Tobacco Marketing and Advertising Restrictions in S. 1648, 105th Congress: First Amendment Issues

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ABSTRACT

Section 906 of S. 1648, 105th Congress, would prohibit, among other things, tobacco advertising on billboards and the Internet. Although the First Amendment provides only limited protection to commercial speech, S. 1648's marketing and advertising restrictions, to the extent that they deny adults access to tobacco advertising more than is necessary to protect children, may be unconstitutional.

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Summary

This report considers whether § 906 of S. 1648, 105th Congress, would violate the First Amendment's guarantee of freedom of speech. Section 906 would prohibit, among other things, (1) "outdoor tobacco product advertising, including billboards, posters," etc., (2) advertising "tobacco products in any arena or stadium where athletic, musical, artistic, or other social or cultural events or activities occur," (3) the use of "a human image or a cartoon character or cartoon-type character in [tobacco] advertising, labeling, or promotional material," and (4) tobacco product advertising on the Internet "unless such an advertisement is inaccessible in or from the United States."

The First Amendment provides only limited protection to commercial speech, such as tobacco advertising. The Supreme Court has prescribed the *Central Hudson* test to determine the constitutionality of governmental restrictions of commercial speech. This test requires that restrictions of non-misleading commercial speech directly advance a substantial governmental interest in a manner that is not overbroad. In 1996, in *44 Liquormart, Inc. v. Rhode Island*, the Supreme Court increased the protection that the *Central Hudson* test guarantees to commercial speech, expressing skepticism of "regulations that seek to keep people in the dark for what the government perceives to be their own good." One may apparently infer from this decision that restrictions on truthful tobacco advertising that is not aimed at minors would likely be unconstitutional.

Subsequent to *44 Liquormart*, a federal court of appeals upheld a Baltimore ordinance that prohibited tobacco advertisements on billboards, except in certain commercially and industrially zoned areas of the city. It reasoned that, although the ordinance reduced the opportunities for adults to receive tobacco advertising, it did not preclude them, and the ordinance constituted a reasonable way to attempt to limit underage smoking. S. 1648's total ban on billboards with tobacco advertisements, by contrast, would seem more likely to be found unconstitutional. Similarly, its other marketing and advertising restrictions, to the extent that they deny adults access to tobacco advertising more than is necessary to protect children, may be unconstitutional.

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This report considers whether § 906 of S. 1648, 105th Congress, the "Preventing Addiction to Smoking among Teens Act" or the "PAST Act," would violate the First Amendment's guarantee of freedom of speech. Section 906 contains restrictions on marketing and advertising of tobacco products. It would *prohibit* the following 18 things:[1]

(1) "outdoor tobacco product advertising, including billboards, posters," etc.
(2) advertising "tobacco products in any arena or stadium where athletic, musical, artistic, or other social or cultural events or activities occur."
(3) the use of "a human image or a cartoon character or cartoon-type character in [tobacco] advertising, labeling, or promotional material."
(4) tobacco product advertising on the Internet "unless such an advertisement is inaccessible in or from the United States."
(5) for each manufacturer and retailer, more than a specified number of "point-of-sale advertisements in or at each location at which tobacco products are offered for sale." Such advertisements could be no larger than a specified size, consist of other than black letters on a white background, or be "located within 2 feet of any fixture on which candy is displayed for sale."
(6) playing or viewing of audio and video advertisements at points of sale.
(7) "[d]isplay fixtures in the form of signs consisting of brand name and price that are . . . larger than 2 inches in height."
(8) use of "a trade or brand name of a nontobacco product as the trade or brand name for a cigarette or smokeless tobacco product," except for trade or brand names in use on or before January 1, 1995.
(9) advertising tobacco products in a medium *other than* a newspaper, magazine, billboard, poster, placard, nonpoint-of-sale promotional material (including direct mail), point-of-sale promotional material, audio or visual formats delivered at a point-of-sale, *unless* the manufacturer, distributor, or retailer that intends to advertise notifies the Commissioner of the Food and Drug Administration not less than 30 days prior to the date on which such medium is to be used.
(10) payments "by any manufacturer, distributor, or retailer for the placement of any tobacco product or tobacco product package or advertisement — (i) as a prop in any television program or motion picture produced for viewing by the general public; or (ii) in a video or on a video game machine."

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[1] The following list contains summaries, not complete descriptions, of the items in the bill. The items in the bill appear in the same order as in the list, but are not numbered according to the same format, and do not all appear phrased as prohibitions.

(11) direct or indirect payments "by any manufacturer, distributor, or retailer to any entity for the purpose of promoting the image or use of a tobacco product through print or film media that appeals to individuals under 18 years of age or through a live performance by an entertainment artist that appeals to such individuals."
(12) labeling or advertising for a tobacco product in other than black text on a white background, *except* (i) in any facility where vending machines and self-service displays are permitted under this chapter if the advertising involved . . . is not visible from outside of the facility; and . . . is affixed to a wall or fixture in the facility,"[2] or (ii) that appears in any "adult publication," which § 906 would define as publications with fewer than a specified percentage or number of readers under 18.
(13) tobacco advertising in audio format unless "limited to words only with no music or sound effects."
(14) tobacco advertising in video format unless "limited to static black text only on a white background," with any audio in the advertising limited as in # 13.
(15) marketing, licensing, distributing, or selling any non-tobacco item or service bearing the brand name, "logo, symbol, motto, selling message, recognizable color or pattern of colors, or any other indicia of product identification similar or identifiable to those used for any brand of tobacco products."
(16) offering to any person purchasing tobacco products any gift or item other than a tobacco product in consideration of the purchase, or of furnishing evidence, such as proofs-of-purchase, of a purchase.
(17) sponsoring "any athletic, musical, artistic, or other social or cultural event, or any entry or team in any event, in which the brand name, "logo, symbol, motto, selling message, recognizable color or pattern of colors, or any other indicia of product identification similar or identifiable to those used for tobacco products is used."
(18) sponsoring "any athletic, musical, artistic, or other social or cultural event in the name of the corporation which manufactures the tobacco product" *unless* (i) both the corporate name and the corporation were registered and in used in the United States prior to January 1, 1995; and (ii) the corporate name does not include any brand name, "logo, symbol, motto, selling message, recognizable color or pattern of colors, or any other indicia of product identification similar or identifiable with, those used for any brand of tobacco products."

First Amendment Protection for Commercial Speech

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." This language restricts government both more and less than it would if it were applied literally. It restricts government more in that it applies not only to Congress, but to all branches of the federal government, and to all branches of state and local government.[3] It restricts government less in that it provides no protection to some types of speech and only limited protection to others. One type of speech to which

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[2] Under § 908(i)(1), tobacco vending machines would be restricted to facilities that exclude individuals under 18. The intention presumably is the same for self-service displays, but the omission of § 908(j)(1)(C), which is referred to in § 908(i)(2), from the bill (at least from the version on the Internet) causes this intention not to be stated.

[3] Herbert v. Lando, 441 U.S. 153, 168 n.16 (1979).

it applies only limited protection is commercial speech, which is "speech that *proposes* a commercial transaction."[4]

Commercial speech may be banned if it advertises an illegal product or service, and, unlike fully protected speech, may be banned if it is unfair or deceptive. Even when it advertises a legal product and is not unfair or deceptive, the government may regulate commercial speech more than it may regulate fully protected speech.

Fully protected speech may be restricted only "to promote a compelling interest" and only by "the least restrictive means to further the articulated interest."[5] For commercial speech, by contrast, the Supreme Court has prescribed the four-prong *Central Hudson* test to determine its constitutionality. This test asks initially (1) whether the commercial speech at issue is protected by the First Amendment (that is, whether it concerns a lawful activity and is not misleading) and (2) whether the asserted governmental interest in restricting it is substantial. "If both inquiries yield positive answers," then to be constitutional the restriction must (3) "directly advance[ ] the governmental interest asserted," and (4) be "not more extensive than is necessary to serve that interest."[6] In *Board of Trustees of the State University of New York v. Fox*, the Supreme Court made it easier for the government to satisfy the fourth prong of the *Central Hudson* test. It held that the fourth prong is not to be interpreted "strictly" to require the legislature to use the least restrictive means available to accomplish its purpose.[7] Instead, the Court held, legislation regulating commercial speech is to be upheld if there is a "'fit' between the legislature's ends and the means chosen to accomplish those ends," — "a fit that is not necessarily perfect, but reasonable . . . ."[8] The Court, however, does "not equate this test with the less rigorous obstacles of rational basis review."[9] In other words, although, to satisfy the fourth prong, a restriction on commercial speech need not constitute the least restrictive means to advance the asserted governmental interest, it must be more than merely rational.

In 1996, in *44 Liquormart, Inc. v. Rhode Island*, the Supreme Court increased the protection that the *Central Hudson* test guarantees to commercial speech by indicating that "when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair

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[4] Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 482 (1989) (emphasis in original).

[5] Sable Communications of California, Inc. v. Federal Communications Commission, 492 U.S. 115, 126 (1989).

[6] Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 566 (1980). In Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995), the Court referred to the *Central Hudson* test as having three parts, and referred to its second, third, and fourth prongs as, respectively, the first, second, and third. In 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1521 (1996), the Justices seemed to return to the traditional numbering.

[7] *Fox*, *supra* note 4, at 476.

[8] *Id*. at 480.

[9] Florida Bar v. Went For It, Inc., *supra* note 6, at 632.

bargaining process," the restriction will be subject to a stricter review by the courts than a regulation designed "to protect consumers from misleading, deceptive, or aggressive sales practices."[10] The prohibition in *44 Liquormart* was on advertising the price of alcoholic beverages, not on all advertising of alcoholic beverages. Therefore, when the Court referred to "entirely" prohibiting the dissemination of truthful, nonmisleading commercial messages, it apparently included entirely prohibiting the dissemination of any particular item of truthful, nonmisleading information.

We will now discuss the application of each of the four prongs of the *Central Hudson* test to § 906, considering § 906 in general, rather than considering each of its 18 prohibitions separately. Then we will consider whether *44 Liquormart* affects our general conclusion. Finally we will consider the constitutionality of each of the 18 prohibitions.

Applying *Central Hudson*: First Prong

The first prong of the *Central Hudson* test asks whether the restricted speech concerns a lawful activity and is not misleading. We will assume that the advertising is not misleading, as if it is, it is already illegal under § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, which prohibits "unfair or deceptive acts or practices in or affecting commerce." We will also assume that the advertisements concern a lawful activity, even though the sale of tobacco products to minors is illegal in every state.[11] We will assume that the advertisements concern a lawful activity because, even though the stated goal of S. 1648 is to decrease and prevent youth smoking (§ 3), most of the restrictions in § 906 would affect tobacco advertisements aimed at adults as well as at minors.

Applying *Central Hudson*: Second Prong

The second prong of the *Central Hudson* test asks whether the asserted governmental interest in restricting the commercial speech in question is substantial. The Supreme Court, in *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, held that a government's "interest in the health, safety, and welfare of its citizens constitutes a 'substantial' governmental interest."[12] Although Part VI of the Court's opinion in *44 Liquormart* questioned some aspects of *Posadas*, this was not one of them, and there seems no doubt that § 906 would satisfy the second prong.

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[10] 116 S. Ct. 1495, 1507 (1996). The nine Justices were unanimous in striking down the law, which prohibited advertising the price of alcoholic beverages, but only parts of Justice Stevens' opinion for the Court were joined by a majority of Justices. The quotations above, for example, are from Part IV of the Court's opinion, which was joined by only Justices Kennedy and Ginsburg besides Justice Stevens.

[11] U.S. Department of Health and Human Services, Public Health Service, Centers for Disease Control and Prevention, *State Laws on Tobacco Control — United States, 1995*.

[12] 478 U.S. 328, 341 (1986).

Applying *Central Hudson*: Third Prong

In *Posadas*, the Supreme Court, applying the third prong of the *Central Hudson* test, found reasonable the Puerto Rico legislature's view that restricting advertising would directly advance the asserted governmental interest by reducing the demand for the product advertised (which, in this case, was gambling).[13] The Court also cited with approval a statement from an earlier case that the third prong of *Central Hudson* is satisfied where the legislative judgment is "not manifestly unreasonable."[14]

In subsequent cases, however, the Court has not deferred as readily to legislative judgments that a restriction directly advances the asserted governmental interest. In *Edenfield v. Fane*,[15] for example, the Court struck down a Florida ban on solicitation by certified public accountants, even though the Court had previously, in *Ohralik v. Ohio State Bar Association*,[16] upheld a ban on solicitation by attorneys. The Court found that the government had substantial interests in the ban, including the prevention of fraud, the protection of privacy, and the need to maintain CPA independence and to guard against conflicts of interest. However, the Court found no evidence that the ban directly advanced these interests, and noted, among other things, that, "[u]nlike a lawyer, a CPA is not 'a professional trained in the art of persuasion,'" and "[t]he typical client of a CPA is far less susceptible to manipulation than the young accident victim in *Ohralik*."[17]

In *Ibanez v. Florida Board of Accountancy*, the Court held that the Florida Board of Accountancy could not reprimand an accountant for truthfully referring to her credentials as a Certified Public Accountant and a Certified Financial Planner in her advertising and other communication with the public, such as her business cards and stationery. The Court applied the *Central Hudson* test, noting that "the State 'must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.'"[18]

In *Rubin v. Coors Brewing Co.*, the Court struck down a federal statute, 27 U.S.C. § 205(e), that prohibits beer labels from displaying alcohol content unless state law requires such disclosure.[19] The Court found sufficiently substantial to satisfy the second prong of the *Central Hudson* test the government's interest in curbing "strength wars" by beer brewers who might seek to compete for customers on the basis of alcohol content. However, it concluded that the ban "cannot directly and materially advance" this "interest because of the overall irrationality of the

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[13] *Id*. at 341-342.

[14] *Id*. at 342, citing Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981).

[15] 507 U.S. 761 (1993).

[16] 436 U.S. 447 (1978).

[17] Edenfield, *supra* note 15, at 775.

[18] 512 U.S. 136, 143 (1994).

[19] 514 U.S. 476 (1995).

Government's regulatory scheme."[20] This irrationality is evidenced by the fact that the ban does not apply to beer advertisements, and by the fact that the statute *requires* the disclosure of alcohol content on the labels of wines and spirits.

Finally, in *44 Liquormart*, the Court, in striking down a prohibition on advertising the price of alcoholic beverages, found that Rhode Island had not met its burden of showing that the "ban will significantly advance the State's interest in promoting temperance."[21] "[T]he State's own showing," the Court wrote, "reveals that any connection between the ban and a significant change in alcohol consumption would be purely fortuitous. . . . [A]ny conclusion that elimination of the ban would significantly increase alcohol consumption would require us to engage in the sort of 'speculation or conjecture' that is an unacceptable means of demonstrating that a restriction on commercial speech directly advances the State's asserted interest."[22]

Cases like *Edenfield*, *Ibanez*, *Rubin*, and *44 Liquormart* indicate that, to satisfy the third prong of the *Central Hudson* test, the government must present evidence to support its claim that its restriction on commercial speech directly and materially advances a substantial governmental interest. In *Florida Bar v. Went For It, Inc.*, the Court upheld a rule of the Florida Bar that prohibited personal injury lawyers from sending targeted direct-mail solicitations to victims and their relatives for 30 days following an accident or disaster.[23] The Bar argued "that it has a substantial interest in protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers,"[24] and the Court found that "[t]he anecdotal record mustered by the Bar" to demonstrate that its rule would advance this interest in a direct and material way was "noteworthy for its breadth and detail"; it was not "mere speculation and conjecture."[25]

When the Food and Drug Administration promulgated tobacco advertising restrictions, it concluded "that tobacco advertising plays a concrete role in the decision of minors to smoke, and that each specific restriction on this advertising that it is adopting will contribute to limiting its effect and thus to protecting the health of children and adolescents under the age of 18."[26] If this is true, then the advertising restrictions would, in general, apparently satisfy the third prong of the *Central Hudson* test. Of course, it is possible for a court to find some of the restrictions in § 906 constitutional but others unconstitutional.

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[20] *Id*. at 488.

[21] 116 S. Ct. at 1509.

[22] *Id*. at 1510.

[23] *Florida Bar*, *supra* note 6.

[24] *Id*., 515 U.S. at 624.

[25] *Id*. at 627.

[26] 61 Fed. Reg. 44,474 (1996). These regulations have not taken effect because a federal court held that the FDA lacked the statutory authority to implement them. Coyne Beahm, Inc. v. United States, 958 F. Supp. 1060 (M.D. N.C. 1997).

The FDA, in connection with its regulations, wrote: "It is not necessary in satisfying this prong of *Central Hudson* for the agency to prove conclusively that the correlation [between advertising and minors' smoking] in fact (empirically) exists, or that the steps undertaken will completely solve the problem. . . . Rather, the agency must show that the available evidence, expert opinion, surveys and studies provide sufficient support for the inference that advertising does play a material role in children's tobacco use."[27] This seems accurate, given the Court's acceptance of anecdotal evidence (albeit anecdotal evidence "noteworthy for its breadth and detail") in *Florida Bar v. Went For It, Inc.*, even though anecdotal evidence by itself cannot conclusively prove general propositions.

In sum, it appears likely that the restrictions of § 906 would satisfy the third prong if the government can present evidence that they will reduce the demand for tobacco and thereby reduce the incidence of tobacco-related illnesses.

Applying *Central Hudson*: Fourth Prong

We now turn to the fourth and final requirement of the *Central Hudson* test — that restrictions on commercial speech represent a reasonable "fit" between the legislature's ends and the means chosen to accomplish those ends. As noted above, this prong requires that a restriction be more than merely rational, but not necessarily the least restrictive means to advance the asserted governmental interest.[28] In *Cincinnati v. Discovery Network, Inc.*, the Supreme Court struck down a Cincinnati regulation that banned newsracks on public property if they distributed commercial publications, but not if they distributed news publications.[29] The Court found that the asserted governmental interest in safety and esthetics was substantial, but that the distinction between commercial and noncommercial speech "bears no relationship *whatsoever* to the particular interests that the city has asserted."[30] The city, therefore, did not establish "the 'fit' between its goals and its chosen means that is required by our opinion in *Fox*."[31]

In *44 Liquormart*, the Court found it "perfectly obvious that alternative forms of regulation would be more likely to achieve the State's goal of promoting temperance. As the State's own expert conceded, higher prices can be maintained either by direct regulation or by increased taxation. . . . Even educational campaigns . . . might prove to be more effective."[32]

The Court's strong language in *Cincinnati v. Discovery Network* ("no relationship *whatsoever"*) and in *44 Liquormart* ("perfectly obvious") suggests that it found the regulations it struck down in those two cases to be particularly poorly

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[27] *Id.*

[28] *See*, text accompanying note 9, *supra*.

[29] 507 U.S. 410 (1993)

[30] *Id.* at 424 (emphasis in original).

[31] *Id.* at 428.

[32] *44 Liquormart*, *supra* note 10, 116 S. Ct. at 1510.

thought-out. Section 906, in general, does not appear similar in this respect. However, the reasonableness of its 18 restrictions must be considered one by one, which we do after we consider the effect of *44 Liquormart*.

Effect of *44 Liquormart*

As noted above, the Supreme Court in *44 Liquormart* indicated that a total prohibition on "the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process" will be subject to a stricter review by the courts than a regulation designed "to protect consumers from misleading, deceptive, or aggressive sales practices."[33] Section 906, like the speech restriction struck down in *44 Liquormart*, appears primarily intended to reduce consumption of a dangerous product rather than to protect consumers from unfair sales practices.[34] Section 906, however, unlike the speech restriction struck down in *44 Liquormart*, would not impose a total prohibition on any information sought to be advertised.

In addition, the fact that § 906 is intended to protect minors may help to distinguish it from the Rhode Island statute. A thread that appears to run through *44 Liquormart* is the Justices' hostility to the paternalistic aspect of Rhode Island's ban. In Part IV of the Court's opinion, Justice Stevens writes:

> The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.[35]

In Part V, he adds that mere speculation as to whether "a restriction on commercial speech directly advances the State's asserted interest . . . certainly does not suffice when the State takes aim at accurate commercial information for paternalistic ends."[36] Justice Scalia, concurring, indicated that he "share[s] Justice Stevens' aversion toward paternalistic governmental policies that prevent men and

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[33] *Id*. at 1507, quoted in the text accompanying note 10, *supra*.

[34] The "goals and purposes" of S. 1648, spelled out in § 3, all appear to focus on reducing underage use of tobacco products. The FDA argued that its restrictions were related to the bargaining process, as they "derive from the fact that, at least as a matter of law, minors are not competent to use these products." 61 Fed. Reg. 44,470. It would seem to strengthen the FDA's case in this regard if we read this instead to mean that minors are not competent to resist tobacco advertisements. This argument would also seem available to S. 1648, but with less force because, though S. 1648 is intended to protect youth, its restrictions apply to more advertisements aimed at adults, and so seem less designed to protect consumers from misleading, deceptive, or aggressive sales practices. For example, the FDA's restrictions would ban tobacco billboards within 1,000 feet of a school or playground, whereas S. 1648 would ban all outdoor tobacco billboards.

[35] *44 Liquormart*, *supra* note 10, 116 S. Ct. at 1508.

[36] *Id*. at 1510.

women from hearing facts that might not be good for them."[37] Justice Thomas, in his concurring opinion, refers to "the antipaternalistic premises of the First Amendment."[38]

Nevertheless, although § 906 is designed to protect minors, it would limit advertisements aimed at adults as well as at children. In the context of "indecent" material, the Supreme Court has reiterated that the government may not "reduce the adult population . . . to reading only what is fit for children."[39] Thus, for example, indecent material may not be banned from the airwaves for 24 hours a day,[40] and adults' access to indecent material on the Internet may not be precluded in order to protect children, at least if less restrictive means to protect children are available.[41] This principle may not apply quite as forcefully to governmental restrictions of commercial speech, however, as adults' access to indecent material, unlike to commercial speech, receives full First Amendment protection. Nevertheless, the Justices' discomfort with the paternalism they perceived in the Rhode Island statute suggests that, even if a commercial speech restriction aimed at public health might otherwise pass the *Central Hudson* test, it might not if it restricts adults' access to truthful, nonmisleading commercial messages.

Prior to *44 Liquormart*, the U.S. Court of Appeals for the Fourth Circuit, in two cases, upheld municipal restrictions on billboard advertisements of tobacco products and alcoholic beverages.[42] Then, after *44 Liquormart*, the Supreme Court vacated and remanded both cases "for further consideration in light of *44 Liquormart* . . . ."

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[37] *Id*. at 1515 (Scalia, J., concurring).

[38] *Id*. at 1517 (Thomas, J., concurring).

[39] Bolger v. Youngs Drug Products, Inc., 463 U.S. 63, 73 (1983); *Sable*, *supra* note 5, 492 U.S. at 128.

[40] Action for Children's Television v. Federal Communications Commission, 932 F.2d 1504, 1509 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 913 (1992).

[41] Reno v. ACLU, 117 S. Ct. 2329 (1997). The Court wrote in that case:

> In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve. . . . As we have explained, the Government may not "reduc[e] the adult population . . . to . . . only what is fit for children."

Id. at 2346. There is a tension between the second and third quoted sentences with which the Court did not deal: if there are no less restrictive alternatives available, then may the government reduce the adult population to only what is fit for children?

[42] Penn Advertising of Baltimore, Inc. v. Mayor and City Council of Baltimore, 63 F.3d 1318 (4th Cir. 1995), *vacated and remanded*, 116 S. Ct. 2575 (1996); Anheuser-Busch, Inc. v. Schmoke, 63 F.3d 1305 (4th Cir. 1995), *vacated and remanded*, 116 S. Ct. 1821 (1996).

Next, the Fourth Circuit, after further consideration in light of *44 Liquormart*, readopted its previous decisions in both cases, and the Supreme Court subsequently declined to review the cases.[43] In *Penn Advertising*, the tobacco advertising case, the court said simply that it was readopting its previous decision for the reasons it gave in its opinion issued the same day in *Anheuser-Busch*, the alcoholic beverage advertising case. In that case, the court wrote that, in its previous decision,

> we recognized the reasonableness of Baltimore City's legislative finding that there is a "definite correlation between alcoholic beverage advertising and underage drinking." We also concluded that the regulation of commercial speech is not more extensive than necessary to serve the governmental interest. Recognizing that in the regulation of commercial speech there is some latitude in the "fit" between the regulation and the objective, we concluded that "no less restrictive means may be available to advance the government's interest." While we acknowledged that the geographical limitation on outdoor advertising may also reduce the opportunities for adults to receive the information, we recognize that there were numerous other means of advertising to adults that did not subject the children to "involuntary and unavoidable solicitation [while] . . . walking to school or playing in their neighborhood. . . .
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> In *44 Liquormart*, by contrast, the State prohibited all advertising throughout Rhode Island, "in any manner whatsoever," of the price of alcoholic beverages except for price tags or signs displayed with the beverages and not visible from the street. . . . While Rhode Island's blanket ban on price advertising failed *Central Hudson* scrutiny, Baltimore's attempt to zone outdoor alcoholic beverage advertising into appropriate areas survived our "close look" at the legislature's means of accomplishing its objective . . . . Baltimore's ordinance expressly targets persons who cannot be legal users of alcoholic beverages, not legal users as in Rhode Island. More significantly, Baltimore does not ban outdoor advertising of alcoholic beverages outright but merely restricts the time, place, and manner of such advertisements. And Baltimore's ordinance does not foreclose the plethora of newspaper, magazine, radio, television, direct mail, Internet, and other media available to Anheuser-Busch and its competitors.[44]

The pertinent question, it seems, is whether the restrictions that § 906 would impose would be more like those struck down in *44 Liquormart* or those upheld in the Fourth Circuit cases. Like the ordinances the Fourth Circuit upheld, § 906 would not impose a total ban on any information sought to be advertised. However, even though § 906 is intended to protect children, it would not be as narrowly focused on advertisements accessible to children as are the ordinances the Fourth Circuit upheld. It is not the case with § 906, as it was with the Baltimore ordinances, that it would

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[43] Penn Advertising v. Mayor and City Council of Baltimore, 101 F.3d 332 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1569 (1997); Anheuser-Busch v. Schmoke, 101 F.3d 325 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1569 (1997).

[44] 101 F.3d at 327-329 (citations omitted).

"not ban outdoor advertising of alcoholic beverages outright but merely restricts the time, place, and manner of such advertisements." But, like Baltimore's alcoholic beverage ordinance, it would not, except with respect to the Internet, foreclose the "plethora" of other media on which tobacco products may be advertised. At the same time, however, federal law already reduces the size of this "plethora," as it bans advertisements for cigarettes, little cigars, and smokeless tobacco "on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission."[45] This would be a factor that could be cited to argue that § 906 would have a more restrictive effect on adults than might appear from its face. In addition, § 906 would restrict the content of advertisements in media in which it would continue to permit advertisements, which is something the Baltimore ordinances do not do.

In conclusion, it appears that the degree of restrictiveness of § 906 would lie somewhere between that of the provision struck down in *44 Liquormart* and those upheld in the Fourth Circuit cases. Some of the prohibitions of § 906 would seem to include the sort of paternalism to which the Court objected in *44 Liquormart*, but others of its prohibitions seem more narrowly focused on protecting minors. We will distinguish among these in the next section of this memorandum.

First, however, we offer a more general comment. The decision in *44 Liquormart* might, on the one hand, be viewed as part of a trend on the Court's part to increase the First Amendment protection it accords to commercial speech. If this is in fact a trend, then the likelihood of its striking down substantial portions of § 906 would increase. On the other hand, the Court in *44 Liquormart*, as noted above, seemed to view the Rhode Island statute in question as particularly poorly thought-out, with the Court commenting "that any connection between the ban and a significant change in alcohol consumption would be purely fortuitous," and that "[i]t is perfectly obvious that alternative forms of speech would be more likely to achieve the State's goal of promoting temperance." Although § 906 would restrict more speech than the Baltimore ordinances do, it does not appear poorly thought-out in the manner that the Supreme Court seemed to think the Rhode Island statute in *44 Liquormart* was. But now we must examine the 18 prohibitions in § 906 individually, as that is how they will stand or fall.

Conclusions

We will list each the restrictions as summarized at the beginning of this memorandum and consider whether it would violate the First Amendment. This necessitates applying the four prongs of the *Central Hudson* test. However, we will take as a given that all the restrictions would pass the first two prongs, as tobacco advertising is legal and we will presume it is not misleading, and as restricting it would serve the substantial governmental interest of promoting public health. In addition, to the extent that the prohibitions would reduce children's exposure to tobacco advertisements, we will assume that they would directly and materially advance the governmental interest in reducing underage smoking. The constitutionality of most of the restrictions, therefore, will apparently turn on the fourth prong, which asks

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[45] 15 U.S.C. §§ 1335, 4402.

whether, for each restriction, there is a reasonable "fit" between the government's means and ends. The restriction must be more than merely rational, but need not necessarily be the least restrictive means available.

(1) "outdoor tobacco product advertising, including billboards, posters," etc. The constitutionality of this restriction is difficult to predict. If it were limited, as the Baltimore ordinance is, to outdoor advertising within 1,000 feet of a school or playground, then there would be a precedent for its constitutionality. The restriction as it stands clearly would reduce children's exposure to tobacco advertising, so it would seem likely to satisfy the third prong of *Central Hudson.* But it would also reduce adults exposure to tobacco advertising, so the government would apparently have to demonstrate that a restriction limited as the Baltimore ordinance is would leave minors overly exposed to tobacco advertising, and would not overly restrict adults' access to tobacco advertising.

(2) advertising "tobacco products in any arena or stadium where athletic, musical, artistic, or other social or cultural events or activities occur." This seems more likely than the outdoor advertising restriction to be found unconstitutionally overbroad, because it does not exempt events or activities that children are unlikely to attend. The government could accomplish its aim of protecting children without banning advertisements at performances from which children are excluded because they are X-rated (though, admittedly, such performances usually occur in theaters or bars rather than in arenas or stadiums). There are also performances from which children are not excluded, but which relatively few children attend, such as classical music concerts (other than those designed for children). If few children typically attend a particular type of performance, then one might challenge this restriction on the ground that it would not materially advance the governmental interest in protecting children, and would therefore fail the third prong. Or one might challenge it on the ground that it would unreasonably interfere with the rights of adults, and would therefore fail the fourth prong. These arguments would apply on the assumption that the advertisements in question could be easily taken up and down; if they were relatively permanent, then there would be a stronger argument that banning them would be constitutional.

(3) the use of "a human image or a cartoon character or cartoon-type character in [tobacco] advertising, labeling, or promotional material." If the government could present evidence that children respond particularly to human images and cartoon characters, then this restriction would apparently be constitutional to the extent that it would not overly restrict adults' access to the proscribed pictures.[46] It would, however, apparently be unconstitutional to the extent that it would apply to X-rated material unavailable to children, and perhaps also to the extent that it would apply to material with an intellectual content that would attract few minors.

(4) tobacco product advertising on the Internet "unless such an advertisement is inaccessible in or from the United States." Although the Supreme Court held in *Reno v. ACLU* that the government may not ban all indecent material from the Internet,

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[46]Pictures as well as words are protected by the First Amendment. *See*, Manuel Enterprises v. Day, 370 U.S. 478 (1962).

indecent material, unlike advertising, is fully protected under the First Amendment. Nevertheless, this restriction might well be found not to represent a reasonable "fit" under *Central Hudson*'s the fourth prong. There are Web sites available to adults only, by subscription only, which apparently could be excluded from the ban without significantly interfering with the goal of protecting minors. There are also public Web sites containing academic or intellectual material of little interest to minors, and it seems unlikely that minors would visit them solely to view tobacco advertisements.

(5) for each manufacturer and retailer, more than a specified number of "point-of-sale advertisements in or at each location at which tobacco products are offered for sale." Such advertisements could be no larger than a specified size, consist of other than black letters on a white background, or be "located within 2 feet of any fixture on which candy is displayed for sale." If the government could present evidence that this restriction could reduce underage smoking, then it would seem likely to be upheld, as it would allow some point-of-sale advertisements. An opponent of the restriction could argue, however, that the size restriction would too severely limit the amount of information that could be communicated to adults.

(6) playing or viewing of audio and video advertisements at points of sale. If the government could present evidence that children respond particularly to such advertisements, then this restriction would seem likely to be found constitutional, as it would not deprive adults of access to any written message that a tobacco company wished to communicate.

(7) "[d]isplay fixtures in the form of signs consisting of brand name and price that are . . . larger than 2 inches in height." If the government could present evidence that children respond particularly to such signs, then this restriction would seem likely to be found constitutional, as it would not deprive adults of access to any written message that a tobacco company wished to communicate.

(8) use of "a trade or brand name of a nontobacco product as the trade or brand name for a cigarette or smokeless tobacco product," except for trade or brand names in use on or before January 1, 1995. In *Friedman v. Rogers*, the Supreme Court held that a state statute that prohibited optometrists from doing business under a trade name rather than under their own names did not violate the First Amendment.[47] The Court noted that "[t]he use of trade names . . . is a form of commercial speech and nothing more," and "a form of commercial speech that has no intrinsic meaning. A trade name conveys no information about the price and nature of the services offered . . . until it acquires meaning over a period of time by associations formed in the minds of the public between the name and some standards of price or quality."[48]

(9) advertising tobacco products in a medium *other than* a newspaper, magazine, billboard, poster, placard, nonpoint-of-sale promotional material (including direct

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[47] 440 U.S. 1 (1979).

[48] *Id*. at 11-12. Although *Friedman* was decided before *Central Hudson*, and the Court therefore did not decide it by applying the *Central Hudson* test, the Court has cited it with approval in a decision subsequent to *Central Hudson*: San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 483 U.S. 522, 535 (1987).

mail), point-of-sale promotional material, audio or visual formats delivered at a point-of-sale, *unless* the manufacturer, distributor, or retailer that intends to advertise notifies the Commissioner of the Food and Drug Administration not less than 30 days prior to the date on which such medium is to be used. Section 906 does not state the purpose of this provision, nor specify what if anything the FDA may do with this information. Nor is it clear what the manufacturer, distributor, or retailer must notify the FDA of. If it is merely of the fact that it intends to advertise, then the provision might be upheld as analogous to requirements that groups notify authorities in advance of staging parades, in order to enable the government to regulate their "time, place, and manner."

(10) payments "by any manufacturer, distributor, or retailer for the placement of any tobacco product or tobacco product package or advertisement — (i) as a prop in any television program or motion picture produced for viewing by the general public; or (ii) in a video or on a video game machine." This provision would, in effect, prohibit particular forms of tobacco advertising, without regard to whether such advertising would be viewed by minors. It would appear unconstitutionally overbroad to the extent that it does not exclude X-rated material, and perhaps also to the extent that it does not exclude material with an intellectual content that would attract few minors.

(11) direct or indirect payments "by any manufacturer, distributor, or retailer to any entity for the purpose of promoting the image or use of a tobacco product through print or film media that appeals to individuals under 18 years of age or through a live performance by an entertainment artist that appeals to such individuals." If the word "appeals" in this provision were modified with a word like "significantly," then it would seem less subject to constitutional challenge. Without such a modifier, it could be construed to apply not merely to material aimed at children or at families, but to material aimed at adults that may appeal to a small number of minors.

(12) labeling or advertising for a tobacco product in other than black text on a white background, *except* (i) in any facility where vending machines and self-service displays are permitted under this chapter if the advertising involved . . . is not visible from outside of the facility; and . . . is affixed to a wall or fixture in the facility,"[49] or (ii) that appears in any "adult publication," which § 906 would define as publications with fewer than a specified percentage or number of readers under 18. This provision apparently would not apply to facilities that exclude minors (see footnote 2, *supra*), and would not apply to advertisements in adult publications. As "adult publication" would include not merely X-rated publications prohibited to minors, but all publications with fewer than a specified percentage or number of readers under 18, this restriction would not, like some of the previous restrictions, apply to material of an intellectual level that would appeal to few minors. Consequently, it appears more likely to be found constitutional.

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[49] Under § 908(i)(1), tobacco vending machines would be restricted to facilities that exclude individuals under 18. The intention presumably is the same for self-service displays, but the omission of § 908(j)(1)(C), which is referred to in § 908(i)(2), from the bill (at least from the version on the Internet) causes this intention not to be stated.

(13) tobacco advertising in audio format unless "limited to words only with no music or sound effects." Not being at all limited to advertising to which minors are exposed, this provision might be found unconstitutional.

(14) tobacco advertising in video format unless "limited to static black text only on a white background," with any audio in the advertising limited as in # 13. Not being at all limited to advertising to which minors are exposed, this provision might be found unconstitutional.

(15) marketing, licensing, distributing, or selling any non-tobacco item or service bearing the brand name, "logo, symbol, motto, selling message, recognizable color or pattern of colors, or any other indicia of product identification similar or identifiable to those used for any brand of tobacco products." This restriction seems the flip side of restriction # 8: whereas # 8 would prohibit nontobacco names for tobacco products, this one would prohibit tobacco names for nontobacco products. This restriction might then, as might # 8, be upheld on the basis of *Friedman v. Rogers*, *supra*. A case might be made, however, that *Friedman v. Rogers* is not as apropos here. The purpose of prohibiting tobacco brand names on nontobacco products arguably would be less to protect consumers from being misled when they purchase nontobacco products, as it would be to restrict a particular form of tobacco advertising. If so, the restriction might be unconstitutional because it would not be limited to nontobacco products used by children to a significant degree.

(16) offering to any person purchasing tobacco products any gift or item other than a tobacco product in consideration of the purchase, or of furnishing evidence, such as proofs-of-purchase, of a purchase. This provision would not limit speech and consequently would raise no First Amendment issue.

(17) sponsoring "any athletic, musical, artistic, or other social or cultural event, or any entry or team in any event, in which the brand name, "logo, symbol, motto, selling message, recognizable color or pattern of colors, or any other indicia of product identification similar or identifiable to those used for tobacco products is used." Our analysis of # 15 seems apropos here.

(18) sponsoring "any athletic, musical, artistic, or other social or cultural event in the name of the corporation which manufactures the tobacco product" *unless* (i) both the corporate name and the corporation were registered and in used in the United States prior to January 1, 1995; and (ii) the corporate name does not include any brand name, "logo, symbol, motto, selling message, recognizable color or pattern of colors, or any other indicia of product identification similar or identifiable with, those used for any brand of tobacco products." Our analysis of # 15 seems apropos here.