Nos. 10-5234 & 10-5235

IN THE

United States Court of Appeals for the Sixth Circuit

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.

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

BRIEF FOR *AMICI CURIAE* AMERICAN ADVERTISING FEDERATION, AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, & ASSOCIATION OF NATIONAL ADVERTISERS, INC., IN SUPPORT OF PLAINTIFFS-APPELLANTS/CROSS-APPELLEES SEEKING REVERSAL IN PART AND AFFIRMANCE IN PART

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June 4, 2010

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 10-5234,10-5235 Case Name: Discount Tobacco et al. v. U.S. et al.

Name of counsel: Robert Corn-Revere; Ronald G. London

Pursuant to 6th Cir. R. 26.1, American Advertising Federation
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No. The American Advertising Federation attests that it is a nonprofit trade association with no stock and no parent corporations

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on June 4, 2010 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/Robert Corn-Revere

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 10-5234,10-5235 Case Name: Discount Tobacco et al. v. U.S. et al.

Name of counsel: Robert Corn-Revere; Ronald G. London

Pursuant to 6th Cir. R. 26.1, American Association of Advertising Agencies
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No. The American Association of Advertising Agencies attests that it is a nonprofit trade association with no stock and no parent corporations

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

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Sixth Circuit
Case Number: 10-5234,10-5235 Case Name: Discount Tobacco et al. v. U.S. et al.

Name of counsel: Robert Corn-Revere; Ronald G. London

Pursuant to 6th Cir. R. 26.1, Association of National Advertisers, Inc.
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No. 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.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

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INTERESTS OF *AMICI*

Amici Curiae American Advertising Federation, American Association of Advertising Agencies, and Association of National Advertisers, Inc.,[1] respectfully submit the District Court failed to recognize how significantly the Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31 (2009), strikes at the heart of advertiser rights to convey truthful information about legal products to adults. *Amici* are concerned the Act impairs commercial speech far beyond tobacco-related issues – via harsh marketing restrictions directly at odds with core First Amendment principles painstakingly developed over several decades – and that the decision below leaves this incursion largely unchecked.

The Act ignores important limits on government in this area, including 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 even when pursuing important interests, "regulating speech must be a last – not first – resort." *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 373 (2002). Instead, the District Court upheld sweeping restrictions, erroneously assuming the government may restrict expression based on nothing more than the possibility that

[1] All parties consent to the filing of this Brief.

young persons might come across tobacco advertisements, hear about sponsored events from the mass media, or see someone wearing brand logos.

First Amendment commercial speech jurisprudence does not countenance such broad and speculative restrictions, and the Act is a prime example of unconstitutional regulatory overkill. Such regulation often begins with heavily-regulated or controversial products, like tobacco, but quickly spreads to others – at the expense of bedrock constitutional principles – when courts fail to apply First Amendment tests rigorously or consistently. *Amici* thus agree with Plaintiff-Appellants that this Court must reverse the District Court as to the Act's provisions it upheld.

INTRODUCTION

Over three decades ago, the Supreme Court acknowledged that a "consumer's interest in the free flow of commercial information … may be as keen, if not keener by far, than his interest in the [] most urgent political debate." *Virginia Bd. of Pharmacy v. Virginia Citizens Council*, 425 U.S. 748, 763 (1976). *See Bigelow v. Virginia*, 421 U.S. 809, 818-20 (1975). The court below recognized that, under the commercial speech doctrine, restrictions on truthful advertising must directly and materially serve important government interests without restricting more speech than necessary. *Commonwealth Brands, Inc. v. United States*, 678 F.Supp.2d 512, 520-21 (W.D. Ky. 2010) (*citing Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 565-66 (1980); *Pagan v.*

Fruchey, 492 F.3d 766, 771 (6th Cir. 2007) (*en banc*)). This jurisprudence is "grounded in 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 do not face the strictest scrutiny, "if the Government [can] 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.

Commercial speech jurisprudence has evolved steadily, and since *Bigelow* and *Virginia Board*, has conferred significantly increased protection. Over the decades, the Supreme Court has invalidated: (1) prohibitions on illustrations in attorney ads, *Zauderer*, 471 U.S. at 647-49; (2) regulation of commercial news-racks, *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 430-31 (1993); (3) a ban on CPA in-person solicitations, *Edenfield v. Fane*, 507 U.S. 761, 777 (1993); (4) a ban on "CPA" and "CFP" in law-firm stationery, *Ibanez v. Florida Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136 (1994); (5) restrictions on alcohol content on beer labels, *Rubin v. Coors*, 514 U.S. 476, 491 (1995); (6) a ban on advertising alcohol prices, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1986); (7) a ban on broadcasting casino ads, *Greater New Orleans*, 527 U.S. 173;

and (8) limits on advertising drug-compounding practices, *Western States*, 535 U.S. at 377.

Notably, and most relevant here, the Court has invalidated advertising restrictions intended to prevent children from seeing ads for products they are too young to buy. For example, it struck down state regulation of tobacco advertising, stressing that "so long as sale and use of tobacco is lawful for adults, [there is] a protected interest in communication about it[that] adult consumers have an interest in receiving." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 571 (2001). *See also Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983) (invalidating ban on unsolicited direct-mail marketing of contraceptives).

BACKGROUND

The marketing restrictions at issue here flout the trend toward greater constitutional protection for commercial expression. The Act "continue[s] to permit the sale of tobacco [] to adults," but also seeks "to promote cessation" of 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). Yet it embraces a wide assortment of exceptionally broad marketing restrictions that are not tailored to these objectives, including:

- prohibiting color and images in most tobacco ads and displays, restricting them to black text on white backgrounds – so-called "tombstone ads," *id.* § 102(a)(2);

- requiring warnings in large-font color graphics on the top 50% of both sides of cigarette packages and top 30% of the two principal sides for smokeless tobacco, *id.* §§ 201(a), 205(a);
- requiring tobacco purveyors to stigmatize their products by dedicating the top 20% of ad space to new anti-tobacco "warnings" to be highlighted by color graphics, *id.* §§ 201(a), 204(a);
- prohibiting tobacco providers' brand-name sponsorship of artistic, athletic, musical, or other social/cultural events, including adult-only events, *id.* § 101(b);
- prohibiting distribution of tobacco brand-name promotional items, including to adults in adult-only venues, *id.* § 101(b).

See also Commonwealth Brands, 678 F.Supp.2d at 519-20. The Act further restricts true statements about modified risk tobacco products ("MRTPs") absent prior, affirmative FDA approval in both commercial and *non*-commercial contexts. *Id.* at 520; Pub. L. No. 111-31, § 101(b). These limits add extensive new restrictions to pre-existing prohibitions on TV and radio tobacco advertising, [2] and together virtually eliminate advertising as commonly understood and practiced for other lawful products. *Cf. Virginia Bd. of Pharmacy*, 425 U.S. at 752 (invalidating regulation under which "all advertising …, in the normal sense, is forbidden").

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[2] *See* 15 U.S.C. §§ 1335, 4402(f) (placing "off limits" to tobacco ads any electronic communication medium subject to FCC jurisdiction). In addition, the 1998 Master Settlement Agreement ("MSA") executed by most of the largest tobacco companies, *see infra* 12-14 & n.6, 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).

The District Court properly held the Act's tobacco ad/label color-and-graphics prohibition is unconstitutional, but failed to apply the applicable First Amendment standard broadly enough. 678 F.Supp.2d at 520-21, 526. It did not reject out of hand (as it should have) claims that "information [] communicated by color and graphics *in tobacco advertising and labels* is not the sort … the First Amendment protects because it … creates meaningless associations between tobacco products and attractive lifestyles." *Id*. at 523 (emphasis original). Instead, it held only that the provision was overinclusive because it swept in "large categories of innocuous images." *Id.* at 526. *See also id*. at 534-35 (also holding facially unconstitutional ban on statements conveying products are less harmful due to regulation by or compliance with FDA rules). The court incongruously failed to apply even its overbreadth analysis to other of the Act's provisions, including restrictions on communication channels directed only to adults, and the too-narrow exemption for adult publications. *Id*. at 524-25. It also left intact brand-name event sponsorship and merchandise prohibitions and mandatory large-font, color-graphic government warnings on tobacco packaging and ads, concluding that such restrictions provide "a reasonable fit between ends and means" and are "sufficiently tailored." *Id*. at 527-528, 531-32.

The District Court agreed the Act's MRTP provisions are a prior restraint, but did not invalidate them because of proposed time limits on the FDA approval

process. *Id*. at 533-34. The court also rejected arguments that various non-speech-restrictive alternatives undermine the constitutionality of the Act's marketing provisions, concluding they were tried and found ineffective. *Id*. at 537-39.

ARGUMENT

Amici are concerned the Act's numerous harsh marketing restrictions directly repudiate core principles of commercial speech doctrine painstakingly developed over several decades. Though the provisions at issue restrict tobacco marketing, our constitutional focus is not cigarettes or other tobacco products. Rather, it involves our nation's commitment to the First Amendment, and particularly, the commercial speech doctrine's essential underpinnings.

The District Court's decision to uphold most of the Act's marketing restrictions conflicts with invalidation of the color-and-graphics ban, and contravenes commercial speech precedent. The District Court also ignores that the Act's highly paternalistic regulation of speech – including, especially, that directed to adults – cuts against well-established First Amendment jurisprudence. Of even more concern, it rubber-stamped the government's out-of-hand dismissal of non-speech-affecting ways to achieve its interests, even though government reports and data reveal such measures are effective.

I. THE ACT UNCONSTITUTIONALLY LIMITS SPEECH AS A FIRST RESORT

A. The District Court Gave Short Shrift to the Principle that the First Amendment Requires the Government to Regulate Conduct Rather Than Speech

The court below overlooked that the Act regulates constitutionally-protected speech despite the Supreme Court's admonition that doing so must be a "last resort." *Western States*, 535 U.S. at 373. As this Court recently held:

> 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). The District Court concluded the Act was a last resort because Congress had sought for decades to implement measures that did not affect speech, and that "every other tool in the government's arsenal is made less effective and more costly by Plaintiff's use of advertising." *Commonwealth Brands*, 678 F.Supp.2d at 538. However, this conclusion ignores the record and misapplies the law.

Commercial speech restrictions cannot be "more extensive than is necessary to serve" government interests, *Western States*, 535 U.S. at 374 (*quoting Central Hudson*, 447 U.S. at 566), and existence of "numerous and obvious less-burden-some alternatives" to restricting speech bears on "whether the 'fit' between the ends and means is reasonable." *Discovery Network*, 507 U.S. at 417 n.13. Where the government can achieve its objectives without "restrict[ing] speech, or [by]

restrict[ing] less speech, [it] *must* do so." *Western States*, 535 U.S. at 371 (emphasis added). At the same time, each speech regulation must serve its asserted interest in a "direct and material way," requiring "evidentiary support" that it "will significantly advance" the asserted interest. *44 Liquormart*, 517 U.S. at 505-06. *See also Coors*, 514 U.S. at 480; *Edenfield*, 507 U.S. at 770.

There is no legal basis for the District Court's conclusion that less restrictive measures are inadequate because the existence of commercial speech makes non-speech restrictions "less effective and more costly." Its presumption that advertising undermines behavioral restrictions is highly dubious, and the court cites no authority for this approach to analyzing less restrictive alternatives. Accepting such an approach would mean regulating commercial speech would never be a "last resort," as *Western States* requires, 535 U.S. at 373, but rather could be a "first resort" on the asserted ground that advertising "cancels out" non-speech-affecting alternatives.

The government cannot constitutionally apply a redundant "belt and suspenders" approach, claiming speech restrictions are necessary because non-speech regulations have not eliminated the problem. Under the First Amendment, "if the belt works at least as effectively as the suspenders, then the Government cannot prosecute people for not wearing suspenders." *ACLU v. Mukasey*, 534 F.3d 181, 204 (3d Cir. 2008). In this case, the government failed to demonstrate either

that the Act's broad marketing restrictions actually will reduce youth smoking or that non-speech-related measures would fail to do so. Thus, it "has failed to establish a 'reasonable fit' between its abridgment of speech and its … goal." *44 Liquormart*, 517 U.S. at 507; *Coors*, 514 U.S. at 491.

Equally as important, the record below hardly justifies the District Court's sanguine assessment that non-speech restrictions had been tried "for decades" but not "done the trick." Quite to the contrary, the facts presented to the court showed various restrictions had been quite effective in reducing smoking among young people, and that such measures would have an even greater effect if implemented more fully. The District Court's opinion failed to apply these facts to its analysis and did not even attempt to compare the relative effectiveness of such measures to the Act's speech restrictions.

B. The Government Overlooked Obvious Less Restrictive Alternatives

The District Court listed a number of alternatives to banning speech, including enforcing various laws against the purchase or use of tobacco products by minors, but rejected such measures as viable alternatives, agreeing with the government that it would not be "'less burdensome' to increase penalties on minors falling victim to 'the industry's advertising techniques' rather than directly curtailing those techniques." *Commonwealth Brands*, 678 F.Supp.2d at 538 (citation omitted). But less burdensome for whom? The relevant constitutional

inquiry is whether the government is seeking to impose unnecessary burdens *on speech*. *Greater New Orleans*, 527 U.S. at 192. *See also Coors*, 514 U.S. at 490-91 (alternatives, including direct regulation of conduct, indicate banning speech "is more extensive than necessary"). The District Court erroneously reasoned that it somehow "burdens" local governments to enforce existing laws against underage smoking, and burdens minors to have to comply with such laws.

Contrary to the decision below, improved enforcement of prohibitions on selling minors tobacco is an obvious alternative to regulating speech. All 50 states ban sales to minors and are bolstered by federal requirements, including the "Synar Amendment."[3] A 2008 report on the Amendment explained:

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

2008 Synar Report at 7. The *Report* calls comprehensive and multifaceted enforcement "extremely effective in reducing and preventing … sales to minors"

[3] The Synar Amendment (§ 1926) in the Alcohol, Drug Abuse, and Mental Health Administration Reorganization Act, Pub. L. No. 102-321 (1992), limits youth access to tobacco by requiring state laws prohibiting sale/distribution of tobacco to minors, and annual, random, unannounced inspections of retail outlets with findings reported to the Department of Health and Human Services ("DHHS"), on pain of loss of up to a 40% of federal substance abuse funding. Substance Abuse and Mental Health Services Administration ("SAMHSA"), *FFY 2008 Annual Synar Reports Youth Tobacco Sales*, at 3 (http://prevention.samhsa.gov/tobacco/synarreportfy2008.pdf) ("*2008 Synar Report*").

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%***, from 40.1% in 1997 to 9.9% in 2008, and was accompanied over that period by a nearly 50% reduction in youth tobacco use.[4]

Notwithstanding the District Court's holding, the additional comprehensive control programs recommended by the *Synar Report* were not given a chance to "do the trick" before the Act's 2009 adoption. As the American Lung Association ("ALA") explained, there has been a "clearly articulate[d] need … to fully fund tobacco prevention and cessation programs, increase state cigarette taxes and pass comprehensive smokefree laws," all of which are alternatives to regulating tobacco ads.[5] It is hardly a "burden" for government to actually spend on tobacco-reduction meaningful portions of the billions of settlement dollars tobacco companies provide.[6] Failure to pursue these alternatives is especially troubling insofar as "[i]t would take just 15 percent of th[is] tobacco money to fund [] programs in

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[4] SAMHSA Center for Substance Abuse Prevention, *Tobacco/Synar*, at 3 (*available at* http://prevention.samhsa.gov/tobacco/fctsheet.aspx).

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

[6] The 1998 MSA negotiated and entered by the largest tobacco companies to settle lawsuits with 46 states, D.C. and five territories requires annual payments in perpetuity, with each state receiving a share without any requirement on how to spend it. *See* 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*").

every state at CDC-recommended levels." *Id*. The government could thus achieve the Act's interests 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:

> 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.

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

The *IOM Blueprint* highlights all these alternatives and the evidence of their efficacy, including a lengthy chapter showing that if states support comprehensive tobacco control programs, national goals for reducing minors' use are attainable.[7] The *Blueprint* tackles the same interests as the Act – offering a veritable laundry list of steps that can be taken, the vast majority having nothing to do with limiting tobacco marketing[8] – and its authors seem to have no doubt these non-speech-

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[7] *Id*. 157-269. The IOM 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.

[8] *Id*. at 19-26. *See also id*. at 158 (listing "seven key substantive elements of comprehensive state programs" with no speech-restrictive rules).

related steps are available and would be effective. *See id*. at 271 ("If the plan set forth in Chapter 5 is successfully implemented and sustained, it could have a significant impact ...."). There is no question Congress knew of these alternatives when it passed the Act.[9]

The District Court gave far too much credence to the government's claims that it already has tried these alternatives and found them wanting. 678 F.Supp.2d at 537-38. For example, GAO's *Tobacco Settlement* report emphasizes the inefficacy of use of MSA funds. In 2006, it reported that states allocated the two largest portions of their funds – accounting for over half the proceeds – to general health-related programs and debt-service, *id*. at 4, 8, while spending only about 5% annually on tobacco control.[10] Campaign for Tobacco-Free Kids similarly showed that, "[i]n the last 10 years, states have spent just 3.2 percent of their [MSA funds] on prevention and cessation," while "no state is funding [it] at levels [the CDC]

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[9] *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. The *IOM Blueprint* expressly incorporates legislative materials. *See, e.g.*, *IOM Blueprint* at 173-75, 185; *id*. at 180, 259; *id*. at 160, 182, 242, 249. The District Court mistakenly assumed that congressional action signifies a finding that the alternatives are inadequate. *Commonwealth Brands*, 678 F.Supp.2d at 537. But such assumptions are unwarranted where constitutionally-required alternatives were not fully implemented. *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 128-29 (1989).

[10] *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.

recommended." *Broken Promises* at i. The *IOM Blueprint* reinforces the paucity of MSA funds devoted to tobacco control and need for strategies to fund at CDC-recommended levels. *See id*. at 181.

Similarly, ALA's review of government efforts to curb tobacco use, through issuance of "report cards" to each jurisdiction, gave federal action a "D" and three "Fs," no "As" to any state, and only 6 "Bs."[11] 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 labeled this 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. *Compare Commonwealth Brands*, 678 F.Supp.2d at 537.

The effectiveness of comprehensive tobacco control programs as compared to regulating advertising – if they were ever tried in earnest – is undeniable, contrary to the findings below. The CDC affirms that "the more states spend … the greater the reductions in smoking," and those "that invest more fully" see

[11] *State of Tobacco Control 2008* at 8, 44. *See also id*. at 9 ("41 states and [D.C.] receive an 'F' – having funded their comprehensive tobacco control programs at less than 50 percent of the [CDC] recommended level.").

"smoking prevalence among … youth decline[] faster."[12] As CDC forcefully concluded: "We know what works, and if we were to fully implement the proven strategies, we could prevent the … toll that tobacco takes." *Id*. at 15.

The government cannot be given a free pass to curtail truthful commercial speech about lawful products in lieu of meaningfully pursuing these other options. The District Court's incorrect assumption that such measures were tried and failed – and its skewed view of the law, that it would be "burdensome" for state and local governments to enforce such non-speech restrictions – cannot be sustained under the First Amendment.

II. THE ACT IMPOSES UNPRECEDENTED AND UNCONSTITUTIONAL RESTRICTIONS ON TRUTHFUL SPEECH ABOUT LEGAL PRODUCTS

None of the Act's advertising restrictions rest on allegations that the speech at issue is misleading or deceptive. Instead, it restricts speech based on paternalistic notions that the government knows best about lifestyle choices, so that it may hobble tobacco-related messages while simultaneously mandating government warnings. This flouts the commercial speech doctrine's overriding presumption "that the speaker and the audience, not the Government, should … assess the value of … nonmisleading information about lawful conduct." *Greater New*

[12] Centers for Disease Control and Prevention, *Best Practices for Comprehensive Tobacco Control Programs* (October 2007) at 9 (*available at* http://www.cdc.gov/tobacco/tobacco_control_programs/stateandcommunity/best_practices/).

Orleans, 527 U.S. at 195. The "paternalistic assumption that the public will use truthful, nonmisleading commercial information unwisely cannot justify [its] suppress[ion]," so 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 497, 503.

The District Court also greatly exaggerated the government's ability to decide what commercial speech is "unfit" for children. It held that brand-name sponsorship of events may be banned because news of them may reach children through "media coverage of the event," *Commonwealth Brands*, 678 F.Supp.2d at 527 n.4, that brand logos may be prohibited on clothing and other merchandise because minors may see "walking advertisements" out in the world, *id*. at 528, and that tombstone ads may be required in adult-themed publications and direct mail because they are "easily accessible" to the young. *Id*. at 524, 525. The Supreme Court has never upheld such far-reaching restrictions on commercial speech based simply on possibilities that young persons may come across an advertisement, or even a mere logo. *See*, *e.g.*, *Lorillard*, 533 U.S. at 561-66; *Bolger*, 463 U.S. at 73. Accordingly, the Second Circuit in *Bad Frog Brewery, Inc. v. New York State Liquor Auth.*, 134 F.3d 87, 101 (2d Cir. 1998), struck down as "plainly excessive" a ban on vulgar beer labels designed to protect children because the broad

prohibition lacked a reasonable fit with the government's objective of promoting temperance. This Court should reach the same conclusion here.

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

Many provisions of the Act purport to be child-protective, yet dictate the level of tobacco-related expression permissible for all consumers. Examples include restrictions on event-sponsorship, apparel logos, and using color, characters and trademarks in advertising. 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 sponsorship or receive promotional items. This is far from a narrowly-tailored law, as it censors commercial speech not just for minors, but everyone. *Lorillard*, 533 U.S. at 563-64.

The laudable goal of reducing smoking by minors cannot obscure the Act's constitutional deficiencies, nor can it permit the government to lower the overall level of marketplace discourse to that deemed appropriate "for the sandbox." *See, e.g.*, *Bolger*, 463 U.S. at 74; *Butler v. Michigan*, 352 U.S. 380 (1957). The Supreme Court has made clear that interests in shielding children from certain matters cannot justify "unnecessarily broad suppression of speech addressed to adults," *Reno v. ACLU*, 521 U.S. 844, 875 (1997), while repeatedly prohibiting "reduc[ing] the adult population … to … only what is fit for children." *Butler*, 352 U.S. at 383; *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727,

759 (1996) (*quoting Sable*, 492 U.S. 115). Congress may not sweep away adults' First Amendment rights with respect to advertising lawful products simply by asserting interests in protecting children. *Lorillard*, 533 U.S. at 555. Quarantining the public to shield juveniles from advertising "is to burn the house to roast the pig." *Butler*, 352 U.S. at 526.

Although the District Court invalidated the color-and-graphics ban, it erred in accepting that the government can restrict some assertedly "non-informational" aspects of product advertising on the theory children are more influenced by cues like color and imagery. *Compare Commonwealth Brands*, 678 F.Supp.2d at 523 *with id*. at 525 (rejecting only that "all" imagery creates noninformative associations that encourages underage tobacco use). This impermissibly assumes such elements inherently target minors, and that broad prophylactic bans do not hamper constitutionally-protected messages to adults. *See* Pub. L. No. 111-31, § 102(a)(2). Indeed, as the court below correctly noted, under *Zauderer*, "'use of illustrations or pictures in advertisements serves important communicative functions: it attracts the attention of the audience … and it may also serve to impart information directly,'" 678 F.Supp.2d at 522 (*quoting* 471 U.S. at 646), and "[t]he same is undoubtedly true of … color."[13]

[13] *Zauderer*, 471 U.S. at 643. Where ads lack features "likely to deceive, mislead, or confuse" the State must "distinguish[] … the harmless from the harmful." *Id*. *See also Bad Frog Brewery*, 134 F.3d at 96-97. Congress highlighted the

Graphics and color are "entitled to the First Amendment protections afforded verbal commercial speech," *Zauderer*, 471 U.S. at 646, and ultimately the court below properly rejected that blanket rules prohibiting graphics are necessary. *Zauderer* rejected the notion that images "present[] regulatory difficulties" that differ from "other forms of advertising." *Id*. at 647. Just because tobacco ads in publications not qualifying as "adult" under the Act use graphics/color does not mean their ads target minors. The mere potential for color or graphics to mislead is plainly insufficient to support advertising restrictions. *Alexander v. Cahill*, 598 F.3d 79, 89, 94 (2d Cir. 2010).

There are myriad examples of using color, logos, and trademarks to sell products not intended for and rarely if ever bought by children. Even fictional characters generally associated with children's content in other contexts sell products/services not intended for children, without any suggestion that using such "spokesmen" targets children. For example, Owens Corning uses the Pink Panther for insulation, "Peanuts" sell Met Life insurance, and Marvel superheroes hawk credit cards, none of which are bought by children.[14] Nothing in the record even

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importance of color via the Act's new ad/packaging warnings that must use color and graphics. *See* Pub. L. No. 111-31, §§ 201(a), 204(a), 205(a).

[14] *Amici* submitted with their District Court brief an appendix listing over a dozen products not bought by children but marketed through trade characters and character logos. Brief of *Amici Curiae* American Association of Advertising Agencies, *et al.*, (RE. No. 95, Att. #1, App. A,

approaches satisfying the government's burden to justify the need for as sweeping a ban as the Act's limits on use of color/graphics, nor may such blanket bans rest on assumptions it is too difficult to demonstrate harm.[15] Tobacco companies do not use such characters in ads, but it is vital to *Amici* the government not be able as a general proposition to assert unconstitutional authority to ban use of characters.

Nor can such bans be saved by illusory allowances for graphics and color, such as the exemption for "adult" publications where minors constitute less than 15 percent of readership and fewer than 2 million readers total. Pub. L. No. 111-31, § 102(a)(2). The so-called "safe harbor" does not preserve advertisers' ability to reach a sizable adult audience in publications that neither cater to nor reach large numbers of children. Many publications not targeted to youth, such as ESPN the Magazine, People, OK! Weekly, and Sports Illustrated, would be relegated to tombstone ads, dampening marketers' ability to reach adults.

Simply put, the Act redefines what it means to "target" minors with tobacco advertising to mean no more than to publish such messages in a way that may be

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https://ecf.kywd.uscourts.gov/doc1/08311534361). They also included an appendix highlighting more than a dozen uses of various colors to convey information about products and services and/or to uniquely identify of their source. *Id*. (RE. No. 95, Att. #2, App. B, https://ecf.kywd.uscourts.gov/doc1/08311534362).

[15] *Zauderer*, 471 U.S. at 648-49 (rejecting that "use of illustrations … creates unacceptable risks that the public will be misled, manipulated, or confused," and that "[a]buses associated with the visual content of advertising are particularly difficult to police [due to] subtle uses of illustrations to play on [] emotions" and/or "operat[e] on a subconscious level").

seen by minors. As with various of the Act's restrictions, the District Court found it sufficient that a certain number of children may see tobacco advertising despite the adult-orientation of the publication or venue. *Commonwealth Brands*, 678 F.Supp.2d at 524-25 (counting number of minors purportedly exposed to tobacco advertising via direct mail, exposure to ads inside "adult-only" stores, and noting "minors may well read publications to which they do not subscribe"). This reasoning stands the commercial speech doctrine on its head, suggesting the government can reduce the adult population to the level of discourse "suitable for the sandbox" if some arbitrarily determined threshold is met, and young people get a "sense that tobacco use is widely accepted."[16] The Supreme Court, however, has rejected such arguments. *See Bolger*, 463 U.S. at 74; *Butler*, 352 U.S. at 383; *Reno*, 521 U.S. at 875).

The District Court disregarded the fact that publications geared toward adults and with overwhelmingly adult readership would be affected adversely by tombstone ad requirements. Seeking to deflect attention from the principal constitutional question, it focused instead on the relative burden imposed on

[16] *Id*. at 528. The Act's restrictions in this regard are utterly arbitrary, banning sponsorships and brand logos entirely, while permitting publications with less than two million youth readers to carry unrestricted tobacco advertisements. Even without such inconsistency, the theory that the Act's broad restrictions will alter minors' general impressions about tobacco use in society cannot survive First Amendment scrutiny. *Bad Frog Brewery*, 134 F.3d at 100.

advertisers to develop "competent and reliable" readership evidence before unrestricted advertising may run in magazines.[17] However, the court accepted the government's principal contention, that it may restrict advertising in publications directed toward adults simply because minors *may* read them.

These restrictions, as well as those on marketing in adults-only venues and by direct mail effectively ban substantial amounts of promotional messaging directed exclusively or predominantly to adults, contrary to the narrow tailoring requirement that the government restrict only advertising or promotional practices that appeal to youth "while permitting others." *Lorillard*, 533 U.S. at 563. For example, the Act restricts advertising in "adults only" establishments, including forbidding even table-top displays, and even tobacco shops face "tombstone ad" restrictions. The District Court's response to these incursions was not that they withstand First Amendment scrutiny, but that they occur too infrequently to give Plaintiffs standing. *See* 678 F.Supp.2d at 524. This is disingenuous. There is no *de minimis* exception to the First Amendment. *Lorillard*, 533 U.S. at 567. Similarly, the court's failure to scrutinize the government's showings regarding

[17] *Commonwealth Brands*, 678 F.Supp.2d at 524-25. The court reasoned that the cost of such surveys is insignificant in light of the total amount spent on tobacco advertising nationwide. This misstates the relevant question and overlooks that such costs operate as a tax burdening the First Amendment rights of any publication wishing to determine if its readership allows it to avoid the Act's restrictions. *Cf. Minneapolis Star & Trib. Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983).

direct mail, *see Commonwealth Brands*, 678 F.Supp.2d at 523-24, is inconsistent with *Bolger*'s finding that "parents [] exercise substantial control over … mail," 463 U.S. at 73. *See also Rowan v. Post Office Dep't*, 397 U.S. 728 (1970); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530 (1980).

Restrictions erecting "nearly a complete ban on the communication of truthful information about … tobacco … to adult consumers," even if only in some areas, cannot stand. *Lorillard*, 533 U.S. at 562. In cases where a regulation targets just one specific channel of communication, ostensibly leaving many others open, the Supreme Court still has invalidated commercial speech restrictions as too extreme.[18] Here, the Act eliminates or so greatly restricts most promotional channels for tobacco advertising that it can not be said to leave sufficient options for fully advertising to adults. Its marketing provisions are so sweeping, and so little effort was made to tailor them to serving the interest in protecting minors, that

[18] *E.g.*, *Lorillard*, 533 U.S. at 563-65 (outdoor advertising and signage regulation not tailored despite availability of other marketing channels like newspapers); *Bolger*, 463 U.S. at 69 n.18 & 74-75 (targeting only delivering ads to mailboxes was a "sweeping prohibition" invalid under *Central Hudson*); *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 93 (1977) (ban on residential for-sale signs not tailored even though newspaper ads, leaflets, sound trucks, etc., remained available).

they plainly intrude far too deeply on protected commercial speech and are thus unconstitutional.[19]

B. The Act Unconstitutionally Compels Speech and Restricts Noncommercial as well as Commercial Speech

The Act also violates the First Amendment because it confiscates the upper 50% of cigarette pack front and rear panels (30% for smokeless tobacco) for specified warnings to appear on a rotating basis, in particular font-size, with "color graphics depicting [] negative health consequences," and the top 20% of ads for similar warnings. Pub. L. No. 111-31, §§ 201(a), 204(a), 205(a). The commercial speech doctrine allows disclosure requirements, but only if messages *actually* mislead or deceive. *E.g.*, *Zauderer*, 471 U.S. at 651. Regulations compelling overly burdensome disclosure, or adversely affecting a speaker's message, are unconstitutional.

The Seventh Circuit explained the applicable principle in *Entertainment Software Ass'n v. Blagojevich*, 469 F.3d 641 (7th Cir. 2006), which invalidated mandated warnings on "violent" and "sexually explicit" video games. The court noted "we would not condone a health department's requirement that half the

[19] Even the IOM, many of whose recommendations – including tobacco-ad limits – the Act reflects, admitted "[i]t is by no means clear that restrictions … of the kind recommended … would survive constitutional challenge." *IOM Blueprint* at 324. The IOM expressed "belief" they could be constitutional, *see generally id.* at 324-27, but only if courts are "persuaded to uphold restrictions for tobacco advertising *that would not be constitutionally permissible in other contexts*." *Id.* at 324 (emphasis added).

space on a restaurant menu be consumed by [a] warning. Nor will we condone … [a] four square-inch '18' sticker." *Id*. at 652. The District Court here tried to distinguish *ESA* by asserting "color graphics depicting [] negative health consequences" are not "controversial," and that they will not "alter the substance" of advertisers' messages. *Commonwealth Brands*, 678 F.Supp.2d at 531-32. Such blithe conclusions are misplaced. "Mandating speech [] a speaker would not otherwise make necessarily alters [its] content." *Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988).

Here, the Act turns cigarette packages into veritable "mobile billboards" for government anti-smoking messages. Worse, when combined with mandates for black-and-white "tombstone" ads that must be combined with full-color graphics/imagery for government warnings, the Act's impact on speech is greatly magnified. The court below inexplicably rejected claims that the government's goal is to browbeat consumers with anti-tobacco messages at the manufacturers' expense, 678 F.Supp.2d at 530, yet in virtually the next breath upheld labeling mandates *because consumers may disregard current warning labels*. This is the essence of the kind of paternalism the First Amendment does not permit, and it violates well-accepted norms that Congress "has no [] 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).

The Act also imposes unconstitutional prior restraints on tobacco-company communications, including some that are not commercial speech. As with the ban on color/graphics, the District Court properly invalidated some but did not follow through as to others. It correctly found facially unconstitutional the Act's prohibition on statements indicating a product is less harmful due to compliance with FDA standards, holding that "without question [] the ban applies to more than just commercial speech and must satisfy strict scrutiny." *Commonwealth Brands*, 678 F.Supp.2d at 534-35. The District Court likewise should have struck down provisions regarding modified risk tobacco products that ban "any action directed to consumers," including true statements "through the media or otherwise," that may be "reasonably expected to result in [their] believing [a] tobacco product … may present lower risk of disease or is less harmful than [other] tobacco products," and reaches speech "other than by [a] … product's label, labeling, or advertising." Pub. L. No. 111-31, § 101(b).

The surviving MRTP provision regulates much more than "commercial speech" that "does no more than propose a commercial transaction." *See Discovery Network*, 507 U.S. at 423; *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001). The holding below suggested erroneously that the ban "does not implicate the First Amendment outside … advertising and labels." 678 F.Supp.2d at 532. But as with statements about FDA regulation that were struck down, the

MRTP provision encompasses all manner of expression, including purely scientific and political messages, and should have been invalidated. At minimum, failure to impose strict scrutiny, or consider Plaintiffs' vagueness claims, *id*. at 532, 534, must be reversed.

The court below correctly deemed the MRTP provision a prior restraint, 678 F.Supp.2d at 533, but erred in suggesting the 360-day period for review is a reasonable time-limit for constitutional purposes. It applied neither strict scrutiny nor the "heavy presumption against constitutional validity" of prior restraints despite the broad scope of the ban. *E.g.*, *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963). That erroneous conclusion also undermines the holding that the MRTP provision satisfies requirements that censors imposing prior restraints decide within a "specified brief period" whether to allow the speech, *Freedman v. Maryland*, 380 U.S. 51, 59 (1965), based on the FDA's proposal of 360-day MRTP application review. 678 F.Supp.2d at 533.

Precedent on which the District Court relied that permitted review periods as long as 540 days involved only labeling, not the range of statements the MRTP provision reaches. *Nutritional Health Alliance v. Shalala*, 144 F.3d 220 (2d (Cir. 1998) (cited at 678 F.Supp.2d at 533). In any event, the "specified brief period" requirement applies to commercial speech, as *Nutritional Health Alliance* noted. 144 F.3d at 227-28 (*citing New York Magazine v. Metropolitan Transp. Auth.*, 136

F.3d 123 (2d Cir. 1998)). *See also Bosley v. WildWetT.com*, 2004 WL 1093037 (6th Cir. Apr. 21, 2004)(*citing N.Y. Magazine*). Moreover, where speech restrictions apply to more than just labeling and commercial speech – as the MRTP regulation does here – the permissible "brief period" of prior restraint review/delay is measured in days or weeks, not months or years as FDA proposes here.[20] Strict constitutional limits constrain the government because "[i]n the interim, opportunities for speech are irretrievably lost." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 760 (1988).

Evaluation of prior restraints must examine the particular "circumstances" of the speech and review process involved, *see Nutritional Health Alliance*, 144 F.3d at 228, yet the District Court did not conduct the required analysis. *See* 678 F.Supp.2d at 533. The FDA's general obligation to "act with reasonable dispatch" cannot salvage what the court below acknowledged is a prior restraint. *City of Lakewood*, 486 U.S. at 771.

CONCLUSION

For the foregoing reasons, this Court should strike down the Act's unconstitutional marketing restrictions that the District Court failed to invalidate.

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[20] *See, e.g.*, *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 318-19, 324 (2002); *M.I.C. Ltd. v. Bedford Twp.*, 463 U.S. 1341 (1983) (Brennan, J., Cir. Justice); *East Brooks Books, Inc. v. Shelby County*, 588 F.3d 360, 370 (6th Cir. 2009); *Currence v. City of Cincinnati*, 28 Fed. Appx. 438, 445-46 (6th Cir. 2002); *Lusk v. Village of Cold Spring*, 475 F.3d 480, 491-92 (2d Cir. 2007); *American Target Advertising, Inc. v. Gianni*, 199 F.3d 1241, 1253 (10th Cir. 2000).

Doing so is vital because of the court's overall failure to properly apply First Amendment principles governing commercial expression.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(5)-(7)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,963 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 hereby certify that the foregoing Brief of *Amici Curiae* American Advertising Federation, American Association of Advertising Agencies and Association of National Advertisers was, this June 4, 2010, filed through the ECF system, which will send a notice of electronic filing to the following counsel for all parties in this case:

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