

BETTING ON OVERSIGHT: REPURPOSING REGULATIONS FOR CIGARETTE AND TOBACCO ADVERTISING TO ADDRESS SPORTS GAMBLING, AMERICA’S FASTEST GROWING VICE INDUSTRY

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INTRODUCTION

From dice games played on the sidewalk to the World Series of Poker, gambling has played an ever-present and controversial role in American culture since before the nation's founding.¹ In fact, lotteries helped fund the Revolutionary War.² Over time, American society's views on gambling have changed depending on the moral, economic, and jurisprudential paradigms of the day. For most of modern history, the federal government has maintained some regulations on sports gambling, such as licensing requirements or prohibitions on certain types of games.³ Several law school textbooks, especially those dealing with federal criminal law, highlight cases involving illegal sports gambling.⁴ Famous television series portray sports betting as a feature of organized crime, reflecting much of the country's impression of the business.⁵ For most of the last thirty years, sports gambling prohibitionists ran the table when Congress passed the Professional and Amateur Sports Protection Act of 1992 (PASPA), effectively outlawing sports gambling outside of a handful of grandfathered states.⁶

However, in *Murphy v. National College Athletic Ass'n*,⁷ the U.S. Supreme Court determined that PASPA's main provisions violated the anticommandeering principle embedded in the Tenth Amendment, and thus, the Court struck down the law in its entirety.⁸ This case represents a significant victory for federalism as states seek to reap the benefits of liberalizing sports gambling.⁹ On the other

1. See generally *A History of American Gaming Laws*, HG.ORG LEGAL RES., <https://www.hg.org/legal-articles/a-history-of-american-gaming-laws-31222> (last visited May 10, 2022) (describing the history of gambling in the United States).

2. Becky Little, *Lottery Tickets Helped Fund America's 13 Colonies*, HIST. (Oct. 11, 2019), <https://www.history.com/news/13-colonies-funding-lottery>.

3. See, e.g., Federal Wire Act, 18 U.S.C. § 1084 (1964) (prohibiting certain types of gambling businesses that operate using wire communications); Unlawful Internet Gambling Enforcement Act, 31 U.S.C. § 5363 (2006) (prohibiting gambling businesses from "knowingly accept[ing] [payments] in connection with the participation of another in unlawful Internet gambling").

4. See generally *Katz v. United States*, QUIMBEE, <https://www.quimbee.com/cases/katz-v-united-states> (last visited May 10, 2022) (citing thirty contemporary casebooks that use *Katz* as an example for six different law school subjects).

5. See, e.g., Jimmy Traina, 'Sopranos' All-Time Best Sports Scenes: TRAINA THOUGHTS, SPORTS ILLUSTRATED (June 10, 2020), <https://www.si.com/extra-mustard/2020/06/10/best-sopranos-sports-moments> (commenting on a scene from *The Sopranos* involving sports betting).

6. See generally 28 U.S.C. §§ 3701–04 (repealed 2018) (prohibiting sports gambling).

7. 138 S. Ct. 1461 (2018).

8. *Id.* at 1478.

9. See Jonathan O. Ballard, Comment, *Murphy v. NCAA: The Supreme Court's Latest Advance in Chemerinsky's "Federalism Revolution,"* 52 LOY. L.A. L. REV. 173, 173–74 (2018) (declaring the *Murphy* ruling "a major victory for federalists").

hand, the federal government is uniquely capable of reining in this national industry to minimize problem gambling, thereby inherently limiting those benefits. If sports gambling cannot reach a critical mass of regular bettors as legalization spreads, states will not recover as much tax revenue as projected.¹⁰ Since 2018, almost half of U.S. states have authorized sports betting, and scores of casinos and other companies have opened sportsbooks¹¹ to meet the growing demand.¹² At the same time, a concerted effort to create more demand for sports gambling by recruiting brand-loyal bettors has emerged as one of the noisiest marketing campaigns across all industries.¹³ Sportsbook advertisements have been among the most common on television and social media platforms in the three years since *Murphy*.¹⁴

10. See *Economic Impact of Legalized Sports Betting*, OXFORD ECON., 1, 4–5, 27–53 (May 2017), https://www.americangaming.org/wp-content/uploads/2019/02/AGA-Oxford-Sports-betting-impacts-2017-May_FINAL-report.pdf (displaying tables of theoretical state tax revenues from sports gambling in a study commissioned by the American Gaming Association).

11. “Sportsbook” gambling is what most would recognize as sports betting; a sportsbook is the entity, online or in-person, through which gamblers place their bets on the “moneyline” (who wins the game), “over/under” (total points scored), or other common bets. See *Types of Sports Betting — Different Ways to Bet*, GAMBLINGSITES.COM, <https://www.gamblingsites.com/sports-betting/types> (last visited May 10, 2022); Darren Rovell, *Where Is Sports Betting Legal? Projections for All 50 States*, ACTION NETWORK (Feb. 12, 2022, 1:05 PM), <https://www.actionnetwork.com/news/legal-sports-betting-united-states-projections>.

12. Rovell, *supra* note 11; Ryan Rodenberg, *United States of Sports Betting: An Updated Map of Where Every State Stands*, ESPN (Apr. 7, 2021), https://www.espn.com/chalk/story/_/id/19740480/the-united-states-sports-betting-where-all-50-states-stand-legalization.

13. See Daniel Roberts, *As Live Sports Return to TV, So Do DraftKings and FanDuel Ads*, YAHOO! FINANCE (Aug. 3, 2020), <https://www.yahoo.com/now/as-live-sports-return-to-tv-so-draft-kings-and-fan-duel-ads-204403327.html> (explaining DraftKings and FanDuel’s race to open sportsbooks in multiple states upon the legalization of sports betting). This concerted advertising conspicuously expanded during Super Bowl LV in 2021, and it carried forward to Super Bowl LVI in 2022. See Adam Chandler, *Sports Betting is Ruining More Than Your Bank Account*, ATLANTIC (Feb. 11, 2022) <https://www.theatlantic.com/technology/archive/2022/02/sports-betting-super-bowl/622058/> (highlighting 2021’s relevant advertising trends in the week approaching Super Bowl LVI and referencing several issues relevant to this Comment); Joe Hernandez, *Online Betting Companies are Kicking off a Super Bowl Ad Blitz*, NPR (updated Feb. 13, 2022, 6:35 PM), <https://www.npr.org/2022/02/11/1079880190/super-bowl-betting>. Though it is beyond the scope of this Comment, the running of sports gambling advertisements alongside those for cryptocurrency investing during Super Bowl LVI merits additional consideration. See, e.g., Tiffany Hsu, *Crypto Companies Weren’t the Only Advertising First-Timers*, N.Y. TIMES (Feb. 13, 2022), <https://www.nytimes.com/2022/02/13/business/media/coinbase-crypto-super-bowl-commercials.html>; Terry Nguyen, *The Winner of This Year’s Super Bowl: Money*, VOX (updated Feb. 14, 2022, 9:43 AM), <https://www.vox.com/the-goods/22925225/super-bowl-ads-money-crypto-sports-betting>.

14. See generally 138 S. Ct. 1461 (declaring the Professional and Amateur Sports Protection

Around 2015, however, a popular form of quasi-sports betting appeared in mainstream sports discussions called daily fantasy sports (DFS).¹⁵ Between 2015 and 2018, DFS incited a widespread desire to legalize sports gambling, but there was a considerable amount of debate as to whether lawmakers should consider DFS a form of gambling at all.¹⁶

Regardless of any official distinctions between sportsbooks and DFS, these companies are engaged in a marketing crusade that mirrors what generations of Americans were subjected to by Big Tobacco.¹⁷ Tobacco companies were once some of the most prominent advertisers.¹⁸ They advertised on many platforms, ranging from plastering images on billboards to sponsoring some of the most famous shows on television.¹⁹ Tobacco advertising spawned many mainstream cultural institutions. For example, R.J. Reynolds's sponsorship of the former "Winston Cup" greatly expanded NASCAR's popularity outside of the South.²⁰ However, activists recognized early on that the marriage between tobacco and the growing television industry, in particular, was problematic.²¹

Act (PASPA) in violation of the anticommandeering rule and no provisions severable from the provisions at issue); *see also* Roberts, *supra* note 13 (discussing the million-dollar budgets of sportsbook advertising companies).

15. *See generally* Zachary Shapiro, Note, *Regulation, Prohibition, and Fantasy: The Case of FanDuel, DraftKings, and Daily Fantasy Sports in New York and Massachusetts*, 7 HARV. J. SPORTS & ENT. L. 277 (2016) (discussing the debate surrounding whether daily fantasy sports (DFS) constitutes gambling in highly publicized state debates).

16. *See, e.g.*, Walt Bogdanich & Jacqueline Williams, *For Addicts, Fantasy Sites Can Lead to Ruinous Path*, N.Y. TIMES (Nov. 22, 2015), <https://www.nytimes.com/2015/11/23/sports/fantasy-sports-addiction-gambling-draftkings-fanduel.html>. This article comes from a New York Times series titled "Wired For Profit" published from October to November 2015. It explores the similarities between sports gambling and daily fantasy sports. For further discussion of the debate over DFS, *see infra* Part I.A.

17. *See infra* Parts I.A–Big Tobacco's Mission: Priming New Generations of Smokers

18. U.S. DEP'T OF HEALTH & HUMAN SERVS., NAT'L CANCER INST., NIH PUB. NO. 07-6242, THE ROLE OF THE MEDIA IN PROMOTING & REDUCING TOBACCO USE 124–26 (2008) (displaying data comparing marketing expenditures of tobacco companies with those of other prominent brands).

19. Press Release, Radio Corp. of Am., RCA-NBC Firsts in Color Television, a Chronological List of Significant Firsts by the Radio Corporation of America and the National Broadcasting Company in Color Television (Mar. 27, 1955) (on file with RCA-NBC); Madison Miller, *I Love Lucy: Lucille Ball Used a Sly Trick with Her Cigarettes to Please Sponsors*, OUTSIDER (Mar. 9, 2021), <https://outsider.com/news/entertainment/i-love-lucy-lucille-ball-used-sly-trick-her-cigarettes>.

20. *See* David Dubczak, "What If?" Part III: What If We Still Called it the Winston Cup?, BLEACHER REP. (Jan. 18, 2010), <https://bleacherreport.com/articles/328730> (noting that R.J. Reynolds ceased sponsorship of NASCAR in the wake of early-2000s legal and political issues).

21. *See* Ronald Bayer, *Tobacco, Commercial Speech, and Libertarian Values: The End of the Line for*

Different considerations guided each era of restrictions on tobacco advertising, from both legal and moral perspectives. For instance, in the late 1960s, the Fairness Doctrine²² provided the basis for the Federal Communications Commission's (FCC's) determination that networks must allot "a significant amount" of advertising time for anti-smoking messaging free of charge.²³ Other regulations, many of which existed at the state level but were overturned judicially,²⁴ focused on prohibiting advertising in places frequented by children, such as near schools.²⁵ Cigarette advertising essentially earned its own jurisprudence in the Supreme Court due to its prevalence as a hotly debated public concern.²⁶

The 2009 Family Smoking Prevention and Tobacco Control Act (Tobacco Control Act) solidified certain restrictions on cigarette advertising that had frequently been the subject of legal scrutiny since the 1964 Surgeon General's Report—the federal government's first official recognition of the harms associated with smoking.²⁷ From 2010 onward, the federal agencies charged with enforcing the Tobacco Control Act have updated their regulations and guidance documents according to the latest advertising methods.²⁸ Different legislative and regulatory schemes have also changed each of the enforcing agencies' responsibilities for this issue.²⁹ Ultimately, today's

Restrictions on Advertising, 92 AM. J. PUB. HEALTH 356, 356 (2002) (citing *Banzhaf v. F.C.C.*, 405 F.2d 1082, 1096–1103 (D.C. Cir. 1968)); *id.* at 356 (citing *Advertisement of Cigarettes*, 34 Fed. Reg. 1,959, 1,960 (Feb. 11, 1969) (to be codified at 47 C.F.R. pt. 43)) (explaining that it would be at odds with the public interest to "present advertising promoting the consumption of the product posing [a] unique danger . . . in terms of an epidemic of deaths and disabilities").

22. The Fairness Doctrine was a 20th century Federal Communications Commission (FCC) rule requiring television and radio stations, then occupying a much more finite range of broadcast frequencies, to devote airtime "to discussing controversial matters of public interest" and "to air contrasting views regarding those matters." See Steve Rendall, *The Fairness Doctrine: How We Lost It, and Why We Need It Back*, FAIR (Jan. 1, 2005), <https://fair.org/extra/the-fairness-doctrine/>.

23. Bayer, *supra* note 21 (internal quotation omitted).

24. See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (holding unconstitutional several Massachusetts regulations on cigarette advertisements).

25. *Id.* at 533–34 (citing 940 MASS. CODE REGS. § 21.01 (2000) (repealed 2001)).

26. See discussion *infra* Part I.C.

27. See 21 U.S.C. § 387 [hereinafter Tobacco Control Act]; U.S. DEP'T HEALTH, EDUC., & WELFARE, PUB. HEALTH SERV. PUBL'N. NO. 1103, SMOKING & HEALTH: REPORT OF THE ADVISORY COMM. TO THE SURGEON GEN. OF THE PUB. HEALTH SERV. (1964) [hereinafter Surgeon General's Report].

28. See, e.g., *Advertising and Promotion Guidances*, U.S. FOOD & DRUG ADMIN. (May 4, 2021), <https://www.fda.gov/animal-veterinary/guidance-industry/advertising-and-promotion-guidances> (collection of linked guidance documents).

29. *Compare* Cigarette Labeling and Advertising Act, 15 U.S.C. § 1333(c) (giving the

regulatory model for cigarette advertising is primarily developed and enforced by a combination of the Food and Drug Administration (FDA), the Federal Trade Commission (FTC), and the FCC.³⁰ Since regulating sports gambling advertising does not concern the sale of a dangerous physical product—the usual standard for what is regulated by the FDA³¹—the FDA would potentially need to have its cigarette advertising model adopted by the larger Department of Health and Human Services (HHS), or another smaller agency within it. HHS has several subagencies that could adopt the FDA’s role if needed.³²

With a complex array of advertising issues requiring multiple agencies’ jurisdictions and resources, either Congress or the President should establish an interagency task force to create a cigarette advertising-type regulatory framework for sports gambling. Under this framework, different federal agencies would play distinct roles in developing and enforcing rules pursuant to a consolidated authorizing statute or executive order.³³ This model works best when an issue’s complexities render it too cumbersome to foist onto one existing agency, but it nonetheless has too specific a focus to warrant the creation of a whole new agency.³⁴ The fact that a useful multiagency regulatory model already exists—one which needs only a handful of alterations—makes the creation of a new agency particularly redundant.³⁵

Overall, a sports gambling advertisement task force should utilize the existing cigarette and tobacco advertisement model, but it should also develop and enforce new rules to account for the evolving marketing landscape. Part I of this Comment presents the parallel marketing histories of sports gambling and cigarettes, highlighting the relative lack of regulation for the former compared to the latter. Part II explains why the interagency task force model is most appropriate for tackling this issue in light of the

Federal Trade Commission (FTC) authority over cigarette advertisement controls), *with Tobacco Control Act*, 21 U.S.C. § 387(a) (2009) (giving responsibilities formerly held by FTC to the U.S. Food and Drug Administration (FDA), with revisions).

30. See discussion *infra* Part III.

31. U.S. FOOD & DRUG ADMIN., IMPLEMENTING THE TOBACCO CONTROL ACT THROUGH POL’Y, RULEMAKING, AND GUIDANCE (Jan. 26, 2018), <https://www.fda.gov/tobacco-products/about-center-tobacco-products-ctp/implementing-tobacco-control-act-through-policy-rulemaking-and-guidance>.

32. See *id.*; U.S. DEP’T OF HEALTH & HUMAN SERV., HHS AGENCIES & OFFICES, <https://www.hhs.gov/about/agencies/hhs-agencies-and-offices/index.html> (listing the U.S. Department of Health and Human Services (HHS) subagencies with links to each respective website).

33. See discussion *infra* Part III (highlighting the benefits of interagency task forces).

34. *Id.*

35. See discussion *infra* Part III (describing the multi-party agency regulatory model of FTC, FDA, and FCC for regulating tobacco advertising, and proposing the same for sports gambling).

complexity of digital advertising for sports gambling.³⁶ Part III analyzes the jurisdiction and proposed responsibilities of each of the chosen agencies, addressing possible challenges for each one. Finally, this Comment concludes that the regulatory framework for cigarette and tobacco advertising through the FTC, FDA, and FCC would capably manage the issue of sports gambling advertising with a few modifications.

I. THE MIRRORED HISTORIES OF TOBACCO AND SPORTS GAMBLING MARKETING

Today's sports gambling environment comprises many different forums. In places where sportsbooks have long taken legal bets due to exemptions in federal law, they have a storied tradition of operating within brick-and-mortar casinos. While there is certainly much to say about the advertising practices utilized by traditional casinos—and that remains relevant to some degree here—the emergence of online sports gambling has produced advertising that resembles now-outlawed cigarette and tobacco promotions.³⁷ Online sports gambling comes in two primary forms: traditional sportsbook betting and DFS.³⁸

In the 1960s, cigarette advertising, then commonplace, was suddenly exposed as a serious public health risk that lawmakers and federal regulators wanted to mitigate.³⁹ But enforcement of rules against cigarette and tobacco advertising did not begin in any significant way until almost the 1970s, when the consequences of tobacco use became widely understood and accepted after decades of disinformation.⁴⁰ In the decades after the release of the Surgeon General's Report in 1964, the Supreme Court's opinion as to whether tobacco companies had constitutional rights to advertise their dangerous products was constantly in flux.⁴¹ Lawmakers, attorneys, and

36. See *Murphy v. NCAA*, 138 S. Ct. 1461, 1484 (2018) (explaining that Congress must explicitly and discretely authorize federal regulation of advertising for a legal product).

37. See *infra* Part B (discussing the history of tobacco advertising and its regulation).

38. See *Types of Sports Betting — Different Ways to Bet*, GAMBLINGSITES.COM, <https://www.gamblingsites.com/sports-betting/types/> (last visited May 10, 2022) (providing the different types of sports betting). Most of the described types are available in typical sportsbooks. *Id.*

39. See Matthew R. Herington, *Tobacco Regulation in the United States: New Opportunities and Challenges*, 23 HEALTH L. 13, 13 (2010) (reviewing the history of tobacco regulation in the United States); see also *id.* at 15 (noting the effectiveness of advertising regulations in discouraging adolescents from taking up smoking).

40. *Id.* at 13 (“[B]y 1968, [the] percentage [of Americans who believed smoking caused cancer] had jumped to 78 percent.”).

41. See Bayer, *supra* note 21, at 356–59 (reviewing the Supreme Court decisions on tobacco advertising from the 1980s to the 2000s).

judges managed competing priorities—one in favor of free speech for corporations and the other concerned about public health issues.⁴² While this legal debate took place, however, cigarette companies took advantage of regulatory gaps and unclear commercial speech jurisprudence, bombarding all forms of media with advertisements.⁴³

Today, lawmakers have an opportunity to mitigate widespread problem gambling and associated health issues before the newly legalized industry becomes too great of a problem.⁴⁴ To take advantage of this opportunity, they must recognize the troubling public health similarities between the marketing tactics of two industries selling addictive and deleterious products. Both gambling and tobacco companies rely on captured return customers using their products regularly and continuously.⁴⁵ In both industries, addictive behavioral patterns incited and reinforced, at least in part, by exposure to advertising leads to further consequences down the line.⁴⁶ While smoking and problem gambling come with different symptoms—chronic physical illness versus serious mental health concerns, respectively—both involve significant long-term consequences, often including financial troubles, stemming from “proper” use of the respective products.⁴⁷ Therefore, federal regulators must analyze how sports gambling companies incorporate Big Tobacco’s advertising methods to apply the correlative regulatory model effectively.

42. *Id.* at 357.

43. See COMM. ON PREVENTING NICOTINE ADDICTION IN CHILD. & YOUTHS, INST. OF MED., GROWING UP TOBACCO FREE: PREVENTING NICOTINE ADDICTION IN CHILDREN AND YOUTHS 107–14 (Barbara S. Lynch & Richard J. Bonnie eds., 1994) [hereinafter GROWING UP TOBACCO FREE] (discussing the marketing forms employed by tobacco companies in the 1990s).

44. See NAT’L COUNCIL ON PROBLEM GAMBLING, A REVIEW OF SPORTS WAGERING & GAMBLING ADDICTION STUDIES EXECUTIVE SUMMARY, https://www.ncpgambling.org/wp-content/uploads/2020/01/Sports-gambling_NCPGLitRvwExecSummary.pdf (last visited May 10, 2022) (explaining how the current sports betting landscape creates a unique risk of fostering problem gambling).

45. GROWING UP TOBACCO FREE, *supra* note 43, at 115.

46. See Marc N. Potenza, *The Neurobiology of Pathological Gambling and Drug Addiction: An Overview and New Findings*, 363 PHIL. TRANS. R. SOC. B. 3181, 3181 (2008) (noting how many of the diagnostic criteria for problem gambling—including withdrawal, unsuccessful attempts to quit, and interference in other areas of life—are also central to diagnoses of “drug dependence”).

47. See Marie Fazio, *It’s Easy (and Legal) to Bet on Sports. Do Young Adults Know the Risks?*, N.Y. TIMES (Apr. 1, 2021), <https://www.nytimes.com/2021/04/01/sports/sports-betting-addiction.html> (emphasizing the psychological, physical, and social impacts of sports betting addictions); *Implementing the Tobacco Control Act through Policy, Rulemaking, and Guidance*, FDA (Jan. 26, 2018), <https://www.fda.gov/tobacco-products/about-center-tobacco-products-ctp/implementing-tobacco-control-act-through-policy-rulemaking-and-guidance> (“Tobacco is the only consumer product regulated by [the] FDA which causes disease, disability, and death when used as intended.”).

A. *Daily Fantasy Ads to Murphy v. NCAA*

1. *How Daily Fantasy Sports Became a Widely Advertised Form of Gambling*

Despite its steep increase over the last few years, the rise of sports betting advertisements may not have been so sudden. In the 1990s, companies of various sizes created a new fantasy sports model, a form of quasi-gambling called daily fantasy sports. Throughout the 2000s and early 2010s, the venture capital world became enamored with DFS and by 2015, two companies, DraftKings and FanDuel, emerged as the powerhouses of the budding industry, controlling ninety-five percent of the market combined.⁴⁸ When Congress included an exemption for fantasy sports in the anti-gambling provisions of the SAFE Port Act of 2006,⁴⁹ “[n]o one envisioned . . . that *seasonal bets* on fantasy teams would open the door to *daily wagering* and million-dollar prizes.”⁵⁰ Legislators naively regarded DFS as a harmless, logical evolution of traditional fantasy sports that teenagers play with their friends for much smaller prizes.⁵¹ In turn, DraftKings and FanDuel, among others, embarked on an extremely aggressive advertising campaign for their sparsely regulated business.⁵²

DFS reduces traditional fantasy sports from a season-long competition to one that repeatedly spans one weekend or less.⁵³ In traditional fantasy sports leagues, friends compete by “drafting” professional athletes onto their “fantasy teams”—which participants maintain for almost the full season—earning points based on the real-life athletes’ statistics.⁵⁴ Companies like

48. Shapiro, *supra* note 15, at 278.

49. Security and Accountability for Every Port Act, 31 U.S.C. § 5362(1)(E)(ix) (2006) (“The term ‘bet or wager’ . . . does not include . . . participation in any fantasy or simulation sports game or educational game or contest . . .”).

50. Walt Bogdanich, James Glanz, & Agustin Armendariz, *Cash Drops and Keystrokes: The Dark Reality of Sports Betting and Daily Fantasy Games*, N.Y. TIMES (Oct. 15, 2015), <https://www.nytimes.com/interactive/2015/10/15/us/sports-betting-daily-fantasy-games-fanduel-draftkings.html> (emphases added).

51. See Alex Huntsberger, *How Much Do People Spend on Fantasy Football*, OPPU (Aug. 25, 2021), <https://www.opploans.com/oppu/articles/how-much-do-people-spend-on-fantasy-football/> (describing a survey showing that the median buy-in for a fantasy football league is fifty dollars with a first-place prize of \$350).

52. See Roberts, *supra* note 13.

53. *Compare How To Play Daily Fantasy Sports*, DRAFTKINGS, <https://www.draftkings.com/how-to-play/> (last visited May 10, 2022) (“[C]ontests range from a day to a week . . .”), with Joseph Stromberg, *Fantasy Football, Explained for Non-Football Fans*, VOX (Aug. 24, 2015, 10:15 AM), <https://www.vox.com/2014/8/15/6003131/fantasy-football-how-to-play-draft-rankings> (“Traditional leagues are season-long . . .”).

54. Stromberg, *supra* note 53.

ESPN and Yahoo! Sports have long offered customizable online formats for public leagues that any user can join or private leagues among friends.⁵⁵

In a traditional fantasy league, one could reasonably claim that a participant's ability makes it a legitimate game of skill. Effective participants negotiate trades with competitors,⁵⁶ craft their rosters to maximize dominance in particular aspects of the game, and keep watchful eyes on the waiver wire.⁵⁷ Conversely, DFS's condensed model makes it much less a game of skill and more one of chance—or in other words, gambling.⁵⁸ To see this difference, look no further than instances of unpredictable injuries or improper calls by referees that can, in a moment, completely change the outcome of a daily wager.⁵⁹ Despite these common obstacles, a moderately knowledgeable participant in a season-long league could skillfully mitigate their losses. Strengthening the argument that DFS is gambling is the fact that, as soon as the Supreme Court held the federal ban on sports gambling unconstitutional, the two largest DFS companies opened sportsbooks—a widely recognized form of sports betting—on the same websites as their fantasy games.⁶⁰

55. Notably, neither ESPN nor Yahoo! Sports allow for buy-in payments to be made directly on their websites. Participants must make their payments off the sites. Evidently, they recognize that fantasy sports can act as a form of sports betting. *See, e.g., Legal Restrictions*, ESPN, <https://support.espn.com/hc/en-us/articles/115003859212-Legal-Restrictions> (last visited May 10, 2022) (“Gambling Prohibition. This Promotion is strictly for entertainment purposes and may not be used in connection with any form of gambling.”).

56. In a season-long fantasy competition, participants can trade athletes with one another to try to improve their teams, much like the trading that occurs in real professional sports leagues. In DFS, no such opportunity exists, and each player is stuck with the choices they make on any given day until that matchup is over. *See supra* note 53 and accompanying text.

57. “Waivers” refers to the list of available, un-rostered players, both in real life and in fantasy sports, from which teams may select new players. In real life and traditional fantasy leagues, there are time restrictions on acquiring players and priority picking orders for teams. *Claim a Player Off Waivers*, ESPN, <https://support.espn.com/hc/en-us/articles/360000036711-Claim-a-Player-Off-Waivers> (last visited May 10, 2022).

58. Scott Nover, *The Rise of Daily Fantasy and Sports Betting has Created an Economy of its Own*, VOX (Jan. 29, 2020), <https://www.vox.com/2020/1/29/21112491/daily-fantasy-sports-betting-dfs-merch-analysis-weatherman> (“DFS . . . bridged the world of traditional friend-group fantasy with what we’re seeing now: a burgeoning sports-betting market . . .”).

59. For example, star forward Julius Randle broke his leg a mere fourteen minutes into his NBA debut in 2014. Jeff Zillgitt, *Seven NBA Rookies Who Began Careers Injured and What Happened to Them*, USA TODAY (updated Oct. 22, 2019, 11:02 AM), <https://www.usatoday.com/story/sports/nba/2019/10/22/zion-williamson-seven-nba-rookies-who-started-career-s-injured/4061189002/>. DFS players who selected Randle for that night most likely lost any chance to win money due to his injury, but traditional fantasy players, despite suffering a significant loss for their teams, did not.

60. *See* DRAFTKINGS SPORTSBOOK, <https://sportsbook.draftkings.com/sportsbook> (last

Daily fantasy's growth as a popular form of quasi-gambling has raised concerns for lawmakers all over the country, so much so that debate moderators in 2016 asked presidential candidate Jeb Bush a question on the issue during the Republican primaries.⁶¹ The debate over the status of DFS remains unresolved, and states treat the contests differently under state law.⁶² Some states maintain that DFS includes enough of the skill-based qualities of traditional fantasy sports to consider it outside the reach of state gambling laws.⁶³ Other states, including Nevada, have taken the opposite approach, choosing to regulate DFS as a form of gambling—in effect, calling DFS's bluff.⁶⁴ Some federal agencies, including the Internal Revenue Service (IRS), consider DFS a form of gambling; the IRS does this for tax purposes.⁶⁵ While this distinction may have some significance in legal and political debates, testimony from those suffering from gambling addiction, as well as associated research, have overwhelmingly shown that DFS triggers the same psychological response as any other form of sports gambling.⁶⁶

Capitalizing on a serious lack of state regulation or regulatory inconsistency where DFS laws exist, DraftKings and FanDuel both advertise prominently on television and on the Internet, particularly during live

visited May 10, 2022); FANDUEL SPORTSBOOK, <https://sportsbook.fanduel.com> (last visited May 10, 2022); *see also* Daniel Roberts, *FanDuel and DraftKings are Racing to Open Sports Betting Operations*, YAHOO! FINANCE (July 26, 2018), <https://www.yahoo.com/news/fanduel-draftkings-racing-open-sports-betting-operations-140027524.html> (last visited May 10, 2021).

61. Shapiro, *supra* note 15, at 277–78 (highlighting the difference of opinion between former Florida Governor Jeb Bush and then-New Jersey governor Chris Christie, a vocal proponent of legalizing sports gambling).

62. *Compare* Joe Drape, *Nevada Says It Will Treat Daily Fantasy Sports Sites as Gambling*, N.Y. TIMES (Oct. 15, 2015), <https://www.nytimes.com/2015/10/16/sports/gambling-regulators-block-daily-fantasy-sites-in-nevada.html> (quoting a Nevada sports lawyer: “[t]he Nevada Gaming Commission concluded that daily fantasy is gambling and needs to be licensed here”), *with* Dew-Becker v. Wu, 2020 IL 124472, ¶ 28 (ruling that DFS contests “are predominantly skill based”).

63. *See supra* note 62 and accompanying text.

64. *See* Drape, *supra* note 62 (noting that FanDuel and DraftKings continue to represent DFS as something other than a form of gambling).

65. Applicability of Section 165(d) to Daily Fantasy Sports Transactions, C.C.A. Mem. No. 202042015 (Sep. 14, 2020) (considering DFS a form of “wagering” under § 165(d) of the tax code); *see also* 26 U.S.C. § 165(d).

66. *See* Bogdanich & Williams, *supra* note 16; Sacha Feinman & Josh Israel, *The Hot New Form of Fantasy Sports is Probably Addictive, Potentially Illegal, and Completely Unregulated*, THINKPROGRESS (May 7, 2015), <https://archive.thinkprogress.org/the-hot-new-form-of-fantasy-sports-is-probably-addictive-potentially-illegal-and-completely-4c90c89db63b/>; Steve Petrella, *DFS player: How Daily Fantasy Ruined my Life*, SPORTING NEWS (Oct. 8, 2015), <https://www.sportingnews.com/us/fantasy/news/daily-fantasy-sports-dfs-gambling-addiction-regulation-lawsuit-industry-nfl/flkexo2yfb1udlyq9dc19uq>.

sporting events.⁶⁷ During the first week of the 2015 NFL season, DraftKings spent more on television advertisements than any other company in the United States.⁶⁸ The combined total advertising expenditures between DraftKings and FanDuel exceeded \$150 million in the fiscal quarter coinciding with the start of the NFL season.⁶⁹ Given the similarities between DFS and games widely recognized as gambling, the advertisements for these companies' sportsbooks currently use the same themes as they did when they only hosted daily fantasy games.⁷⁰ Daily fantasy companies clearly seek to capitalize on sportsbooks' similarities to DFS in the absence of a legal coupling of the two forms of sports gambling.

2. *Murphy and Post-PASPA Advertising Trends*

In 2018, the Supreme Court held PASPA unconstitutional in *Murphy v. NCAA*, ruling that the Act violated the anticommandeering doctrine.⁷¹ The Court reasoned that the federal government could not prevent state governments from legalizing sports gambling.⁷² At the time, several states—including New Jersey (whose governor, Phil Murphy, is a named petitioner)—wanted to pass laws authorizing and regulating sports gambling.⁷³ In the majority opinion, Justice Alito stressed that the provision in PASPA forbidding states from repealing their state law prohibitions on sports gambling did not regulate private conduct, and instead acted as a “direct command to the states” in violation of the anticommandeering principle.⁷⁴

67. See Roberts, *supra* note 13.

68. Shapiro, *supra* note 15, at 282.

69. *Id.*

70. Compare John T. Holden & Simon A. Brandon-Lai, *Advertised Incentives for Participation in Daily Fantasy Sports Contests in 2015 and 2016: Legal Classification and Consumer Implications*, 15 ENT. & SPORTS L. J. 1, 7 (2017) (highlighting “social interaction” between friends as a key theme in DFS advertising), with *DraftKings TV Spot, ‘Trash Talk’ Featuring Paul Pierce*, iSPOT.TV, <https://www.ispot.tv/ad/qNNG/draftkings-trash-talk> (last visited May 10, 2022) (displaying an advertisement for DraftKings Sportsbook featuring former NBA star Paul Pierce playing pick-up basketball with a friend while “trash talking” in a humorously positive way).

71. *Murphy v. NCAA*, 138 S. Ct. 1461, 1478 (2018).

72. *Id.* at 1481–85.

73. Adam Liptak & Kevin Draper, *Supreme Court Ruling Favors Sports Betting*, N.Y. TIMES (May 14, 2018), <https://www.nytimes.com/2018/05/14/us/politics/supreme-court-sports-betting-new-jersey.html> (“Across the country, state officials and representatives of the casino industry greeted the ruling with something like glee, nowhere more than in New Jersey, which anticipated the decision and had been prepared to quickly take advantage of it.”).

74. *Murphy*, 138 S. Ct. at 1481 (focusing on how § 3701(1) of the PASPA, the challenged section of the law, did nothing but prohibit states from authorizing sports gambling).

Citing legislative intent, the *Murphy* majority also held the PASPA provisions that barred private individuals from “sponsor[ing], operat[ing], or promot[ing]” sports gambling were not severable from the unconstitutional portions of the statute;⁷⁵ thus, these provisions were also held unconstitutional. Justices Breyer and Ginsburg both criticized this severability analysis, arguing that § 3702(2)⁷⁶ discretely, and thus, constitutionally, restricted individual conduct.⁷⁷ Therefore, Justice Ginsburg dissented, § 3702(2) could hold on its own as a prohibition on private actors from sponsoring, advertising, and promoting sports gambling.⁷⁸ Favoring new legislation over severing PASPA, Justice Alito explicitly acknowledged the validity of heavy regulations—rather than complete prohibitions—on cigarette and tobacco advertising insofar as that model exists as a legally permissible one.⁷⁹ Presumably, since the *Murphy* majority has already drawn the connection between cigarette and sports gambling advertisements, the Court should have no problem with federal regulators treating them alike if properly authorized with new, constitutional legislation.

Doing so would likely provide the regulatory backdrop necessary to prevent a problematic surge in sports gambling.⁸⁰ When the Supreme Court weakened or struck down regulations on cigarette advertising in the 1990s, teen and young adult usage increased dramatically, albeit briefly.⁸¹ While other cultural indicators may have contributed to that temporary uptick, one could reasonably link the pro-commercial advertising jurisprudence of the day with the smoking rate among young people.⁸²

75. *Id.* at 1483–84 (assuming Congress would not have wanted to prohibit advertising of an activity that is legal under both federal and state law) (internal quotation omitted); *see also* 28 U.S.C. §§ 3701, 3702.

76. 28 U.S.C. § 3702 (repealed 2018).

77. *Murphy*, 138 S. Ct. at 1488 (Breyer, J., concurring); *id.* at 1489–90 (Ginsburg, J., dissenting).

78. *Id.* at 1489–90 (Ginsburg, J., dissenting).

79. *Id.* at 1484 (“If these provisions were allowed to stand, federal law would forbid the advertising of an activity that is legal under both federal and state law, and that is something that Congress has rarely done. For example, the advertising of cigarettes is heavily regulated but not totally banned.”).

80. *See* Rich Schapiro, *Sports Betting Skyrocketed in Pandemic. Experts Warn of a ‘Ticking Time Bomb’*, NBC NEWS (May 15, 2021, 6:00 PM), <https://www.nbcnews.com/news/us-news/sports-betting-skyrocketed-pandemic-experts-warn-ticking-time-bomb-n1266518> (explaining that the boom in sports gambling cannot be sufficiently managed due to a combination of poor oversight of problem users by gambling companies and a lack of funding for addiction nonprofits).

81. *See* Am. Lung Ass’n, *Overall Tobacco Trends*, <https://www.lung.org/research/trends-in-lung-disease/tobacco-trends-brief/overall-tobacco-trends> (last visited May 10, 2022) (displaying data from 1965–2018).

82. *See generally* GROWING UP TOBACCO FREE, *supra* note 43, at 105–34.

Since at least 2015, DFS companies have bombarded every form of media with advertising.⁸³ Following *Murphy*, that trend has only gotten worse, and advertisers for sportsbooks have become similarly empowered to create new gamblers out of America's youth.⁸⁴ The sports gambling industry has largely utilized the same marketing techniques that Big Tobacco did for the century preceding the 2009 Tobacco Control Act.⁸⁵ For instance, tobacco companies consistently hired or sponsored celebrities to promote their brands.⁸⁶ Currently, actor Jamie Foxx is the face of MGM Resorts International's online sportsbook, BetMGM.⁸⁷ Several prominent former athletes, including Michael Jordan—who, notably, ignited gambling controversies during his storied NBA career—have been tapped to promote sportsbooks and other gambling ventures.⁸⁸ These celebrity endorsements will almost certainly inspire youth gambling in a similar way that endorsements for cigarette brands once tempted kids to smoke.⁸⁹

While traditional advertising methods remain effective for creating new demand, social media marketing for sports gambling has become increasingly pervasive, and, arguably, plays a greater role in enticing new young gamblers.⁹⁰ Younger generations are heavy social media users,⁹¹ and online sports gambling is incredibly easy to access; bettors need not even type a URL because advertisements on social media almost always contain hyperlinks to gambling sites.⁹² Unlike how a smoker must go to a store to

83. Shapiro, *supra* note 15, at 282 (“DraftKings and FanDuel spent more than \$150 million on TV and internet advertising in the quarter that included the beginning of the football season.”) (internal citation omitted).

84. See Roberts, *supra* note 13; Fazio, *supra* note 47.

85. See generally Tobacco Control Act, 21 U.S.C. § 387 (2009); see also GROWING UP TOBACCO FREE, *supra* note 43. For further discussion of cigarette advertising, see *infra* Part I.B–C.

86. See, e.g., Miller, *supra* note 19 (describing Lucille Ball's cigarette habit due to sponsorship).

87. Larry Gibbs, *Add Jamie Foxx for BetMGM to Growing List of Celebrities Pitching for Sportsbooks*, WSN (Sept. 24, 2020), <https://www.wsn.com/betting/jamie-foxx-for-betmgm-to-growing-list-of-celebrities-pitching-for-sportsbooks/>.

88. See *id.*

89. See Am. Ass'n of Advert. Agencies, *Celebrity Endorsers Have More Impact on Young Consumers*, 4A'S (Nov. 23, 2009, 6:44 PM), https://www.aaa.org/111709_celebrity/?cn-reloaded=1.

90. See Jessica Bursztynsky, *Instagram is the Best Way to Market to Teens, Says Piper Jaffray Survey*, CNBC (Apr. 8, 2019, 12:57 PM), <https://www.cnbc.com/2019/04/08/instagram-best-for-marketing-to-teens-snapchat-second-piper-jaffray.html>.

91. *Social Media Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/social-media/>.

92. Wayne Parry, *Bet Responsibly? A Struggle for Some as Sportsbook Ads Widen*, ASSOC. PRESS (June 1, 2019), <https://apnews.com/article/nm-state-wire-nv-state-wire-sports-betting-wv-state-wire-ap-top-news-15962a368b3d4250bd717906d442e8a2>.

buy cigarettes, an online sports bettor can gamble from their couch.⁹³

While DraftKings, FanDuel, and other gambling companies market aggressively online, typical consumers would not mistake their advertising for anything other than advertising due to both companies' preferences for traditional advertising. On the other hand, Barstool Sports (Barstool), a controversial, but extremely popular sports entertainment and gambling company,⁹⁴ takes a much more interactive approach to priming new gamblers. Barstool existed long before sports gambling prohibitions were repealed at the federal level, but it has offered gambling-related content since its inception.⁹⁵ The company, founded by Dave Portnoy,⁹⁶ primarily operates through social media, with a significant presence on Twitter, Instagram, and other popular websites.⁹⁷ It produces dozens of podcasts, YouTube series, and even had two brief television stints on Comedy Central and ESPN.⁹⁸ Barstool also contracts with local social media promoters, typically college students, to whom it licenses trademarks on the Internet.⁹⁹ While the company does not require student representatives to promote Barstool Sportsbook—and there is little evidence, if any, that college representatives promote gambling explicitly—the brand strength achieved by its non-gambling entertainment ventures undoubtedly draws young followers to the gambling operation.¹⁰⁰ Just as tobacco companies have long tried to link smoking to a fun

93. *See id.*

94. *See* BARSTOOL SPORTS, <https://www.barstoolsports.com> (last visited May 10, 2021).

95. Chris Spargo, *Saturdays are for the Boys: How Barstool Sports Grew from a Local Boston Paper into a Media Empire*, DAILY MAIL (Nov. 23, 2016, 3:38 PM), <https://www.dailymail.co.uk/news/article-3960576/Saturdays-boys-Barstool-Sports-grew-local-Boston-paper-media-empire.html>.

96. *See infra*, note 100 and accompanying text.

97. *See Advertising Inquiries*, BARSTOOL SPORTS, LLC <https://www.barstoolsports.com/partnerships> (last visited May 10, 2022) (showing statistics about the company's high engagement with its audience).

98. Michael David Smith, *NFL Pulls Credentials from Barstool Sports*, NBC SPORTS (Jan. 31, 2017, 8:58 AM), <https://profootballtalk.nbcsports.com/2017/01/31/nfl-pulls-credentials-from-barstool-sports/>; Brian Steinberg, *ESPN Cancels 'Barstool Van Talk,' Citing Concerns About Barstool Content*, VARIETY (Oct. 23, 2017, 1:05 PM), <https://variety.com/2017/tv/news/espn-cancel-barstool-van-talk-1202596760/>.

99. *See generally Viceroy Agreement*, BARSTOOL SPORTS, <https://www.barstoolsports.com/viceroy-signup> (last visited May 10, 2022). This page outlines the specific rules and responsibilities that social media users running what effectively amount to online franchises must adhere to while using Barstool's trademark.

100. *See* Peter Kafka, *A Casino Company is Buying Barstool Sports in a \$450 Million Deal*, VOX (Jan. 29, 2020, 1:37 AM), <https://www.vox.com/recode/2020/1/29/21113130/barstool-sports-penn-national-deal-dave-portnoy-chemin> ("Penn National . . . seems to think it can use Barstool's brand to bring traffic to its casinos and an online betting app it wants to launch."); John Dick, *Barstool Sports*

night out, sports gambling firms seek to tie wagering money to the enjoyment of athletic competitions. In fact, studies have shown a correlation between the 1990s bump in young adult smoking rates with some of the more lenient terms in the 1998 Master Settlement Agreement¹⁰¹ that allowed tobacco promotions at certain venues, most often bars and nightclubs.¹⁰²

Instead of advertising using traditional techniques, Barstool has completely invested in the influencer¹⁰³ and sponsorship strategies. The company can largely attribute its direct-to-consumer marketing strength to The Chernin Group (TCG), which acquired a majority ownership stake in Barstool Sports in 2016.¹⁰⁴ TCG, founded by longtime media executive Peter Chernin, has focused its portfolio on online content ranging from music to hunting videos to anime.¹⁰⁵ Barstool's partnership with TCG alone is not in and of itself problematic. Online content creators frequently contract with media companies and consultants to help promote their brands without instigating larger social issues. Instead, federal advertising regulators should take notice of the meeting of Barstool's partnerships with TCG and Penn National Gaming.¹⁰⁶

is *Legit*, CIVIC SCI. (Aug. 14, 2019), <https://civicscience.com/barstool-sports-is-legit/> (“A whopping 67% of daily Barstool users are under the age of [thirty].”). Recently, Penn National's relationship with Barstool has drawn scrutiny following a series of sexual assault allegations against Dave Portnoy. Katherine Sayre and Omar Abdel-Baqui, *Dave Portnoy Accusations Prompt Scrutiny of Barstool as Penn National Pursues Acquisition*, WALL ST. J. (Mar. 17, 2022), <https://www.wsj.com/articles/dave-portnoy-accusations-prompt-scrutiny-of-barstool-as-penn-national-pursues-acquisition-11647511200>.

101. See generally Tobacco Master Settlement Agreement (MSA) (1998). The MSA accomplished a lot of what federal regulators could not at that time, which helped establish many of the rules that Congress authorized the FDA to adopt in 2009. See Anne Hurst, Note, *Marketing, Federalism, and the Fight Against Teen E-Cigarette Use: Analyzing State and Local Legislative Options*, 69 CASE W. RES. L. REV. 173, 183–87 (2018) (noting benefits of state-led approaches while highlighting issues which must be addressed federally).

102. See Nancy A. Rigotti, Susan E. Moran & Henry Weschler, *US College Students' Exposure to Tobacco Promotions: Prevalence and Association with Tobacco Use*, 95 AM. J. PUB. HEALTH 138, 138, 142 (2005); see also Am. Lung. Ass'n, *supra* note 81.

103. The term “influencer” refers to an online personality who has “the power to affect the purchasing decisions of others because of his or her authority, knowledge, position, or relationship with his or her audience.” Werner Geysler, *What is an Influencer? — Social Media Influencers Defined [Updated 2022]*, INFLUENCER MKTG. HUB (Jan. 27, 2022), <https://influencermarketinghub.com/what-is-an-influencer/>. Oftentimes, this endorsement power is earned by simply accumulating large, engaged followings within social niches, which makes influencers' endorsements valuable to sellers of certain products enjoyed by those niches. See *id.*

104. Noah Kulwin, *The Chernin Group is Taking a Majority Stake in Controversial Website Barstool Sports*, VOX (Jan. 7, 2016, 11:10 AM), <https://www.vox.com/2016/1/7/11588594/the-chernin-group-is-taking-a-majority-stake-in-controversial-website>.

105. *Portfolio*, THE CHERNIN GRP., <https://tcg.co/portfolio/> (last visited May 10, 2021).

106. See Kafka, *supra* note 100.

In 2020, Barstool Sports officially transitioned into a gambling company, transcending the bounds of the sports media industry.¹⁰⁷ Consequently, for regulators, the company now belongs among the ranks of casinos, online sportsbooks, and daily fantasy sports sites. Barstool's shift to operating a sports betting enterprise raises questions as to what degree its entertainment content acts as a network of advertisements meant to promote the sportsbook. Social media influencing is a complicated topic, especially in the sports gambling industry, but federal regulators have already added it as an agenda item for further rulemaking.¹⁰⁸ Similarly, regulators should investigate the effect on sports gambling participation when mainstream sports networks, like ESPN, visibly partner with sportsbook and DFS companies. Overall, today's sports betting advertising landscape mirrors that of last century's cigarette and tobacco marketing, as well as current Big Tobacco advertising.¹⁰⁹ As such, regulations and restrictions like those currently applied to cigarette companies should apply to sports gambling companies.

B. Big Tobacco's Mission: Priming New Generations of Smokers

As much as gambling helped spark the early development of American culture, “[t]he history of tobacco is inextricably linked with the history of the United States” as well.¹¹⁰ From the end of World War II to the late 1960s, tobacco companies took full advantage of the budding television advertising industry, and, to a degree, financed the rise of television itself.¹¹¹ For example, in 1954, R.J. Reynolds Tobacco Company sponsored the first ever NBC color TV newscast, *Camel News Caravan*.¹¹² Phillip Morris, a major tobacco manufacturer, bankrolled *I Love Lucy*, the famous 1950s comedy watched by families nationwide, for most of the show's run.¹¹³

107. *Id.*

108. Press Release, FTC, CSGO Lotto Owners Settle FTC's First-Ever Complaint Against Individual Social Media Influencers (Sept. 7, 2017) [hereinafter FTC, CSGO Lotto Press Release]. See discussion *infra* Part III.A (noting how FTC social media advertising rules should apply to Barstool and others).

109. See Andrew Rowell, *Big Tobacco Wants Social Media Influencers to Promote its Products—Can the Platforms Stop It?*, THE CONVERSATION (Jan. 23, 2020, 3:46 AM), <https://theconversation.com/big-tobacco-wants-social-media-influencers-to-promote-its-products-can-the-platforms-stop-it-129957> (noting that, as recently as five years ago, tobacco companies began looking toward social media to replace old marketing platforms).

110. Herington, *supra* note 39, at 13.

111. See *supra* note 19 and accompanying text.

112. *Id.*

113. Miller, *supra* note 19.

As commercial speech jurisprudence developed mid-century,¹¹⁴ Big Tobacco continued its intense media campaign. While cigarette companies continue to deny this reality, the intention behind their marketing is, and has always been, clear: cigarette advertising primarily targets young people because they make up the next generation of smokers.¹¹⁵ Researchers have broadly determined that the cigarette market displays an extremely high degree of brand loyalty; Big Tobacco knows this intimately.¹¹⁶ As such, advertising rarely entices active adult smokers into trying new brands.¹¹⁷ Therefore, in order to acquire new, young, and loyal customers, tobacco companies used advertising strategies common for children and teens' products.¹¹⁸ Oftentimes, this was done through the use of characters that represented youthful social aspirations such as popularity, fitting in, anxiety relief, and a rite of passage to adulthood.¹¹⁹ One of the most notable examples of this is the "Marlboro Man," the cowboy character developed by Philip Morris in 1954.¹²⁰ More modern examples like R.J. Reynolds's "Old Joe Camel" made particularly clear that cigarette advertising first and foremost targeted young people.¹²¹

C. *The Movement to Minimize Cigarette Marketing*

In 1964, Surgeon General Luther L. Terry and the Advisory Committee on Smoking and Health published the U.S. government's first official recognition that smoking cigarettes can cause certain cancers and chronic bronchitis.¹²² The report spurred a movement for regulating the cigarette and tobacco industry in many ways, including regulating where people can

114. See discussion of commercial speech jurisprudence *infra* notes 132–149 and accompanying text.

115. GROWING UP TOBACCO FREE, *supra* note 43, at 115.

116. *Id.* at 115–17 (explaining how tobacco market segmentation works and why advertisements appeal to children and teens).

117. *Id.* at 116.

118. See *id.* at 116–21.

119. *Id.* at 120–21.

120. See Adrian Shirk, *The Real Marlboro Man*, ATLANTIC (Feb. 17, 2015), <https://www.theatlantic.com/business/archive/2015/02/the-real-marlboro-man/385447/>.

While Marlboro Man did not necessarily target children specifically, it would be difficult to argue that one of the most successful advertising campaigns of all time did not, in some way, entice children and teenagers to smoke. See GROWING UP TOBACCO FREE, *supra* note 43, at 120 ("Indeed, the popularity of the Marlboro cowboy dispels the myth that in order to appeal to young people . . . , the ad must show young people.") (internal citation omitted).

121. See GROWING UP TOBACCO FREE, *supra* note 43, at 116–17; Bayer, *supra* note 21, at 358.

122. See Surgeon General's Report, *supra* note 27, at 7–8.

smoke, cigarette ingredients, and the age at which Americans can purchase tobacco.¹²³ Requiring that cigarette companies place a “Surgeon General’s Warning” label on every box provides an example of a significant regulation specifically designed to discourage new smokers.¹²⁴ The FDA currently enforces this rule in place of the FTC, which originally had this authority.¹²⁵

One of the most important and expansive sets of regulations on tobacco, however, remains the limitations on marketing imposed on tobacco companies. From the very beginning of widespread television viewership, activists recognized the problematic marriage between the growing television industry and tobacco companies.¹²⁶ In 1967, John Banzhaf—The George Washington University law professor who founded the group Action on Smoking and Health—petitioned the FCC to require that public airwaves publish content that countered the prominent cigarette advertisements on TV.¹²⁷ In the era of the Fairness Doctrine, the FCC agreed with the argument that a narrowly tailored counter against this specific public health issue was worthwhile.¹²⁸ The Commission would soon thereafter require that TV and radio stations allot “a significant amount of time” to anti-cigarette messaging free of charge.¹²⁹ In 1971, the FCC went even further, completely banning cigarette advertisements on regulated television and radio airwaves, and in 1986, applying the prohibition to smokeless tobacco.¹³⁰ These FCC prohibitions remain in place, even after the abolition of the Fairness Doctrine in 1987.¹³¹

Within the Supreme Court’s development of a new commercial speech jurisprudence, the Court considered the cigarette question. For most of American history, the Court held that regulating purely commercial speech falls outside of constitutional scrutiny.¹³² Starting in the mid-1970s, however,

123. See Herington, *supra* note 39, at 13.

124. *Id.*

125. See 21 C.F.R. §§ 1143.3, 1143.5 (2018).

126. See *supra* note 21 and accompanying text.

127. Bayer, *supra* note 21, at 356.

128. *Id.* at 356–57.

129. *Id.* at 356; see also Banzhaf v. FCC, 405 F.2d 1082, 1093–1103 (D.C. Cir. 1968) (affirming the FCC’s authority to impose this requirement on TV and radio stations and holding that the Commission’s ruling did not violate the First Amendment).

130. *What do Tobacco Advertising Restrictions Look Like Today?*, TRUTH INITIATIVE (Feb. 6, 2017), <https://truthinitiative.org/research-resources/tobacco-industry-marketing/what-do-tobacco-advertising-restrictions-look-today>.

131. *Id.*

132. See, e.g., *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (“[T]he Constitution imposes no such restraint on government as respects purely commercial advertising. Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment.”).

the Court reevaluated this position, holding that, although commercial speech does merit some constitutional protection, it deserves “less . . . protection than social or political discourse.”¹³³ In fact, public health concerns, such as “abortion referral services, advertisements for contraceptives, [and] the price of pharmaceuticals” provided the backdrop for the Court’s evolving standards of balancing consumer protections with free speech.¹³⁴ When the Court decided *Central Hudson Gas & Electric Corp. v. Public Service Commission*¹³⁵ in 1980, it created a four-part test for commercial speech regulation, “emphasizing its lower level of constitutional scrutiny.”¹³⁶

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.¹³⁷

Even as the Supreme Court maintained the *Central Hudson* test, the 1990s represented an era of departure from precedent.¹³⁸

In several notable cases, including two involving gambling advertisements, the Court strengthened the First Amendment rights of private businesses to advertise.¹³⁹ In *FDA v. Brown & Williamson Tobacco Corp.*,¹⁴⁰ the Court held that the FDA overstepped its authority by “promulgat[ing] regulations governing tobacco products’ promotion, labeling, and accessibility to children and adolescents.”¹⁴¹ Relying on *Chevron U.S.A., Inc. v. Natural Resources*

133. Lawrence O. Gostin, *Corporate Speech and the Constitution: The Deregulation of Tobacco Advertising*, 92 AM. J. PUB. HEALTH 352, 352 (2002) (internal citation omitted).

134. *Id.* (internal citations omitted).

135. 447 U.S. 557 (1980).

136. Gostin, *supra* note 133, at 352.

137. *Central Hudson*, 447 U.S. at 566 (establishing the “*Central Hudson* test” for commercial speech regulation).

138. Gostin, *supra* note 133, at 352.

139. *Compare* *United States v. Edge Broad. Co.*, 509 U.S. 418, 426, 428–31 (1993) (determining that, under the *Central Hudson* test, a federal law prohibiting broadcasters in legal-lottery states from broadcasting lottery advertisements in non-lottery states advanced the government’s interest in accommodating states that wanted to discourage lottery participation), *with* *Greater New Orleans Broad. Ass’n v. United States*, 527 U.S. 173, 190–91, 195–96 (1999) (declining to extend *Edge*, deciding that 18 U.S.C. § 1304 and corresponding FCC regulations violated the First Amendment rights of private casinos in legal states wishing to advertise in states where casinos were illegal).

140. 529 U.S. 120 (2000).

141. *Id.* at 120, 128–29, 161.

Defense Council, Inc.,¹⁴² the Court determined that the FDA erred in interpreting its authorizing statute as allowing it to regulate cigarettes because it had not previously regulated tobacco products, and Congress had explicitly given tobacco regulation duties to other agencies.¹⁴³

This trend of conferring First Amendment rights on private companies paved the way for the Court to rule in *Lorillard Tobacco Co. v. Reilly*¹⁴⁴ that Massachusetts state regulations on cigarette advertising violated the Constitution.¹⁴⁵ Massachusetts's former scheme included rules ranging from prohibiting tobacco advertisements near schools, to regulating at what height stores could shelve cigarettes and smoking paraphernalia.¹⁴⁶ The Court first focused on federal preemption in striking down these state regulations, but it took the opportunity to additionally invalidate them on First Amendment grounds.¹⁴⁷ It required nearly another decade of congressional back-and-forth to pass the 2009 Tobacco Control Act.

Even after *Lorillard*, and likely because of the 2009 law passed in the meantime, the Supreme Court chose not to review a Sixth Circuit affirmation¹⁴⁸ of FDA regulations on cigarette packaging in 2013. The Court clearly felt that enough consideration of prior jurisprudence had been taken in promulgating new rules that it could allow the rules to stand. Even though the Supreme Court and federal advertising regulators have routinely upheld advertising restrictions for industries creating public health concerns,¹⁴⁹ the federal government has not put forth enough regulations to combat the issue of exploding sports gambling marketing.

142. 467 U.S. 837 (1984).

143. *Brown & Williamson*, 529 U.S. at 132–33, 161 (“[N]o matter how ‘important, conspicuous, and controversial’ the issue . . . , an administrative agency’s power to regulate . . . must always be grounded in a valid grant of authority from Congress.”) (quoting 529 U.S. at 190 (Breyer, J., dissenting)).

144. 533 U.S. 525 (2001).

145. *Id.* at 525.

146. *Id.* at 533–36.

147. *Id.* at 571.

148. Sam Baker, *Supreme Court Rejects Challenge to Tobacco Warnings*, THE HILL (Apr. 22, 2013 2:45 PM), <https://thehill.com/policy/healthcare/295255-supreme-court-rejects-challenge-to-tobacco-warnings>; see also *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509 (6th Cir. 2012) (upholding numerous FDA regulations on cigarette advertising).

149. *Cf.* *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980) (establishing the test for commercial speech balancing free speech with substantial government interest).

II. THE INTERAGENCY TASK FORCE MODEL

For many regulatory issues, a single agency or department has all the tools needed to create and enforce its rules. Alternatively, the interagency task force model is frequently used when the federal government needs to regulate in a way that requires “a whole-of-government approach” in combatting complex issues.¹⁵⁰ This seems particularly true when initiatives require a combination of existing rulemaking and enforcement mechanisms. Interagency task forces come with two primary benefits: personnel flexibility and a greater abundance of resources.¹⁵¹

The ability of task forces to include multiple agencies and institutions flexibly allows for the widest range of expertise possible. For example, the President’s Interagency Task Force to Monitor and Combat Trafficking in Persons was established in 2000 with the stated goal of combatting human trafficking, slavery, and other related human rights violations in the United States and abroad.¹⁵² Congress authorized the President to establish this task force under the Victims of Trafficking and Violence Protection Act of 2000, requiring that it be chaired by the Secretary of State, and that it include six other listed Cabinet-level officials and offices.¹⁵³ Other than those officials required by the statute, the President chose independently to include nine other agencies and executive offices to make use of their jurisdiction and resources.¹⁵⁴ This collaboration has been invaluable because enforcement against human trafficking requires a multifaceted approach—covering distinct issues such as domestic law enforcement training, foreign affairs, data gathering and intelligence, and assistance for formerly trafficked persons.¹⁵⁵

Many more examples have followed this same or a similar formula. The Interagency Task Force on Agriculture and Rural Prosperity¹⁵⁶ includes

150. *Federal Response on Human Trafficking: Interagency Taskforce*, U.S. DEP’T OF STATE, <https://www.state.gov/humantrafficking-interagency-task-force/> (last visited May 10, 2022).

151. U.S. DEP’T OF JUST., OFF. OF JUST. PROGRAMS, OFF. FOR VICTIMS OF CRIME, TRAINING & TECH. ASSISTANCE CTR., HUM. TRAFFICKING TASK FORCE E-GUIDE (2011).

152. 22 U.S.C. § 7103 (2000).

153. *Id.* at § 7103(b)–(c).

154. *See Agencies of the President’s Interagency Task Force to Monitor & Combat Trafficking in Persons*, U.S. DEP’T OF STATE, <https://www.state.gov/humantrafficking-agencies-of-the-presidents-interagency-task-force-to-monitor-and-combat-trafficking-in-persons> (last visited May 10, 2022) (listing agencies that the President added to the task force’s membership, some of which are not statutorily mandated to participate).

155. *Id.*

156. Exec. Order No. 13,790, 82 Fed. Reg. 20237 (Apr. 25, 2017); USDA, REP. TO THE PRESIDENT OF THE U.S. FROM THE TASK FORCE ON AGRIC. & RURAL PROSPERITY (2017) [hereinafter USDA CHAIR’S REPORT].

twenty-one Cabinet-level departments and other executive agencies.¹⁵⁷ The page of the U.S. Department of Agriculture Chair’s Report that lists the member agencies includes a seemingly inconsequential but nonetheless important line explaining why interagency task forces work well, stating that they “capitalize on the programmatic specialties spanning the federal government.”¹⁵⁸ Provisions allowing task force chairs to recommend and invite officers and employees from other agencies provide flexibility for a centrally agreed-upon rulemaking and enforcement process.¹⁵⁹

Congress has already determined that the task force approach is appropriate for combatting smoking, establishing the Interagency Committee on Smoking and Health (ICSH) under an amendment to the Cigarette Labeling and Advertising Act in 1984.¹⁶⁰ The task force model was chosen for this issue because of the need for a coordinated mission that involved concerns such as public health, education, advertising, and many others.¹⁶¹ The Secretary of HHS chairs the task force, supervising various internal subagencies focused on health issues associated with smoking and tobacco use.¹⁶² Additionally, the Committee must include at least one representative from the FTC, Department of Education, Department of Labor, and, again, “any other [f]ederal agency designated by the Secretary,” establishing the necessary flexibility.¹⁶³ Public notice-and-comment is required for all Committee meetings, allowing stakeholders to track and opine on regulatory movement before each member agency implements changes recommended by the Committee.¹⁶⁴

Fundamentally, interagency task forces primarily exist to conduct consolidated or shared research so that all member agencies have a unified, or at least mutually understood approach to dealing with complex issues. For example, the Centers for Disease Control and Prevention’s Office on Smoking and Health (OSH)—a participating member agency in the ICSH—published a report in 2003 with recommendations to federal and state agencies on how to design and implement counter-marketing

157. USDA CHAIR’S REPORT, *supra* note 156, at 13.

158. *Id.*

159. *See, e.g.*, Exec. Order No. 14,011, 86 Fed. Reg. 8273 § 3(a)(vi) (Feb. 2, 2021) (incorporating this type of provision into the Interagency Task Force on the Reunification of Families).

160. Comprehensive Smoking Education Act, 15 U.S.C. §§ 1331, 1341(b) (1984).

161. *See* U.S. DEP’T OF HEALTH & HUM. SERVS., CHARTER, INTERAGENCY COMM. ON SMOKING & HEALTH RENEWAL 2021–2023, at 1–2 (Mar. 20, 2021) (defining the “Objective and Scope of Activities” and the “Description of Duties”).

162. 15 U.S.C. §§ 1341(a), 1341(b)(1)(A).

163. *Id.* at § 1341(b)(1)(C).

164. U.S. DEP’T OF HEALTH & HUM. SERVS., CHARTER, INTERAGENCY COMM. ON SMOKING & HEALTH 2 (Mar. 20, 2021).

campaigns against tobacco companies.¹⁶⁵ In 2019, then-FDA Director of Public Health & Education Gem Benozza gave a presentation at an ICSH public committee meeting.¹⁶⁶ In her presentation, Benozza spoke about the FDA's anti-vaping "Real Cost" campaign that launched in 2014, highlighting some of its main messages for teens that reflect the studies done by OSH over a decade earlier.¹⁶⁷ While the FDA may or may not have intentionally designed its "Real Cost" campaign around OSH's decade-old research, communication through the ICHS likely contributed to the development of that messaging.

Regulating advertisements for sports gambling will require the flexibility and research quality associated with interagency task forces. While several agencies already have congressional authorization to regulate advertisements in the manner necessary to tackle sports gambling addiction— notwithstanding the need for new, targeted legislation—those agencies should come together to plan research, coordinate regulations, and provide unified notice-and-comment opportunities to stakeholders. An Interagency Task Force on Sports Gambling Marketing could model its coordinated advertising regulatory scheme off the cigarette and tobacco model to meet a similarly complex issue head-on.

III. RECOMMENDATIONS FOR THE INTERAGENCY TASK FORCE ON SPORTS GAMBLING MARKETING: AGENCY ANALYSIS

Of the chosen agencies, each already has, or once had, a distinct role in regulating cigarette advertisements.¹⁶⁸ Those responsibilities would translate well into a framework for regulating the marketing of a newly legal, highly addictive, and heavily advertised sports gambling industry. However, the existing regulatory structure for cigarette and tobacco advertising does not sufficiently address the complexities of the current sports gambling advertisement issue because of the contemporary

165. CTRS. FOR DISEASE CONTROL & PREVENTION, OFF. ON SMOKING & HEALTH, DESIGNING AND IMPLEMENTING AN EFFECTIVE TOBACCO COUNTER-MARKETING CAMPAIGN 171–77 (1st ed. 2003) [hereinafter CDC TOBACCO COUNTER-MARKETING].

166. PUBLIC COMM. MEETING INTERAGENCY COMM. ON SMOKING & HEALTH, EMPOWERING YOUTH & YOUTH INFLUENCERS TO PREVENT THE USE OF EMERGING TOBACCO PRODUCTS, RECORD OF THE MEETING (Sept. 9, 2019, 9:00 AM).

167. *Compare id.* at 13–15 (describing teen-focused anti-vaping messaging that incorporates themes such as aging, tooth loss, bullying, and mental health decline caused by nicotine addiction), with CDC TOBACCO COUNTER-MARKETING, *supra* note 156, at 172–73 (citing a focus on health issues and the “repositioning” of teen-focused themes like “rebellion and independence” as effective messages to reduce adolescent smoking).

168. *See* discussion *supra* note 29 (explaining how the FDA adopted cigarette advertising regulation responsibilities once held by the FTC).

prevalence of social media. Nevertheless, the agencies involved in this proposal already perform many of the tasks necessary for a more comprehensive approach. This Part will describe the role each agency should take in the task force based on the legal authority they hold.

A. *The Federal Trade Commission—Protecting Consumers from a Novel, Predatory Industry*

Advertising for sportsbooks and DFS commonly occurs on the Internet, particularly social media,¹⁶⁹ and some of this advertising likely misleads consumers. Online advertising requires oversight from the FTC, as the Federal Trade Commission Act “prohibits unfair or deceptive advertising in any medium.”¹⁷⁰ Although the Internet did not exist when President Wilson signed the Act into law in 1914, the FTC’s jurisdiction over Internet advertising has generally not been questioned. This authority to enact and enforce regulations on online advertising might appear broad, but the Commission simply applies the same rulemaking and enforcement mechanisms to the Internet that already apply to traditional forms of advertising.¹⁷¹ In other words, the FTC treats Internet advertising as having the same fundamentals as all other forms of marketing.¹⁷²

Regarding online sports gambling marketing, the FTC must address social media influencers disguising advertisements as entertainment content. “Influencer” advertising has become one of the most commonplace forms of marketing, covering most industries and present everywhere with widespread access to social media. Distinguishing between an advertisement and entertainment content is key to addressing marketing on social media. FTC regulations have covered endorsements since 1980, but the Commission took almost thirty years to update regulations for Internet endorsements, and took another decade to recognize that social media influencing required new rule interpretations to apply existing rules to this new form of marketing.¹⁷³ From

169. See *Sports Betting & Social Media — What’s Hot, What’s Not, and What’s Coming Next*, BETMGM, <https://www.betmgm.com/blog/industry-news/sports-betting-social-media/> (last visited May 10, 2022).

170. FED. TRADE COMM’N, ADVERTISING AND MARKETING ON THE INTERNET: RULES OF THE ROAD 1–2 (2000), <https://www.ftc.gov/system/files/documents/plain-language/bus28-advertising-and-marketing-internet-rules-road2018.pdf> [hereinafter RULES OF THE ROAD]; Federal Trade Commission Act, 15 U.S.C. § 41.

171. RULES OF THE ROAD, *supra* note 170, at 1 (“[M]any of the same rules that apply to other forms of advertising apply to electronic marketing.”).

172. *Id.*

173. Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255 (2009); Press Release, FTC, FTC Seeks Public Comment on its Endorsement

a practical standpoint, the key difference between traditional and influencer advertising is that influencers, through their presence as “content creators” on social media, can disguise advertisements as entertainment.¹⁷⁴ Furthermore, social media blurs the line between friend and public figure, and followers develop parasocial relationships¹⁷⁵ with online personalities trying to sell them products.¹⁷⁶ In simplest terms, this resembles the relationship a bar patron develops with a bartender. A bartender will socially engage a patron in the hope that the customer will continue to order drinks and tip, while the patron perceives the bartender as a friendly face.

The FTC first took action against social media influencers in 2017, when the Commission alleged that two widely followed online video-gamers, Trevor “TmarTn” Martin and Thomas “Syndicate” Cassell, marketed a gambling-type website to gamers as if they did not personally own it and financially benefit from its use.¹⁷⁷ CSGOLotto, Inc. (CSGO Lotto) formerly allowed players of the first-person shooter game, *Counter Strike: Global Offensive*, to buy, sell, trade, and gamble for “skins”¹⁷⁸ using real money.¹⁷⁹ Martin and Cassell both posted several videos on their respective YouTube channels with titles such as, I to promote their website.¹⁸⁰ They also hired other online influencers, paying some up to \$55,000, to promote the site.¹⁸¹ The FTC mainly took issue with Martin and Cassell posting promotional content without disclosing their ownership of the company.¹⁸²

Guides (Feb. 12, 2020).

174. See Nick Levine, *This is How Instagram is Cracking Down on Influencers Who Aren't Honest About Sponsored Posts*, REFINERY29 (Oct. 25, 2020), <https://www.refinery29.com/en-gb/instagram-cracking-down-on-influencers-hiding-ads> (discussing some platforms' attempts to eliminate disguised influencer advertising).

175. Some experts define para-social relationships as “the illusion of friendship’ with a public persona.” Elise Brisco, *Twitter is Buzzing About ‘Parasocial Relationships.’ Are They Unhealthy?*, USA TODAY (Sept. 28, 2021, 11:06 AM), <https://www.usatoday.com/story/life/health-wellness/2021/09/28/parasocial-relationship-explained-meaning-and-unhealthy/5892428001/>.

176. See Andrea Lindal, *Parasocial Relationships and Business Marketing*, LEXABI COMM’NS (Sept. 13, 2020), <https://lexabi.com/parasocial-relationships-and-business-marketing/> (explaining why consumers respond well to para-social relationship advertising).

177. See FTC, CSGO Lotto Press Release.

178. In the video gaming context, “skins” are artwork for in-game weapons and characters. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. See *id.* (finding that paid influencers were also prohibited from making negative statements about CSGO Lotto, Inc.).

Barstool Sports' rise as a commonplace online presence raises similar issues as the CSGO Lotto case. Unlike CSGO Lotto, the business connection between Barstool's online cast and the company's sportsbook operation is quite evident.¹⁸³ Both issues, however, concern people and companies with massive online followings promoting a gambling enterprise they created after earning mainstream popularity.

Regarding social media influencing in general, Barstool usually discloses when a tweet or Instagram post is an advertisement for the Barstool Sportsbook.¹⁸⁴ Even still, Barstool's main cast members, including founder Dave Portnoy, host a podcast dedicated to offering sports betting "advice."¹⁸⁵ The *Barstool Pick Em* podcast is published through the media enterprise, not Barstool Sportsbook.¹⁸⁶ In other cases, however, social media content and other forms of entertainment fail to make abundantly clear that Barstool is fundamentally a gambling company.¹⁸⁷ For instance, Barstool Sports' Instagram account has long featured a variety of amateur videos—oftentimes objectifying young women or showing college students drinking heavily and acting recklessly—that serve to promote the Barstool brand.¹⁸⁸ Given that

183. For the most part, Barstool personnel accounts link to the company's main social media accounts or feature Barstool's intellectual property in some way. See, e.g., Dan "Big Cat" Katz (@BarstoolBigCat), TWITTER, <https://twitter.com/BarstoolBigCat> (last visited May 10, 2022).

184. Compare Dave Portnoy (@stoolpresident), TWITTER (Sept. 5, 2021, 5:40 PM), <https://twitter.com/stoolpresident/status/1434632579936833538?lang=en> (featuring a promotion for a branded hoodie that features a banner, albeit a small one, for the problem gambling hotline), with Dan Katz (@BarstoolBigCat), TWITTER (Oct. 2, 2021, 1:41 PM), <https://twitter.com/BarstoolBigCat/status/1444356817136594949> (providing joking commentary about gamblers who bet a certain way, but making no explicit reference to Barstool Sportsbook or the problem gambling hotline).

185. See generally *Barstool Pick Em*, BARSTOOL SPORTS, <https://www.barstoolsports.com/shows/91/barstool-pick-em> (last visited May 10, 2022).

186. *Id.*

187. Emphasizing that as gambling has become their priority, several of Barstool's main cast have relocated from New York to Philadelphia, where sports betting is legal. See Richard Rys, *Barstool Sports is Betting Big on Philly. But Are We the City They Think We Are?*, PHILA. MAG. (Jan. 23, 2021, 9:00 PM), <https://www.phillymag.com/news/2021/01/23/barstool-sports-dave-portnoy-philadelphia/>; see also Chris Murphy, *Penn National Gaming Lauds Positive Impact of Barstool Sportsbook in Q1 Trading Statement*, SBC AMS. (May 6, 2021), <https://sbcamericas.com/2021/05/06/penn-national-gaming-lauds-positive-impact-of-barstool-sportsbook-in-q1-trading-statement/> (showing how beneficial Barstool's brand is to the promotion of Penn National Gaming sportsbooks).

188. See generally Barstool Sports (@barstoolsports), INSTAGRAM, <https://www.instagram.com/barstoolsports/> (last visited May 10, 2022) (Barstool Sports main account).

Penn National Gaming will likely soon own a majority stake in Barstool,¹⁸⁹ the FTC should formally recognize that all of Barstool's content acts as a funnel to the sports betting operation run in conjunction with Penn National Gaming. Barstool intentionally conditions followers into developing parasocial relationships with the brand, so that—along with purchasing other merchandise—they gamble with Barstool Sportsbook. The Commission should, accordingly, establish content regulations for gambling firms and company personnel on social media and any other entertainment ventures that gambling firms engage in.

Even though the FTC does regulate social media influencing, the Commission has other primary goals and functions, including enforcement against unfair or deceptive advertising.¹⁹⁰ The central premise behind FTC enforcement against false advertising is that some advertisements are blatantly false and misleading, hurting consumers and business competitors alike.¹⁹¹ When a company's advertising contains objectively false messaging, the Commission can easily identify and act against it.¹⁹² The Lanham Act, which covers trademark infringement and false advertising, allows private parties to bring suit against the use of product features, descriptions of origin, or false or misleading representations, which, "in commercial advertising or promotion, misrepresents the nature . . . of his or her or another person's goods, services, or commercial activities."¹⁹³ However, due to limited resources, the FTC primarily focuses on "outright scams and on situations in which no single competitor suffers so greatly that it has an incentive to sue."¹⁹⁴

But what does the Commission do with advertisements that are not objectively false? One example of potentially false and misleading advertising that the FTC seeks to continue observing is the growing video game microtransaction industry, specifically, what are known as "loot boxes."¹⁹⁵ Loot box transactions essentially allow players to pay real money to purchase slot machine-type spins of chance to unlock desirable, but often

189. Kafka, *supra* note 100.

190. See Michael A. Carrier & Rebecca Tushnet, *An Antitrust Framework for False Advertising*, 106 IOWA L. REV. 1841, 1847 (2021) (describing the FTC's primary motives behind its regulation of advertising).

191. *Id.* at 1847 ("The goal of false advertising law is to protect consumers and competitors from . . . deception.").

192. *Id.* at 1857–58.

193. See Lanham Act § 43(a)(1)(B), 15 U.S.C. § 1125(a)(1)(B).

194. Carrier & Tushnet, *supra* note 190, at 1847 (discussing various perspectives on how and why the FTC does and does not regulate certain advertisements).

195. Benjamin Pu, *What are Loot Boxes? FTC Will Investigate \$30B Video Game Industry*, NBC NEWS (Nov. 28, 2018, 2:27 PM), <https://www.nbcnews.com/tech/tech-news/loot-boxes-gambling-video-games-ftc-look-it-n941256>.

inconsequential and repetitive game features.¹⁹⁶ In August 2019, the FTC hosted a workshop with representatives from the video game industry, consumer advocates, academics, and others “to discuss concerns regarding the marketing and use of loot boxes and other in-game purchases.”¹⁹⁷ This working group was particularly concerned about young people making these purchases, which resemble gambling.¹⁹⁸ For two months after the workshop, the Commission invited public comments, which reinforced the findings it published in an August 2020 staff perspective paper.¹⁹⁹ Agency staff found that, in order to avoid violating Section 5 of the FTC Act, video games with loot boxes must clearly display accurate odds so that customers can make informed purchasing decisions.²⁰⁰

The Commission should use this framework to target misleading advertisements disseminated by sports gambling firms. For instance, sportsbooks should be required to present better-detailed explanations of betting odds in their advertisements. This might discourage potential bettors from spending significant sums on far-fetched, thoughtless bets that favor “the house.” Another way the FTC should target misleading sportsbook advertisements is by prohibiting certain rhetoric in marketing. An advertisement by WynnBET²⁰¹—featuring a video including personalities Ben Affleck, Shaquille O’Neal, and Melvin Gregg—serves as an example of arguably misleading rhetoric by claiming that betting “is a team sport.”²⁰² The unrealistic video clip shows Affleck receiving friendly advice from casino gamblers as he makes his way through the Wynn casino in Las Vegas before placing his bet.²⁰³ Finally, the FTC should prohibit phrases, such as “risk free” from being used to advertise sports gambling promotions, as these are tantamount to cigarette companies offering free samples meant to get new customers hooked.²⁰⁴

196. *See id.*

197. FTC, *Inside the Game: Unlocking the Consumer Issues Surrounding Loot Boxes*, <https://www.ftc.gov/news-events/events-calendar/inside-game-unlocking-consumer-issues-surrounding-loot-boxes> (last visited May 10, 2022).

198. *Id.*

199. FTC, FTC VIDEO GAME LOOT BOX WORKSHOP: STAFF PERSPECTIVE (2020), https://www.ftc.gov/system/files/documents/reports/staff-perspective-paper-loot-box-workshop/loot_box_workshop_staff_perspective.pdf.

200. *Id.* at 4; *see also* Federal Trade Commission Act § 5, 15 U.S.C. § 45 (2006).

201. WynnBet is the online sportsbook run by Wynn Resorts. WYNNBET, <https://www.wynnbet.com/> (last visited May 10, 2022).

202. *Id.*; *see also* WYNNBET, *Ben Affleck, Shaq, and Melvin Gregg Team Up to Bet on Sports with WynnBET: Extended Cut*, YOUTUBE (Aug. 29, 2021), <https://www.youtube.com/watch?v=IFr0PpY5opo&t=51s>.

203. *Id.*

204. *See, e.g.*, WYNNBET, *supra* note 202 (displaying a photo of a smiling Shaq on a “Risk Free

The FTC should also apply its advertisement regulations to marketing that treats DFS as something other than gambling. The Commission should require companies like DraftKings and FanDuel to change their rhetoric to fit within what Americans typically understand as gambling promotions. Furthermore, DFS advertisements should be required to display the number for the problem gambling hotline, which they are not yet required to do under the law.²⁰⁵

This would mirror the labeling requirements that the FTC once imposed upon cigarette packaging. Currently, FTC advertising regulations play no part in the cigarette and tobacco issue. The Commission had a role in the regulation of cigarette advertisements between the passage of the Cigarette Labeling and Advertising Act (Cigarette Act) of 1966 and its 2009 amendments in the Family Smoking Prevention and Tobacco Control Act.²⁰⁶ The Commission's responsibilities during its enforcement era were essentially limited to enforcing the warning label requirements, but it was the primary agency filling that role. The 2009 Act transferred that responsibility to the FDA. However, the FTC may still bring enforcement actions under its own authorizing statute if an advertising practice violates both Section 5 of the FTC Act and the Cigarette Act.²⁰⁷

Under the proposed interagency task force, the FTC would revive its labeling and disclosure enforcement role and add new, targeted regulations against misleading rhetoric used in sports gambling advertisements.²⁰⁸ To overcome the burdens imposed by the *Central Hudson* test, however, FTC regulators would need to research the effects of advertising, and how the lack of certain disclosures affects the rates of sports gambling and problem gambling.²⁰⁹ That research role would best be filled by an agency with experience in both public health regulation and advertising, such as the

Bet" promotion); *see also* Rigotti, Moran, & Weschler, *supra* note 102, at 138–39, 143 (discussing the efficacy of offering free samples to young people as a cigarette advertising technique).

205. *But cf.* FTC, FEDERAL CIGARETTE LABELING AND ADVERTISING ACT, <https://www.ftc.gov/enforcement/statutes/federal-cigarette-labeling-advertising-act> (last visited May 10, 2022) (describing the Surgeon General's Warning label requirement under both the FDA and FTC's respective jurisdictions over this issue); Federal Cigarette Labeling & Advertising Act of 1966, 15 U.S.C. §§ 1331–40.

206. 15 U.S.C. § 1333(c); *see also* 21 U.S.C. § 387(c).

207. *See* FTC, *supra* note 173.

208. *See supra* notes 170–177 and accompanying text (summarizing the policy and effects of misleading and deceptive advertisement).

209. *See* Andrew S. Gollin, *Improving the Odds of the Central Hudson Balancing Test: Restricting Commercial Speech as a Last Resort*, 81 MARQ. L. REV. 873, 890 (1998) (citing *Edenfield v. Fane*, 507 U.S. 761, 771–72 (1993) (holding Florida regulations on in-person solicitations by certified public accountants unconstitutional under the third prong of the *Central Hudson* test due to the state having failed to “offer studies or anecdotal evidence that demonstrates that the regulation directly advances its interest in protecting potential clients from deception or unscrupulous accountants.”)).

FDA or a cousin agency, that has the expertise to justify advertising regulations on public health grounds.

B. The Food and Drug Administration—The Correct Agency for a Public Health Issue?

The FDA currently has the statutory authority to regulate cigarette advertising and promotion, and it does so under the following broad categories: event sponsorships,²¹⁰ packaging of imported cigarettes and smokeless tobacco,²¹¹ restrictions on free samples,²¹² and warning statement compliance.²¹³ One foreseeable issue with including the FDA in a gambling-focused regulatory framework would be that, fundamentally, the FDA is primarily concerned with diseases and death experienced by individuals when dangerous products are used, or when safe products are used incorrectly. Typically, the “FDA standard of approving ‘safe and effective’ products” guides the Agency’s rulemaking.²¹⁴ However, with regard to cigarettes and tobacco, the FDA understands that “[t]obacco is the only consumer product regulated by the FDA which causes disease, disability, and death when used as intended.” This reality led Congress to empower the FDA to take a *public health* approach rather than an individualistic one, giving the Agency broader regulatory powers to mitigate tobacco’s threat to the public.²¹⁵ Instead of a determination that cigarettes and tobacco are “safe” to use under “proper” conditions, the government’s desire to reduce the number of potential future smokers undergirds the FDA’s regulation of cigarette marketing.

That model accommodates and addresses the reasons why sports gambling advertisements must be regulated in a similar way. While individual gamblers might experience addiction and associated ills, the goal of the FDA—like with cigarettes—can be to protect young people from gambling and encourage active gamblers to reduce participation or quit.²¹⁶ The FDA has experience and supportive caselaw that backs its ability to implement a reduction-based strategy toward a public health issue related to marketing. Through passage of the Tobacco Control Act, Congress authorized the FDA to regulate differently compared to its traditional duties, allowing it to enforce restrictions on a legal product with inherent dangers.

If the Task Force’s creators determine that the FDA is the wrong agency

210. 21 C.F.R. § 1140.34(c).

211. *Id.* at § 1140.34(a).

212. 21 C.F.R. § 1140.16(d).

213. 21 C.F.R. § 1143.

214. *Implementing the Tobacco Control Act*, *supra* note 47.

215. *Id.*

216. *Id.*

for regulating gambling advertisements, several other sub-agencies within HHS could take up the mantle for research and enforcement.²¹⁷ For example, the Substance Abuse and Mental Health Services Administration (SAMHSA) is the primary agency responsible for organizing resources and research for mental health treatment, substance abuse, and suicide prevention.²¹⁸ While some SAMHSA personnel have experience in the realm of preventing gambling addiction in past positions,²¹⁹ the Administration neither focuses on gambling in any capacity, nor does it regulate advertising.²²⁰ While the proposed Task Force’s authorizing statute could solve this problem by giving SAMHSA power to regulate advertising and gambling, it seems more prudent to include a public health agency with experience in at least one of those issues in the Task Force. Including both the FDA and SAMHSA, among others, might be the best option.

C. *The Federal Communications Commission—Ending the TV Onslaught*

The last necessary Task Force agency, the Federal Communications Commission, would play an indispensable role in the regulation of sports gambling advertisements on television and radio. Most federal regulations with any relation to television or radio broadcasts come under FCC jurisdiction.²²¹ In terms of the FCC’s current regulatory authority over cigarettes, it is the agency keeping cigarette advertisements off the air.²²² Enforcing a complete prohibition on tobacco advertising is the complete extent of the FCC’s rule. “Federal law prohibits the airing of advertising for cigarettes” and most other tobacco products “on radio, TV, or any other

217. See *HHS Agencies & Offices*, DEP’T HEALTH & HUM. SERVS., <https://www.hhs.gov/about/agencies/hhs-agencies-and-offices/index.html> (last visited May 10, 2022) (listing the different sub-agencies under HHS).

218. See generally SAMHSA, <https://www.samhsa.gov/> (last visited May 10, 2022).

219. See, e.g., *Profile of SAMHSA Regional Administrator David A. Dickinson, MA*, SAMSHA, <https://www.samhsa.gov/about-us/who-we-are/leadership/biographies/david-dickinson> (last visited May 10, 2022) (explaining Dickinson’s past background in working on a program to address gambling addiction in Kansas).

220. See generally *SAMHSA Strategic Plan FY2019-2023*, SAMSHA, https://www.samhsa.gov/sites/default/files/samhsa_strategic_plan_fy19-fy23_final-508.pdf (last visited May 10, 2022).

221. See *What We Do*, FCC, <https://www.fcc.gov/about-fcc/what-we-do> (last visited May 10, 2022) (noting FCC’s regulation and authority over radio, television, cable, satellite, and wire communications).

222. See FCC, MEDIA BUREAU, THE PUBLIC AND BROADCASTING: HOW TO GET THE MOST SERVICE FROM YOUR LOCAL STATION 24–25 (2019), <https://www.fcc.gov/sites/default/files/public-and-broadcasting.pdf> (summarizing the FCC’s advertisement regulations).

medium of electronic communication under the FCC's jurisdiction."²²³ Given the legislative foundations of these rules, the FCC could similarly receive statutory authorization to ban sports gambling advertisements on regulated broadcasts. The fact remains, however, that reducing gambling advertising is better than doing nothing, especially considering the roles that would be given to other Task Force member agencies.

CONCLUSION

Since the *Murphy* decision in 2018, Congress has done little to address the advertising crusade to which sports gambling companies have subjected Americans.²²⁴ With this lack of oversight, the federal government has made an unwise bet on state and local regulators being able to mobilize the resources needed to manage the issue. Establishing an Interagency Task Force on Sports Gambling Marketing will allow federal regulators to build a framework mirroring the cigarette and tobacco model, with all the research and resources necessary to create and enforce rules. In doing so, the Task Force will need to address the challenges associated with modern-day advertising and commercial speech law, including misleading rhetoric, social media influencing, and often subtle distinctions between different forms of sports betting. Delaying regulation will contribute to a nearly inevitable rise in sports gambling addiction. Lawmakers, therefore, must take immediate action to prevent gambling companies from irresponsibly using Big Tobacco's marketing tactics to fuel a drastic increase in gamblers.

223. *Id.*

224. See Patrick Moran, *Anyone's Game: Sports-Betting Regulations after Murphy v. NCAA*, CATO INST. CTR. FOR CONST. STUD. LEGAL POL. BULLETIN 1, 5–6 (Mar. 11, 2019) (explaining how Congress has not done much regarding regulated sports betting since the 2018 *Murphy* decision, but there has been a push for regulation).