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Tobacco Advertising Restrictions – Risky Policies with Noble Intentions:

Lessons learned from Lorillard v. Reilly and other commercial speech jurisprudence affecting state and local regulations of tobacco advertising

(Part 1 of 2 in Respiratory Health Association's look at the crossroads of tobacco advertising regulations and the First Amendment)

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Tobacco Advertizing Restrictions – Risky Policies with Noble Intentions:

Lessons learned from Lorillard v. Reilly and other commercial speech jurisprudence

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In the last 15 years, tobacco advertising has moved almost entirely to the point of sale. Tobacco companies spend eight billion dollars a year promoting their products in the U.S. and 84 percent of that promotion budget is spent at the point of sale. Many studies have explored the effects of tobacco advertising on youth and found that exposure to tobacco advertising and promotion, particularly at the point of sale, is positively associated with increased smoking initiation, weakened resolve not to smoke, impulse purchases, brand preference, and increased difficulty quitting. State and local policymakers seek to mitigate the negative health effects of youth exposure to tobacco advertising; however, such policies almost invariably draw preemption and First Amendment challenges from tobacco manufacturers, retailers, and trade associations. This paper is part one in a two part series exploring the crossroads of local tobacco advertising regulations and the First Amendment. This paper explores state and local restrictions on tobacco advertising, and how federal preemption and commercial speech jurisprudence can inform such policies. The paper first outlines the Federal Cigarette Labeling and Advertising Act and its preemption clause. Second, the paper analyzes Lorillard v. Reilly, a 2001 U.S. Supreme Court case addressing federal preemption and the constitutionality of state restrictions on tobacco advertising. Next, the paper examines other relevant commercial speech cases and how they may apply to future challenges to local tobacco regulations. Finally, the paper offers a number of lessons learned and policy considerations based on the applicable case law.

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This paper has been written with a general audience in mind and is provided for educational purposes only and is not to be construed as legal opinion. Policy makers considering regulating tobacco advertising in their municipalities should consult with their city law departments or other legal counsel.

I. INTRODUCTION

In 2009, Congress passed sweeping changes to existing tobacco control laws. The Family Smoking Prevention and Tobacco Control Act (FSPTCA) granted the U.S. Food and Drug Administration (FDA) the authority to regulate tobacco products, reserved certain areas of local control over tobacco products, and placed various other restrictions on the tobacco industry.[1] Among the provisions of the FSPTCA was a section amending the Federal Cigarette Labeling and Advertising Act (FCLAA) to enable state and local governments to impose restrictions on the "time, place, and manner, but not content, of the advertising or promotion of cigarettes."[2] This clause would appear at first glance to enable local governments to restrict the advertising and marketing of cigarettes; however, major legal barriers remain, including federal preemption and the First Amendment. Adopting such policies therefore requires careful consideration and planning.

Over the last twenty years, tobacco control researchers have built a robust body of evidence demonstrating the effects of point of sale tobacco advertising on youth smoking habits and attitudes toward smoking. Numerous studies show that tobacco promotion, generally, is linked to youth and adolescent susceptibility and probable initiation to smoking.[3] At the point of sale, tobacco advertising has been positively associated with increased youth initiation to smoking,[4] as well as weakened resolve not to smoke.[5] Tobacco promotion at the point of sale has likewise been shown to strongly influence brand selection, inspire impulse cigarette purchases, and tempt smokers trying to quit.[6] Most recently, a 2014 study of tobacco advertising practices in Washington, D.C. found that illicit tobacco sales to minors were more common at retailers that had exterior tobacco ads near public parks.[7]

The disconcerting findings of studies such as these have caused public health officials to revisit policy initiatives for local tobacco advertising restrictions. Such policies are politically popular, but local jurisdictions must nevertheless proceed with caution in light of preemption and First Amendment considerations. A municipality considering a tobacco advertising restriction should be aware that: (1) a lawsuit challenging such a policy is very likely; and (2) the municipality has a high evidentiary burden in any resulting lawsuit with a First Amendment claim.

Given the daunting burden in enacting a tobacco advertising or marketing restriction, it is the goal of this paper to provide a plain language analysis of the existing statutes and First Amendment case law affecting such policies and to provide a number of lessons that municipalities should glean from these rulings. First, the paper will lay out the relevant federal statutory law: the Federal Cigarette Labeling and Advertising Act of 1966 (as amended by the FSPTCA). Next, the paper will provide an in-depth examination of *Lorillard Tobacco Co. v. Reilly*,[8] the 2001 U.S. Supreme Court case addressing the constitutionality of certain state tobacco advertising restrictions. Subsequently, the paper will summarize other relevant commercial speech cases, both related and unrelated to tobacco control. Finally, the paper will offer a number of lessons learned and future policy considerations that can be derived from the applicable case law and statutory schemes.

This is the first of two papers by Respiratory Health Association addressing the crossroads of tobacco advertising and the First Amendment. The second paper, *Locally Mandated Tobacco Health Warnings*, addresses the Federal preemption and First Amendment issues surrounding locally mandated tobacco health warnings at the point of sale. Respiratory Health Association hopes these papers will serve as a useful educational tool for local public health officials weighing policy options to reduce youth exposure to tobacco.

II. FEDERAL PREEMPTION

While the focus of this paper is predominantly on the First Amendment constraints to state and local restrictions of tobacco advertising, it is necessary to first briefly lay out the regulatory scheme that governs tobacco advertising at the federal level. Prior to 2009, state and local restrictions on tobacco advertising were impeded not just by the First Amendment, but by the FCLAA. The FCLAA contains a preemption[i] provision, which states:

> **(b) State regulations**
> [n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.[9]

In 2001, the U.S. Supreme Court in *Lorillard* (discussed in full below) interpreted this provision as preempting a state restriction on outdoor cigarette advertising promulgated by the Massachusetts Attorney General.[10] However, in 2009 with the passage of the FSPTCA, Congress amended the FCLAA[ii] to add an exception to the Act's preemption provision.[11] Specifically, the FSPTCA added the following language to the above preemption provision:

> **(c) Exception**
> [n]otwithstanding subsection (b), a State or locality may enact statutes and promulgate regulations, based on smoking and health, that take effect after the effective date of the Family Smoking Prevention and Tobacco Control Act, imposing specific bans or restrictions on the *time, place, and manner, but not content*, of the advertising or promotion of any cigarettes.[12]

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[i] "The principle (derived from the Supremacy Clause [of the U.S. Constitution]) that a federal law can supersede or supplant any inconsistent state law or regulation." (*Black's Law Dictionary* 958 (7th ed. 2000)).

[ii] This amendment was in many ways a direct response to the U.S. Supreme Court ruling in *Lorillard*. Prior to the Supreme Court's opinion in 2001, three different federal Courts of Appeals had concluded that the FCLAA only preempted state and local regulation of the *content* of cigarette advertisements or promotions. With the FSPTCA's express declaration that states may regulate the time, place, and manner of cigarette advertisements, Congress more or less confirmed that this was the original intent for the FCLAA's preemption provision.

With the addition of this language, Congress clarified that state and local governments are permitted to regulate the **time, place, and manner** of cigarette advertisements and promotions. In other words, since 2009, a state or local government can enact a regulation on **when, where, or how** cigarettes are advertised or promoted and not run afoul of FCLAA preemption; however, it cannot enact a regulation affecting **what** is said in cigarette advertisements. There remains some ambiguity as to the precise scope of the time, place, and manner exception added by the FSPTCA. This is partly because the provision is a recent addition and only two Courts of Appeal have had an opportunity to interpret its meaning.[13] It should be noted that both the preemption and exception clauses only cover regulation of *cigarette* advertising. Other tobacco products, such as smokeless tobacco, cigars, or e-cigarettes, would not be affected by FCLAA preemption. That being said, even if a local tobacco advertising restriction were able to avoid preemption by the FCLAA, it would still face a far more daunting legal barrier via the First Amendment.

III. FIRST AMENDMENT

Advertising and marketing might not be the first things one thinks of upon hearing the words "free speech," but they are in fact protected forms of expression under the First Amendment. While advertisements might not be considered as valuable a form of expression to society as, for example, a personal political or religious statement, businesses nevertheless need to be able to make truthful statements about their products and services to consumers, and likewise, consumers have a right to receive truthful communications from businesses. Courts consider advertising and marketing to be "commercial speech" and they are therefore afforded a medium degree of protection under the First Amendment.

Given the distinctions between commercial speech and "core" speech, the Supreme Court devised a unique test for analyzing the constitutionality of restrictions on commercial speech. Known as the *Central Hudson* test,[iii] the analysis consists of four inquiries:

1.) Is the expression protected by the First Amendment? To come within the boundaries of the First Amendment, the expression must regard a **lawful activity** and be **non-misleading**.
2.) Is the asserted government interest **substantial**?
3.) Does the regulation **directly advance** the government interest asserted?
4.) Is the regulation **not more extensive than necessary** to serve the government interest?[14]

The *Central Hudson* test incorporates what is known as an intermediate level of judicial scrutiny. When analyzing Constitutional rights, the courts use varying levels of judicial scrutiny depending on the right

[iii] *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980) (Court developed a framework similar to "time, place, and manner" restrictions to analyze restrictions on commercials speech. The test was applied to find unconstitutional a Public Service Commission regulation prohibiting promotional advertisements by electric utilities.)

involved. The highest level is known as strict scrutiny. Strict scrutiny requires the regulation in question to be *narrowly tailored* to further a *compelling* government interest.[15] The lowest level of judicial scrutiny is known as rational basis review. Rational basis review simply requires that the regulation in question be *rationally related* to a *legitimate* government interest.[16] *Central Hudson's* intermediate requirements of *directly advancing* a *substantial* government interest fall somewhere in between.

The *Central Hudson* test has been consistently applied to state and local restrictions on tobacco advertising. Satisfying *Central Hudson*'s intermediate level of scrutiny is not easy. The Court's application of *Central Hudson* "routinely results in the invalidation of restraints on truthful commercial speech."[17] The third and fourth prongs of the test are the most difficult to satisfy.

a. Lorillard Tobacco Co. v. Reilly (2001)

Any proposed state or local government restriction of tobacco advertising must be viewed through the lens of the 2001 U.S. Supreme Court case, *Lorillard Tobacco Co. v. Reilly*. In *Lorillard,* the Supreme Court directly addressed the constitutionality of a state restriction on tobacco advertising via the aforementioned *Central Hudson* test.

The litigation in *Lorillard* stemmed from tobacco regulations promulgated in 1999 by the Massachusetts Attorney General (Attorney General).[18] The regulations addressed tobacco advertising as well as certain retail sales practices.[19] Like many tobacco control measures, the Attorney General passed the regulations to address the incidence of tobacco use by children.[20] The advertising regulations contained both outdoor advertising and point of sale advertising components. The outdoor advertising section prohibited outdoor smokeless tobacco and cigar advertising, including "advertising from within a retail establishment that is directed toward or visible from the outside of the establishment, in any location that is within a 1,000 foot radius of any public playground, playground area in a public park, elementary school or secondary school."[21] The point of sale advertising component required that smokeless tobacco and cigar advertising not be placed "lower than five feet from the floor of any retail establishment which is located within a one thousand foot radius of any public playground, playground area in a public park, elementary school or secondary school and which is not an adult-only retail establishment."[22] Finally, the regulations also included a broad definition of the term "advertisement," which covered "any oral, written, graphic, or pictorial statement[s]."[23]

Upon issuance of the regulations, the Attorney General was sued by several members of the tobacco industry, alleging violations of federal law and the U.S. Constitution.[24] Both the U.S. District Court for the District of Massachusetts and the U.S. Court of Appeals for the First Circuit ruled against the tobacco companies and the case was appealed to the U.S. Supreme Court.[25] As mentioned above, a portion of the case centered on the issue of FCLAA preemption. While the cigarette-specific portions of the regulations were found to be preempted by the FCLAA,[26] the question remained whether the smokeless

tobacco and cigar targeted portions of the regulations ran afoul of First Amendment protection of commercial speech.

The Supreme Court analyzed the State's smokeless tobacco and cigar advertising regulations through the *Central Hudson* test.[27] In *Lorillard*, as would most likely be the case with future regulations, the first two steps of the *Central Hudson* test were not at issue.[28] While an argument could be made that certain tobacco advertising is targeted towards minors and would thus be solicitations for illegal transactions (which are not protected under the First Amendment), it was assumed in *Lorillard* that the tobacco companies' speech was entitled to First Amendment protection.[29] Likewise, none of the parties in *Lorillard* argued against the government's interest in preventing youth tobacco use.[30] It is likely that a future tobacco advertising restriction would follow this same pattern, thereby placing the heart of any subsequent legal analysis on whether the regulation directly advances the government's interest in preventing youth tobacco use (third step of *Central Hudson*) and whether the regulation is not more extensive than necessary to prevent youth tobacco use (fourth step).

The Court in *Lorillard* explained that the third step relates to the *underlying harm* of the interest targeted by the government and the *identified means* of advancing that interest.[31] The Court further emphasized that the government must demonstrate that "the harms it recites are real" and that the regulation will "in fact alleviate them to a material degree."[32] This burden, the Court noted, cannot be satisfied by "mere speculation or conjecture."[33] With regard to the Attorney General's regulations and whether they would directly advance the government's interest in preventing youth tobacco use, the Court directed its focus on the studies and reports submitted by the Attorney General articulating the problem of underage smokeless tobacco and cigar use and demonstrating the link between smokeless tobacco and cigar advertising and youth tobacco use.[34] As the Court noted, the Attorney General relied heavily upon findings cited by the FDA in support of a previous attempt to regulate tobacco advertising at the federal level. Among the other submitted studies reviewed by the Court were reports by the Surgeon General, the Institute of Medicine, the National Cancer Institute, the Federal Trade Commission, and the Office of Inspector General in the Department of Health and Human Services, as well as a handful of independent studies published in leading medical journals.[35] Upon review of these studies, the Court determined that the Attorney General had provided "ample documentation" on the problem with youth tobacco use and that preventing youth exposure to tobacco advertising would in fact reduce youth tobacco use.[36] Given the strong legislative record, complete with numerous scientific studies and government reports, the Court declared that the Attorney General's regulations were not based "on mere speculation [and] conjecture" and thus satisfied the third step of *Central Hudson* because the regulation directly advanced the asserted government interest.[37]

While the Attorney General's evidentiary record was thorough enough to satisfy the third step of *Central Hudson*, the legislative record was not enough to satisfy step four – demonstrating the regulation was not more extensive than necessary to achieve the government interest. In analyzing whether the regulation was "not more extensive than necessary,"[38] the Court first noted that a demonstration of

"the least restrictive means" is not what is required, but instead, a showing of a "reasonable 'fit between the legislature's end and the means chosen to accomplish those ends.'"[39] The Court further emphasized that the means chosen must be "narrowly tailored to achieve the desired objective."[40] In the Court's own words, this check for a reasonable fit between means and ends of the regulatory scheme is the "critical inquiry" in a commercial speech case.[41]

Applying those principles to the Massachusetts tobacco regulations, the Court was unable to find such a fit and concluded that the Attorney General's smokeless tobacco and cigar outdoor advertising restrictions were more extensive than necessary to advance the substantial government interest of preventing youth tobacco use.[42] Looking at the issue generally, the Court emphasized that the Attorney General **failed to weigh the cost and benefits of burdening free speech**.[43] The court noted that the burden on speech imposed by the Attorney General was quite large in scope. By prohibiting outdoor advertising of smokeless tobacco and cigars within 1,000 feet of a school, park, or playground, the burden on speech would have covered 87-91 percent of Boston, Worcester, and Springfield.[44] As the Court put it, in places such as these, "[the] regulations would constitute nearly a complete ban on the communication of truthful information . . . to adult consumers."[45]

The Court further explained that the broad scope of the burden was made all the more egregious by other factors that went unconsidered by the Attorney General.[46] First, the Attorney General **did not sufficiently measure the local impact** to major metropolitan areas.[47] The Attorney General had selected 1,000 feet as the radius around schools, parks, and playgrounds based on cigarette and smokeless tobacco advertising regulations that had previously been attempted by the FDA.[48] This reliance, the Court found, did not demonstrate adequate tailoring to Massachusetts's local circumstances.[49] The Court explained that the impact of speech restrictions vary from location to location and that "the degree to which speech is suppressed . . . under a particular regulatory scheme tends to be case specific."[50] The somewhat arbitrary selection of 1,000 feet would have had a widely varying impact – even in a relatively small state such a Massachusetts – between rural, suburban, and urban areas.[51]

Second, the Court found that the regulations **covered too broad a range of communications** to be considered adequately tailored.[52] Of particular interest to the Court was the fact that the Attorney General's prohibition on outdoor advertising included oral communications, as well as all signs regardless of size.[53] Taken to its logical extreme, the regulations could be interpreted as prohibiting retailers from even answering questions about smokeless tobacco or cigars while standing outside.[54] Likewise, the Court found that the prohibition on signs of any size was too broad to address the noted problem of large, highly visible billboards.[55] The Court then articulated that for the signage prohibition to be adequately tailored, it would have to target the specific modes of visual advertising that can be shown through empirical studies to appeal to youth.[56]

However, according to the Court, even if a government could demonstrate a positive connection between outdoor advertising and youth tobacco use, that demonstration would not in and of itself be

enough to satisfy the requirement of adequate tailoring.[57] In this key section of the inquiry, the Court articulated that an analysis of "countervailing First Amendment interests" is critical in commercial speech cases.[58] The "countervailing First Amendment interests" refers to the rights of parties who have a protected interest in making and/or receiving those communications. In the case of local tobacco advertising restrictions, the Court noted that the government's interest in reducing youth tobacco use is "substantial, and even compelling;" however, the sale and use of tobacco products is a legal activity.[59] The Court in *Lorillard* then emphasized that tobacco manufacturers and retailers have a protected interest in marketing their products and tobacco users have a protected interest in receiving truthful information about such products.[60]

Throughout its analysis of step four of the *Central Hudson* test, the Court in *Lorillard* stressed that the Attorney General **failed to weigh the burden on free speech** that its outdoor advertising regulations would impose.[61] As an example, the Court noted that the burden on free speech would be particularly harsh for small cigar retailers who traditionally have limited advertising budgets.[62] Likewise, convenience stores could have been heavily burdened since store safety can necessitate full visibility of the store via outside window space (i.e., in some stores advertising space is already limited).[63] The Court posited that since the ban on outdoor smokeless tobacco and cigar advertising covered print, visual, symbolic, and oral communications, tobacco retailers in Massachusetts might be rendered completely unable to advertise those products to passersby on the street.[64] While newspaper ads would remain unrestricted, the Court noted that these do not enable retailers to market "instant transaction[s]" the way that other forms of marketing could.[65] Taken together, the Court found that these factors demonstrated that the outdoor advertising regulations were, "more extensive than necessary to advance the State's substantial interest in preventing underage tobacco use," and thus failed the fourth step of *Central Hudson*.[66] Having failed the fourth step of *Central Hudson*, the Attorney General's smokeless tobacco and cigar outdoor advertising regulations were, therefore, an unconstitutional hindrance to Constitutionally protected commercial speech.

Turning to the Attorney General's regulation requiring point of sale cigar and smokeless tobacco advertisements to be placed no less than five feet from the ground, the Court found that it failed not only the fourth step of *Central Hudson*, but the third step as well.[67] In a rather curt analysis, the Court observed that "[n]ot all children are less than [five] feet tall, and those who are certainly have the ability to look up . . ." in order to find that the Attorney General's point-of-sale regulation did not directly advance the government's substantial interest in curbing youth tobacco use.[68] Likewise, the Court found the "blanket height requirement" did not constitute a "reasonable fit" with the State's goal of targeting advertisements that entice children, and was thus more extensive than necessary under the fourth step of *Central Hudson*.[69]

Curiously enough, the Court concluded its opinion by restating the importance of reducing youth tobacco use. The Court stated that "tobacco use, particularly among children and adolescents, poses perhaps the simple most significant threat to public health in the United States."[70] Elaborating on the

issue, though, the Court noted that "Federal law . . . places limits on policy choices available to the States."[71] In closing, the Court clarified that, "[t]o the extent that federal law and the First Amendment do not prohibit state action, states and localities remain free to combat the problem of underage tobacco use by appropriate means."[72] So, while the ultimate ruling in *Lorillard* represented a monumental roadblock for certain tobacco control efforts, the Court did not dismiss the possibility that a more narrowly tailored tobacco advertising restriction could pass Constitutional muster.

b. Other Commercial Speech Cases

As evidenced by the decision in *Lorillard,* courts today analyze restrictions on non-misleading commercial speech under the *Central Hudson* test. While most of the following cases do not relate to tobacco regulation, they are nevertheless demonstrative of courts' acceptance of *Central Hudson* as the appropriate test for commercial speech restrictions. However, as discussed below, a 2011 Supreme Court decision may indicate a possible paradigm shift toward a more strict form of review for commercial speech restrictions.

i. 44 Liquormart v. Rhode Island (1996)

In *44 Liquormart*, a licensed liquor retailer in Rhode Island filed suit alleging a First Amendment violation against the state after the Liquor Control Administrator fined the retailer for being in violation of the state's statutory price-advertising ban due to the retailer's advertisement impliedly referencing bargain liquor prices.[73] The state's advertising ban disallowed advertising on beer, wine, and liquor prices for a stated objective of reducing alcohol consumption because presumably, this type of advertisement would lead to price wars on liquor and thereby contribute to greater alcohol consumption among Rhode Island citizens.[74]

Applying *Central Hudson*, the Supreme Court struck down the Rhode Island statutory ban and similar bans of ten other states.[75] Finding that the ban could not withstand the third and fourth prongs of *Central Hudson*, the Supreme Court stated that "although the record suggests that the price advertising ban may have some impact on the purchasing patterns of temperate drinkers of modest means, the State has presented no evidence to suggest that its speech prohibition will *significantly* reduce market wide consumption."[76] The Supreme Court noted that the statute does nothing to meet Rhode Island's goal of deterring alcoholism, as an abusive drinker will still drink regardless of fluctuations in price and that "the true alcoholic may simply reduce his purchases of other necessities" and that any connection between the ban and a significant change in alcohol consumption would be purely "fortuitous."[77] Finally, the court noted that alternatives to the ban existed that would help Rhode Island meet its stated objective, such as direct regulation of alcohol or increased taxation.[78] As a result, Rhode Island failed to establish a "reasonable fit" between its abridgement of speech and its goal.

ii. Thompson v. Western States Medical Center (2002)

In *Thompson*, a group of licensed pharmacies that specialized in compounding drugs sought to enjoin enforcement of the advertising and solicitation provisions of the Food and Drug Administration Modernization Act of 1997 (FDAMA), arguing that they violate the First Amendment. [79] The FDAMA exempts "compounded drugs" – drugs in which a pharmacist or doctor has combined, mixed, or altered ingredients to create a medication tailored to an individual patient's needs – from the FDA standard drug approval requirements under the Federal Food, Drug, and Cosmetic Act (FDCA), so long as the providers of the compounded drugs abide by several restrictions.[80] The restrictions included that the prescription be unsolicited and that the providers not advertise or promote the compounding of any particular drug, class of drug, or type of drug.[81]

The Supreme Court applied intermediate scrutiny under *Central Hudson* and ruled that the statute unnecessarily inhibited commercial speech.[82] The Court concluded that proscribing all advertising of drug compounding was more restrictive than necessary and therefore the statute failed *Central Hudson*'s fourth prong.[83] The Court stated, "we have made clear that if the Government could achieve its interests in a matter that does not restrict speech, or that restricts less speech, the Government must do so."[84] Several alternatives could have had the same effect as the statute without limiting speech.[85] A few suggestions for alternatives the Court offered included prohibiting compounding prior to the receipt of prescriptions, or limiting the amount of compounded drugs sold by either the location or the individual pharmacist.[86] In other words, **only after contemplating and failing to come up with non-speech related options can the government be justified in restricting commercial speech**.

iii. R.J. Reynolds Tobacco Co. v. FDA (D.C. Cir. 2012)

In *R.J. Reynolds Tobacco Co.*, the tobacco industry launched a First Amendment challenge to the FDA's promulgation of "color graphics depicting the negative health consequence of smoking."[87] The graphic warnings would appear on the top of all cigarette packaging and cover about a quarter of print advertisement.[88] The suit was filed in the U.S. District Court for the District of Columbia and the court held that the warnings violated the First Amendment. The district court noted that "compelled speech is 'presumptively unconstitutional,'" applied *strict scrutiny*, and struck down the graphic warnings.[89]

On appeal, the Court of Appeals for the District of Columbia affirmed.[90] However, while the court of appeals endorsed the district court's conclusion, it applied *Central Hudson*'s intermediate scrutiny and not strict scrutiny.[91] The court noted that based on precedent, the *Central Hudson* test provided the appropriate framework for evaluating commercial speech disclosures that are not strictly factual.[92] The Court of Appeals found that there was not "a shred of evidence" that the graphic warning images would "reduc[e] the number of Americans who smoke."[93] The court of appeals concluded that the FDA relied on too few studies that evaluated the impact of graphic warnings on actual smoking rates, that the cited studies relied on questionable social science, and that in turn, the FDA overstated the effectiveness of

the graphic warnings.[94] Therefore, the graphic warnings did not directly **advance** an important government interest under the third prong of the *Central Hudson* test.

iv. Discount Tobacco City & Lottery, Inc. v. United States (6th Cir. 2012)

In *Discount Tobacco*, the Sixth Circuit Court of Appeals applied the *Central Hudson* test to a challenge by a group of tobacco manufacturers and sellers alleging that provisions of the FSPTCA violated their free speech rights under the First Amendment.[95] The challenge targeted various provisions of the Act, including: (1) the requirement that tobacco manufacturers reserve a significant portion of tobacco packaging for the display of health warnings, including graphic images intended to illustrate the hazards of smoking; (2) the restrictions on the commercial marketing of so-called "modified risk tobacco products;" (3) the ban of statements that implicitly or explicitly convey the impression that tobacco products are approved by, or are safer by virtue of being regulated by, the FDA; (4) the restriction on the advertising of tobacco products to black text on a white background in most media; and (5) the bar on the distribution of free samples of tobacco products in most locations, brand-name tobacco sponsorship of any athletic or social event, branded merchandising of any non-tobacco product, and distribution of free items in consideration of a tobacco purchase.[96] The district court declared unconstitutional the black and white advertising requirement and the prohibition of implicit or explicit approval by the FDA, but upheld the remaining provisions as constitutional.[97]

On appeal, the Sixth Circuit upheld all but two of the challenged requirements.[98] The two requirements struck down were the restrictions imposed on the use of color in tobacco advertisements and the ban on continuity programs.[99] The court struck down those two requirements of the FSPTCA because they were too overbroad to further the interest of reducing consumer deception and did not narrowly fit the government's substantial interest of limiting juvenile tobacco use.[100]

The other requirements, including the ban on free samples of tobacco products, the restrictions on marketing "modified risk" tobacco products, and the ban on implying tobacco products product safety due to FDA regulation, were all upheld under *Central Hudson*. The court of appeals found these requirements to be narrowly tailored to prevent youth tobacco use.[101] The court of appeals also noted that these restrictions only imposed a small burden on the tobacco industry in light of the potential to mislead consumers absent the restriction.[102] The FDA produced considerable evidence showing that these specific marketing techniques reached an overwhelming number of juveniles.[103] Based on this evidence, the court found the requirements passed muster under *Central Hudson*.

v. Ideology Shifting? - Sorrell v. IMS Health Inc. (2011)

While all of the aforementioned cases applied *Central Hudson* to commercial speech restrictions, a 2011 Supreme Court case suggested a potential ideology shift toward a more strict form of review.

In *Sorrell*, in two consolidated suits, data miners and pharmaceutical manufacturers alleged that Vermont's Prescription Confidentiality Law, which aimed to prevent the practice of "detailing" by pharmaceutical companies, violated their First Amendment rights.[104] Detailing involves highly targeted marketing of drugs to doctors by drug sales, which rely heavily on "prescriber-identifying information" indicating the prescribing practices of the doctors they service.[105] With this law, Vermont sought to limit the practice of detailing as a means of containing health care costs and barred the selling and using of prescriber-identifying information by drug companies.[106]

The Supreme Court applied "heightened judicial scrutiny" and struck down the Vermont law because the state failed to show that the law directly advanced the government's interest in protecting medical privacy, improving public health, and reducing healthcare costs.[107] The Supreme Court noted that the state permitted the information to be used for purposes other than detailing and failed to lower health care costs "in a permissible way."[108]

The Court hinted that "heightened judicial scrutiny" should apply to commercial speech cases and that the *Central Hudson* test should be replaced with the same review "core" protected speech is entitled.[109] In explaining why the Vermont statute was unconstitutional, Justice Anthony Kennedy, writing the majority opinion, likened the statute to one that suppressed political speech, criticizing Vermont for "tilt[ing] public debate in a preferred direction."[110] Reemphasizing that the value of commercial speech is a two-way street, the Court suggested that in some cases, a consumer's interest in freely receiving truthful advertising, "often may be far keener than his concern for urgent political dialogue."[111]

c. Strict Scrutiny or Intermediate Scrutiny in Commercial Speech Cases

Case law has reiterated that *Central Hudson* should be the test courts use in analyzing non-misleading commercial speech restrictions. With *Sorrell*, the Supreme Court suggested that perhaps strict scrutiny should apply to commercial speech. While the regulation in *Sorrell* targeted the sale of doctor prescription records for marketing purposes (arguably, very much distinguishable from a tobacco advertising restriction), Justice Kennedy's opinion was a reminder that "the state may not seek to remove a popular but disfavored product from the marketplace by prohibiting truthful, non-misleading advertisements that contain impressive endorsements or catchy jingles. That the state finds expression too persuasive does not permit it to quiet the speech or to burden its messengers."[112]

Tobacco products are a classic example of a "popular bur disfavored product" and it is no secret that public health officials and policymakers have contemplated the "tobacco end game."[113] If the doctrinal shift hinted in *Sorrell* were to gain further judicial acknowledgement, it would be very disconcerting from a tobacco control perspective, as it is very difficult for any law to withstand strict scrutiny.[114] Strict scrutiny requires a law be necessary to achieve a compelling government interest. The test in *Central Hudson* is an intermediate form of scrutiny and requires less of a showing than strict scrutiny, but more than a rational reason.

Despite the suggestion by the Supreme Court in *Sorrell* that content-based commercial speech regulations be viewed under the magnifying glass of strict scrutiny, the Supreme Court failed to definitively identify strict scrutiny or *Central Hudson* as the test, identifying only "heightened judicial scrutiny" in striking down the Vermont law.[115] The *Central Hudson* test has been the primary tool of courts in assessing protections afforded to commercial speech for decades, so there is little concern that the Supreme Court would depart from *Central Hudson* without definite indication by the Court to the contrary.[116] Finally, as a point of emphasis, there has been no case to date that has subjected a tobacco advertising restriction to strict scrutiny.

IV. POLICY CONSIDERATIONS – LESSONS LEARNED

Any government restriction on commercial speech may end up in litigation, and therefore, these types of restrictions should be considered carefully before adoption. First and foremost, it is important to look to commercial speech precedent. *Lorillard* identified many factors to consider when attempting to restrict commercial speech. For example, *Lorillard* illustrated that in an attempt to regulate commercial speech, a state or local government must consider the geographical scope the restriction will have. The restriction in *Lorillard* restricted tobacco advertising within 1,000 feet of schools. The Court found the restriction too broad and not narrowly tailored because the geographical scope of the advertising ban would have encompassed almost the entire city of Boston. Thus, it is important to consider the reach of a commercial speech restriction. Courts will likely not uphold a restriction that is too broad.

Although the *Central Hudson* test poses an intermediate level of scrutiny, the fourth prong is very challenging. The fourth prong requires a restriction on commercial speech to not be more extensive than necessary to achieve the restriction's purpose. While the Attorney General in *Lorillard* offered "ample documentation" of the correlation between tobacco advertising and underage tobacco use and the consequences of use on youth so as to satisfy the third prong of *Central Hudson*, even this strong evidentiary record was not enough to pass the test's fourth prong.

Pursuant to case law, the following measures should be taken so as to improve the success of a commercial speech restriction, tobacco related or not:

1. CONSIDER NON-SPEECH ALTERNATIVES FIRST

A municipality should carefully consider all potential means of combating tobacco use. The First Amendment requires that the government refrain from sacrificing speech on the basis of its content when other means of advancing the government's goals are available. This is so even when the government has a compelling interest like protecting children from addiction and the devastating, long-term health consequences of tobacco use.

Careful analysis of state and federal preemption issues will be necessary to identify the range of permissible regulatory steps. But even where preemption is obvious, findings should reflect the legislative body's consideration of means that otherwise would have been adopted in lieu of or in conjunction with the restrictions on advertising.

Advocacy organizations have proposed a number of measures that would contribute to the critical task of reducing youth smoking, and the Surgeon General's 2012 Report contains evidentiary support for many possible approaches. *All* identifiable options should be collected and considered to formulate the best possible record. Thoughtfully articulating alternatives that were considered by the municipality before ultimately pursuing the policy will help improve the success of a challenge to a commercial speech restriction.

2. CLEARLY IDENTIFY THE PUBLIC HEALTH INTERVENTION AND THE RATIONALE SUPPORTING ADOPTION OF THE INTERVENTION

It is important to clearly establish the scope of the intervention, the aims to be achieved, and the policy reasons supporting the intervention. The policy rationale should be supported by research whenever possible, particularly peer-reviewed academic studies and relevant data provided by federal, state, or local governments. The rationale for adoption should also highlight the problem of tobacco use – particularly youth tobacco use – and to the extent possible federal and state statistics should be supplemented by local data whenever possible.

3. GATHER EVIDENCE AND ESTABLISH A RECORD

The government must offer evidence in support of its position that a restriction on commercial speech is necessary and will further the government's substantial interest. To do this, the government must gather or perform as much research as necessary to show a court that the regulation is the least restrictive means to satisfy the restriction's goals and qualifies as a "reasonable fit between the legislature's ends and the means chosen to accomplish those ends . . ." For example, in the tobacco related arena, those seeking to restrict tobacco advertising and marketing to youth should show the restriction contemplated will successfully decrease youth use and exposure to tobacco products.

4. DO NOT ATTEMPT TO REGULATE THE CONTENT OF CIGARETTE ADVERTISING AND PROMOTION

FCLAA presents a significant barrier to localities interested in regulating the *content* of cigarette advertising and promotion. The time, place, and manner exception to preemption does not allow for state and local governments to regulate the actual content of cigarette advertising and promotion. A local government considering the adoption of any law that regulates the content of cigarette advertising or promotion is at significant risk of losing a federal preemption challenge.

5. DO NOT OVERREACH

Commercial speech is constitutionally protected. So, when attempting to restrict it, a state or local government must have a specific goal in mind that the restriction will help it meet. You cannot throw every suggestion into a restriction that can help achieve your goal. If the restriction is excessive, courts will not see this as narrowly tailored and strike it down.

For example, the regulation in *Lorillard* attempted to regulate both indoor and outdoor retail store tobacco advertising. The Court found that it was not narrowly tailored and suggested that to the extent that only outdoor advertising is shown to be connected with underage tobacco use, a government should only attempt to regulate advertisements visible from outside the store.[117] This regulation would have enabled retailers to communicate with customers while inside the store about tobacco products for sale, thus not inhibiting their right to speech. Moreover, as suggested in *Lorillard*, a blanket ban on tobacco advertising in a particular area will not be upheld. There must be a careful consideration of the geographical impact of a commercial restriction. Perhaps a narrowly tailored version of the restriction in *Lorillard* would be reducing the distance of the ban from school zones to only 500 feet instead of a 1,000 feet or otherwise restrict the scope of the prohibition. However, the important lesson from *Lorillard* is not simply that a restriction on advertising should be scaled down; it is that **a government entity must consider the particular effects of such a restriction within its jurisdiction**. In the example above, it would not be enough to arbitrarily change the 1,000 feet rule to 500 feet without an accompanying explanation of why 500 feet is appropriate. The more narrow a restriction's application, the more likely a court will see it as narrowly tailored and not excessive.

V. CONCLUSION

Courts generally analyze commercial speech restrictions under the *Central Hudson* test. Numerous courts have applied the test to tobacco restrictions in several cases with varying degrees of success. Case law gives rules and lessons that may help to restrict harmful commercial speech. It is important to be proactive to ensure that a commercial speech restriction will survive litigation. Certain measures can be taken to improve a restriction's chance of success. Any commercial speech restriction must be narrowly tailored, formulated by evidence and research, not more extensive than necessary and not limit expressive or creative content. Most importantly alternatives to a commercial speech restriction must be considered and documented accordingly.

ADDITIONAL POLICY RESOURCES:

Restricting Tobacco Advertising and Promotions [webpage]. (accessed, January 28, 2014). CounterTobacco.org. Available at: http://www.countertobacco.org/pos-marketing-advertising-and-promotions.

Cause and Effect: Tobacco Marketing Increases Youth Tobacco Use – Findings of the 2012 Surgeon General's Report. (May, 2012). Center for Public Health and Tobacco Policy. Available at: http://www.tobaccopolicycenter.org/documents/SGR%20NY%205-25-12.pdf.

Content-Neutral Advertising Laws [Tips and Tools]. (August, 2011). Tobacco Control Legal Consortium. Available at: http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-guide-contentneutralads-2011l.pdf.

Restricting Tobacco Advertising [Tips and Tools]. (May, 2011). Tobacco Control Legal Consortium. Available at: http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-guide-restricttobadvert-2011.pdf.

Tobacco Product Display Restrictions. (October, 2010). Center for Public Health and Tobacco Policy. Available at: http://publichealthlawcenter.org/sites/default/files/nycenter-syn-tobproductdisplaybans-2013.pdf.

Regulating Tobacco Advertising and Promotion: A "Commerce Clause" Overview for State & Local Governments. (May, 2010). Tobacco Control Legal Consortium. Available at: http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-fs-regadvert-2010.pdf.

Regulating the Advertising and Promotion of Tobacco Products after the 2009 FDA Law [Presentation]. (April, 2010). Tobacco Control Legal Consortium. Available at: http://publichealthlawcenter.org/sites/default/files/resources/tclc-pres-fda-04-10.pdf.

Regulating Tobacco Marketing: A "Commercial Speech" Factsheet for State and Local Governments. (March, 2010). Tobacco Control Legal Consortium. Available at: http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-fs-speech-2010.pdf.

Regulating Tobacco Marketing: A "Commercial Speech" Flowchart for State and Local Governments. (March, 2010). Tobacco Control Legal Consortium. Available at: http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-flowchart-speech-2010.pdf.

Regulating Tobacco Marketing: "Commercial Speech" Guidelines for State and Local Governments. (March, 2010). Tobacco Control Legal Consortium. Available at: http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-guidelines-speech-2010.pdf.

ENDNOTES

[1] Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111–31, div. A (2009).
[2] 15 U.S.C. § 1334 (2010).
[3] *See generally* Joseph R. DiFranza,, Robert J. Wellman, James D. Sargent, Michael Weitzman, Bethany J. Hipple & Jonathan P. Winickoff, *Tobacco Promotion and the Initiation of Tobacco Use: Assessing the Evidence for Causality*, 117 PEDIATRICS e1237 (2006); Chris Lovato, Gilat Linn, Lindsay F. Stead & Allan Best, *Impact of Tobacco Advertising and Promotion on Increasing Adolescent Smoking Behaviors*, COCHRANE DATABASE OF SYSTEMATIC REVS. CD003439 (2003) (updated in Chris Lovato, Allison Watts & Lindsay F. Stead, *Impact of Tobacco Advertising and Promotion on Increasing Adolescent Smoking Behaviors*, COCHRANE DATABASE OF SYSTEMATIC REVS. CD003439.pub2 (2011)); John P. Pierce, Won S. Choi, Elizabeth A. Gilpin, Arthur J. Farkas & Charles C. Berry, *Tobacco Industry Promotion of Cigarettes and Adolescent Smoking*, 279 JAMA 511 (1998); David D. Altman, Douglas W. Levine, Remy Coeytaux, John Slade & Robert Jaffe, *Tobacco Promotion and Susceptibility to Tobacco Use among Adolescents Aged 12 through 17 Years in a Nationally Representative Sample*, 86 AM. J. PUB. HEALTH 1590 (1996); Ellen Feighery, Dina L. G. Borzekowski, Caroline Schooler & June Flora, *Seeing, Wanting, Owning: The Relationship Between Receptivity to Tobacco Marketing and Smoking Susceptibility in Young People*, 7 TOBACCO CONTROL *123* (1998); Jennifer B. Unger, C. Anderson Johnson & Louise A. Rohrbach, *Recognition and Liking of Tobacco and Alcohol Advertisements among Adolescents: Relationships with Susceptibility to Substance Use*, 24 PREVENTATIVE MED. 461 (1995).
[4] Sandy J. Slater, Frank J. Chaloupka, Melanie Wakefield, Lloyd D. Johnston, Patrick M. O'Malley, *The Impact of Retail Cigarette Marketing Practices on Youth Smoking Uptake*, 161 ARCHIVES OF PEDIATRICS & ADOLESCENT MED. 440 (2007).
[5] Melanie Wakefield, Daniella Germain, Sarah Durkin & Lisa Henriksen, *An Experimental Study of Effects on Schoolchildren of Exposure to Point-of-Sale Cigarette Advertising and Pack Displays*, 21 HEALTH EDUC. RES. 338 (2006).
[6] Owen J. B. Carter, Brennan W. Mills, Rob J. Donovan, *The Effect of Retail Cigarette Pack Displays on Unplanned Purchases: Results from Immediate Postpurchase Interviews*, 18 TOBACCO CONTROL 218 (2009).
[7] Thomas R. Kirchner et al., *Tobacco Retail Outlet Advertising Practices and Proximity to Schools, Parks and Public Housing Affect Synar Underage Sales Violations in Washington, DC*, TOBACCO CONTROL 1-7 (Feb. 25, 2014) (published online first).
[8] Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001).
[9] 15 U.S.C. § 1334 (2010).
[10] *Lorillard,* 533 U.S. at 546.
[11] Pub. L. No. 111-31, 123 Stat. 1776, Sec. 203 (codified as amended at 15 U.S.C. § 1334 (2010)).
[12] 15 U.S.C. § 1334 (emphasis added).
[13] *See* Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence, R.I., 731 F.3d 71, 80-81 (1st Cir. 2013); 23-34 94th St. Grocery Corp. v. New York City Bd. of Health, 685 F.3d 174, 184 n.9 (2d Cir. 2012).
[14] Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 566 (1980).
[15] *See*, *e.g.*, Citizens United v. Fed. Elections. Comm'n, 558 U.S. 310, 312 (2010).
[16] *See, e.g.*, United States v. Carolene Products Company, 304 U.S. 144 (1938).
[17] David C. Vladeck, *Lessons from A Story Untold:* Nike v. Kasky *Reconsidered*, 54 Case W. Res. L. Rev. 1049, 1068 (2004)
[18] *Lorillard*, 533 U.S. at 532-36.
[19] *Id.* at 533-36.
[20] *Id.* at 533-34.
[21] *Id*. at 534-35.
[22] *Id.*
[23] *Id.* at 536.
[24] *Id.* at 536-37.
[25] *Id.* at 536-539.
[26] Id. at 551.
[27] *Id*. at 554-67.
[28] *Id*. at 555.
[29] *Id.*
[30] *Id.*
[31] *Id.* (emphasis added).
[32] *Id.* (quoting Greater New Orleans Broadcasting Assn., Inc. v. United States, 527 U.S. 173, 188 (1999)).

[33] *Id.* (quoting Greater New Orleans Broadcasting Assn., Inc. v. United States, 527 U.S. 173, 188 (1999)).
[34] *Id.* at 556-61
[35] *Id.* at 558-561.
[36] *Id.* at 561.
[37] *Id.* (quoting Edenfield v. Fane, 507 U.S. 761, 770 (1993)).
[38] *Id.* at 556 (quoting Greater New Orleans Broadcasting Assn., Inc., 527 U.S. at 188).
[39] *Id.* at 556 (quoting Florida Bar v. Went For It, Inc., 515 U.S. 618, 632 (1995)).
[40] *Id.* (quoting Went For It, Inc., 515 U.S. at 632).
[41] *Id.* at 561 (quoting Central Hudson, *supra* note 14, at 569).
[42] *Id.* at 565.
[43] *Id.* at 561.
[44] *Id.* at 561-62.
[45] *Id.* at 562.
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.* at 562-63
[50] *Id.* at 563.
[51] *Id.*
[52] *Id*.
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.* at 564.
[59] *Id.*
[60] *Id.*
[61] *See Id.* at 561.
[62] *Id.* at 564-65.
[63] *Id.* at 565.
[64] *Id.*
[65] *Id*.
[66] *Id.*
[67] *Id.* at 566.
[68] *Id.*
[69] *Id.* at 567.
[70] *Id.* at 570 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 161 (2000)).
[71] *Id.* at 571.
[72] *Id.*
[73] 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 492-93 (1996).
[74] *See id*. at 493-94.
[75] *Id*. at 508.
[76] *Id*. at 506-08.
[77] *Id*. at 506-07.
[78] *Id*. at 507.
[79] Thompson v. Western States Medical Center, 535 U.S. 357, 360 (2002).
[80] *Id*. at 360-61; *See* Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §352 (2010)(; Food and Drug Administration Modernization Act of 1997, Pub. L. No. 105-115, 11 Stat 2296, Sec. 127 (codified at 21 U.S.C. § 353a (2010))..
[81] *Western States Medical* Center, 535 U.S. at 360.
[82] *Id*. at 371-72.
[83] *Id*.

[84] *Id.* at 371.
[85] *Id*. at 371-72.
[86] Id. at 372.
[87] 15 U.S.C. § 1333(d) (2010); R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1205 (D.C. Cir. 2012).
[88] 15 U.S.C. §1333(a)(2).
[89] *See* R.J. Reynolds Tobacco Co. v. FDA, 845 F. Supp. 2d 266, 268 (D.D.C. 2012) (district court's ruling) (quoting Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 830 (1995)).
[90] 696 F.3d 1205 at 1208.
[91] *Id*. at 1217.
[92] *Id.*
[93] *Id*. at 1219.
[94] *Id.*
[95] Discount Tobacco City & Lottery, Inc. v. U.S., 674 F.3d 509, 518 (6th Cir. 2012).
[96] *Id.* at 520.
[97] Commonwealth Brands, Inc. v. United States, 678 F. Supp. 2d 512, 525, 527-28, 532,534-36, 538-39 (W.D. Ky. 2010) *aff'd in part, rev'd in part sub nom*. Discount Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509 (6th Cir. 2012).
[98] 674 F.3d at 518.
[99] *Id.* at 544, 548.
[100] *Id*.
[101] *Id.* at 541-43.
[102] *See id.* at 530-31, 551.
[103] *Id.* at 541.
[104] Sorrell v. IMS Health Inc., 131 S.Ct. 2653, 2661 (2011).
[105] *Id.* at 2659-60.
[106] *See id.*
[107] *Id.* at 2668.
[108] *Id.* at 2667-70.
[109] *Id.* at 2664.
[110] *Id.* at 2671
[111] *Id*. at 2664 (quoting Bates v. State Bar of Ariz., 433 U.S. 350, 364).
[112] *Id.* at 2671
[113] *See* Anna Edney, *Surgeon General Sets Tobacco End-Game as Smoking Persists*, Business Week, January 17, 2014, *available at* http://www.businessweek.com/news/2014-01-17/surgeon-general-sets-tobacco-end-game-as-smoking-decline-stalls; Margaret Chan, Director-General, WHO, Keynote address at the International Conference on Public Health Priorities in the 21st Century: the Endgame for Tobacco (September 11, 2013), *available at* http://www.who.int/dg/speeches/2013/tobacco_endgame_20130911/en/.
[114] *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 844 (2006).
[115] *Sorrell*, 131 S. Ct. 2653 at 2664.
[116] *See* Fleminger, Inc. v. U.S. Dep't of Health & Human Servs., 854 F. Supp. 2d 192, 197 (D. Conn. 2012) ("[I]t is unlikely that the Supreme Court would directly overturn a prior holding and drastically alter the level of scrutiny afforded under a foundational constitutional analysis without a thorough and comprehensive discussion heralding such an elemental change to the long standing and well-established constitutional framework.").
[117] *See* Lorillard, 533 U.S. at 563.