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**Nos. 10-5234 & 10-5235**

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IN THE

**United States Court of Appeals for the Sixth Circuit**

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DISCOUNT TOBACCO CITY & LOTTERY, INC.; LORILLARD TOBACCO COMPANY;  
NATIONAL TOBACCO COMPANY, L.P.; AMERICAN SNUFF  
COMPANY, LLC; R.J. REYNOLDS TOBACCO COMPANY; AND COMMONWEALTH  
BRANDS, INC.

PLAINTIFF-APPELLANTS/CROSS-APPELLEES,

v.

UNITED STATES OF AMERICA; UNITED STATES FOOD AND DRUG  
ADMINISTRATION; MARGARET HAMBURG, COMMISSIONER OF THE  
UNITED STATES FOOD AND DRUG ADMINISTRATION; AND KATHLEEN  
SEBELIUS, SECRETARY OF THE UNITED STATES DEPARTMENT OF  
HEALTH AND HUMAN SERVICES

DEFENDANT-APPELLEES/CROSS-APPELLANTS.

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**ON APPEAL FROM THE U.S. DISTRICT COURT  
FOR THE WESTERN DISTRICT OF KENTUCKY**

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**BRIEF FOR *AMICI CURIAE* THE NATIONAL ASSOCIATION OF  
CONVENIENCE STORES IN SUPPORT OF APPELLANTS**

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## CORPORATE DISCLOSURE STATEMENT

The National Association of Convenience Stores ("NACS") is a non-profit trade association representing more than 2,200 retail and 1,800 supplier company members in the United States and abroad. Pursuant to Circuit Rule 26.1, NACS testifies that it is incorporated as a non-profit trade association, has no parent corporation, and has no stock or other interest owned by a publicly held company.

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## INTERESTS OF AMICUS CURIAE

NACS was founded August 14, 1961, as the National Association of Convenience Stores. It is an international trade association representing more than 2,100 retail and 1,500 supplier company members. The majority of members are based in the United States, though NACS member companies do business in nearly 50 countries worldwide. The U.S. convenience store industry has nearly 145,000 stores across the country. In 2009, it posted \$511 billion in total sales.

While 49 of the top 50 convenience stores in the United States are members of NACS, the association's membership roughly tracks the industry as a whole. Of the 145,000 convenience stores in the United States, 62% are owned and operated by someone who only has one store.

Sales of cigarettes and other tobacco products comprised 35.9% of the in-store sales at convenience stores in 2009.<sup>1</sup> At 66% of total sales volume, convenience stores are the channel of choice for cigarette sales.<sup>2</sup> While controversial, tobacco is still a legal product. Moreover, it is one that is critical

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<sup>1</sup> See App. A, NACS State of the Industry Annual Report at 76 (2009). Portions of this publication cited in this brief are attached as Appendix A. If directed, NACS will be happy to file the publication in its entirety with the Court.

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

to the economic viability of the highly competitive convenience store industry – which made annual pre-tax profits of only \$42,624 per store in 2009.<sup>3</sup>

NACS supports the goal of eliminating underage tobacco use. It is concerned, however, that the proposed restrictions on color displays and graphics including logos in tobacco advertising are an ill-conceived effort of dubious efficacy that will impair the First Amendment rights of store owners. While they may have little to no impact on underage tobacco use, they will certainly interfere with convenience stores' ability to communicate with customers.

Convenience stores are dependent on impulse purchases for many sales. While a desire to obtain a tobacco product may be the original motivator behind a customer visiting a store, many customers use the visit to purchase additional merchandise such as snack foods, candy or coffee.

The limitations on point-of-sale communications with customers will make it virtually impossible to communicate offerings and specials to anyone other than the most determined and hawkeyed customer. NACS members are concerned that the loss of tobacco traffic from customers who are not aware of the product offerings of a particular store will have cascading effects resulting in lost sales for other items available in the store.

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<sup>3</sup> *Id.* at 54-55.

Moreover, this is likely to achieve no purpose other than to divert tobacco consumers to other channels, such as the Internet or mail order catalogues that are not affected by the current ban on color and graphics. Indeed, given that such avenues are less regulated and often evade state tobacco taxes, this diversion might well *increase* underage tobacco consumption.

#### STATEMENT OF THE CASE

This suit challenges particular provisions of the Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (the “Act”). While the Act encompasses several provisions, this brief is limited to the issue of the use of color and graphics in advertising, specifically the black and white text “tombstone” provision of Pub. L. No. 111-31, § 102(a)(2). The Act provides that Plaintiffs “shall use only black text on a white background” in “any labeling or advertising for cigarettes or smokeless tobacco.” 21 U.S.C. § 387a-1(a)(2); 21 C.F.R. § 1140.32(a).

The plaintiffs, who are in the business of manufacturing and distributing lawful tobacco products within the United States, filed an amended complaint in this matter on September 21, 2009. In pertinent part, the amended complaint sought declaratory and injunctive relief against the Act’s ban on color or graphics in tobacco advertising. In its order of January 15, 2010, the district court struck down the ban on color and graphics in labels and advertising on First Amendment

grounds entered summary judgment for Defendant-Appellees on virtually every count. *Commonwealth Brands, Inc. v. United States*, 678 F. Supp. 2d 512, 525 (W.D. Ky. 2010) (noting that the plaintiffs “are clearly right when they say that images of packages of their products, simple brand symbols, and some uses of color communicate important commercial information about their products . . . . The Court therefore concludes that the ban on color and graphics fails review.”) This appeal followed.

The parties to this action have consented to NACS filing this amicus brief on the question of the Act’s ban on the use of color and graphics in advertising.

#### SUMMARY OF ARGUMENT

In evaluating whether a restriction on commercial speech oversteps First Amendment bounds, the Supreme Court has employed a four part test. The questions to examine are whether (1) the speech in question is not misleading (2) the asserted government interest in imposing the restriction is substantial (3) the regulation directly advances the asserted government interest and (4) the restriction on speech is no more extensive than necessary to serve the asserted interest. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N. Y.*, 447 U.S. 557, 566 (1980). The District Court in this case correctly found that the Act’s ban on the use of color and graphics in tobacco advertising runs afoul of this four part test.

The ban on color and graphics at issue here does not advance the government's interest in preventing underage tobacco use. Not only will the advertising ban not help achieve the stated goal, it is far broader than necessary and therefore cannot pass muster under *Central Hudson*. The ban limits the ways in which tobacco sellers can communicate with customers about product offerings to such a narrow range it makes many of the communications necessary to propose a lawful sale ineffectual. This is particularly true for stores serving customers who speak different languages or cannot read. These customers will be unable to receive basic information about tobacco products if ads are limited to black text on a white background. Sellers should be able to communicate the basics of product choice and commercial transactions to these adult consumers without running afoul of the law. In fact, the First Amendment guarantees that they can and the ban on all color and graphics at issue here cannot pass constitutional muster.

#### ARGUMENT

First Amendment jurisprudence is replete with strong distaste for Government measures designed to withhold accurate information from the public: "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." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996).

The Act's prohibition on the use of color and graphics allows one narrow type of advertising. Sellers and marketers of tobacco products are permitted to have advertisements that consist of black lettering on a white background to communicate information about their tobacco products. These so-called "tombstone" ads are the sole means of commercial speech permitted under the Act. Allowing "tombstone" ads does not prevent these restrictions from running afoul of the First Amendment. It should be noted, in fact, that the Supreme Court has "never held that commercial speech may be suppressed in order to further the State's interest in discouraging purchases of the underlying product that is advertised." *Central Hudson*, 447 U.S. at 574 (Blackmun, J., concurring in the judgment).

I. Under The *Central Hudson* Test, Any Proposed Restrictions On Commercial Speech Must Be Demonstrably Efficacious And Carefully Tailored To The Government Objective.

In the last forty years, the Supreme Court has emphasized that First Amendment protections extend to commercial speech. Indeed, while the First Amendment argument has prevailed "in every recent commercial speech case decided by the Supreme Court", First Amendment jurisprudence has been trending in this direction for the last half century.<sup>4</sup>

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<sup>4</sup> Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 Loy. L.A. L. Rev. 67, 67-68 (2007).

Thus, in 1975, while striking down a Virginia statute prohibiting the advertising of abortion clinics, the Supreme Court affirmed that speech is not stripped of its First Amendment protection merely because it appears in commercial form. *Bigelow v. Virginia*, 421 U.S. 809, 813 (1975). A year later, in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 819 (1976), the Court emphasized that even commercial advertising completely and totally devoid of any editorializing on any cultural, philosophical or political subject, still comes within the protection of the First Amendment.

In 1980, the Supreme Court first laid down the four part test that determines the constitutionality of regulations imposed on commercial speech in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980).

*Central Hudson* held that:

For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

*Id.* at 566.

Applying this in the present case, the Supreme Court itself has noted that the sale and use of tobacco by adults is a lawful activity. *Lorillard Tobacco Co v. Reilly*, 533 U.S. 525, 564 (2001). Therefore, truthful speech regarding it is protected under the first prong of *Central Hudson*. For the second prong, NACS

does not dispute that the asserted governmental interest, limiting underage smoking, is substantial.<sup>5</sup> Therefore, NACS limits its analysis to the last two prongs of *Central Hudson*.

A. Banning Color and Graphics in Advertising Does Not “Directly Advance” the Government’s Objective Of Curbing Underage Tobacco Use.

It is well established that “[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it.” *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71, n.20 (1983). The Government’s stated objective for the speech restrictions is “curbing underage tobacco use.” Br. for Defendants-Appellees at 50. Therefore, under the third prong of *Central Hudson*, the Government must show that its ban on colors and logos will in fact directly reduce underage tobacco use. *Central Hudson*, 447 U.S. at 564. *See also 44 Liquormart*, 517 U.S. at 507 (the Government must establish that “restriction on commercial speech *directly advances* the State’s asserted interest.”) (emphasis added).

This burden is “not satisfied by mere speculation or conjecture; rather, a governmental body must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.” *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). Therefore, “[t]he third prong of *Central Hudson* is far

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<sup>5</sup> *See Lorillard Tobacco Co v. Reilly*, 533 U.S. 525, 555 (2001) (noting that none of the parties contested the importance of the State’s interest in preventing underage tobacco use).

from a mechanical one.” *44 Liquormart Inc. v. Rhode Island*, 517 U.S. 484, 527 n.9 (1996) (Thomas, J., concurring).

For instance, in *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486-87 (1995), the Supreme Court rejected the Federal Alcohol Administration’s (FAA’s) claim that its ban on beer labels displaying alcohol strength was necessary to prevent “strength wars.” Finding the third prong to be “critical”, the Supreme Court rejected the FAA’s attempts to defend the regulation on the basis of “common sense,” “anecdotal evidence” and “educated guesses.” *Id.* at 490. The Court noted that there was no evidence of the “strength wars” the legislation was aimed at. *Id.*

This Court has followed the same approach. *See Pagan v. Fruchey*, 492 F.3d 766, 778 (6th Cir. 2007) (“It is [the Government’s] obligation to provide something in support of its regulation, and we do not find ourselves free to hold that obligation has been discharged based on principles of common sense or obviousness, especially where, as here, all do not agree as to what is obvious or a matter of common sense.”). This requirement is critical otherwise the Government “could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression.” *Edenfield*, 507 U.S. at 771. The Government cannot meet this burden.

1. There Is Little Evidence That Advertising Causes Underage Smoking.

Contrary to the Government's premise, the issue of what causes an individual to use tobacco is far from settled. Decades old marketing documents on recognizing trends, needs, and preferences in future customers do not establish advertising as the critical catalyst that propels otherwise abstemious individuals to underage tobacco use. In particular, the role of advertising as the sole, primary, or even significant motivator for the decision to *start* underage smoking has not been established.

Thomas Schelling, former director of Harvard's Institute for the Study of Smoking Behavior and Policy has stated:

I've never seen a genuine study of the subject .... Most of the discussion that I hear - even the serious discussion - is about as profound as saying, 'If I were a teenage black girl, that ad would make me smoke.' I just find it altogether unpersuasive .... I've been very skeptical that advertising is important in either getting people to smoke or keeping people smoking. It's primarily brand competition.

Jacob Sullum, *For Your Own Good: The Anti-Smoking Crusade and the Tyranny of Public Health* at 106 (1998) (citations omitted).

Former Surgeon General C. Everett Coop has similarly stated that "[t]here 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.”<sup>6</sup> The primary reason for tobacco advertising is to shift consumers from one brand to another.<sup>7</sup>

A number of studies, in fact, conclude that there is no empirical evidence that banning advertising would reduce underage smoking. *See e.g.*, C. McDonald, *Children, Smoking and Advertising: What Does the Research Really Tell Us*, 12 Int'l J. of Advertising 279 (1993) (“There is no evidence in any of the studies to suggest that, if advertising were banned, it would make the least difference in the propensity of children to smoke.”).

It is striking that McDonald’s conclusion was premised on a complete ban in the advertising-saturated world of 1993. Its findings apply with even greater force to color and logo restrictions in the severely curtailed tobacco marketing world of 2010.<sup>8</sup> Simply put, there is absolutely no evidence that forcing convenience stores to drop color and logos would curb underage smoking. The Government’s

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<sup>6</sup> U.S. Department of Health and Human Services, *Reducing the Health Consequences of Smoking: A Report of the Surgeon General* at 516 (1989), available at [http://profiles.nlm.nih.gov/NN/B/B/X/S/\\_/nnbbxs.pdf](http://profiles.nlm.nih.gov/NN/B/B/X/S/_/nnbbxs.pdf).

<sup>7</sup> *See* Council of Economic Advisors, *Economic Report of The President* at 186 (1987) (stating “There is little evidence that advertising results in additional smoking. As with many products, advertising mainly shifts consumers among brands.”), available at [http://fraser.stlouisfed.org/publications/erp/issue/1592/download/6022/ER\\_1987.pdf](http://fraser.stlouisfed.org/publications/erp/issue/1592/download/6022/ER_1987.pdf).

<sup>8</sup> Section I.B.2 of this brief discusses the striking differences between the tobacco advertising that was allowed during the early 1990s and that which is allowed today.

arguments and studies on the efficacy of the ban on color and graphics do not take into account the very different scope of tobacco advertising available today as opposed to that which was allowable in the early 1990s. The nexus between the restriction and the objective is not just tenuous; it is entirely missing. The enquiry should stop there.

2. Prohibitions on the Use of Images Have Been Struck Down under the Third Prong of *Central Hudson*

The Supreme Court has previously struck down speech restrictions on the use of images. In *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 648 (1985), the Court found that Ohio's rationale for prohibiting attorneys from using graphics in advertising amounted to "little more than unsupported assertions." The Court noted that none of the identified ills were directly tied with the illustrations at issue. *Id.* at 649 ("[N]one of the State's arguments establish that there are particular evils associated with the use of illustrations in attorneys' advertisements."). The same can be said in the case at hand. The Government simply cannot show that color, graphics, logos and the like are the element of marketing that cause underage smoking, nor can they show that removal of those elements from marketing would reduce such smoking. This lack of evidence is simply insufficient to justify the dramatic limitations on commercial speech required by the Act.

B. The Acts' Restrictions Are Far More Extensive Than Necessary To Advance The Government's Interest

Under the fourth prong of the *Central Hudson* test, commercial speech restrictions must be no more extensive than necessary to achieve the Government's stated objective. *Cent. Hudson Gas*, 447 U.S. at 566. Analyzing this, the Supreme Court has held that a content-based state law that restricts commercial speech is more extensive than necessary if the Government does not "demonstrate narrow tailoring of the challenged regulation to the asserted interest." *Greater New Orleans Broad. Ass'n, Inc., v. United States*, 527 U.S. 173, 188 (1999) (citing *Bd. of Trs of the State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989)). Moreover, to be upheld under this prong, "the challenged regulation should indicate that its proponent 'carefully calculated' the costs and benefits associated with the burden on speech imposed by its prohibition." *Greater New Orleans Broad. Assn.*, 527 U.S. at 188.

Satisfying this requirement necessitates a fit between the challenged provisions and the asserted governmental interest that "is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served.'" *Id.*

In this case, the restrictions against the use of color and graphics are sweeping and universal. Offsite and "tombstone" advertisements are wholly ineffective substitutes for that most fundamental of on-site communications:

announcing that a product is available for purchase at an establishment for a particular price.

The key element of the business of any convenience store is its convenience.<sup>9</sup> This necessarily includes the ability to quickly and easily communicate product offerings to customers. By their nature, color and graphics are far more effective means of rapidly communicating such offerings than text. Yet these modes of communication have been completely foreclosed by the Act at issue here. These sweeping measures do not constitute the narrow tailoring required by *Central Hudson*'s fourth prong.

1. The Supreme Court Has Struck Down Similar Restrictions on Commercial Speech Relating to Tobacco As Lacking Sufficient Tailoring Or Justification.

The Supreme Court has specifically applied the *Central Hudson* test to restrictions on commercial speech regarding tobacco. In *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 571 (2001), the Court confronted a Massachusetts anti-tobacco advertising law. The provisions of the Massachusetts law were similar in many ways to the restrictions proposed by the current Act. The Massachusetts law

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<sup>9</sup> This has been documented in a recent anthropological study. See Michael G. Powell, Ph.d., *The Fast and the Furious*, NACS Magazine (Feb 2010) ("During our observations, we heard repeatedly that hurried convenience store consumers use the store like a 'pit stop.'"), available at <http://www.nacsonline.com/NACS/Magazine/PastIssues/2010/February2010/Pages/Feature3.aspx>

prohibited outdoor tobacco advertising – construed as including indoor advertisements visible from outside a store – that could be seen within a 1,000 foot radius of any public playground, (including playground areas in parks) or school. This prohibited advertising was broadly defined to include pictures, logos, symbols, mottos, selling messages, graphic displays, visual images, recognizable colors or patterns of colors, or any other indicia of product identification used for tobacco products.<sup>10</sup> The similarity between the advertising restrictions at issue in *Lorillard* and those at issue here are unmistakable. That is no accident. The Massachusetts regulations at issue in *Lorillard* were based on the Food and Drug Administration’s 1996 regulations which the Act at issue here revived. *Id.* at 557-58.

a. Under *Lorillard*, The Current Restrictions Cannot Pass Muster.

The provisions of the Act at issue here are, if anything, more restrictive than those in the Massachusetts law struck down in *Lorillard*. The advertising portions of the Massachusetts law were only applicable to stores that were within a certain radius of schools or playgrounds. The Massachusetts restrictions also exempted displays within stores that were more than five feet above the floor (as long as they could not be seen from outside). The Act at issue in this case contains no such

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<sup>10</sup> 940 Mass. Code Regs. §§ 21.03, 22.03 (LexisNexis 2010).

concessions. Its restrictions apply to all tobacco advertising in any brick-and-mortar store.

It is thus instructive that the Supreme Court in *Lorillard* found that even the lesser restrictions at issue there failed the *Central Hudson* test. *Id.* at 566. The Court noted that:

Massachusetts may wish to target tobacco advertisements and displays that entice children, much like floor-level candy displays in a convenience store, but the blanket height restriction does not constitute a reasonable fit with that goal. The Court of Appeals recognized that the efficacy of the regulation was questionable, but decided that, “[i]n any event, the burden on speech imposed by the provision is very limited.” . . . *There is no de minimis exception for a speech restriction that lacks sufficient tailoring or justification.*

*Id.* at 567 (emphasis added).

Given the Supreme Court’s holding in *Lorillard*, the restrictions at issue here simply cannot pass muster. As the Court made clear:

The First Amendment also constrains state efforts to limit advertising of tobacco products, because so long as the sale and use of tobacco is lawful for adults, the tobacco industry has a protected interest in communicating information about its products and adult customers have an interest in receiving that information.

*Id.* at 571.

- b. In *Lorillard*, The Supreme Court Specifically Noted The Effect Of Commercial Speech Restrictions On Convenience Stores.

NACS respectfully highlights the fact that the Supreme Court has specifically considered the effects of restricting tobacco related communications on

convenience stores. Even though the *Lorillard* restrictions were less draconian than the ones currently proposed, their effect on convenience stores was one basis for striking them down:

[A] retailer . . . may have no means of communicating to passersby on the street that it sells tobacco products because alternative forms of advertisement, like newspapers, do not allow that retailer to propose an instant transaction in the way that on site advertising does. The ban on any indoor advertising that is visible from the outside also presents problems in establishments like **convenience stores**, which have unique security concerns that counsel in favor of full visibility of the store from the outside. It is these sorts of considerations that the Attorney General failed to incorporate into the regulatory scheme.

*Lorillard*, 533 U.S. at 565 (emphasis added). These concerns are as applicable now as they were a decade ago. If the objective of protecting children did not create a “tobacco exception” to the First Amendment then, it should not do so now.

2. The Restrictions Are A Poor Fit Because They Are Designed For A World That No Longer Exists.

The Act is a Congressional directive to enact an FDA Rule that was first proposed in 1996. § 102(2)(2). However, the 1996 rule was crafted in an entirely different world, where tobacco could be marketed with few restrictions. Neither the 1996 FDA, nor the 2009 Congress which relied upon it, has presented evidence that these speech restrictions will be effective in a world that is far different from the one in which these restrictions were originally proposed.

a. The Tobacco Marketing World of 1996

In 1996, there were few restrictions on tobacco marketing. Tobacco advertisements were splashed all over newspapers, billboards, and sports stadiums. Consequently, the FDA sought to limit this flood of messages based on its view that the “ubiquity and unavoidability of [tobacco] advertising in all media, created a climate that influence[d] young people’s decisions about tobacco use.” 61 Fed. Reg. 44,475 (Aug 28, 1996). The FDA believed that it was virtually impossible for parents to shield their children from tobacco advertising since tobacco “products were among the most heavily advertised and promoted products in America.” *Id.*

b. The Tobacco Marketing World After 1998

Fourteen years have passed. The tobacco world is very different. In 1998, the major tobacco companies entered into a Master Settlement Agreement (“MSA”) and a Smokeless Tobacco Master Settlement Agreement (“STMSA”) with the Attorney Generals of virtually all states, territories and the District of Columbia.<sup>11</sup> In the process, they surrendered most of their communication channels, despite their First Amendment rights to those media.

For instance, tobacco may no longer be advertised on billboards, or in stadiums or malls. Also excluded are taxi stands, bus stops and vehicles. Branded

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<sup>11</sup> Separate agreements with similar provisions govern states not party to the MSA.

merchandise may only be distributed to tobacco company employees legally eligible to purchase tobacco. Cartoons, including Joe Camel, the source of much of the concern in the 1990s, are prohibited.

c. The Tobacco Marketing World Today.

Clearly, tobacco marketing today is on a different plane than it was in 1996. Tobacco manufacturers are now limited to a handful of communication channels. Moreover, even these channels are carefully circumscribed. Outdoor advertising is limited to retail establishments licensed to sell tobacco – such as convenience stores. The outside signs are limited to 14 square feet. This is a far different world than the FDA identified in 1996. Retail tobacco sellers are one of the only means still available for tobacco marketing.

The Act thereby responds to a threat of overexposure to tobacco advertising that simply does not exist any more. Indeed, even the passage of fourteen years understates the staleness of the analysis; the studies and data the FDA used in 1996 were already several years old at the time. *See* 61 Fed. Reg. at 44,509-10.

3. The Supreme Court Has Recognized That First Amendment Protections Extend Beyond Words.

It is well established that “[s]ymbolism is a primitive but effective way of communicating ideas,” *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 632 (1943). Consequently, “the Constitution looks beyond written or spoken words as

mediums of expression.” *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569 (1995).

In the specific context of commercial speech, the Supreme Court has recognized that the “use of illustration or pictures in advertisements services important communicative functions, including “attract[ing] the attention of the audience to the advertiser’s message, and [serving] to impart information directly.” *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 647 (1985).

“[R]estrictions on the use of color and imagery... significantly interfere with the communicator’s ability to reach the intended audience. Compounding the problem is that they do so on a blatantly content-based ground. Moreover, a speaker’s ability to choose the manner of expression should not be viewed as uniquely tied to the speaker’s developmental interest, but to the listener’s free-speech rights as well.” Martin H. Redish, *Tobacco Advertising and the First Amendment*, 81 Iowa L. Rev. 589, 626-27 (1996) (analyzing the 1996 regulations promulgated by the Food and Drug Administration).

- a. The Desire To Protect Children Cannot Be Used To Limit The Entire Population To Materials Suitable For Children.

For at least fifty years, the Supreme Court has emphasized that the desire to protect children cannot be used to impose a universal G or PG-13 standard on all

Americans: “the governmental interest in protecting children from harmful materials . . . does not justify an unnecessarily broad suppression of speech addressed to adults.” *Reno v. ACLU*, 521 U.S. 844, 875 (1997) (citations omitted). See also *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 74 (1983) (“The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.”); *Erznoznik v. Jacksonville*, 422 U.S. 205, 213-214 (1975) (speech “cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.”); *Butler v. Michigan*, 352 U.S. 380, 383 (1957) (“The incidence of this enactment is to reduce the adult population . . . to reading only what is fit for children.”).

Particularly instructive is *Butler v. Michigan*, 352 U.S. 380 (1957). In *Butler*, the Supreme Court struck down a Michigan law restricting the sale of materials “tending to incite minors to violent or depraved or immoral acts.” *Id.* at 381 (quoting then Mich. Penal Code § 343). The effect of the law, the Supreme Court noted, was “to reduce the adult population of Michigan to reading only what is fit for children.” 352 U.S. at 383. As Justice Frankfurter memorably observed, “Surely, this is to burn the house to roast the pig.” *Id.* Yet, as noted above, the same motivation – protecting children – is prompting the Government to repeat the same behavior – proscribing adult speech – in this case.

b. The Supreme Court Has Specifically Admonished Against Proscribing Tobacco Communication Because It May Reach Children.

The Government's position is even more untenable because the Supreme Court has previously addressed this specific issue: whether the general admonition against proscribing adult speech to protect children applies in the context of tobacco. Again, the answer was an emphatic "Yes." The Court held that while protecting children was appropriate, this could not be accomplished by riding roughshod over the rights of other parties: "As the State protects children from tobacco advertisements, tobacco manufacturers and retailers and their adult consumers still have a protected interest in communication." *Lorillard*, 533 U.S. at 564.

This is precisely the admonition that the Act at issue in this matter contravenes. It uses the possibility of underage exposure to tobacco labels to ban most tobacco communications for virtually all Americans. Tobacco remains a legal product. Adult Americans are entitled to information about it so that they can purchase the product. The fact that some underage individuals will be exposed to that information does not change the analysis under *Butler*.

4. The Restrictions Are Underinclusive: They Ignore Important Channels for Underage Sales.

The FDA's regulation of displays at traditional brick-and-mortar sellers reflects past experiences, not current reality. While the Act eviscerates the ability

of brick-and-mortar stores to communicate with their customers, it does not address the fact that the minors ostensibly protected by its restrictions have access to a dazzling universe of tobacco material including color, logos and other graphics in their own homes via the Internet.

Internet sites even make significant numbers of sales of tobacco to underage individuals. A Minnesota study looking at 96 tobacco websites found that “[a]ge verification safeguards on most of the sites examined were meaningless or nonexistent.”<sup>12</sup> In the study, children were able to access a cornucopia of tobacco products on the Internet; an eight year old actually received a delivery of cigarettes ordered in cyberspace.<sup>13</sup>

It is difficult to fully appreciate how much the Internet has already supplanted advertising through traditional media. Online advertising spending in 2008 exceeded \$23 billion.<sup>14</sup> That places the Internet on par with traditional print media, and ahead of radio or outdoor advertising in terms of ad revenue.<sup>15</sup> If the

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<sup>12</sup> Douglas Blanke, Minn. Dep’t of Pub. Health, *Smoke on the Web: can Children Buy Cigarettes Online?*, iii (2002), available at <http://www.health.state.mn.us/divs/hpcd/tpc/youth/smokeontheweb.pdf>.

<sup>13</sup> *Id.*

<sup>14</sup> See Interactive Advertising Bureau (“IAB”), *Economic Value of the Advertising-Supported Internet Ecosystem*, 8 (June 10, 2009), available at <http://www.iab.net/media/file/Economic-Value-Report.pdf>.

<sup>15</sup> *Id.*

driving concern is shielding underage individuals from tobacco-related commercial messages, the Act fails in its objective.

While the proposed regulations will force convenience stores to lose their speech rights, online tobacco sellers will be largely unaffected. Section 906(d)(4)(A) of the Act does mandate the study and future imposition of additional measures to control online and mail access to tobacco related materials.

Specifically, it requires that the Secretary of Health and Human Services shall:

(ii) within 2 years after such date of enactment, issue regulations to address the promotion and marketing of tobacco products that are sold or distributed through means other than a direct, face-to-face exchange between a retailer and a consumer in order to protect individuals who have not attained the minimum age established by applicable law for the purchase of such products.

These regulations, however, are not yet in effect. At a minimum then, tobacco related information will continue to be available on the Internet for a period after the “tombstone” restrictions are imposed on convenience stores. The scope and stringency of future Internet or mail order restrictions also remain unclear and may well be quite different than the complete ban on color and graphics that has been imposed on brick and mortar stores. And, given the global nature of the Internet, countless websites will remain beyond the Government’s jurisdiction because of their location abroad. The fact that the speech that is banned in almost all contexts will still be available to children through the Internet

demonstrates the poor fit between the Government's interest and the restrictions at issue.

C. The Government Has Less Restrictive Options Available.

Commercial speech restrictions must be “no more extensive than necessary,” so that “if the Government could achieve its interest in a manner that does not restrict speech, or that restricts less speech, the Government *must* do so.” *Thomas v. W. States Med. Ctr.*, 535 U.S. 357, 371 (2002) (emphasis added). *Western States* is instructive: the Court struck down restrictions on pharmacy advertising in part because “several non-speech-related means” were available to the Government. *Id.* at 372. With that in mind, the Supreme Court directed that courts evaluating speech restrictions analyze whether the government could achieve its stated objectives in ways that do not restrict speech, or are less restrictive of speech. *Id.* at 371. In short, to show sufficient tailoring between the Government's interest and a speech restriction “regulating speech must be a last—not first—resort.” *Id.* at 373.

This Court has similarly held that: “Before a government may resort to suppressing speech to address a policy problem, it must show that regulating conduct has not done the trick or that as a matter of common sense it could not do the trick.” *BellSouth Telecomms., Inc v. Farris*, 542 F.3d 499, 508 (6th Cir. 2008). In this case, the Government has done neither. Its own studies have listed a litany

of options, many of which could be funded by MSA funds, including community based programming, chronic disease programs, school based programming, counter-marketing, cessation programs, and enforcement of existing laws.

The government thus has countless tools at its disposal. It can use them to achieve its objective,<sup>16</sup> and importantly, do so without infringing speech. It has made no effort to show that utilizing these tools has failed, forcing it to fall back on speech infringement as a regrettable last resort. Yet that is precisely what it is required to do. *See Coors*, 514 U.S. at 490-91 (the availability of alternative options indicate that the speech restrictions are more extensive than necessary).

D. This Court Has Previously Struck Down Less Sweeping Restrictions As Insufficiently Tailored.

This Court has already struck down analogous restrictions in the alcohol context. *See Eller Media Co. v. City of Cleveland*, 326 F.3d 720, 721 (6th Cir. 2003) (affirming the judgment of the trial court on the basis of its reasoning in *Eller Media Co. v. City of Cleveland*, 161 F.Supp.2d 796 (N.D. Ohio 2001)).

In *Eller Media*, the restrictions at issue were set forth in a Cleveland City ordinance that prohibited billboards advertising alcoholic beverages in any

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<sup>16</sup> Campaign for Tobacco-Free Kids, *Decade of Broken Promises: The 1998 Tobacco Settlement Ten Years Later*, at v. (Nov. 18, 2008), available at <http://www.tobaccofreekids.org/reports/settlements/2009/fullreport.pdf>, (stating “The evidence is conclusive that state tobacco prevention and cessation programs work.”)

“publicly visible location or at any location visible from a sidewalk, street, or highway.” 161 F.Supp.2d at 805. If anything, the *Eller Media* speech restrictions were far less stringent than those proposed by the Government here: they applied only to one form of communication – billboards. By contrast, the restrictions here are virtually universal, limiting tobacco advertisements inside or outside any retail establishment selling the product itself to “tombstone” ads. Similar to the present case, the proffered government interest in *Eller Media* was the desire to curb underage drinking. *Id.* at 810.

In reasoning subsequently adopted by this Court, the trial court in *Eller Media* struck down the Cleveland ordinance as unconstitutional on the basis of the infringement of free speech. *Id.* at 812. The Court found that even if the restrictions did curb underage drinking, the ordinance was fatally defective for two reasons: (1) the lack of a close fit between the means and governmental interest, and (2) the excessive burden on speech. *Id.* at 811-12. Both concerns are at least equally applicable here.

In pertinent part, the trial court explained:

In the instant case, the Court finds that the fourth step remains unsatisfied because, as in *Lorillard*, the costs and benefits associated with the burden on the speech imposed are not carefully calculated. . . In comparing this case to the *Lorillard* matter, the ordinance is similar in that it imposes a restriction on speech that extends to a substantial geographic area. . . This includes the prohibition on the advertising of alcohol in a large portion of Cleveland's densely populated areas. . . Thus, the ordinance could be said to constitute nearly a complete ban

on the communication of truthful information about legal alcoholic products to adult consumers. . . .

*Id.* at 811 (citations omitted). Each of these concerns apply with even greater force here.

The Government's preferred restrictions apply not just "to a substantial geographic area", but to the nation as a whole. And the ban on color and graphics is exacerbated by the fact that these communicative tools are also limited by the Act on packages of the products themselves.<sup>17</sup>

The Government here is using a far blunter instrument than the City of Cleveland did in *Eller Media*; the fit between objective and means is, if anything, far looser.

The *Eller Media* holding also rested on an alternative basis: the Cleveland ordinance was far too broad to pass First Amendment scrutiny.

In addition, as in *Lorillard*, the range of communications restricted by the ordinance also seems unduly broad . . . . In the words of the Supreme Court with respect to this issue, "[t]o the extent that studies have identified particular advertising and promotion practices

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<sup>17</sup> The Act requires all cigarette packs to carry a warning label over fifty percent of the front and rear panels of each pack. Pub. L. No. 111-31, § 201(a), 123 Stat. 1775, 1843 (amending 15 U.S.C. § 1333). The word "WARNING" should be emblazoned in large seventeen-type font. *Id.* The warning itself must appear on the top half of the packs – the part most likely to be seen by customers in a convenience store. *Id.* And these requirements are capped by a requirement that packs feature "color graphics depicting the negative health consequences of smoking." Pub. L. No. 111-31, § 201, 123 Stat. 1775, 1845 (amending 15 U.S.C. § 1333).

that appeal to youth, tailoring would involve targeting these practices while permitting others.” . . . As it stands, the ordinance makes no distinction among advertising practices on this basis. As was the case in the matter before the Supreme Court, *the fact remains that the sale and use of alcoholic products, like tobacco products, by an adult is a legal activity. . . . Because a speech regulation cannot unduly impinge on the speaker's ability to propose a commercial transaction and the adult listener's opportunity to obtain information about products, the Court finds that, because the City fails to show that the regulations at issue were not more extensive than necessary, it fails to satisfy step four of the Central Hudson test. . . . Thus, the outdoor advertising ordinance is insufficient for purposes of the First Amendment and, therefore, unconstitutional.*

*Id.* at 811-12 (emphasis added). Once again, the concerns articulated by the trial court present even greater concerns here.

The restrictions at issue here leave store owners without any adequate substitute for communicating with customers. For instance, in *Linmark Assocs., Inc. v. Willingboro Township*, 431 U.S. 85, 93 (1977), the Court invalidated a law prohibiting the placement of “For Sale” signs from being placed in front of houses. The objective of the restriction was to prevent “white flight” and a fall in property values that might be triggered by numerous “For Sale” signs. *Linmark Assocs., Inc.* explained that the restriction did not leave homeowners with satisfactory alternatives to communicate their intention to sell their homes. The same is true here. Store owners have no satisfactory alternative to getting information to their customers inside their stores communicating the full range of products offered. Information about brands, types of products and the like simply cannot be

effectively communicated to the same extent in text only – particularly in small stores where space is often limited.

As *Eller Media* noted, permissible speech regulations “cannot unduly impinge on the speaker's ability to propose a commercial transaction.” 161 F. Supp. 2d at 809 (citing *Lorillard*, 533 U.S. at 565). Yet the Government’s restrictions here are far more oppressive than those proposed in *Eller Media*, which after all, only applied to a single, and very visible medium, billboards. In fact, alcohol has access to a wide variety of media, such as television and radio commercials, which have been off-limits to tobacco for years. Indeed, what makes the “tombstone” restrictions particularly oppressive is that they propose to gut the limited opportunities that still remain for tobacco related communications.

E. The Ban on Color and Graphics is Not Necessary Because The Objective Is Being Accomplished Without The Ban.

Undisputed evidence shows that underage tobacco use in the United States has been steadily declining for years.<sup>18</sup> The Government has offered no evidence that this downward trend has reversed or slowed – even absent any new speech

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<sup>18</sup> See Substance Abuse and Mental Health Services Administration, Office of Applied Studies, *The NSDUH Report: Trends in Tobacco Use among Adolescents: 2002 to 2008* (October 15, 2009), available at <http://www.oas.samhsa.gov/2k9/152/152Trends.htm>.

restrictions.<sup>19</sup> Given this, the Government cannot possibly show that its speech restrictions are *necessary* to “significantly reduce” underage tobacco use. *See 44 Liquormart*, 517 U.S. at 506; *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486-87 (1995) (noting that the Government’s burden of showing how the speech restrictions would achieve the necessary objective could not be met by “mere speculation or conjecture”).

## II. The Act Unconstitutionally Restricts Speech Entitled to Heightened Protection.

As a matter of constitutional jurisprudence, dual aspect speech is not stripped of its First Amendment protection solely on the basis of its commercial content. *Bigelow v. Virginia*, 421 U.S. 809, 825-26 (1975). Yet the Act does not take account of the political content of tobacco-related speech.

There may be no activity more sacrosanct for purposes of the First Amendment than political speech. Yet so broad are the restrictions imposed by the Government here that even political speech is sacrificed at the altar of reducing tobacco’s attractiveness. For instance, the current Chief Judge of the Ninth Circuit, Alex Kozinski has analyzed a famous episode in which Phillip Morris supported

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<sup>19</sup> For their part, Plaintiff-Appellants have proffered evidence showing that not only has underage tobacco use already declined below the targeted amount in 1996, but that it is likely to decline even further – all without speech restrictions. *See Plaintiff-Appellants’ Principal Br.* at 14.

advertising emphasizing the importance of the Bill of Rights.<sup>20</sup> The commercials urged viewers to become familiar with the provisions of the Bill of Rights.

Viewers were even offered free copies of the Bill of Rights.

By any measure, this would constitute free speech on a vital topic to all Americans. Economic motivation would not change this analysis. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 67 (1983). And neither would the fact that the speaker was a store, business, or corporation. *See Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876, 899 (2010) (“The Court has recognized that First Amendment protection extends to corporations.”) (listing numerous cases).

Because the commercials featured a Phillip Morris logo, however, they would be proscribed under the Act. As Judge Kozinski noted:

It would not be a far leap at all to conclude that the Phillip Morris ads are simply commercial speech, presumably subject to banning from the airwaves. Yet, given the educational and political nature of the speech involved, this seems a result oddly contrary to our notions of how the first amendment ought to operate.<sup>21</sup>

Nor is the Phillips Morris story the only example of the potential consequences of the Act. For instance, C. M. Coolidge’s iconic paintings of Dogs

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<sup>20</sup> See Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 Va. L. Rev. 627, 645 (1990).

<sup>21</sup> *Id.* at 646.

Playing Poker – commissioned to advertise cigars<sup>22</sup> – would be prohibited by the Act. A convenience store displaying these pieces of classic Americana would run afoul of the Act as written. Other iconic scenes from American history, showing figures such Winston Churchill, Franklin Roosevelt, Generals Douglas MacArthur, Dwight D. Eisenhower and George S. Patton, or even a young Barack Obama using tobacco, would presumably also be off-limits to convenience stores if they contained tobacco logos or could be construed as endorsing or offering tobacco products.

The Act as written appears to encompass even the reproduction of news stories. One example is found in Chief Judge Kozinski's discussion of a 1990 story in the *Wall Street Journal*. The *Journal* discussed the widespread use of Kent cigarettes as black market currency in Romania.<sup>23</sup> The manufacturer subsequently distributed enlarged copies of the story with the caption "In Romania, Kents are too valuable to smoke. Fortunately, we live in America."<sup>24</sup>

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<sup>22</sup> Annette Ferrara, *Lucky Dog!: The Art History of C.M. Coolidge's Dogs Playing Poker*, Ten by Ten Magazine (April 2008) available at <http://web.archive.org/web/20080327040522/http://www.tenbyten.net/luckydog.html>.

<sup>23</sup> See Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 Va. L. Rev. 627, 646 n.66 (1990).

<sup>24</sup> *Id.*

A convenience store's display of this particular *Wall Street Journal* article might potentially pass muster under the Government's proposed regulations – or it might not. Apparently, its acceptability would hinge on a broad array of factors such as the background, use of graphics or photographs and other display characteristics. The absurdity of imposing such a test on what is incontrovertibly a news story is evident. Yet that is the outcome under the Act at issue here.

III. The Restrictions Undercut Convenience Stores' Ability to Communicate With Non-Native English Speaking Customers And Customers With Disabilities.

Many convenience stores serve customers who cannot speak or read English. This includes stores located in communities with large numbers of recent immigrants. In many urban communities, in fact, people who speak many different languages may frequent a single store. The value of familiar brand icons and colors to such patrons is obvious. Those colors and symbols communicate clear messages regarding the products offered for sale and can do so across language barriers. Putting messages in black and white text in multiple languages may not be feasible (due to space concerns and store owners' own language limitations) in many retail settings.

These concerns are not limited to customers from non-English speaking communities. Many native English speakers, including the illiterate or those struggling with physical impairments such as severe astigmatism, or disabilities

such as dyslexia, may need icons or colors to help inform their purchases. The loss of the ability to advertise or display color and graphics will severely affect the ability of convenience stores to communicate with these customers.

Indeed, as the Supreme Court noted in *Lorillard*, these advertising measures are perhaps the prime methods by which convenience stores signal that they have tobacco products – a perfectly legal commodity – available for purchase.

*Lorillard*, 533 U.S. at 564-65 Preventing any effective communication to these entire classes of customers by tobacco sellers makes the Act's restrictions far too broad to survive First Amendment scrutiny.

#### CONCLUSION

The Government simply cannot meet its burden of showing that the Act's ban on the use of any colors or graphics (including logos) directly advances its interest in reducing underage smoking nor can it show that such a broad ban is necessary to achieve its goal. As such, the ban cannot survive First Amendment scrutiny. "We have previously rejected the notion that the Government has an interest in preventing the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with the information." *Western States Med. Ctr.*, 535 U.S. at 374; *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. at 497 (Stevens, J., plurality opinion) (rejecting the State's "paternalistic assumption that the public will use truthful, nonmisleading

commercial information unwisely”). We urge the Court to follow this established body of First Amendment law and uphold the District Court’s decision in this case that the Act’s ban on color and graphics cannot be sustained.

Respectfully submitted,

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### CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 8117 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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### CERTIFICATE OF SERVICE

I certify that on September 27, 2010, the foregoing document was served on all of the following parties or their counsel of record through the CM/ECF system, as they are registered CM/ECF users:

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APPENDIX A

NACS State of the Industry Annual Report (2009), p. 1, 76, 54-55