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LOOKING PAST A SMOKE SCREEN: A FIRST AMENDMENT ANALYSIS OF THE FOOD AND DRUG ADMINISTRATION'S RULE RESTRICTING TOBACCO ADVERTISING

Gerald W. Griffin*

INTRODUCTION

On August 23, 1996, President Clinton declared his support for the Food and Drug Administration's ("FDA") new rule restricting tobacco access and advertising to children.¹ The new rule, published in the Federal Register on August 28, 1996,² marks the first

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¹ See John Carey, *Antismoking Plan Won't Exactly Kick Butt*, BUS. WEEK, Sept. 9, 1996, at 42.

² Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396, 44,615 (1996) (codified at 21 C.F.R. § 897). The FDA's new rule:

prohibits the sale of nicotine-containing cigarettes and smokeless tobacco to individuals under the age of 18 and requires manufacturers, distributors, and retailers to comply with certain conditions regarding access to, and promotion of, these products. Among other things, the final rule requires retailers to verify a purchaser's age by photographic identification. It also prohibits all free samples and prohibits the sale of these products through vending machines and self-service displays except in facilities where individuals under the age of 18 are not present or permitted at any time. The rule also limits the advertising and labeling to which children and adolescents are exposed. The rule accomplishes this by generally restricting advertising to which children and adolescents are exposed to a black-and-white, text-only format. In addition, billboards and other outdoor advertising are prohibited within 1,000 feet of schools and public playgrounds. The rule also prohibits the sale or distribution of brand-identified promotional, nontobacco items such as hats and tee shirts. Furthermore, the rule prohibits

time in American history that the FDA has regulated tobacco products.³ The FDA independently determined in 1996 that it has jurisdiction over tobacco products,⁴ despite repeated congressional rejection of proposed legislation which would have amended the Food, Drug and Cosmetic Act⁵ to confer the FDA with such authority.⁶

sponsorship of sporting and other events, teams, and entries in a brand name of a tobacco product, but permits such sponsorship in a corporate name.

61 Fed. Reg. at 44,399.

³ See generally *Nicotine in Cigarettes and Smokeless Tobacco Is a Drug and These Products Are Nicotine Delivery Devices Under the Federal Food, Drug and Cosmetic Act: Jurisdictional Determination*, 61 Fed. Reg. 44,619 (1996).

⁴ 61 Fed. Reg. at 44,628. The rule provides:

FDA is asserting jurisdiction over cigarettes and smokeless tobacco under the drug and device provisions of the [Food, Drug and Cosmetic] Act. Specifically, FDA has concluded that cigarettes and smokeless tobacco are combination products consisting of nicotine, a drug that causes addiction and other significant pharmacological effects on the human body, and device components that deliver nicotine to the body.

Id.

⁵ The Food, Drug and Cosmetic Act, Pub. L. No. 75-717, 52 Stat. 1040 (1938) (codified as amended at 21 U.S.C. §§ 301-395 (1994)). The Food, Drug and Cosmetic Act ("FDCA") limits the jurisdiction of the FDA to those products which are either a "drug" or a "device." See 21 U.S.C. § 321(g)(2) (1994) (stating that "the term 'drug' means . . . articles (other than food) intended to affect the structure or any function of the body of man"); 21 U.S.C. § 321(h)(2) (1994) (stating that "the term 'device' . . . means instruments, apparatus, and contrivances, including their components, parts, and accessories, intended to affect the structure or any function of the body of man"). See generally Michael Whatley, Note, *The FDA v. Joe Camel: An Analysis of the FDA's Attempt to Regulate Tobacco and Tobacco Products Under the Federal Food, Drug and Cosmetic Act*, 22 J. LEGIS. 121 (1996) (examining the history of tobacco regulation and the FDA from the passage of the Pure Food and Drug Act in 1906 through the issuance of the FDA's new rule, and analyzing jurisdictional challenges to the new rule).

⁶ During the course of this century, Congress has consistently made clear that tobacco products are not subject to FDA jurisdiction. See S. 1682, 88th Cong., 1st Sess. (1963) and H.R. 5973, 88th Cong., 1st Sess. (1963) (recognizing that both houses rejected a bill which would put all smoking products under FDA authority); H.R. 11280, 84th Cong., 2d Sess. (1956) (noting that the House of Representatives rejected a bill which would amend the FDCA to grant the FDA

Few government agency rules have sparked as much controversy as the FDA's tobacco regulations.⁷ Opponents to the new rule have attacked its provisions primarily on two grounds, arguing that Congress has not conferred the FDA with jurisdiction over tobacco products,⁸ and that the rule's advertising provisions

regulatory authority over cigarettes); S. 1468, 71st Cong., 1st Sess. (1929) (noting that the Senate rejected a bill which would bring tobacco products within jurisdiction of federal agencies that enforce the nation's drug laws); H.R. REP. NO. 805, 98th Cong., 2d Sess., at 12 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3718, 3725 (1984) (declaring that "[f]ederal laws that protect the public from hazardous food, drugs and consumer products do not apply to cigarettes").

⁷ The FDA received more than 700,000 public comments concerning its new rule. See 61 Fed. Reg. at 44,657. But what will probably be remembered most about the controversy surrounding the FDA's tobacco regulations was the role they played in the 1996 U.S. presidential election:

About the only thing everyone agrees on in the contentious debate over government regulation of cigarettes is the Clinton administration's brilliant political timing in releasing its final tobacco regulations. Issued on the heels of a new report showing an upswing in teen-age drug use, and on the eve of the Democratic convention, the regulation garnered a lot of favorable press for President Clinton.

Claudia McLachlan, *Tobacco's Road is Smooth: FDA Regs Face Legal Fight*, 19 NAT'L L. J., Sept. 9, 1996, at B1. In fact, Republican presidential candidate Bob Dole, a supporter of tobacco interests, received widespread criticism during his campaign for publicly stating that he did not believe that cigarette smoking was addictive. See Carey, *supra* note 1, at 48.

⁸ See 61 Fed. Reg. at 44,407-09 ("[The] FDA received several comments on whether section 520(e) of the [FDCA] authorizes restrictions on youth access and advertising. Most of the comments were from tobacco trade associations, tobacco companies, and advertisers, arguing that section 520(e) of the act does not provide authority for either the access or advertising restrictions."). See generally *Comments of Brown & Williamson Tobacco Corporation, Liggett Group Inc., Lorillard Tobacco Company, Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Tobacco Institute Inc. Before the United States Food and Drug Administration*, Docket Nos. 95N-0253 and 95N-0253J, Vol. I, "FDA Lacks Jurisdiction Over Cigarettes" [hereinafter *Comments of Brown & Williamson*] (on file with *Journal of Law and Policy*).

A copy of these comments may be obtained through a Freedom of Information Act ("FOIA") request to the FDA. FOIA requests must be in writing, and should include the requestor's name, address and telephone number; a description of the documents being sought, such as the full cite to the *Comments of Brown & Williamson* given above; and a statement concerning

deprive tobacco manufacturers, advertisers and retailers of their First Amendment right to promote tobacco products.⁹ Indeed, almost immediately after the FDA issued its proposed regulations in August 1995, tobacco manufacturers, retailers and advertisers filed lawsuits against the FDA in federal court in Greensboro, North Carolina, seeking declaratory judgment invalidating the new rule on these two grounds.¹⁰

This Note is primarily concerned with whether or not the rule's advertising provisions pass constitutional muster. This Note argues that the FDA's advertising provisions violate the First Amendment by unjustifiably restricting commercial free speech. Part I briefly describes the FDA's new rule, the FDA's claimed purpose behind it, and opponents' criticisms of the rule's advertising restrictions. Part II discusses the commercial free speech doctrine as developed by the United States Supreme Court, and in particular, examines a recent decision by the Court, *44 Liquormart, Inc. v. Rhode Island*,¹¹ which concerned advertising restrictions on alcoholic beverages similar to the FDA's new advertising restrictions on tobacco products. Part III analyzes the FDA's new tobacco advertising restrictions under the commercial free speech doctrine

willingness to pay any duplicating and processing fees, including any limitations thereon. All FOIA requests to the FDA should be sent to: Food and Drug Administration, Freedom of Information Staff (HF1-35), 5600 Fishers Lane, Rockville, Maryland 20857, or by facsimile to (301) 443-1726. See <<http://www.fda.gov/opacom/backgrounders/foiahand.html>> (visited Oct. 26, 1997).

⁹ See generally 61 Fed. Reg. at 44,469-538 (discussing public comments received by the FDA concerning the constitutionality of the FDA's new rule under the First Amendment); *Comments of Brown & Williamson*, *supra* note 8, at Vol. IX, "FDA's Proposed Restrictions on Cigarette Advertising Would Violate the First Amendment."

¹⁰ See generally *Coyne Beahm Inc. v. United States Food and Drug Admin.*, 966 F. Supp. 1374 (M.D.N.C. 1997). In *Coyne Beahm*, Judge Osteen held that Congress has not withheld jurisdiction to regulate tobacco from the FDA. *Id.* at 1379. The court also held that the FDCA authorized the FDA to issue only certain regulations aimed at curbing children's access to tobacco products, and that the FDA did not have authority under the FDCA to issue its proposed advertising and promotion restrictions on tobacco products. *Id.* at 1400. Judge Osteen declined, however, to determine whether the FDA's promotion and advertising restrictions violated the First Amendment. *Id.* at 1400 n.33.

¹¹ 116 S. Ct. 1495 (1996).

and concludes that the FDA's new rule violates tobacco manufacturers' First Amendment rights.

I. THE RULE

The FDA first announced that it was proposing new regulations concerning tobacco products on August 11, 1995.¹² After a lengthy public comment period, the FDA published its final rule on tobacco in the Federal Register in August 1996.¹³ The first part of the FDA's new rule is aimed at restricting youth access to tobacco products,¹⁴ while the second part contains the advertising restrictions which the FDA claims are vital to the effectiveness of its access regulations.¹⁵

A. *The FDA's Purpose Behind the Youth Access Restrictions*

In its introduction to the new rule, the FDA reported that tobacco use is the single leading cause of preventable death in the United States.¹⁶ The FDA found that this grave health problem

¹² See Proposed Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products to Protect Children and Adolescents, 60 Fed. Reg. 41,314 (1995). Annexed to the FDA's proposed rule was a separate document in which the FDA reported its conclusion that it had jurisdiction over tobacco products under the FDCA. See *Nicotine in Cigarettes and Smokeless Tobacco Products Is a Drug and These Products Are Nicotine Delivery Devices Under the Federal Food, Drug and Cosmetic Act*, 60 Fed. Reg. 41,453-787 (1995).

¹³ See *supra* note 2 and accompanying text (describing the new rule).

¹⁴ 61 Fed. Reg. at 44,616-17 (codified at 21 C.F.R. § 897, Subpart B). The first part of the FDA's new rule prohibits access to cigarettes or smokeless tobacco for any person under the age of eighteen. 21 C.F.R. § 897.14(a). Prohibition is enforced by 1) requiring retailers to verify that no person purchasing tobacco products is younger than 18 years of age, 2) forbidding distribution of free tobacco samples and 3) banning the sale of tobacco products through vending machines except in facilities where the retailer ensures that no person younger than eighteen is present. 21 C.F.R. § 897.16.

¹⁵ 61 Fed. Reg. at 44,466.

¹⁶ 61 Fed. Reg. at 44,398. The FDA reported that more than 400,000 people die each year from tobacco-related illnesses. *Id.* (citing CENTER FOR DISEASE CONTROL, DEPARTMENT OF HEALTH AND HUMAN SERVICES, CIGARETTE

could not be addressed by completely banning cigarettes due to the high addiction rates of such a product.¹⁷ Instead, the FDA concluded that the best way to halt the death and disease caused by cigarettes is to eliminate or reduce the number of addicted consumers.¹⁸

The agency further concluded that elimination of addiction to tobacco can only be achieved by preventing children from starting to use tobacco products.¹⁹ The FDA found that:

[m]ost people who suffer the adverse health consequences of using cigarettes and smokeless tobacco begin their use before they reach the age of 18, an age when they are not prepared for, or equipped to, make a decision that, for many will have lifelong consequences When cigarette and smokeless tobacco use by children and adolescents results in addiction, as it so often does, these youths lose their freedom to choose whether or not to use the products as adults.²⁰

SMOKING—ATTRIBUTABLE MORTALITY AND YEARS OF POTENTIAL LIFE LOST—UNITED STATES, 1990 MORBIDITY AND MORTALITY WEEKLY REPORT 645-49 (1993)).

¹⁷ *Id.* The FDA stated that:

[b]ecause of the high addiction rates and the difficulties smokers experience when they attempt to quit, there may be adverse health consequences for many individuals if the products were to be withdrawn suddenly from the marketplace. Our current health care system and available pharmaceuticals may not be able to provide adequate or sufficiently safe treatment for such a precipitous withdrawal.

Id. The FDA concluded that a ban in all probability would result in the development of a black market to supply addicted users with tobacco products. 60 Fed. Reg. at 41,349. The preamble to the 1995 proposed rule discussed the possibility that "[t]he products that would be available through a black market could very well be more dangerous (e.g., cigarettes containing more tar or nicotine, or more toxic additives) than products currently on the market." *Id.*

¹⁸ 61 Fed. Reg. at 44,398.

¹⁹ *Id.* at 44,399.

²⁰ 61 Fed. Reg. at 44,398. The FDA reported that "approximately 3 million American adolescents currently smoke, and an additional 1 million adolescent males use smokeless tobacco." *Id.* In addition, 82% of adults who had ever smoked reported that they had their first cigarette before they were 18 years old,

Based upon this finding, the FDA determined that restrictions which would substantially reduce the number of children who become addicted to cigarettes would best serve the public.²¹ The FDA further concluded that the best way to achieve such a reduction "is by limiting the access to, and attractiveness of, cigarettes and smokeless tobacco to young people."²² This purpose is codified in the first part of the FDA's new rule.²³

B. The FDA's Purpose Behind the Advertising Restrictions

The second part of the FDA's new rule drastically restricts tobacco product advertising, promotion and labeling. Specifically, the provisions: 1) limit advertising generally to a black-and-white, text-only format, except for advertising in certain "adult" periodicals;²⁴ 2) prohibit billboards and other outdoor advertising that are within 1,000 feet of schools and public playgrounds;²⁵ 3) prohibit the sale and distribution of non-tobacco items, such as t-shirts and hats that carry tobacco product brand names and logos;²⁶ and 4) limit tobacco product sponsorship of sporting and other events to the corporate name only.²⁷ These advertising restrictions represent a sweeping ban on the dissemination of information about tobacco products.

The FDA stated that the purpose behind its advertising restrictions is to "ensure that the restrictions on access are not

and that more than half of these individuals became regular smokers by age 18.
Id.

²¹ 61 Fed. Reg. at 44,399.

²² *Id.*

²³ 21 C.F.R. § 897.2 (1996). The rule provides that:

[t]he purpose of this part is to establish restrictions on the sale, distribution, and use of cigarettes and smokeless tobacco in order to reduce the number of children and adolescents who use these products, and to reduce the life-threatening consequences associated with tobacco use.

Id.

²⁴ 21 C.F.R. § 897.32.

²⁵ 21 C.F.R. § 897.30(b).

²⁶ 21 C.F.R. § 897.34(a).

²⁷ 21 C.F.R. § 897.34(c).

undermined by the product appeal that advertising for these products creates for young people."²⁸ The FDA has concluded that cigarette advertising entices children to smoke, and a rule without advertising restrictions would be ineffective in the reduction of tobacco use among children.²⁹

The FDA based this conclusion upon its findings of a causal link between cigarette advertising and a child's decision to begin smoking,³⁰ and "a positive effect of stringent advertising measures on smoking rates and on youth tobacco use."³¹ In reaching these findings, the FDA "relied heavily" upon two reports,³² a 1994 report by the Institute of Medicine (the "IOM Report")³³ and a 1994 Surgeon General's Report (the "SGR").³⁴ The FDA cited these two reports as support for its conclusion that "advertising was an important factor in young people's tobacco use, and that restrictions on advertising must be part of any meaningful approach to reducing smoking and smokeless tobacco use among young people."³⁵ Based upon this evidence, the agency determined that its advertising restrictions, in addition to access regulations, will reduce underage smoking while still preserving the important

²⁸ 61 Fed. Reg. at 44,465.

²⁹ *Id.* at 44,466.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ INSTITUTE OF MEDICINE, NATIONAL ACADEMY OF SCIENCES, *GROWING UP TOBACCO FREE: PREVENTING NICOTINE ADDICTION IN CHILDREN AND YOUTHS* (Barbara S. Lynch & Richard J. Bonnie eds., 1994)).

³⁴ CENTERS FOR DISEASE CONTROL, DEPARTMENT OF HEALTH AND HUMAN SERVICES, *PREVENTING TOBACCO USE AMONG YOUNG PEOPLE: A REPORT OF THE SURGEON GENERAL* (1994)).

³⁵ 61 Fed. Reg. at 44,466. The FDA argues that 1) advertising campaigns such as "Joe Camel" directly influence children's decisions to smoke; 2) young people's exposure to cigarette advertising is positively related to smoking behavior and their intention to smoke; 3) cigarette advertising helps young people to decide what is normal or socially acceptable behavior; 4) those who overestimate the prevalence of smoking seem to be more likely to begin smoking and become a regular smoker; and 5) brand advertising is particularly effective with children, and that the three most heavily advertised brands of cigarettes are smoked by 86% of young people who smoke. *See generally id.*

informational components of tobacco advertising such as price, tar and nicotine levels and taste.³⁶

C. Opponents' Criticisms Concerning the Tobacco Advertising Restrictions

Opponents of the FDA's advertising restrictions disagree with the FDA's conclusions and argue that advertising bans will not succeed in reducing underage smoking. Specifically, opponents assert that the evidence cited by the FDA to support its advertising restrictions—the IOM Report and the SGR in particular—fail to provide a causal link between cigarette advertising and the decision by young people to smoke.³⁷ Establishing such a link is critical if the FDA is to constitutionally justify its restrictions on tobacco advertising.³⁸

Upon review of the evidence proffered by the FDA, it appears that the agency has failed to link cigarette advertising with underage smoking. In fact, opponents point out that the IOM Report and the SGR actually recognize the absence of such a link.³⁹ For instance, the IOM Report stated that an implication of a causal link between exposure to advertising and consumption of tobacco products “is questionable,” and that it “is not known at present . . . whether youths already interested in smoking become more attentive to advertisements or whether advertisements lead

³⁶ 61 Fed. Reg. at 44,396, 44,465, 44,469, 44,496-97.

³⁷ See 61 Fed. Reg. at 44,487 (“Several comments appeared to place great importance on the fact that both reports [IOM Report and SGR] acknowledge that the psychosocial and econometric research that they present do not prove that cigarette advertising causes young people to begin smoking or to use smokeless tobacco.”); see generally *Comments of Brown & Williamson*, *supra* note 8, Vol. VII, at 49-59, Vol. IX, at 26-32.

³⁸ See *infra* Part III.D (arguing that without establishing such a link, the FDA cannot show that advertising restrictions directly advance its interest in preventing youth smoking).

³⁹ 61 Fed. Reg. at 44,487 (reporting that “[a]nother comment claimed that the IOM Report acknowledges the lack of a causal relationship between advertising and smoking and acknowledges that the very econometric studies it cites are unreliable to determine whether advertising contributes to youth smoking behavior”).

youths to become more interested in smoking.”⁴⁰ Similarly, the SGR noted that it did not address the “causal” question between advertising and consumption, stating that “no study of the direct relationship of cigarette advertising to smoking initiation has been reported in the literature.”⁴¹ Thus, it appears that the FDA’s evidence fails to establish that tobacco advertising affects children’s decisions to smoke.

Aside from the lack of persuasive evidence linking cigarette advertising with underage smoking, critics point out that there is substantial research demonstrating that advertising does not significantly influence children to smoke.⁴² Rather, this research shows that the critical influences on a child’s decision to begin smoking are the behavior of peers and family members and the child’s perception of the cost and benefits of smoking.⁴³ Opponents to the FDA’s advertising restrictions cite as an example of such research the Federal Trade Commission’s (“FTC”) lengthy study of the “Joe Camel” advertising campaign.⁴⁴ After reviewing comprehensive studies and statistics, the FTC found that, “[a]lthough it may seem intuitive to some that [the] Joe Camel

⁴⁰ INSTITUTE OF MEDICINE, GROWING UP TOBACCO FREE: PREVENTING NICOTINE ADDICTION IN CHILDREN AND YOUTHS 124 (1994 Richard J. Bonnie & Barbara S. Lynch, eds. 1994).

⁴¹ CENTERS FOR DISEASE CONTROL AND HUMAN SERVICES, PREVENTING TOBACCO USE AMONG YOUNG PEOPLE—A REPORT OF THE SURGEON GENERAL 188 (1994).

⁴² See *Comments of Brown & Williamson*, *supra* note 8, Vol. VII at 49; 61 Fed. Reg. at 44,486. The FDA reported that:

[t]he comment further argued that an analysis based upon this theoretical model [an econometric analysis performed for RJR] by Dr. Beales found that neither advertising nor advertising expenditures has an appreciable effect on young people’s perceptions of the benefits of smoking and thus would have no indirect effect on teenage smoking decisions.

61 Fed. Reg. at 44,486.

⁴³ See *Comments of Brown & Williamson*, *supra* note 8, Vol. VII, at 23-25; 61 Fed. Reg. at 44,486 (“Several comments from the advertising and tobacco industries claimed that the econometric studies performed for them by experts found that peers, parents, and siblings have the greatest influence on young people’s decisions to start smoking.”).

⁴⁴ See *Comments of Brown & Williamson*, *supra* note 8, Vol. VII, at 118-23.

advertising campaign would lead more children to smoke or lead children to smoke more, the evidence to support that intuition is not there.”⁴⁵ This study by the FTC and others like it heavily undermine the FDA’s contention that an advertising ban will reduce underage smoking.⁴⁶ As discussed below, the FDA’s restrictions on commercial speech cannot pass constitutional muster in the face of the FDA’s failure to present sufficient support for its assertion that advertising restrictions will decrease underage smoking.⁴⁷

II. HISTORICAL DEVELOPMENT OF COMMERCIAL FREE SPEECH

Freedom of speech is one of the very foundations upon which our country—and our constitution—were formed. The First Amendment⁴⁸ has been utilized to strike down state regulations which violate individuals’ rights to freedom of religion and

⁴⁵ See *Comments of Brown & Williamson, supra* note, Vol. IX, at 27-28 (citing the joint statement of Commissioners Azcuenaga, Owen, and Starek of R.J. Reynolds Tobacco Co., FTC File No. 9323162 (released June 7, 1994)).

⁴⁶ Opponents to the FDA’s rule make reference to numerous studies questioning the effectiveness of tobacco advertising restrictions including: C. Everett Koop, U.S. Surgeon General Report (1989) (“There is no scientifically rigorous study available to the public that provides a definitive answer to the basic question of whether advertising and promotion increase the level of tobacco consumption.”); E. Whelan, American Counsel of Science and Health (1985) (An advertising ban would “probably not” reduce cigarette consumption in the United States.); The Ontario Task Force on Smoking (1982) (“No persuasive empirical evidence exists” to support the contention that advertising is a significant determinant of smoking.); J. Hamilton, 3rd World Conference on Smoking and Health (1975) (explaining that cigarette advertising is “a competitive weapon” and “has not been used as a means for expanding [the] market”). See generally *Comments of Brown & Williamson, supra* note 8, Vol. VII.

⁴⁷ See *infra* Part III.

⁴⁸ U.S. CONST. amend. I. The First Amendment provides that:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

freedom of political expression.⁴⁹ The First Amendment, however, has not always been recognized as a protector of commercial speech. In fact, some early Supreme Court decisions had suggested that the First Amendment afforded no protection to commercial speech.⁵⁰ It was not until 1975, in *Bigelow v. Virginia*,⁵¹ that the Supreme Court firmly embraced the notion that commercial speech is protected by the First Amendment.⁵²

In *Bigelow*, the Supreme Court found error in the lower court's assumption that an abortion advertisement was unprotected by the First Amendment merely because it was commercial speech.⁵³ The Court held that the advertisement warranted First Amendment protection due to "consumer interest in commercial speech and the need it served in fueling personal decisions within the free market system."⁵⁴ The *Bigelow* Court stated that the advertisement, which announced the availability of legal abortions in New York, "did more than simply propose a commercial transaction. It contained factual material of clear public interest."⁵⁵ Thus, the First Amendment protects advertising not only because it conveys transactional information concerning a product such as price information and store location, but also because it fulfills an indispensable role as a necessary medium of information which is of great interest to the public.⁵⁶

⁴⁹ See, e.g., *Widmar v. Vincent*, 454 U.S. 263 (1981) (holding that the refusal of a state university to allow student religious groups to meet anywhere on campus violates the religious group's First Amendment rights to free speech and association); *Near v. Minnesota*, 283 U.S. 697 (1931) (striking down a state regulation that closed down newspapers which criticized local officials).

⁵⁰ See, e.g., *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 758 (1976) ("There can be no question that in past decisions the Court has given some indication that commercial speech is unprotected."); *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (holding that the United States Constitution imposes no restraints on government with respect to regulations restricting purely commercial speech).

⁵¹ 421 U.S. 809 (1975).

⁵² *Id.* at 822.

⁵³ *Id.* at 825-26.

⁵⁴ *Id.* at 819.

⁵⁵ *Id.* at 822.

⁵⁶ *Id.*; see also *Central Hudson Gas & Elec. v. Public Serv. Comm'n of*

By applying the First Amendment to commercial information regarding abortions in *Bigelow*, the Supreme Court has prohibited government regulation which suppresses commercial speech that is based upon a highly paternalistic government interest. The Court has recognized that "[p]eople will perceive their own best interests if and only they are well enough informed, and . . . the best means to that end is to open the channels of communication rather than to close them"⁵⁷

Although protected by the First Amendment, commercial speech is not necessarily entitled to the same degree of constitutional protection as other forms of protected speech.⁵⁸ Because commercial speech is firmly attached to the business transaction that it proposes, a state's interest in regulating the transaction may give it an incidental interest in the expression itself.⁵⁹ "For this reason,

N.Y., 447 U.S. 557, 563 (1980) ("The First Amendment's concern for commercial speech is based on the informational function of advertising . . . [c]onsequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity."); *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976). In *Virginia Board of Pharmacy*, the Court struck down a state statute prohibiting the advertising of prescription drugs, stating that:

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

Id. The Supreme Court confirmed that the public has the right to obtain commercial information and cannot be refused this right because of "paternalistic" goals of the state. *Id.* at 770.

⁵⁷ See *Central Hudson*, 447 U.S. at 562 (quoting *Virginia Bd. of Pharmacy*, 425 U.S. at 770).

⁵⁸ See *Ohrlik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) ("We instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.").

⁵⁹ *Edenfield v. Fane*, 507 U.S. 761, 767 (1993). In *Edenfield*, the Court

laws restricting commercial speech . . . need only be tailored in a *reasonable* manner to serve a substantial state interest in order to survive First Amendment scrutiny.”⁶⁰ Thus, the entire commercial speech doctrine, as it has developed over the last two decades, “represents an accommodation between the right to speak and hear expression about goods and services and the right of government to regulate the sales of such goods and services.”⁶¹ Striking the appropriate balance between these two competing interests, however, has proven difficult. To aid in balancing these interests, the Supreme Court established a First Amendment test for commercial speech in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*.⁶²

A. *The Central Hudson Test*

In *Central Hudson*, the Supreme Court set forth a four prong test to be applied by a reviewing court when determining whether a governmental regulation violates the First Amendment’s protection of commercial speech.⁶³ The first prong of the test requires a determination that the commercial speech at issue concerns a

recognized the government’s interest in preventing fraud and ensuring privacy with respect to solicitations by certified public accountants. *Id.* at 770. *See also* Board of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 479 (1989) (holding that the state’s interests in speech relating to the sale of products in campus dormitories included promoting an educational rather than promotional atmosphere, promoting safety and security, preventing commercial exploitation of students and preserving residential tranquility).

⁶⁰ *Edenfield*, 507 U.S. at 767 (emphasis added).

⁶¹ 44 *Liquormart v. Rhode Island*, 116 S. Ct. 1495, 1506 (1996) (quoting LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 12-15, at 903 (2d ed. 1988)).

⁶² 447 U.S. 557, 566 (1980).

⁶³ *Id.* at 566. *Central Hudson* involved a regulation promulgated by the New York State Public Service Commission which completely banned promotional advertising by utilities. *Id.* at 559. At the time, the nation was experiencing a fuel shortage, and the New York agency had concluded that promotional advertising was contrary to the national policy of conserving energy. *Id.* The *Central Hudson* Court held that the regulation, which completely suppressed advertising, was more extensive than necessary to promote the state interest in energy conservation and therefore violated the First Amendment. *Id.* at 570.

lawful activity and is not misleading.⁶⁴ The second part of the test requires that the asserted governmental interest is substantial.⁶⁵ If the answers to these two inquiries are positive, the third prong of the *Central Hudson* test requires a determination that the regulation at issue "directly advances the governmental interest asserted."⁶⁶ Finally, the fourth prong requires that the regulation be no more "extensive than is necessary" to serve the interest asserted by the government.⁶⁷ The last two prongs of the *Central Hudson* test are critical to a regulation's survival, and are sometimes described as requiring a reasonable "fit between the legislature's ends and the means chosen to accomplish those ends."⁶⁸

Since *Central Hudson*, however, some confusion has developed over the "reasonable fit" requirement as it is set forth in the third and fourth prongs of the test. In fact, courts applying the *Central Hudson* test have raised several questions concerning the "reasonable fit" requirement which are relevant to a First Amendment analysis of the FDA's new rule restricting tobacco advertising. For instance, who has the burden of proving whether the commercial speech regulation directly advances the state's interest, and how is that burden satisfied?⁶⁹ How does one determine whether the

⁶⁴ *Id.*; see also *Pittsburgh Press Co. v. Comm'n on Human Relations*, 413 U.S. 376, 388 (1973) (holding that the First Amendment does not protect commercial speech concerning unlawful activities).

⁶⁵ *Central Hudson*, 447 U.S. at 566.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) (quoting *Posadas de P.R. Assoc. v. Tourism Co. of P.R.*, 478 U.S. 328, 341 (1986)).

⁶⁹ See, e.g., *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981). In *Metromedia*, the Court found that a city ordinance prohibiting billboard advertisements directly advanced the city's interest in preventing traffic accidents and preserving the city's beauty. *Id.* at 507. The *Metromedia* Court was extremely deferential to the legislature's reasons behind the regulation and created doubt as to the teeth of the third prong of the *Central Hudson* test. Compare *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993) (finding that "Congress clearly was entitled to determine that . . . advertising of lotteries undermines . . . a policy against gambling") with *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995) (holding that an alcohol labeling ban violated the First Amendment because other regulations prevented the ban from advancing the

regulation is more extensive than necessary, and what role does the availability of alternative regulations which do not restrict speech have in this analysis?⁷⁰ Does the government's power to completely ban the sale of a product entitle its restriction on commercial speech relating to that product greater deference under the *Central Hudson* test?⁷¹ Finally, are advertisements for so-called "vice" products afforded the same commercial speech protection as other products?⁷² The Supreme Court finally answered these questions in *44 Liquormart v. Rhode Island*.⁷³ In *Liquormart*, the Court resolved the confusion surrounding the "reasonable fit" requirement of the *Central Hudson* test, and set precedent for a future decision analyzing the FDA's restrictions on tobacco advertising.

government's interest in a direct and material way).

⁷⁰ See, e.g., *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989). In *Fox*, a corporation sought an injunction against a state university based upon the university's refusal to allow the corporation to present demonstrations to students within university dormitories. *Id.* at 470. In denying injunctive relief, the Court held that the fourth prong of the *Central Hudson* test did not require that the restriction be the absolute least restrictive means to achieve the state's desired end. *Id.* at 477. See also *Posadas de P. R. Assoc. v. Tourism Co. of P.R.*, 478 U.S. 328 (1986) (holding that the Puerto Rico legislature could choose to reduce gambling of natives by suppressing in-state casino advertising rather than engaging in educational speech).

⁷¹ See, e.g., *Posadas de P.R. Assoc.*, 478 U.S. 328. In *Posadas*, the Court upheld a statute banning advertisements for casino gambling in Puerto Rico. *Id.* at 331. The Court stated that Puerto Rico's "greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling." *Id.* at 345-46.

⁷² See, e.g., *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993). In *Edge*, the Court upheld a federal ban restricting broadcasters licensed in non-lottery states from advertising other states' lotteries. *Id.* at 419. The Court stated that "[g]ambling implicates no constitutionally protected right; rather, it falls into a category of 'vice' activity that could be, and frequently has been, banned altogether." *Id.* at 426.

⁷³ 116 S. Ct. 1495 (1996).

B. 44 *Liquormart v. Rhode Island*

In 1996, the Supreme Court decided *Liquormart*, a case involving a dispute similar to the one over the FDA's tobacco advertising restrictions.⁷⁴ *Liquormart* concerned a Rhode Island statute which prohibited alcohol advertisements from referencing prices.⁷⁵ The state of Rhode Island claimed that the ban on alcohol product price advertising advanced the state's interest by "promoting temperance."⁷⁶ Rhode Island argued that price advertising of alcohol products could stimulate price wars which it believed would lower product prices and thus lead to more abusive consumption of alcohol.⁷⁷ Liquor store operators brought suit arguing that the state's regulations denied them their constitutional right to freedom of speech and denied the citizens of Rhode Island their constitutional right to obtain accurate price information about alcohol, a lawful product.⁷⁸ In a decision holding that the advertising restrictions violated First Amendment rights, the Court finally answered the previously unresolved questions surrounding the *Central Hudson* "reasonable fit" requirement and, in doing so, made clear that the FDA's tobacco advertising restrictions are unlikely to pass constitutional muster.

1. *Who Has the Burden of Proving Whether the Regulation Directly Advances the State's Asserted Interest and How Is That Burden Satisfied?*

Liquormart made clear that, under the third prong of the *Central Hudson* test, the government bears the burden of proving that a reasonable fit exists between its chosen means and desired end. The Court held that the government must show that the challenged commercial speech regulation advances the substantial

⁷⁴ See generally *id.*

⁷⁵ *Id.* at 1515.

⁷⁶ *Id.* at 1509.

⁷⁷ *Id.*

⁷⁸ Brief for Petitioner at 5-6, *Liquormart*, 116 S. Ct. 1495 (No 94-1140).

interest in a "direct way."⁷⁹ The state's proffered justification for the regulation would not be accepted at face value.⁸⁰ Rather, the Court determined that the state must demonstrate, with evidentiary support, that its speech restrictions will directly advance the state's interest.⁸¹ The Court warned that a commercial speech regulation "'may not be sustained if it provides only ineffective or remote support for the government's purpose.'"⁸² The *Liquormart* Court also advised that, although commercial speech is usually afforded less protection by the First Amendment than other types of constitutionally protected speech, Rhode Island's statute would be subject to a more stringent constitutional review, because the statute placed sweeping restrictions on commercial speech in order to serve an end unrelated to consumer protection. The Court stated that:

[b]ans that target truthful nonmisleading commercial messages rarely protect consumers from [public] harm[.]. Instead, such bans often serve only to obscure an underlying governmental policy that could be implemented without regulating speech. In this way, these commercial speech bans not only hinder consumer choice, but also impede debate over central issues of public policy.⁸³

⁷⁹ *Liquormart*, 116 S. Ct. at 1499, 1509 ("The State bears the burden of showing not merely that its regulation will advance its interest, but . . . will do so to a material degree. The need for . . . such a showing is particularly great given the drastic nature of its chosen means—the wholesale suppression of truthful, nonmisleading information."); see *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1591 (1995) ("[T]he Government carries the burden of showing that the challenged regulation advances the Government's interest in a direct and material way."); *Edenfield v. Fane*, 507 U.S. 761, 770 (1993) ("The penultimate prong of the *Central Hudson* test requires that a regulation impinging upon commercial expression directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose.").

⁸⁰ *Liquormart*, 116 S. Ct. at 1522.

⁸¹ *Id.*

⁸² *Id.* at 1509 (quoting *Central Hudson Gas & Elec. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 (1980)).

⁸³ *Id.* at 1508 ("[C]omplete speech bans, unlike content-neutral restrictions on the time, place, or manner of expression . . . are particularly dangerous because they all but foreclose alternative means of disseminating certain information."); see also *Central Hudson*, 447 U.S. at 566 n.9 ("We review with

The Court expressed its concern that by asserting an all-encompassing interest such as protecting the public from harm, a government could easily disguise hidden objectives within a broad ban on commercial speech.⁸⁴ The Court considered such prophylactic bans to be "dangerous" because "they all but foreclose alternative means of disseminating certain information,"⁸⁵ and "suspect" because they suppress the free flow of truthful information in a clandestine manner.⁸⁶

The *Liquormart* Court found Rhode Island's ban on alcohol product price advertising to be particularly suspect because the state was essentially attempting to foster temperance by keeping the public ignorant of the price of alcoholic products.⁸⁷ The Court held that a "State legislature does not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes."⁸⁸ The Court therefore found that the need for Rhode Island to meet its burden of proving that the statute would advance the state's interest in a material way was "particularly great given

special care regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy. In those circumstances, a ban on speech could screen from public view the underlying governmental policy Indeed, in recent years this court has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity."); *Edenfield*, 507 U.S. at 770-71 ("[A] State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression.").

⁸⁴ *Liquormart*, 116 S. Ct. at 1508. The Court stated:

[p]recisely because bans against truthful, nonmisleading commercial speech rarely seek to protect consumers from either deception or overreaching, they usually rest solely on the offensive assumption that the public will respond "irrationally" to the truth. . . . The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.

Id.

⁸⁵ *Id.* at 1507.

⁸⁶ *Id.* at 1508.

⁸⁷ *Id.* at 1508 n.13.

⁸⁸ *Id.* at 1511. See *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 765 (holding that a state may not completely suppress the dissemination of truthful information about an entirely lawful activity).

the drastic nature of its chosen means—the wholesale suppression of truthful, nonmisleading information.”⁸⁹

Rhode Island attempted to meet its burden by claiming that without a ban on alcohol price advertising, the price of alcohol could drop, and abusive consumption of alcohol would rise within the state.⁹⁰ Based upon these conclusions, Rhode Island asserted that its advertising restrictions directly promoted temperance and prevented abusive consumption of alcohol.⁹¹

The Supreme Court, however, disagreed and found that Rhode Island failed to meet its burden of proving that the price advertising ban would significantly advance the state’s interest in promoting temperance.⁹² Specifically, the Court held that there was insufficient evidence linking temperance and prevention of abusive alcohol consumption with Rhode Island’s restrictions on price advertising.⁹³ The Court found that “[a]lthough the record suggests that the price advertising ban may have some impact on the purchasing patterns of temperate drinkers of modest means . . . the State has presented no evidence to suggest that its speech prohibition will significantly reduce market-wide consumption.”⁹⁴ The government’s burden, the Court explained, is not satisfied by mere speculation and conjecture;⁹⁵ rather, the government must show that the problems targeted by the regulations are real and that the regulations will alleviate them to a “material” degree.⁹⁶

⁸⁹ *Liquormart*, 116 S. Ct. at 1509.

⁹⁰ Brief for Petitioner at 7, *Liquormart*, 116 S. Ct. 1495 (No. 94-1140).

⁹¹ *Id.*

⁹² *Liquormart*, 116 S. Ct. at 1509.

⁹³ *Id.* at 1509.

⁹⁴ *Id.*

⁹⁵ *Id.* at 1510 (“Speculation and conjecture [are] unacceptable means of demonstrating that a restriction on commercial speech directly advances the state’s asserted interest. . . . [S]peculation certainly does not suffice when the State takes aim at accurate commercial information for a paternalistic end.”); see *Edenfield v. Fane*, 507 U.S. 761, 770 (1993) (stating that the “burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree”).

⁹⁶ *Liquormart*, 116 S. Ct. at 1510; see *Zauderer v. Office of Disciplinary*

Rhode Island failed to make such a showing. As a result, the state's statute failed the third prong of the *Central Hudson* test, particularly under the heightened scrutiny mandated by the First Amendment in the case of such sweeping restrictions on commercial speech.

Based upon *Liquormart*, it seems clear that the Court will not tolerate broad bans on commercial speech when the government disguises its true interest behind unsupported assertions of public harm.

2. *How does a Reviewing Court Determine Whether a Regulation Is More Extensive Than Necessary and What Role Does the Availability of Alternative Regulations Which Do Not Restrict Speech Have in This Analysis?*

After examining the third prong of *Central Hudson*, the *Liquormart* Court turned to the fourth prong of the test, which prohibits a regulation from being "more extensive than is necessary."⁹⁷ This prong requires "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the best disposition but one whose scope is in proportion to the interest served; that employs not necessarily the least restrictive means, but . . . a means narrowly tailored to achieve the desired objective."⁹⁸ Thus, a government must show more than a mere rational relationship

Counsel of the Supreme Court of Ohio, 471 U.S. 626, 646 (1985) ("Our recent decisions involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful.").

⁹⁷ *Central Hudson Gas & Elec. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980).

⁹⁸ See *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 479 (1989) ("None of our cases invalidating the regulation of commercial speech involved a provision that went only marginally beyond what would adequately have served the government interest. To the contrary, almost all of the restrictions disallowed under *Central Hudson's* fourth prong have been substantially excessive, disregarding far less restrictive and more precise means.").

between its chosen means and the desired end. Instead, it must show that the restriction will reasonably accomplish the desired end, and will do so in a way such that the extent of the restriction is consistent with the interest served.

Alternatives which do not restrict speech play an essential part in this analysis. "A regulation need not be absolutely the least severe that will achieve the desired end . . . but if there are numerous and obvious less burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the fit between ends and means is reasonable."⁹⁹ Applying this "reasonable standard," the *Liquormart* Court concluded that the State could not satisfy the requirement that the restriction on speech be no more extensive than necessary.¹⁰⁰ The Court stated that:

[i]t is perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State's goal of promoting temperance. As the State's own expert conceded, higher prices can be maintained either by direct regulation or by increased taxation. . . . Even educational campaigns focused on the problems of excessive, or even moderate, drinking might prove to be more effective.¹⁰¹

Thus, a government may not simply choose any method which is rationally related to its desired goal, but rather must select a method that is *proportional* to the interest served. In choosing a regulation, a government is obligated to consider all potential types

⁹⁹ *City of Cincinnati v. Discovery Network*, 507 U.S. 410, 418 n.13 (1993) (stating that government may impose reasonable restrictions on the time, place or manner of engaging in protected speech provided that they are adequately justified without reference to the content of the regulated speech). See *Rubin v. Coors Co.*, 115 S. Ct. 1585, 1594 (1995) (explaining that the defects in a federal ban on alcohol advertising "are further highlighted by the availability of alternatives that would prove less intrusive to the First Amendment's protections for commercial speech").

¹⁰⁰ *Liquormart*, 116 S. Ct. at 1510.

¹⁰¹ *Id.*; see *Linmark v. Township of Willingboro*, 431 U.S. 85, 97 (1977) (suggesting that the state use financial incentives or counter-speech, rather than speech restrictions, to advance its interests).

of regulation, especially those which are less restrictive of commercial speech. If a less restrictive alternative exists, it must be chosen by a government, provided that it is as likely to achieve the desired end.

3. *Does the Government's Power to Completely Ban the Sale of a Product Entitle Its Speech Restriction to Greater Deference Under the Central Hudson Test?*

In *Liquormart*, Rhode Island asserted that the Court was required to give particular deference to its legislative choice because the state could choose to ban the sale of alcoholic beverages outright.¹⁰² The state's argument was based upon the Supreme Court's prior decision in *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*.¹⁰³ In *Posadas*, the Court upheld a Puerto Rico statute which prohibited the advertising of gambling.¹⁰⁴ The Court's decision relied heavily on the fact that the government had the authority to completely ban gambling altogether, and concluded that "the *greater* power to completely ban casino gambling necessarily includes the *lesser* power to ban advertising of casino gambling."¹⁰⁵ The Court assumed that restrictions on gambling advertisements were less intrusive than a complete ban on gambling.

In *Liquormart*, however, the Court declined to follow *Posadas*, and declared that "the 'greater includes lesser' argument should be rejected."¹⁰⁶ The Court stated that it could not see how this syllogism requires a conclusion that a state's power to regulate commercial activity is "greater than its power to ban truthful, nonmisleading commercial speech."¹⁰⁷ Contrary to the assumption

¹⁰² *Liquormart*, 116 S. Ct. at 1511. The liquor store operators persuasively argued that Rhode Island's arguments for a lower standard of review virtually concede that the statute is an unconstitutional restriction of commercial speech. Brief for Petitioner at 23, *Liquormart*, 116 S. Ct. 1495 (No. 94-1140).

¹⁰³ 478 U.S. 328, 344 (1986).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 344-46 (emphasis added).

¹⁰⁶ *Liquormart*, 116 S. Ct. at 1512.

¹⁰⁷ *Id.* at 1513.

made in *Posadas*, the Court found it quite clear "that banning speech may sometimes prove far more intrusive than banning conduct."¹⁰⁸

The *Liquormart* Court went on to explain that it would no longer give deference to state legislative choices where those choices are to suppress truthful, nonmisleading commercial speech for the sake of a paternalistic purpose.¹⁰⁹ The Court stated that:

the casino advertising ban was designed to keep truthful, nonmisleading speech from members of the public for fear that they would be more likely to gamble if they received it. As a result, the advertising ban served to shield the State's antigambling policy from public scrutiny that more direct, nonspeech regulation would draw [Thus,] we decline to give force to [*Posadas*'] highly deferential approach. Instead, in keeping with our prior holdings, we conclude that a state legislature does not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes that the *Posadas* majority was willing to tolerate.¹¹⁰

Thus, even if the government has the ability to ban the advertised product entirely, *Liquormart* makes absolutely clear that deference will not be given to commercial speech restrictions which are not for consumer protection but rather for paternalistic purposes.

4. *Are Advertisements for "Vice" Products Afforded the Same Commercial Speech Protection as Other Products?*

Finally, in *Liquormart*, Rhode Island argued that its statute should receive deference because alcoholic beverages are so-called "vice" products, which the state claimed were exceptions to the commercial speech doctrine.¹¹¹ Rhode Island premised its "vice"

¹⁰⁸ *Id.* The Court further stated that "the First Amendment makes clear that the Constitution presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct." *Id.*

¹⁰⁹ *Id.* at 1511.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 1513.

product argument on language in a 1993 case, *United States v. Edge Broadcasting Company*.¹¹² At issue in *Edge* was the constitutionality of statutes restricting the broadcasting of lottery advertisements in states which did not conduct state-run lotteries.¹¹³ The government in *Edge* asserted that gambling is not a constitutionally protected right, but rather falls into a category of activities normally considered a "vice" activity.¹¹⁴ Although the Court in *Edge* held that the statutes at issue passed constitutional muster under *Central Hudson*, the Court did seem to accept the proposition that gambling was a "vice" activity which the government could ban altogether.¹¹⁵

The *Liquormart* Court, however, specifically rejected Rhode Island's "vice" argument based upon the language in *Edge*, holding that there is no "vice exception" to the protection afforded by the First Amendment.¹¹⁶ The Court explained that it would be difficult, if not impossible, to define the scope of any such exception, because "almost any product that poses some threat to public health might be reasonably characterized . . . as relating to vice activity."¹¹⁷ In particular, the Court found that the application of a "vice" label to products such as alcoholic beverages, lottery tickets and playing cards was somewhat inconsistent with the fact that these are lawful products.¹¹⁸ Moreover, the Court was concerned that recognition of a "vice" exception would also permit government to justify censorship by merely placing a "vice" label on

¹¹² 509 U.S. 418, 430 (1993). In *Edge*, the Supreme Court, applying the *Central Hudson* test, held that the restriction on lottery advertising directly advanced the governmental interest in enforcing the restriction of lotteries in nonlottery states, while not interfering with the policy of lottery states and therefore, the fit was a reasonable one. *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 425.

¹¹⁵ *Id.* at 426 ("As in *Posadas* . . . the activity underling the relevant advertising—gambling—implicates no constitutionally protected right; rather, it falls into a category of 'vice' activity that could be, and frequently has been, banned altogether.").

¹¹⁶ 44 *Liquormart v. Rhode Island*, 116 S. Ct. 1495, 1513 (1996).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

selected lawful activities.¹¹⁹ The Court, therefore, held that “a ‘vice’ label that is unaccompanied by a corresponding prohibition against the commercial behavior at issue fails to provide a principled justification for the regulation of commercial speech about that activity.”¹²⁰

Thus, *Liquormart* made clear that for purposes of a *Central Hudson* analysis, the measure of protection afforded by the First Amendment is not determined by the attributes of the underlying product or conduct—so long as the product or conduct is legal. Rather, First Amendment protection is determined by the attributes of the speech that the regulation restricts. Because the price advertising in *Liquormart* was truthful and nonmisleading, it was entitled to full protection under *Central Hudson*.

III. ANALYSIS OF THE FDA’S TOBACCO ADVERTISING RESTRICTIONS UNDER THE *CENTRAL HUDSON* TEST

The government has the power to regulate the production of commercial products in order to strike a balance between a product’s benefits and harms.¹²¹ However, this regulatory authority does not allow sweeping bans on advertisements where the bans suppress truthful information of public interest about a lawful product.¹²² The Supreme Court requires that would-be regulators satisfy the *Central Hudson* test, which focuses on “distinguishing the truthful from the false, the helpful from the misleading, and the

¹¹⁹ *Id.*; see *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1590 (1995) (declining to adopt a lesser standard for “socially harmful” activities finding that neither *Edge* nor *Posadas* support a lesser standard because both cases applied the *Central Hudson* analysis).

¹²⁰ *Liquormart*, 116 S. Ct. at 1513-14.

¹²¹ See *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978).

¹²² The Supreme Court has long recognized commercial speech as an essential medium of public information. See *Bigelow v. Virginia*, 421 U.S. 809 (1975) (holding that the First Amendment protects commercial speech not only because it conveys information concerning a commercial transaction but also because it fulfills an indispensable role as a medium of controversial information).

harmless from the harmful" in the speech itself.¹²³ Thus, in order to pass constitutional muster, the FDA's advertising restrictions on tobacco products must withstand full scrutiny under the four prong test of *Central Hudson*. The Supreme Court's recent decision in *Liquormart*, however, suggests that it is highly unlikely that the FDA's regulations will withstand a *Central Hudson* analysis. Because the FDA's regulation is not entitled to any deference under this analysis, it is likely that it will be struck down as an impermissible restriction on commercial speech.

A. The FDA's Restrictions of Tobacco Advertising Are Not Entitled to Greater Deference Under the Central Hudson Analysis

In its new rule, the FDA states that its regulation should be entitled to deference because the FDA has the power to ban cigarettes entirely and because the FDA believes that tobacco is a "vice" product.¹²⁴ As discussed above, however, the Supreme Court's decision in *Liquormart* forecloses any argument by the FDA that its advertising restrictions are entitled to deference under the First Amendment.¹²⁵

Liquormart rejected the "greater includes lesser" argument in *Posadas* because "banning speech may sometimes prove more intrusive than banning conduct."¹²⁶ The Court made clear that it would no longer give deference to speech regulation for the sake of the government's paternalistic purposes.¹²⁷ The FDA's purpose behind the tobacco advertising ban is clearly paternalistic; the ban is designed to keep truthful, nonmisleading speech from the public because the FDA believes that the public is more likely to smoke

¹²³ Reply Brief for Petitioner at 2-3, *Liquormart*, 116 S. Ct. 1495 (quoting *Ibanez v. Florida Dept. of Business and Professional Regulation*, 114 S. Ct. 2084, 2089 (1994)). See *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 646 (1985).

¹²⁴ 61 Fed. Reg. 44,474 (1996).

¹²⁵ See *supra* Parts II.B.3, II.B.4 (discussing the *Liquormart* Court's rejection of the "greater includes lesser" argument and the "vice" exception).

¹²⁶ *Liquormart*, 116 S. Ct. at 1512.

¹²⁷ *Id.*

if it receives such information. The ban on tobacco advertising therefore serves to conceal the FDA's true goal of delegitimizing smoking from the public, thus avoiding the public outcry that would surely ensue if this goal were revealed. Under *Liquormart*, however, no deference will be given to the FDA's regulation where the government cloaks its true paternalistic purposes in the guise of restrictions on truthful, nonmisleading commercial speech.

The *Liquormart* Court also dispelled any argument based upon *United States v. Edge Broadcasting Company*,¹²⁸ that the FDA's restrictions on tobacco advertisements might be entitled to deference on the basis that smoking is a "vice" activity which is not protected by the First Amendment.¹²⁹ *Liquormart* rejected a "vice" exception to the First Amendment because commercial speech concerning almost any product could be found subject to lesser constitutional protection where the attributes of the product, as opposed to attributes of the speech, are the determinative factor. A "vice" exception to the First Amendment cannot be recognized because there would be no delimiting factors on the government's discretion. The FDA could discriminately pick and choose the products it disfavors on the basis of public health, and suppress commercial speech related to that product—despite the fact that the product is legal—without regard to the truthful and important messages the commercial speech conveys.¹³⁰ Such a rule would render the protection afforded by the First Amendment nonexistent.

As stated above, the Supreme Court has held that unless a "vice" label is accompanied by a prohibition against the underlying product or conduct at issue, the mere "vice" label is insufficient justification for restrictions on commercial speech concerning that product or conduct.¹³¹ At present, tobacco use by adults is perfectly legal, albeit highly criticized conduct. Thus, because tobacco products are legal to use and tobacco advertisements convey truthful important messages, the FDA is not entitled to deference

¹²⁸ 509 U.S. 418 (1993).

¹²⁹ *Id.* at 430; *Liquormart*, 116 S. Ct. at 1513.

¹³⁰ *Liquormart*, 116 S. Ct. at 1513.

¹³¹ See *supra* Part II.B.4. (discussing the *Liquormart* Court's rejection of a "vice" exception for a regulation which restricts commercial speech).

under the First Amendment by simply labeling tobacco a "vice" product.

Because the FDA's regulation restricting tobacco advertisements are not entitled to any special deference under *Posadas* or *Edge Broadcasting*, they must withstand the same strict analysis under *Central Hudson* as regulations restricting advertisements of any other product. As discussed below, however, applying a strict analysis under *Central Hudson*'s four prong test reveals that the FDA's restrictions violate tobacco manufacturers' First Amendment rights.

B. Tobacco Advertising Is Lawful Activity and Is Not Misleading

As discussed above, the first prong of the *Central Hudson* test inquires whether the commercial speech at issue concerns lawful activity and is not misleading.¹³² Illegal conduct and/or misleading commercial speech is afforded no protection by the First Amendment, and the government clearly has the authority to regulate such conduct or speech.¹³³ Thus, tobacco advertising will receive no protection under the First Amendment unless it is truthful and promotes legal activity.¹³⁴ The FDA claims that tobacco advertising may not be entitled to constitutional protection under *Central Hudson* based upon the FDA's findings that tobacco advertisements are misleading and arguably relate to illegal activity. The FDA's argument, however, rests on shaky ground.

First, the FDA claims that tobacco advertisements are misleading because the imagery of these advertisements depict smokers as

¹³² *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980).

¹³³ *See Pittsburgh Press Co. v. Comm'n on Human Relations*, 413 U.S. 376, 388 (1973) (holding that the First Amendment does not protect discriminatory job advertisements in newspapers).

¹³⁴ *See, e.g., Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) (holding that speech relates to unlawful activity only if it proposes and illegal transaction); *Pittsburgh Press Co.*, 413 U.S. at 388 (holding that a law prohibiting newspapers from carrying discriminatory job advertisements which propose the illegal practice of discriminatory hiring was illegal).

young, healthy, active people when the reality is that cigarette smoking causes disease and premature death among long-term users.¹³⁵ As such, the FDA argues that tobacco advertisements are misleading, and therefore, under the first prong of the *Central Hudson* test, may not be protected by the First Amendment. This argument is unpersuasive. Tobacco advertisements make no statements about the health effects of tobacco use.¹³⁶ To the contrary, under the Federal Cigarette Labeling and Advertising Act,¹³⁷ all tobacco advertisements are required to carry printed warnings of a specified size which inform consumers that the Surgeon General has determined that cigarette smoking causes disease and premature death.¹³⁸ Moreover, if tobacco advertisements were in fact misleading as the FDA asserts, because they make unsupported health claims, all such advertisements would be prohibited by the FTC.¹³⁹

Second, the FDA also argues that tobacco advertising relates to the illegal activity of selling tobacco products to minors, and thus, might not be protected speech.¹⁴⁰ Specifically, the FDA claims

¹³⁵ See Charles Harder, *Is it Curtains for Joe Camel? A Critical Analysis of the 1995 FDA Proposed Rule to Restrict Tobacco Advertising, Promotion and Sales to Protect Children and Adolescents*, 16 LOY. L.A. ENT. L.J. 399, 417 (1995).

¹³⁶ See, e.g., Advertisement, *Sports Illustrated*, Oct. 13, 1997, at 107. This advertisement depicts a package of "Basic" cigarettes on a wooden table and has the following headline: "Keep it Basic-Tastes Good. Costs Less." *Id.* The advertisement also contains a noticeable Surgeon General's warning. *Id.*

¹³⁷ Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282 (1965) (codified as amended at 15 U.S.C. § 1331 (1994)); see Comprehensive Smokeless Tobacco Health Education Act, Pub. L. No. 99-252, 100 Stat. 30 (1986) (codified at 15 U.S.C. § 4402(b)) (requiring smokeless tobacco advertisements to carry warning labels).

¹³⁸ 15 U.S.C. § 1333 (a)(3).

¹³⁹ 15 U.S.C. § 1333 (c)(1).

¹⁴⁰ 61 Fed. Reg. at 44,471 (1996). The FDA stated that:

[f]irst, tobacco ads, at least as a legal matter, propose a commercial transaction . . . that is, to sell cigarettes and smokeless tobacco. In proposing these transactions, the advertisers do not differentiate between adult and minor purchasers. Because sales to minors are unlawful in every state . . . the undifferentiated offer to sell constitutes, at least in part, an unlawful offer to sell Thus, in a practical

that tobacco advertising fails to differentiate between adults and children in its offers to sell tobacco products, and induces children to illegally purchase and use tobacco products.¹⁴¹ As discussed above in Part I, however, studies have shown that tobacco advertising is not directed at children, and significantly, these studies have also concluded that tobacco advertising does not appear to have a positive effect on a young person's decision to smoke.¹⁴² Thus, the FDA's finding that tobacco advertising induces children to illegally purchase tobacco products is not supported by the evidence.

Moreover, the mere fact that tobacco use by minors is illegal does not mean, however, that all tobacco advertisements propose an illegal transaction or promote lawless activity.¹⁴³ The commercial free speech doctrine would offer very little protection if the first prong of the *Central Hudson* test eliminated challenges to regulations merely because the advertised product may be used illegally by minors.¹⁴⁴ Based upon this logic, automobile and alcohol advertisements would be given no First Amendment protection at all because these products are often illegally sold to and used by children. *Liquormart* taught that this is not the case, however, as the Supreme Court determined that restrictions on alcohol advertising are subject to *Central Hudson's* analysis, and hence, First

sense, cigarette and smokeless tobacco advertising is proposing transactions that are illegal . . . whether or not that is the advertiser's intent. As such, the protections of the First Amendment might not attach to such advertising because it proposes an illegal transaction.

Id. (citations omitted).

¹⁴¹ *Id.*

¹⁴² See *supra* Part I (discussing the lack of evidence linking tobacco advertising with children's decision to smoke).

¹⁴³ See *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985) (holding that speech relates to unlawful activity only if it proposes an illegal transaction). The FDA seems to concede this point. 61 Fed. Reg. at 44,471 ("Nevertheless, the [tobacco] advertising also relates to lawful activity—the sale of tobacco products to adults . . . [c]onsequently, FDA may not have unlimited discretion to regulate tobacco advertising.").

¹⁴⁴ Third Brief in Support of Plaintiffs' Motion for Summary Judgment at 10, *Coyne Beahm, Inc. v. United States Food & Drug Admin.*, 966 F. Supp. 1374 (M.D.N.C. 1997) (No. 2:95CV00591).

Amendment protection.¹⁴⁵ Similarly, it follows that tobacco advertising is legal speech under the first prong of the *Central Hudson* test, and is protected by the First Amendment.¹⁴⁶ As such, the FDA's restrictions must withstand scrutiny under the remaining prongs of the *Central Hudson* test.

C. The Government's Substantial Interest in Regulating Tobacco Advertisements

The second step under the *Central Hudson* test is to determine whether the asserted governmental interest is substantial.¹⁴⁷ The FDA's articulated interest in protecting minors from physical harm is a substantial governmental interest.¹⁴⁸ Accordingly, the FDA may seek to prevent young people from becoming dependent on tobacco products which, over the long term, could adversely affect their health.¹⁴⁹

The tobacco industry, however, persuasively argues that although this interest is substantial, it is not served by the FDA's advertising restrictions.¹⁵⁰ In fact, the tobacco industry asserts that

¹⁴⁵ See generally 44 *Liquormart v. Rhode Island*, 116 S. Ct. 1495 (1996).

¹⁴⁶ The FDA has virtually conceded this point by admitting that scrutiny of its advertising restrictions under the remaining three prongs of the *Central Hudson* test is appropriate. 61 Fed. Reg. 44,469.

¹⁴⁷ *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980).

¹⁴⁸ *New York v. Ferber*, 458 U.S. 747, 756-57 (1982) (holding that a state's interest in protecting the physical and psychological well-being of a minor is substantial).

¹⁴⁹ The FDA argues that tobacco use is the leading cause of preventable death in the United States. 61 Fed. Reg. at 44,398. The FDA reports that most people who become addicted to cigarettes begin smoking before the age of 18. *Id.* The FDA further reports that "[w]hen cigarette and smokeless tobacco use by children and adolescents results in addiction, as it so often does, these youths lose their freedom to choose whether or not to use the products as adults." *Id.*

¹⁵⁰ 61 Fed. Reg. at 44,473. The FDA reported that:

[o]ne comment said that while FDA's articulated interest in protecting minors from harm clearly is substantial, this interest is not served by FDA's regulations. According to the comment, the only goal served directly by the proposed regulations is that of delegitimizing smoking. Two comments said that under the guise of protecting

the only interest served by the FDA's advertising restrictions is the delegitimizing of smoking entirely.¹⁵¹ Notably, in its response, the FDA denies that it is trying to eliminate smoking altogether.¹⁵² Other statements made by the FDA, however, suggest that this is in fact its true purpose.¹⁵³ Such an end is not a substantial state

adolescents and children, FDA is trying to "save" all Americans from the 'evils' of smoking."

Id.

¹⁵¹ 61 Fed. Reg. at 44,469 (reporting that "[s]everal comments, which were from the tobacco and advertising industries, found in statements made by FDA evidence of an intent not merely to protect the health of young persons but to 'delegitimize' lawful adult conduct [and] that the FDA's goal is to bring about the demise of smoking as a social custom").

¹⁵² *Id.* at 44,469-70. The FDA states:

FDA has carefully considered these comments FDA's primary concern is the public health. Because of the potentiality for harmful effects on individuals under 18 from use of cigarettes and smokeless tobacco, FDA is adopting restrictions on advertising among other restrictions on the sale, distribution, and use of these products The restrictions will have an adverse effect on the cigarette and smokeless tobacco companies. However, this fact does not mean that FDA is trying to bring about the demise of the tobacco industry. The restrictions that FDA is adopting have been tailored to help reduce tobacco advertising's ability to create an underage market for these products, while leaving open ample avenues for cigarette and smokeless tobacco companies to communicate to current users 18 years of age or older about their products. As explained in detail in section VI.E. of this document, this is all that the First Amendment requires.

Id.

¹⁵³ For example, the FDA states that "[t]o effectively address the death and disease caused by tobacco products, addiction to cigarettes and smokeless tobacco must be eliminated or substantially reduced." 61 Fed. Reg. at 44,398. The FDA also reports, however, that "[o]f the 50 million people who use cigarettes, 77 to 92 percent are addicted." *Id.*

If, as the FDA says, 90 percent of tobacco users are addicted, then the only way to "effectively address the death and disease from tobacco products" is to prevent its use altogether, by both adults and children. The FDA rejected an outright ban on tobacco products altogether, however, claiming that such a ban would have "adverse health consequences upon" many smokers because the "current health system and available pharmaceuticals may not be able to provide adequate or sufficiently safe treatment for such a precipitous withdrawal." *Id.*

interest, in light of the fact that, at least at present, the use and sale of cigarettes and smokeless tobacco is legal.¹⁵⁴

Nevertheless, it is likely that the FDA's asserted interest in protecting the health of minors will be recognized as a substantial government interest, and thus, the FDA's rule will survive the second prong of the *Central Hudson* test.

D. The FDA's Regulation Fails to Directly Advance a Substantial Government Interest

The third prong of the *Central Hudson* test requires that the FDA's new tobacco rule directly advance the government's asserted interest.¹⁵⁵ *Liquormart* makes clear that the burden is on the FDA to show that its advertising restrictions will reduce underage smoking in a "direct way."¹⁵⁶ Mere speculation that these restrictions will accomplish this goal will not suffice.¹⁵⁷ Rather, the FDA must present convincing evidence that its advertising restrictions will alleviate the problem of underage smoking to a material degree.¹⁵⁸ Furthermore, the FDA's new rule will receive no deference, but rather is subject to "close review,"¹⁵⁹ because the tobacco advertising restrictions constitute a sweeping ban on truthful commercial speech.¹⁶⁰

¹⁵⁴ *Id.*

¹⁵⁵ *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980).

¹⁵⁶ 44 *Liquormart v. Rhode Island*, 116 S. Ct. 1495, 1508 (1996).

¹⁵⁷ *Id.* at 1511.

¹⁵⁸ *Id.* at 1507, 1522.

¹⁵⁹ See *Central Hudson*, 447 U.S. at 566 n.9 ("We review with special care regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy."); see also *Liquormart*, 116 S. Ct. at 1508 (sweeping bans on commercial speech are subject to a more stringent constitutional review).

¹⁶⁰ The FDA's new rule broadly prohibits billboard advertising of tobacco products except for small areas not located near schools, parks, and playgrounds; it completely prohibits advertising with non-tobacco items such as t-shirts and hats; it limits sponsorship of sporting events to corporate name only and forbids color in tobacco advertisements appearing in all publications except for a few designated "adult" publications by the FDA. 61 Fed. Reg. at 44,617-18 (1996).

The FDA falls short of meeting its burden of justifying its advertising restrictions under the third prong of the *Central Hudson* test. In support of its restrictions, the FDA cites statistical evidence which it claims shows both a relationship between advertising and youth smoking and the positive effect advertising restrictions have on smoking rates and youth smoking.¹⁶¹ However, as discussed above in Part I.C, this evidence is unreliable as it fails to demonstrate that advertising causes minors to take up smoking, or that the FDA's restrictions will prevent young people from starting to smoke.¹⁶² In fact, substantial evidence exists suggesting a contrary conclusion.¹⁶³ Because the FDA fails to provide sufficient evidence linking its ban on tobacco advertising with its goal of reducing underage smoking, its advertising restrictions fail scrutiny under the third prong of the *Central Hudson* test.

The FDA asserts, however, that its restrictions are constitutionally permissible because "highly motivated" adults will be able to obtain tobacco information through allegedly effective mediums such as black text on a white background.¹⁶⁴ However, the Supreme Court has specifically held that the use of imagery and colors in advertising deserves the same "First Amendment Protec-

¹⁶¹ 61 Fed. Reg. 44,475.

¹⁶² See *supra* notes 38-46 and accompanying text.

¹⁶³ See *supra* notes 38-46 and accompanying text.

¹⁶⁴ See 61 Fed. Reg. at 44,468-69. The FDA unpersuasively argues that its restrictions merely limit the "time, place and manner" in which tobacco products may be advertised and therefore are not subject to a strict review under *Central Hudson*. 61 Fed Reg. at 44,498. The Supreme Court has held that government may impose reasonable restrictions on the time, place or manner of engaging in protected speech provided that they are adequately justified without reference to the content of the regulated speech. See *City of Cincinnati v. Discovery Network*, 507 U.S. 410, 428 (1983). However, if restrictions are applied selectively to affect only certain advertised products, the provision will be regarded as content based regardless of whether alternative channels of communication are available. *Id.* Because the FDA's advertising restrictions affect only tobacco products while allowing similar products to go unregulated, they are content based. *Id.* Thus, the FDA's argument that its restrictions merely limit the time, place and manner of tobacco advertisements fails, and the regulation should be subjected to strict review under *Central Hudson*.

tions afforded verbal commercial speech.”¹⁶⁵ Such advertising draws the attention of the public and often conveys information directly.¹⁶⁶ The FDA’s advertising restrictions are really attempting to keep the public ignorant of the existence of tobacco products by camouflaging tobacco advertisements in black-and-white text, in an effort to delegitimize smoking. The FDA does not have the broad discretion to suppress truthful information for such paternalistic purposes.¹⁶⁷ The First Amendment demands that “the speaker and the audience, not the government, assess the value of the information presented.”¹⁶⁸

Therefore, like the broad ban on alcohol price advertising in *Liquormart*, the FDA’s restrictions on tobacco advertising prevent the dissemination of truthful information. Furthermore, the FDA’s regulation disguises the FDA’s true objective, the delegitimizing of smoking, with the all-encompassing interest of protecting children’s health.¹⁶⁹ Such restrictions deserve strict review under *Central Hudson* because they suppress the free flow of truthful information in a clandestine manner.

Because the FDA fails to put forth reliable evidence to support its self-serving conclusion that advertising promotes youth smoking and that restrictions on advertising will prevent youth smoking, they have failed to establish that these restrictions directly advance the government’s substantial interest in preventing youth smoking. Moreover, the third prong of the *Central Hudson* test will not

¹⁶⁵ *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 647-49 (1985).

¹⁶⁶ *See id.* In *Zauderer*, the Supreme Court stated:

[t]he use of illustrations or pictures in advertisements serves important communicative functions: it attracts the attention of the audience to the advertiser’s message, and it may also serve to impart information directly. Accordingly, commercial illustrations are entitled to First Amendment protections afforded verbal commercial speech: restrictions on the use of visual media of expression in advertising must survive scrutiny under the *Central Hudson* test.

Id. at 647.

¹⁶⁷ 44 *Liquormart v. Rhode Island*, 116 S. Ct. 1495, 1511 (1996).

¹⁶⁸ *Edenfield v. Fane*, 507 U.S. 761, 767 (1993).

¹⁶⁹ *See supra* Part I (discussing how the FDA’s true purpose behind its advertising restrictions is to delegitimize smoking).

tolerate sweeping bans on commercial speech that disguise hidden government objectives behind unsupported assertions of public harm.

E. The FDA Regulation Is More Extensive Than Necessary

The fourth prong of the *Central Hudson* test will strike down any regulation that is more extensive than is necessary to serve the government's interest.¹⁷⁰ *Liquormart* further defined this prong of the balancing test as requiring the government to show that its restrictions on speech will reasonably accomplish its goal, and will do so in a way consistent with the goal's benefits.¹⁷¹ Accordingly, advertising restrictions are not reasonable if the government has rejected non-restrictive alternatives.¹⁷² In other words, the fourth prong prevents restriction of commercial speech when restriction is not necessary.¹⁷³

In this case, there are several less burdensome means available to the FDA to advance the objective of preventing underage smoking. First, better enforcement of current state laws prohibiting the sale of cigarettes to minors is a less restrictive measure which would effectively accomplish the government's goal.¹⁷⁴ Through better enforcement and stiffer penalties for offenders, child access laws can have a significant direct impact on youth smoking without burdening speech at all.¹⁷⁵ Also, government sponsored public educational campaigns specifically targeted at minors would provide a reasonable means of advancing the government's aims without encroaching upon the First Amendment rights of others.¹⁷⁶ In fact, the FDA recognizes such alternatives in the access

¹⁷⁰ *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980).

¹⁷¹ See *supra* Part II.B.2 (discussing the *Liquormart* Court's application of the fourth prong of the *Central Hudson* test).

¹⁷² *Liquormart v. Rhode Island*, 116 S. Ct. 1495, 1510 (1996).

¹⁷³ See *City of Cincinnati v. Discovery Network*, 507 U.S. 410, 428 (1993).

¹⁷⁴ See *Comments of Brown & Williamson*, *supra* note 8, Vol. IX.

¹⁷⁵ See *Comments of Brown & Williamson*, *supra* note 8, Vol. IX.

¹⁷⁶ See *Comments of Brown & Williamson*, *supra* note 8, Vol. IX.

provisions of its new rule and plans to implement them along with its advertising restrictions.¹⁷⁷

However, the fact that the FDA plans on regulating child access to tobacco products and sponsoring educational programs along with restricting tobacco advertising does not aid the FDA's rule in satisfying the fourth prong of the *Central Hudson* test. *Liquormart* provides that the government may not restrict speech if non-restrictive alternatives are available that would serve its interest.¹⁷⁸ The fourth prong does not merely encourage non-restrictive means but rather requires government to accept them in lieu of restrictive ones. Because the FDA could have advanced its goal of reducing minors' use of tobacco products through non-restrictive means, but instead restricted truthful speech, its tobacco advertising restrictions fail the fourth prong of the *Central Hudson* test.

Furthermore, the tobacco advertising restrictions would fail scrutiny under the fourth prong of the *Central Hudson* test regardless of whether non-restrictive alternatives exist because their broad prophylactic effect is more extensive than necessary. The government has chosen to employ sweeping bans on tobacco advertising—instead of restricting, on a case-by-case basis, any particular advertisement which it finds adversely affects children.¹⁷⁹ The Supreme Court has held that “the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful.”¹⁸⁰ Thus, the FDA as a “would-be regulator” has the

¹⁷⁷ 61 Fed. Reg. at 44,399.

¹⁷⁸ *Liquormart v. Rhode Island*, 116 S. Ct. 1495, 1510 (1996).

¹⁷⁹ 61 Fed. Reg. at 44,396.

¹⁸⁰ *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 646 (1995).

Broad prophylactic rules may not be . . . lightly justified if the protections afforded commercial speech are to retain their force. We are not persuaded that identifying deceptive or manipulative uses of visual media in advertising is so intrinsically burdensome that the state is entitled to forgo that task in favor of the more convenient but far more restrictive alternative of a blanket ban on the use of illustrations.

Id. at 649.

burden of distinguishing harmful, misleading and false advertisements from harmless, helpful and truthful ones. By choosing the easier prophylactic approach, the FDA has regulated advertising in a way that is more extensive than necessary. Therefore, the FDA's regulation fails to survive *Central Hudson's* fourth prong.

Incredibly, the FDA argues that the fourth prong is satisfied because the rule only restricts advertising and promotion that affect young people, while preserving those aspects of advertising that provide information to adults.¹⁸¹ The FDA's rule does no such thing. Rather, it drastically limits the flow of information to adults by "reduc[ing] the adult population to reading only what is fit for children."¹⁸² In *Bolger v. Youngs Drug Products Corporation*, the Court rejected a similar commercial speech ban for this very reason.¹⁸³ In *Bolger*, the manufacturer and distributor of contraceptives challenged a federal statute prohibiting unsolicited mailing of contraceptive advertisements.¹⁸⁴ The Court held that, while a "marginal degree of protection" is achieved by "purging all mailboxes of unsolicited material that is entirely suitable for adults," a "restriction of this scope is more extensive than the constitution permits, for the government may not 'reduce the adult population . . . to reading only what is fit for children.'"¹⁸⁵

Because less restrictive means to prevent underage smoking are available, and because the FDA's regulation is a broad prophylactic ban on the dissemination of information about tobacco products, the restrictions are more extensive than necessary. Thus the restrictions fail the fourth prong of the *Central Hudson* test. Moreover, the FDA may not reduce the public to reading only that which is fit for children.

¹⁸¹ 61 Fed. Reg. 44,512.

¹⁸² *Butler v. Michigan*, 352 U.S. 380, 383 (1957). In *Butler*, a unanimous Court reversed a conviction under a statute which made it an offense to make available to the general public materials found to have a potentially harmful influence on minors. The Court found the law to be insufficiently tailored since it denied adults their free speech rights by allowing them to read only what was acceptable for children to read. *Id.*

¹⁸³ 463 U.S. 60 (1983).

¹⁸⁴ *Id.* at 61.

¹⁸⁵ *Id.* at 60, 73 (quoting *Butler*, 352 U.S. at 383).

CONCLUSION

The *Central Hudson* test does not prevent regulators from addressing social problems. The government has broad authority to regulate commerce, typically subject only to a “rational basis” review by the courts.¹⁸⁶ However, where the government attempts instead to restrict speech in the hope of manipulating consumer behavior for its own hidden objective—as the FDA has done through its new tobacco rule—it must then confront the strong constitutional presumption in favor of the “free flow of commercial information,” and assume the substantial burden of proof required by *Central Hudson* and its descendants.¹⁸⁷ Because the FDA has failed to carry this burden as set forth in the third and fourth prongs of the *Central Hudson* test, it should be struck down for violating the First Amendment.

¹⁸⁶ *Id.*

¹⁸⁷ Brief for Petitioner at 17-18, *Liquormart v. Rhode Island*, 116 S. Ct. 1495 (1996).