented. Through use of traditional cigarette marketing tactics, e-cigarette manufacturers “gr[e]w essentially unchecked even as an epidemic of teen use emerged and multiplied.”<sup>347</sup>

It is not enough to simply repeat history. The extent of the damage done by e-cigarette manufacturers is currently immeasurable. These civil tort claims against e-cigarette manufacturers, such as JUUL, have legal precedent and are not preempted by federal law or regulation. These suits are only going to continue to grow in number. A new and stricter precedent must be set to keep history from repeating itself a third time.<sup>348</sup> When the e-cigarette manufacturers inevitably seek to enter into a settlement agreement akin to the MSA, the government should not settle. Instead, the government should leave these lawsuits for the courts, where e-cigarette manufacturers can be held liable for the dangerous materials they either purposefully or negligently marketed towards youths in violation of state false advertising laws.

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<sup>344</sup> Karen C. Sokol, *Tort As A Disrupter of Cultural Manipulation: Neuromarketing and the Dawn of the E-Cigarette*, 66 S.C. L. REV. 191, 212 (2014).

<sup>345</sup> Ducharme, *JUUL Once Looked Too Big to Fail*, *supra* note 11.

<sup>346</sup> Ducharme, *JUUL Once Looked Too Big to Fail*, *supra* note 11.

<sup>347</sup> Ducharme, *JUUL Once Looked Too Big to Fail*, *supra* note 11.

<sup>348</sup> See, e.g., Maloney, *Reynolds American Gains on Juul*, *supra* note 16 (“Unit sales of Reynolds’ Vuse e-cigarettes are surging, fueled by price promotions, TV spots, billboards and social-media posts. The brand is hiring musicians and artists for videos[,] . . . using models as young as 25[,] and is marketing on social media with music and images aimed at younger adults—practices that Juul stopped two years ago after being accused by critics of targeting teens.”).