UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
BOWLING GREEN DIVISION

COMMONWEALTH BRANDS, INC.; CONWOOD COMPANY, LLC; DISCOUNT TOBACCO CITY & LOTTERY, INC.; LORILLARD TOBACCO COMPANY; NATIONAL TOBACCO COMPANY, L.P.; and R. J. REYNOLDS TOBACCO COMPANY,	)	
Plaintiffs,	)	CIVIL ACTION NO. 1:09-cv-117-M
v.	)	
	)	(Electronically Filed)
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,	)	
Defendants.	)	

BRIEF OF *AMICI CURIAE*
ASSOCIATION OF NATIONAL ADVERTISERS, INC.
AMERICAN ADVERTISING FEDERATION
AMERICAN ASSOCIATION OF ADVERTISING AGENCIES

Joe Bill Campbell
Law Offices of Joe Bill Campbell
1011 Lehman Ave, Suite 105
Bowling Green, Kentucky 42103-6515
Tel: (270) 782-8228

Robert Corn-Revere (*pro hac vice* pending)
Ronald G. London (*pro hac vice* pending)
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Avenue, NW, Suite 200
Washington, D.C. 20006-3402
Tel: (202) 973-4200
Fax: (202) 973-4499

November 30, 2009

DISCLOSURE STATEMENT

Pursuant to Fed. R. Civ. P. 7.1, the Association of National Advertisers, Inc., attests that it is incorporated as a nonprofit trade association, has no parent corporation, and has no stock or other interest owned by a publicly held company, the American Advertising Federation attests that it is a nonprofit trade association with no stock and no parent corporation, and the American Association of Advertising Agencies attests that it is a nonprofit trade association with no stock and no parent corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

MISCELLANEOUS

Amici Curiae the Association of National Advertisers, Inc., the American Advertising Federation, and the American Association of Advertising Agencies (collectively, the "Advertising Associations") respectfully submit that the Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31 (2009) (the "Act"), strikes at the heart of advertiser rights to convey truthful information about legal products to adults, and thus agree with Plaintiffs that it must be invalidated as a violation of the First Amendment.[1] *Amici* are concerned that the Act impairs commercial speech rights far beyond the issues that relate specifically to tobacco advertising. It ignores core principles that limit the government's ability to restrict commercial speech, including the fact that "the power to prohibit or to regulate particular conduct does not necessarily include the power to prohibit or regulate speech about that conduct," *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 193 (1999), and that when the government seeks to further an important interest, "regulating speech must be a last – not first – resort." *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 373 (2002). Because the Act flaunts these and other key First Amendment concepts, its advertising restrictions are a prime example of unconstitutional regulatory overkill.

BACKGROUND

"Advertising has been a part of our culture throughout our history. Even in colonial days, the public relied on 'commercial speech' for vital information about the market." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 495 (1986) (plurality op.). Over three decades ago, the Supreme Court recognized that a "particular consumer's interest in the free flow of commercial information … may be as keen, if not keener by far, than his interest in the day's most urgent

[1] The interests of *amici* are set forth in the concurrently filed Unopposed Motion for Leave to File Brief of *Amici Curiae* that accompanies this submission. As the Motion notes, all parties have consented to the filing of this Brief.

political debate." *Virginia Bd. of Pharmacy v. Virginia Citizens Council*, 425 U.S. 748, 763 (1976). *See also Bigelow v. Virginia*, 421 U.S. 809, 818-20 (1975). Under the commercial speech doctrine that arose from these decisions, any restrictions on truthful advertising must directly and materially serve an important governmental interest without restricting speech more extensively than necessary to serve that interest. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 565-66 (1980). In this regard, the Court's "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." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 646 (1985). Although commercial speech restrictions are not subjected to the strictest scrutiny, the First Amendment requires that "if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, [it] must do so." *Western States*, 535 U.S. at 371.

The commercial speech doctrine has steadily evolved, and decisions since *Virginia Board of Pharmacy* and *Bigelow* have significantly increased the extent of protections for such expression.[2] Significantly, and most relevant to this case, the Court struck down state regulation of tobacco advertising. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001). It stressed that "so

[2] Over the past several decades the Supreme Court has invalidated: (1) prohibitions on the use of illustrations in attorney ads, *Zauderer*, 471 U.S. at 647-49; (2) an ordinance that regulated placement of commercial newsracks, *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 430-31 (1993); (3) a state ban on in-person solicitation by CPAs, *Edenfield v. Fane*, 507 U.S. 761, 777 (1993); (4) a state ban on using the designations "CPA" and "CFP" on law firm stationery, *Ibanez v. Florida Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136 (1994); (5) a restriction on listing alcohol content on beer labels, *Rubin v. Coors*, 514 U.S. 476, 491 (1995); (6) a state ban on advertising alcohol prices, *44 Liquormart*, 517 U.S. at 516; (7) a federal ban on broadcasting casino advertising, *Greater New Orleans*, 527 U.S. 173; and (8) FDA restrictions on advertising the practice of drug compounding. *Western States*, 535 U.S. at 377.

long as the sale and use of tobacco is lawful for adults, [there is] a protected interest in communication about it[ ] and adult consumers have an interest in receiving that information." *Id*. at 571.

The Family Smoking Prevention and Tobacco Control Act enacts commercial speech restrictions that contrast starkly with this trend toward greater constitutional protection. The Act states that it "continue[s] to permit the sale of tobacco [ ] to adults," but also seeks "to promote cessation" of tobacco use generally and to ensure tobacco products "are not sold or accessible to underage purchasers." *Compare* Pub. L. No. 111-31, § 3(7), *with id*. §§ 2(6), (14), (26), (33)-(34), 3(2), (9). Unfortunately, the principal tools the Act employs to curtail tobacco use entail a wide assortment of exceptionally broad restrictions on advertising and marketing, including:

- a prohibition on the use of color and images in most tobacco advertisements and displays, restricting them to black text on a white background – so-called "tombstone ads," Pub. L. No. 111-31, § 102(a)(2);
- a requirement that tobacco purveyors stigmatize their own products by mandating that the top 20 percent of ad space be used for new anti-tobacco "warnings" that must be highlighted by color graphics, *id*. §§ 201(a), 204(a);
- a requirement that warnings also appear in large-font color graphics on the top 50 percent of both sides of all cigarette packages and top 30 percent of the two principal sides of smokeless tobacco packaging, *id*. §§ 201(a), 205(a);
- a ban on outdoor advertising for cigarettes or smokeless tobacco within 1,000 feet of the perimeter of any elementary school or secondary school, and all public playgrounds, *id*. § 102(a)(2);
- a prohibition on brand-name sponsorship by tobacco providers of athletic, musical, artistic, or other social or cultural events, including adult-only events, *id*. § 101(b);
- a prohibition on distributing non-tobacco goods in exchange for tobacco purchases even to age-verified adults, as well as free cigarette samples, even in adult-only venues, and substantial restrictions on smokeless tobacco samples, *id*. §§ 101(b), 102(a)(2)(G);
- a prohibition on distribution of tobacco brand-name promotional items, including to adult consumers in adult-only venues, *id*. § 101(b);
- a prohibition on joint marketing of tobacco with products the FDA regulates, which include virtually all foodstuffs often sold at the same outlets as tobacco, *id*. § 101(a);

- a restriction on true statements about tobacco products, not only on ads and packages but also in *non*-commercial contexts by prohibiting "action directed to consumers through the media or otherwise" if reasonably expected to cause consumers to believe the product or its smoke may be less harmful than other tobacco products, *id.* § 101(b).

These limits on marketing tobacco products add an extensive new layer of restrictions on top of pre-existing prohibitions on advertising tobacco on radio and television.[3] Taken together, these combined restrictions virtually eliminate advertising as commonly understood and practiced for other lawful products, *cf. Virginia Bd. of Pharmacy*, 425 U.S. at 752 (striking down regulation under which "all advertising …, in the normal sense, is forbidden"), while leaving vastly limited alternative avenues for tobacco ads. Some of the advertising restrictions the Act imposes are almost identical to those struck down in *Lorillard*, 533 U.S. at 561-71. There, the Court invalidated a state prohibition on cigar and smokeless tobacco ads within 1,000 feet of a school or playground as lacking a reasonable fit, as the government had not carefully calculated the costs and benefits of the regulation. *Id*. at 562. The Court explained that the state had failed to consider sufficiently the burdens imposed on advertisers, particularly retailers who may have limited alternative means to communicate with potential customers. *Id*. at 565. The law struck down in *Lorillard* is comparable to one of the provisions of the Act under review in this case, and the First Amendment principles apply across the board. Evidently undaunted by the Court's unequivocal holding, Congress adopted a host of advertising restrictions that make the billboard ban pale by comparison.

[3] *See* 15 U.S.C. §§ 1335, 4402(f). Sections 1335 and 4402(f) place "off limits" for tobacco ads any electronic communication medium subject to FCC jurisdiction, including broadcast radio and television. In addition, the 1998 Master Settlement Agreement ("MSA") entered into by most of the largest tobacco companies, *see infra* at 18-20, eliminated tobacco billboard advertising. *See, e.g.*, Institute of Medicine of the National Academies, Committee on Reducing Tobacco Use, *Ending the Tobacco Problem, A Blueprint for the Nation* (2007) at 123 ("*IOM Blueprint*") (*available at* http://www.nap.edu/catalog.php?record_id=11795).

ARGUMENT

Amici Advertising Associations are concerned because the numerous harsh restrictions on tobacco marketing in the Act directly repudiate core principles of commercial speech doctrine that have been painstakingly developed over the past several decades. In this regard, although the particular provisions challenged in this case restrict tobacco marketing, the constitutional focus of this case is not even "about" cigarettes or other tobacco products. Rather, it is about our nation's commitment to the First Amendment, and particularly, the essential underpinnings of the commercial speech doctrine. The Supreme Court in *Lorillard* made clear that the applicable constitutional principles are the same, regardless of whether the issue involves speech about tobacco or about any other product. It stressed that "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," and that this applies with no lesser force when the object of regulation involves tobacco and/or protecting minors. *Lorillard*, 535 U.S. at 565. There is no "vice exception" to the First Amendment, and "so long as the sale and use of tobacco is lawful for adults," *id*. at 571, the government may not target tobacco marketing on grounds it "pertains to a 'vice' activity." *44 Liquormart*, 517 U.S. at 513. *See also Rubin v. Coors*, 514 U.S. at 478. The Act overlooks these principles entirely.

I. THE ACT IMPOSES UNPRECEDENTED RESTRICTIONS ON TRUTHFUL SPEECH ABOUT LEGAL PRODUCTS

A. The Act's Paternalistic Approach to Commercial Speech Regulation Conflicts With Well-Established First Amendment Jurisprudence

None of the Act's advertising restrictions are predicated on allegations that the speech at issue is misleading or deceptive. Rather, the law embraces the paternalistic notion that the government knows best about lifestyle choices, and it seeks to diminish the available means of communicating tobacco-related messages and to hobble their supposed persuasiveness, while

simultaneously mandating and boosting the power of government warnings. This philosophy flies in the face of the overriding presumption of the commercial speech doctrine "that the speaker and the audience, not the Government, should … assess the value of accurate and nonmisleading information about lawful conduct." *Greater New Orleans*, 527 U.S. at 195. The Supreme Court repeatedly has rejected the idea that the Government has a legitimate interest in preventing the dissemination of truthful commercial information to prevent the public from "making bad decisions with the information."[4] It is "[p]recisely because bans against truthful, nonmisleading commercial speech rarely seek to protect consumers from either deception or overreaching [that] they usually rest solely on the offensive assumption that the public will respond irrationally to the truth," and it is why courts must 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*, 517 U.S. at 503 (international quotation omitted).

The purported goal of restricting smoking by minors cannot obscure the Act's constitutional deficiencies. The First Amendment does not permit the government to lower the overall level of discourse in the marketplace to what it believes is appropriate "for the sandbox." *See, e.g.*, *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 (1983); *Butler v. Michigan*, 352 U.S. 380 (1957). As the Supreme Court has made clear, governmental interests in shielding children from certain materials cannot justify "unnecessarily broad suppression of speech addressed to adults," *Reno v. ACLU*, 521 U.S. 844, 875 (1997), and it has warned repeatedly against "reduc[-ing] the adult population … to … only what is fit for children." *Butler*, 352 U.S. at 383. *E.g.*, *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 759 (1996) (*quoting Sable*

[4] *Western States*, 535 U.S. at 374. *See also Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 94, 96 (1977); *44 Liquormart*, 517 U.S. at 497 (the "paternalistic assumption that the public will use truthful, nonmisleading commercial information unwisely cannot justify a decision to suppress it").

Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115 (1989)). Thus, the government may not sweep away adults' First Amendment rights, even in the context of tobacco advertising, simply by asserting an interest in protecting children. *Lorillard*, 533 U.S. at 555. To quarantine the general public in order to shield juveniles from commercial messages "is to burn the house to roast the pig." *Butler*, 352 U.S. at 526.

B. The Act's Restrictions on Lawful Commercial Speech Violate the First Amendment

1. Measures Designed to Protect Minors Drastically Restrict Speech Intended for Adults

Various provisions of the Act were set forth as necessary to protect children, but instead dictate what expression about tobacco products will be permissible for all consumers. Examples include the Act's restrictions on sponsorship of events, having logos on T-shirts or other apparel, or using color, characters, or trademarks in advertising. Section 101(b) of the Act prohibits brand-name sponsorship of musical, artistic or other cultural events, and branded promotional items, even in adult-only venues, where minors cannot be exposed to the sponsorship or receive any promotional item. This is a clear example of regulatory overkill.[5] Indeed, it appears fairly obvious that the only basis for this restriction is to censor commercial speech not just that minors receive, but that everyone can see and hear. *See supra* at 6 (*citing Bolger*, 463 U.S. at 74; *Butler*, 352 U.S. at 383; *Reno*, 521 U.S. at 875).

The Act's prohibition of color graphics to promote tobacco products and its corresponding requirement that many magazines carry only "tombstone" advertising of black text on white backgrounds impermissibly assumes such design elements inherently target minors, and that

[5] *Lorillard*, 533 U.S. at 564 ("As the State protects children from tobacco advertisements, tobacco manufacturers and retailers and their adult consumers still have a protected interest in communication.").

such a broad prophylactic restriction does not hamper constitutionally-protected communication to adults. *See* Pub. L. No. 111-31, § 102(a)(2). But as the Court explained in *Zauderer*, "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" and is thus "entitled to the First Amendment protections afforded verbal commercial speech."[6] The Court rejected arguments that such blanket rules prohibiting graphics are necessary because images "present[ ] regulatory difficulties" that differ from "other forms of advertising." *Id*. at 643. Where ads contain "no features … likely to deceive, mislead, or confuse … , the burden is on the State," *id.* at 647, to, among other things, "distinguish[ ] … the harmless from the harmful."[7]

The government made no such effort here, and in particular cannot show that every kind of graphic and/or use of color speaks to minors. *Zauderer*, 471 U.S. at 642. Just because tobacco ads in publications not qualifying as "adult" under the Act may use graphics or color does not mean that the ads are directed to minors. There are myriad examples of the use of color, logos, and trademarks to sell products not intended for, and rarely if ever bought by, children.[8] This includes use of characters and color to identify, or convey information about,

---

[6] *Zauderer*, 471 U.S. at 646. Congress in fact highlighted the importance of color to reinforce messaging through the Act's mandate for new warnings on tobacco ads and packages that must be in color type and accompanied by color graphics. *See* Pub. L. No. 111-31, §§ 201(a), 204(a), 205(a).

[7] In addition, where there is "the possibility of policing the use of illustrations in ad[s] on a case-by-case basis, the prophylactic approach … cannot stand." *Id*. at 649.

[8] Appendix A lists numerous products that are not bought by children but marketed through trade characters. Appendix B provides examples of the use of color to uniquely identify, or convey information about, products and services. Insofar as many of the Act's provisions follow the *IOM Blueprint*, *see infra* at 17, 19-20, it is significant that the Act restricts graphics in tobacco ads even where distinctive colors, characters, or similar marks are used "even for [just] the

various products. Even fictional characters often associated with children's content in different contexts frequently are used to sell products and services not intended for children, without any suggestion that, by using such "spokesmen," the products target children. For example, Owens Corning uses the Pink Panther to sell insulation, "Peanuts" cartoon characters sell Met Life insurance, and Marvel super heroes like Spiderman and the X-Men appear in credit card ads, yet none of these products are bought by children. Such examples are common, yet Congress has not found it necessary to "protect" children from animated pitchmen for building materials or financial products. Cigarette companies do not use such characters in advertisements, but it is enormously important to *amici* that the government not be able to assert the unconstitutional authority to ban the use of characters as a general proposition.

To justify the Act's restrictions on the use of color and graphics, Congress must demonstrate the necessity of such a sweeping ban. But nothing in the record even comes close to providing any such justification. The Supreme Court has held the government cannot impose a blanket ban on the use of illustrations on the assumption that it would be too difficult to demonstrate the harm. *Zauderer*, 471 U.S. at 649. It has expressly rejected arguments that "use of illustrations … creates unacceptable risks that the public will be misled, manipulated, or confused," or that "[a]buses associated with the visual content of advertising are particularly difficult to police, because the advertiser is skilled in subtle uses of illustrations to play on [ ] emotions" and/or to "operat[e] on a subconscious level." *Id*. at 648. "[T]he principle that a State may prohibit the use of pictures or illustrations in connection with advertising of any product or service simply on the strength of the general argument that the visual content of advertisements may, under some circumstances, be … manipulative … may not be [ ] lightly justified." *Id*. at

---

asserted purpose of informing consumers that [a] particular brand can be distinguished by a specific logo or color." *IOM Report* at 327.

649. A picture may be worth a thousand words, but that simple proverb does not permit Congress to ignore the First Amendment.

Congress attempted to narrow this broad restriction somewhat by creating a "safe harbor" permitting tobacco ads including color and graphics in "adult" publications where minors make up less than 15 percent of readership and fewer than 2 million readers total. *See* Pub. L. No. 111-31, § 102(a)(2). This "safe harbor" does little to preserve the advertisers' ability to reach a sizable adult audience in publications that neither cater to nor reach large numbers of children, but that nonetheless are affected by the Act's restrictions. Many publications not marketed to youths would nevertheless be relegated to tombstone ads, thus dampening advertisers' ability to appeal to adults. Examples of popular magazines that will fail to qualify as "adult" under the Act include ESPN the Magazine, People, OK! Weekly, and Sports Illustrated.

The Act does not leave tobacco purveyors "other means" of communicating to adults about their products. The extent to which the Act's marketing provisions prohibit a substantial amount of promotional messages directed exclusively or predominantly to adults underscores that these provisions are not narrowly tailored.[9] To withstand constitutional scrutiny, a law must leave advertisers "other means of exercising … speech interest[s] in the presentation of their products." *Id*. at 570. Restrictions on tobacco ads that erect what is "nearly a complete ban on the communication of truthful information about … tobacco … to adult consumers," even if only in some areas, cannot stand. *Id*. at 562. In cases where a regulation targeted just one specific channel of communication, ostensibly leaving many other channels open, the Court invalidated com-

[9] *Lorillard*, 533 U.S. at 563 ("tailoring" requires targeting particular advertising and promotional practices that appeal to youth "while permitting others").

mercial speech restrictions as too extreme.[10] Here, the Act cuts off or greatly restricts the majority of promotional channels that remained open to tobacco advertising, such that it can hardly be said the Act leaves open sufficient options to fully advertise to adults while protecting minors.

Overall, the Act's indiscriminate limits on tobacco advertising intrude far too deeply into the realm of protected commercial speech. Even IOM, many of whose recommendations – including broadly limiting tobacco ads – are reflected in the Act, acknowledged that "[i]t is by no means clear that restrictions on tobacco advertising of the kind recommended … would survive a constitutional challenge." *IOM Blueprint* at 324. Although IOM expressed its "belief" that the proposed restrictions could be constitutional, *see generally id*. at 324-27, that assessment is more accurately characterized as a "wish" based on the optimistic assumption that the Supreme Court could be "persuaded to uphold restrictions for tobacco advertising that would not be constitutionally permissible in other contexts."[11] Such optimism is foreclosed by commercial speech jurisprudence that roundly rejects paternalism as a legitimate governmental objective and specific precedents such as *Lorillard*, that invalidate overly restrictive limits on tobacco advertising.

Those seeking new ways to clamp down on tobacco may well view this as a test case for far-ranging restrictions on how this particular – fully legal – product may be advertised. *Id*. at 326. But the bottom line is that the Act's marketing provisions are so sweeping, and so little

[10] *See, e.g.*, *id*. at 563-65 (statute targeting outdoor advertising and signage was not tailored notwithstanding availability of other marketing channels, such as newspapers); *Bolger*, 463 U.S. at 69 n.18 & 74-75 (statute targeting only delivery of ads to mailboxes was nonetheless "sweeping prohibition" that did not survive *Central Hudson* review); *Linmark*, 431 U.S. at 93 (invalidating as not sufficiently tailored prohibition on residential property "for sale" signs even though newspaper ads, leaflets, sound trucks or the like were still available).

[11] *Id*. at 324. *But see also id*. at 324 n.6 (acknowledging that noted First Amendment scholar "Committee member Cass Sunstein has serious doubts about the constitutionality of the committee's proposal and does not endorse it").

effort was made to tailor them to serving the interest in protecting minors, they are unconstitutional under the Supreme Court's commercial speech standards.

2. The Act Violates First Amendment Restrictions on Compelled Speech

The Act suffers the additional constitutional shortcoming of compelling speech in violation of the First Amendment. It confiscates the upper 50 percent of cigarette packages' front and rear panels (30 percent for smokeless tobacco) to carry one of 9 specified warnings that must appear on a rotating basis, in a particular font size, with "color graphics depicting [ ] negative health consequences." Pub. L. No. 111-31, §§ 201(a), 205(a). It also requires that the top 20 percent of ad space be used for anti-tobacco "warnings" highlighted by color graphics. *Id*. §§ 201(a), 204(a).

As the Supreme Court recently observed, some of its "leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say." *Rumsfeld v. Forum for Academic & Inst. Rights, Inc*., 547 U.S. 47, 61 (2006). Where a statute "[m]andat[es] speech that a speaker would not otherwise make," it "necessarily alters the content of the speech." *See Riley v. National Fed'n of the Blind of N.C., Inc.,* 487 U.S. 781, 795 (1988). Although certain disclosure requirements are permissible under the commercial speech doctrine, they are limited to where commercial messages *actually* mislead or deceive. *E.g., Zauderer,* 471 U.S. at 651. Where the government compels overly burdensome disclosure, or adversely affects a speaker's message, the measure is unconstitutional.

In *Entertainment Software Ass'n v. Blagojevich*, 469 F.3d 641 (7th Cir. 2006), the Seventh Circuit was unequivocal in invalidating a mandate for large stickers on "violent" and "sexually explicit" video games – even though they comprised no more than a large number "18" – holding that "[c]ertainly we would not condone a health department's requirement that half of

the space on a restaurant menu be consumed by [a] raw shellfish warning. Nor will we condone the State's unjustified requirement of the four square-inch '18' sticker." *Id*. at 652. Here, the Act goes far beyond the current, eminently noticeable but unobtrusive stark government warnings to turn cigarette packages into veritable "mobile billboards" for anti-smoking messages. Moreover, the Act's mandates for discriminatory black and white "tombstone" advertisements, contrasted with full color graphics and imagery for warnings, compel advertisers to serve as the vehicles for government messages, magnifying the Act's constitutional deficiencies. Congress "has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *RAV v. City of St. Paul*, 505 U.S. 377, 392 (1992). Indeed, if concerns that minors would emulate violent or sexual conduct in video games were not sufficient to support an "18" sticker in *ESA*, concerns about the simple communication of truthful information about a lawful product or that it is commercially available do not justify compelled labeling here.

3. The Act Imposes Unconstitutional Restrictions on Noncommercial Speech as Well as Commercial Speech

The Act's advertising provisions have the further unconstitutional defect of acting as a prior restraint on tobacco company communications that do not constitute commercial speech. The Act prohibits "any action directed to consumers," including true statements "through the media or otherwise" that may be "reasonably expected to result in consumers believing [a] tobacco product … may present a lower risk of disease or is less harmful than [other] tobacco products." Pub. L. No. 111-31, § 101(b). This encompasses a great deal more than "commercial speech" that "does no more than propose a commercial transaction."[12] Rather, restricting truth-

[12] This provision specifically applies to speech "other than by [a] … product's label, labeling, or advertising." Pub. L. No. 111-31, § 101(b). As such, it restricts far more than commercial speech. *See United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001); *Board of Trus-*

ful statements of this nature, such as those about modified risk tobacco products (for example), go beyond commercial speech regulation and impose on fully protected speech prior restraints subject to the heavy burden of being presumed unconstitutional.[13] Statements falling within the Act's provision quoted above are not limited to advertising and promotion, but rather could include all manner of expression involving purely scientific, political, and public policy messages. This is yet another reason why the Act's marketing provisions are constitutionally suspect.

II. THE ACT UNCONSTITUTIONALLY LIMITS SPEECH AS A FIRST RESORT

A. The First Amendment Requires the Government to Regulate Conduct Rather Than Speech

Commercial speech restrictions are unlawful if they are "more extensive than is necessary to serve" government interests. *Western States*, 535 U.S. at 374 (*quoting Central Hudson*, 447 U.S. at 566). Although this does not require the government to employ the "least restrictive means," the existence of "numerous and obvious less-burdensome alternatives to the restriction on commercial speech" is certainly relevant "in determining whether the 'fit' between the ends and means is reasonable." *Discovery Network*, 507 U.S. at 417 n.13. And where the government could achieve its objectives without "restrict[ing] speech, or [by] restrict[ing] less speech, [it] must do so." *Western States*, 535 U.S. at 371. In applying this rule, the Court does not require that less restrictive alternatives are in fact available or would work – it is sufficient if non-speech related means "might be possible." *Id.* at 372. *See also BellSouth Telecomms., Inc. v. Farris*, 542 F.3d 499, 508-09 (6th Cir. 2008).

---

tees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 482 (1989) ("[S]peech that proposes a commercial transaction … is what defines commercial speech.").

[13] *E.g., Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975) (*quoting Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963)).

This Court's denial of a preliminary injunction in this case suggested "the Sixth Circuit [ ] implicitly rejected" this aspect of *Western States* (*citing Pagan v. Fruchey*, 492 F.3d 766, 771 (6th Cir. 2007) (en banc)). Mem. Op. and Order (Doc. No. 65), Nov. 5, 2009, at 16 n.3. However, *Pagan* did not mention *Western States* in this context, and expressly declined to reach the issue of tailoring under *Central Hudson*. *See Pagan*, 492 F.3d at 771, 778. The Sixth Circuit took no "implicit" position on *Western States*, and, in any event, is in no position to reject the Supreme Court's holding.[14] *Western States* clearly found that "if the Government could achieve its interests in a manner that does not restrict speech … [it] must do so," 535 U.S. at 371, and the Sixth Circuit has reaffirmed that obvious, less burdensome alternatives play a key role in *Central Hudson* tailoring. *BellSouth*, 542 F.3d at 508-10.

B. The Government Overlooked Obvious Less Restrictive Alternatives

A significant number of other measures could achieve the objectives of discouraging smoking and protecting minors, none of which involve restricting speech, but Congress ignored these various non-speech-related alternatives in favor of speech restrictions, in direct contravention of constitutional requirements.[15] One obvious alternative is improved enforcement of the prohibitions on selling minors tobacco. Such restrictions already exist in all 50 states, are required by federal law, and can clearly help reduce smoking, as shown by one of the keystones to

[14] *See, e.g., U.S. Gypsum Co. v. Consolidated Expanded Metal Cos.*, 130 F.2d 888, 892 (6th Cir. 1942) ("We cannot ignore … that the Supreme Court, whose word is final, has for a decade or more shown an increasing disposition to raise the standard … and that it is [our] duty, cautiously to be sure, to follow not to resist.") (internal quotation and citations omitted). *Cf. Pagan*, 492 F.3d at 782 (noting an "ironclad obligation to follow the holdings of the Supreme Court").

[15] *Greater New Orleans*, 527 U.S. at 192. *See also Rubin*, 514 U.S. at 490-91 (the fact that there are "several alternatives," including direct regulation, that "could advance the Government's asserted interest in a manner less intrusive to … First Amendment rights, indicates that [a ban] is more extensive than necessary").

enforcement, the "Synar Amendment."[16] The *2008 Synar Report* calls comprehensive and multifaceted enforcement "extremely effective in reducing and preventing … sales to minors" as "part of [the] strategy to reduce youth tobacco use." *Id.* at 2. Under Synar, the national weighted average retailer violation rate dropped by ***75 percent***, from 40.1 percent in 1997 to 9.9 percent in 2008, and was accompanied over the same period by a nearly 50 percent reduction in tobacco use among youth. SAMHSA Center for Substance Abuse Prevention, Tobacco/Synar, at 3 (*available at* http://prevention.samhsa.gov/tobacco/fctsheet.aspx). As SAMHSA explained:

> DHHS recommends that States implement comprehensive youth tobacco control programs that include the following key components: community programs to reduce tobacco use, chronic disease programs … , school programs, statewide programs, counter-marketing, cessation programs, surveillance and evaluation, administration and management, and enforcement.

2008 Synar Report at 7. Not only does this show improved enforcement is but one of many non-speech-related alternatives, it is notable that none of DHHS's steps involve curtailing marketing.

A further non-speech-related alternative would be pursuing the kinds of comprehensive programs DHHS suggests. As the American Lung Association ("ALA") has explained, the President's Cancer Panel and the Institute of Medicine "clearly articulate[d a] need … to fully fund tobacco prevention and cessation programs, increase state cigarette taxes and pass comprehensive smokefree laws,"[17] all of which are alternatives to broadside regulation of tobacco ads.[18]

---

[16] The Synar Amendment (§ 1926) in the Alcohol, Drug Abuse, and Mental Health Administration Reorganization Act, Pub. L. No. 102-321 (1992), seeks to limit youth access to tobacco by requiring states to enact and enforce laws prohibiting sales and distribution of tobacco to minors, and to conduct annual, random, unannounced inspections of retail outlets and report findings to the Department of Health and Human Services ("DHHS"), or face up to a 40 percent loss of federal Substance Abuse Prevention and Treatment Block Grant funding. *FFY 2008 Annual Synar Reports Youth Tobacco Sales*, Substance Abuse and Mental Health Services Administration ("SAMHSA") at 3 (*available at* http://prevention.samhsa.gov/tobacco/synarreportfy2008.pdf) ("*2008 Synar Report*").

[17] American Lung Association, *State of Tobacco Control 2008* at 5 (*available at* http://www.stateoftobaccocontrol.org/2008/ALA_SOTC_08.pdf).

Noting the federal government "once again did not implement the 2003 tobacco cessation recommendation of [DHHS's] Interagency Committee on Smoking and Health," *id*. at 45, and that "states continue to shortchange prevention and cessation efforts," *id*. at 9, the ALA labels these failures a "missed opportunity," especially as "[t]obacco taxes are a proven … way to raise … revenue for state programs, including tobacco prevention and cessation programs, as well as reduce the number of … youth who smoke." *Id*. at 8-9. *Accord IOM Blueprint* at 9, 181. The effectiveness of comprehensive tobacco control programs as compared to regulating advertising is undeniable. The CDC affirms that "the more states spend … the greater the reductions in smoking," and those "that invest more fully … have seen … smoking prevalence among … youth decline[ ] faster." Centers for Disease Control and Prevention, *Best Practices for Comprehensive Tobacco Control Programs* (October 2007) at 9 ("*CDC Best Practices*") (*available at* http://www.cdc.gov/tobacco/tobacco_control_programs/stateandcommunity/best_practices/). *See also id*. at 15 ("We know what works, and if we were to fully implement the proven strategies, we could prevent the … toll that tobacco takes ….").[19]

---

[18] Notably, ALA reviews government efforts to curb tobacco use, issuing "report cards" to each jurisdiction, and reported that federal action received a "D" and three "Fs" in each of four graded categories, no states received "As" for offering comprehensive cessation benefits, and only 6 states received "Bs." *Id*. at 8, 44. *See also id*. at 9 ("Based on [Center for Disease Control ('CDC')] funding … recommendations, 41 states and [D.C.] receive an 'F' – having funded their comprehensive tobacco control programs at less than 50 percent of the recommended level.").

[19] In addition, instead of focusing on reducing tobacco marketing as a panacea, CDC suggests the answer is more speech, funded by the government as part of the solution, and this stands as another non-speech-restrictive alternative to the Act. *See id*. at 8, 33-35 (advocating "tobacco counter-marketing" via "television, radio, billboard, print, and web-based advertising" and "advocacy through public relations efforts, such as press releases, local events, media literacy, and health promotion activities"); *44 Liquormart*, 517 U.S. at 507 (noting educational campaigns as viable alternative to speech regulation). This approach also is more consistent with the manner in which the First Amendment prohibits paternalism and "protection based in large part on public ignorance." *Virginia Bd. of Pharmacy*, 425 U.S. at 769. *See also Bates v. State Bar of Arizona*, 433 U.S. 350, 375 (1977) ("[W]e view as dubious any justification that is based on the benefits of public ignorance."); *Western States*, 533 U.S. at 375.

It also would be less speech restrictive if governments actually spent meaningful portions of the billions of settlement dollars received from tobacco companies on tobacco-reduction.[20] In 2006, GAO reported that states allocated the two largest portions of their MSA funds, accounting for over half the proceeds, to general health-related programs and debt service after securitizing the fund proceeds, *id*. at 4, 8, while spending approximately only 5 percent annually on tobacco control.[21] Another report shows that, "[i]n the last 10 years, the states have spent just 3.2 percent of their [MSA funds] on prevention and cessation," and "no state is funding [it] at levels [the CDC] recommended."[22] Failure to pursue this alternative is all the more troubling insofar as "[i]t would take just 15 percent of their tobacco money to fund tobacco prevention programs in every state at CDC-recommended levels." *Id*. The government could achieve the interests identified in the Act without restricting speech simply by using these funds – acquired "as reimbursement for health care costs … related to tobacco use," GAO, *Tobacco Settlement*, at 1 – to actually address tobacco-related problems. Or, put another way:

> The evidence is conclusive that state tobacco prevention and cessation programs work …. Every scientific authority that has studied the issue, including the IOM, the President's Cancer Panel, the National Cancer Institute, the CDC and the U.S. Surgeon General, has concluded that when properly funded, implemented and sustained, these programs reduce smoking among both kids and adults.

---

[20] Specifically, the 1998 MSA that the largest tobacco companies negotiated and entered to settle lawsuits with 46 states, D.C. and five territories, requires annual payments in perpetuity to the states, with each receiving a share without any requirements on how they spend the proceeds. *See*, *e.g.*, Government Accountability Office (GAO), *Tobacco Settlement: States' Allocations of Fiscal Year 2005 and Expected Fiscal Year 2006 Payments* (April 2006) (GAO-06-502), at 1 ("*Tobacco Settlement*").

[21] *Id*. at 11. This included not just enforcement funding but also all spending on prevention, youth education and cessation. *Id*. at 25. And for years, states used the lion's share of funds for "budget shortfalls." *Id*. at 10.

[22] Campaign for Tobacco-Free Kids, *A Decade of Broken Promises: The 1998 Tobacco Settlement Ten Years Later*, Nov. 18, 2008, at i ("*Broken Promises*"), *available at* http://www.tobaccofreekids.org/reports/settlements/2009/fullreport.pdf.

Broken Promises, at v. The *de minimis* spending on tobacco control programs shows that the government has made no serious effort to pursue non-speech-restrictive options.

All these alternatives, as well as evidence of their efficacy, are woven into the *IOM Blueprint*.[23] The *IOM Blueprint* dedicates a lengthy chapter to showing that if states support comprehensive tobacco control programs, national goals for reducing use by minors are attainable.[24] The *Blueprint* tackles the very same interests as the Act, ultimately offering a veritable laundry list of steps that can be taken, with the vast majority having nothing to do with limiting tobacco marketing.[25] There is no question Congress was well aware of these alternatives when it passed the Act.[26] Most obviously, the alternative of actually spending MSA funds on tobacco controls in amounts consistent with CDC recommendations was discussed, *see* Pub. L. No. 111-31, § 2(48), competing legislation would have required states to use at least 20 percent of MSA payments on tobacco control, and committee markup included discussion – and rejection –

[23] The *Blueprint* underscores the availability and vitality of not only increased enforcement to limit youth access to tobacco, *id*. at 10, 203-06, and comprehensive state tobacco control programs, *id*. at 9, 158-89, but also the role that can be played by schools and youth-oriented media campaigns, *id*. at 11, 211-18, 223-36, and by tobacco control agencies joining with health care providers to increase demand for cessation programs. *Id*. at 12.

[24] *Id*. 157-269. IOM also reinforces the paucity of MSA funds devoted to tobacco control and the need for strategies to provide funding at CDC-recommended levels. *See id*. at 181. It also offers modeling to show the "considerable potential benefit if the policies outlined in this chapter [on strengthening traditional tobacco controls] are pursued aggressively." *Id*. at 249-53.

[25] *Id*. at 19-26. *See also id*. at 158 (listing "seven key substantive elements of comprehensive state programs" with no speech-restrictive rules). The *Blueprint*'s authors seem to have no doubt these non-speech-related steps are available and would be effective if used. *See id*. at 271 ("If the plan set forth in Chapter 5 is successfully implemented and sustained, it could have a significant impact on tobacco use ….").

[26] *See Hearing Before the Subcommittee on Health of the Committee on Energy and Commerce on H.R. 1108*, 110th Cong., Serial No. 110-69 (2007), at 32-37.

of amending the bill that became the Act to include such language.[27] Given the extent to which the *Blueprint* incorporates, and/or responds to other legislative materials, it is quite clear their substance – and the non-speech-related alternatives they contain – were before Congress.[28]

Consequently, Congress was faced with a clear choice between regulating conduct and restricting constitutionally-protected speech. Unfortunately, it chose to restrict speech. This choice in adopting the Act's advertising restrictions flies in the face of the Supreme Court warning that when the government seeks to further an important interest, "regulating speech must be a last – not first – resort." *Western States*, 535 U.S. at 373. As the Sixth Circuit recently held:

> If [it] sounds like the government is playing on an uneven field, that is because it is: 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, 542 F.3d at 508. The government's failure to do so here is alone a sufficient reason for this Court to strike down the Act's speech restrictions for violating the First Amendment.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' motion and invalidate the Act's unconstitutional tobacco marketing restrictions.

---

[27] Family Smoking Prevention and Tobacco Control Act, H.R.1256, 11th Cong. (introduced Mar. 3, 2009); Youth Prevention and Tobacco Harm Reduction Act, H.R.1261, 111th Cong. (introduced Mar. 3, 2009); Buyer Amendment No. 1 [H.R.1261], in the nature of a substitute (considered and failed, markup of H.R.1256, House Comm. on Energy & Commerce, Mar. 4, 2009); H.R.1256 (reported by House Comm. on Energy & Commerce, Mar. 26, 2009); H.R. Res. No. 307 (permitting re-introduction of H.R.1261 as H.R. Amend. 71 in the nature of a substitute, passed by House, Apr. 1, 2009); Consideration of H.R. Amend. 71 (Cong. Rec. H4310-4368, Apr. 1, 2009); Rejection of H.R. Amend. 71 (Roll No. 185, 155 Cong. Rec. D404-01, Apr. 2, 2009); H.R.1256 (as passed by House, Roll No. 187, Apr. 2, 2009).

[28] *See, e.g.*, *IOM Blueprint* at 173-75, 185; *id*. at 180, 259; *id*. at 160, 182, 242, 249.

Respectfully submitted,

/s/ Joe Bill Campbell
Joe Bill Campbell
Law Offices of Joe Bill Campbell
1011 Lehman Ave, Suite 105
Bowling Green, Kentucky 42103-6515
Tel: (270) 782-8228

Robert Corn-Revere (*pro hac vice* pending)
Ronald G. London (*pro hac vice* pending)
DAVIS WRIGHT TREMAINE LLP
19191 Pennsylvania Avenue, NW, Suite 200
Washington, D.C. 20006-3402
Tel: (202) 973-4200
Fax: (202) 973-4499

COUNSEL FOR *AMICI CURIAE*
ASSOCIATION OF NATIONAL ADVERTISERS
AMERICAN ADVERTISING FEDERATION
ASSOCIATION OF AMERICAN ADVERTISING AGENCIES

November 30, 2009

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Amici Curiae American Advertising Federation, American Association of Advertising Agencies and Association of National Advertisers was, this November 30, 2009, filed through the ECF system, which will send a notice of electronic filing to the following counsel for all parties in this case:

Charles E. English, Jr.
Email: buzz@elpolaw.com

Charles E. English, Sr.
Email: Charles@elpolaw.com

D. Gaines Penn
Email: gaines@elpolaw.com

E. Kenly Ames
Email: kames@elpolaw.com

Philip J. Perry
Email: philip.perry@lw.com

Scott J. Ballenger
Email: scott.ballenger@lw.com

Donald B. Ayer
Email: dbayer@jonesday.com

Geoffrey K. Beach
Email: gkbeach@jonesday.com

Leon F. DeJulius, Jr.
Email: lfdejulius@jonesday.com

Noel J. Francisco
Email: njfrancisco@jonesday.com

Robert F. McDermott, Jr.
Email: rfmcdermott@jonesday.com

Floyd Abrams
Email: fabrams@cahill.com

Joel Kurtzberg
Email: jkurtzberg@cahill.com

Kayvan Sadeghi
Email: ksadeghi@cahill.com

LeAnne Moore
Email: leanne@crunet.com

Alisa B. Klein
Email: alisa.klein@usdoj.gov

Andrew Edward Clark
Email: andrew.clark@usdoj.gov

Daniel K. Crane-Hirsch
Email: daniel.crane-hirsch@usdoj.gov

Daniel Tenny
Email: daniel.tenny@usdoj.gov

Eugene M. Thirolf
Email: Eugene.thirolf@usdoj.gov

James T. Nelson
Email: james.nelson2@usdoj.gov

Jessica R. Gunder
Email: jessica.r.gunder@usdoj.gov

Joel D. Schwartz
Email: joel.schwartz@usdoj.gov

Karen Schifter
Email: karen.schifter@fda.hhs.gov

Mark R. Freeman
Email: mark.freeman@usdoj.gov

Mark B. Stern
Email: mark.stern@usdoj.gov

Michael D. Ekman
Email: Michael.Ekman@usdoj.gov

Samantha L. Chaifetz
Email: samantha.chaifetz@usdoj.gov

Sarang V. Damle
Email: sarang.damle@usdoj.gov

Nicholas J. Bagley
Email: nicholas.bagley@usdoj.gov

William F. Campbell
Email: Bill.Campbell@usdoj.gov

Allison M. Zieve
Email: azieve@citizen.org

Jennifer A. Moore
Email: JMoore@gminjurylaw.com

/s/ Joe Bill Campbell

Law Offices of Joe Bill Campbell
1011 Lehman Ave, Suite 105
Bowling Green, Kentucky 42103-6515
Phone: 270-782-8228
Email: campbelljoebill@bellsouth.net

APPENDIX A

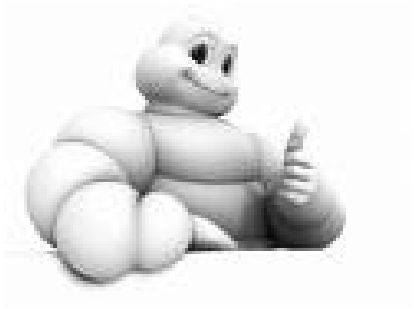
ADVERTISING/LOGOS

Graphic	Company Name	Product
	Owens-Corning	Insulation
	MetLife	Life Insurance/Financial Services
 	Visa	Credit/Debit Cards
	Ford Escape	Hybrid SUV

ADVERTISING/LOGOS

Graphic	Company Name	Product
 	Aflac	Insurance
	Charmin	Toilet Paper
	Cottonelle	Toilet Paper
	Energizer	Batteries

ADVERTISING/LOGOS

Graphic	Company Name	Product
 	Geico	Insurance
	Michelin	Tires
	Mr. Clean	Cleaning Products
	Nasonex	Allergy Medication

ADVERTISING/LOGOS

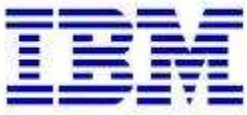
Graphic	Company Name	Product
	Pacific Life Insurance	Life Insurance
	Scrubbing Bubbles	Cleaning Products
	Weight Watchers	Weight Loss Program

APPENDIX B

COLOR TRADEMARKS

Color Trademarked	Company	Product
Insulation Pink: 	Owens-Corning	Insulation
Brown: 	UPS	Mailing Supplies and Services
Purple: 	Kimberly Clark	Latex Gloves
Tiffany Blue: 	Tiffany & Co.	Jewelry (boxes), Nail Polish
Magenta: 	T-Mobile	Cellular Phones
Green-Gold: 	Qualitex	Dry-Cleaning Pads

WELL-KNOWN COLOR SCHEMES

Color or Color Scheme & Logo	Company	Product
Pink: 	Pepto-Bismol	Antacid
Golden Arches: 	McDonald's	Fast Food
"Big Blue": 	IBM	Computer Products
BCBS: 	Blue Cross Blue Shield	Health Insurance
FedEx Purple, Light Platinum, Light Platinum Reverse, etc.:  http://fedex.com/purplepromise/docs/en/pp_logo_guidelines.pdf	Federal Express	Mailing Supplies and Services

Other Color-Communicated Meanings

FDA consideration of a “traffic light” scheme for food labeling: http://www.fda.gov/Food/LabelingNutrition/LabelClaims/ucm187320.htm.