



NATIONAL LATINO COUNCIL
ON ALCOHOL AND TOBACCO PREVENTION

The Impact of Alcohol and Tobacco Advertising On the Latino Community As A Civil Rights Issue

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Table of Contents

	pages
I. Introduction	1-9
A. Demographic Data	1-2
B. Incidence of Alcohol & Tobacco Use in the Latino Community	2-5
C. Alcohol & Tobacco Advertising Targeting Latinos	5-7
D. Impact Considering Health Disparities	7-9
II. U.S. Legal Analysis	9-26
A. Litigation Strategies	10-15
1. Negligence Arguments	10-12
2. U.S. Department of Justice Tobacco Litigation	12-15
B. Potential Statutory Remedies	15-28
1. The 1964 Civil Rights Act	15-17
2. Federal Consumer Protection Regulation	17-26
a. Deceptive or Unfair Advertising	18-20
b. Federal Communications Commission Regulation	20-22
c. Industry Self-Regulation	22-23
3. 21 st Amendment State Regulation	23-27
4. New Legislation	27-28
III. Conclusions & Recommendations	28-30

I. Introduction: The Impact of Alcohol and Tobacco Advertising on Latino Communities as a Civil Rights Issue¹

The impact of alcohol and tobacco on Latino communities is a health issue, and as this paper will discuss, it is also a civil rights issue. Alcohol and tobacco abuse became considered as public health issues during the last century. American public policy on alcohol has changed since the days of Prohibition (in the 1920s), when alcohol abuse was considered as a moral issue rather than a health issue.² Later in the 20th century, views on cigarette smoking also changed. The public became increasingly aware that nicotine is highly addictive and that smoking causes serious health damage; therefore, tobacco became considered a public health issue.³ As public policy changed, the law stepped in to regulate alcohol and tobacco companies, particularly in the context of targeted advertising.⁴ Yet and still, advertising and promotion of alcohol and tobacco continues into the 21st century, and companies are increasingly targeting the young, growing Latino population as potential consumers. For example, according to the National Latino Council on Alcohol and Tobacco Prevention (LCAT) Executive Director Guillermo Brito, U.S. beer companies have recently begun aggressive marketing campaigns on Spanish-language TV, targeting the increasingly lucrative Latino market. The ads are more frequent and more aggressive than what is permitted on mainstream TV.⁵ This is not only a public health issue, but also a civil rights issue.

A. Demographic Data

According to the most recent U.S. Census data, Hispanics (the Census Bureau's official term) are now at least 14% of the U.S. population, making persons of Hispanic origin the largest U.S. "minority" group.⁶ Over 40 million Hispanics live in the U.S. and Puerto Rico, and the population is young and growing.⁷ In 2005, the PEW Hispanic Center reported that recent immigrants are themselves younger and have more children than other groups, and the Hispanic population is expected to grow to 64.4 million by 2020.⁸ LCAT summarizes that:

Latinos constitute the largest minority group in the United States and estimates show that Latino children and youth (under age 18) accounted for 34.4% of the population in 2002. Other studies estimate that the Latino youth population (ages 12-24) will grow at an astounding rate of 32% by 2010 from current levels.⁹

¹ The author wishes to thank her colleagues at the National Latino Council for Alcohol and Tobacco Prevention (LCAT), who have generously shared their expertise, support, and inspiration for this project. *¡Muchísimas gracias!*

² See, e.g., Mark Moore & Dean Gerstein, eds., *Alcohol and Public Policy: Beyond the Shadow of Prohibition* (1981); W. J. Rorabaugh, *The Alcoholic Republic* (1979); Schaffer Library of Drug Policy, *History of Alcohol Prohibition*, www.druglibrary.org/schaffer/Library/studies/nc/nc2a.htm.

³ One milestone in this continuum of changing views on tobacco as a public health issue was that: "In 1994, less than one month after the CEOs of the seven largest tobacco companies testified before Congress that they believed nicotine was 'not addictive,' an unsolicited box containing several thousand pages of confidential documents from the Brown & Williamson Corporation arrived at Professor Stanton Glantz's office at the University of California, San Francisco. These documents demonstrated the shocking disparity between the tobacco industry's private knowledge and their public statements over the past 50 years." American Legacy Foundation, *Legacy Tobacco Documents Library (Introduction)*, www.americanlegacy.org.

⁴ See Section II, *infra*.

⁵ Guillermo Brito, Ph.D. & Katherine Culliton, Esq., Marketing Disease to Latinos, *Hispanic Link* (Aug. 28, 2005).

⁶ *A U.S. Snapshot by Race and Ethnicity, 2004*, Annual Social and Economic Supplement, Current Population Survey (March 2004).

⁷ U.S. Census Bureau, Betsy Guzmán, *The Hispanic Population*, Census 2000 Brief (May 2001), www.census.gov/prod/2001pubs/c2kbr01-3.pdf.

⁸ Roberto Suro, et. al., PEW Hispanic Center, *Hispanics: A People in Motion* (2005).

⁹ LCAT, *Latino Youth & Tobacco Fact Sheet* (2005), available at www.nlcatt.org.

Due to youth susceptibility and other factors, marketing to young people is considered to be an extremely effective marketing tool.¹⁰ Therefore, for producers of almost any product, the U.S. Hispanic population represents a young, significant, and rapidly growing potential market. Latino buying power is estimated at \$653 billion in consumer dollars.¹¹ Experts have documented that the greater level of alcohol advertising, the greater level of alcohol-related violence, and deaths in the community.¹² Furthermore, considering the demographics, failure to address and remedy alcohol and tobacco abuse among Latinos “is likely to result in a significant amount of preventable disease and death for millions.”¹³

B. Incidence of Alcohol & Tobacco Use in the Latino Community

Alcohol and tobacco have a significant negative impact on Latino communities. With regard to tobacco, Latinos reportedly smoke *less* than non-Hispanic Whites, but it is very troubling that adolescent smoking is increasing. In 2001, LCAT studied the most recent data and reported that:

- In 1997, 20.4% of Latino adults smoked cigarettes;
- Smoking prevalence among Latino youth increased by 34% from 1990 to 1997;
- Social, economic and psychosocial factors all contribute to worrisome patterns of tobacco use among Latinos;
- Cigarette smoking is the single most preventable cause of disease and premature death in the U.S. Smoking is related to a variety of health problems, including cancers, cardiovascular diseases, and respiratory diseases. This is significant, since the leading causes of death for Latinos include heart disease, cancer, and pulmonary/respiratory problems.¹⁴
- Moreover, the following chart shows that the incidence of smoking is higher among men and various subgroups of the diverse Latino population:

Characteristic Group	M	F
	%	%
Mexican American	24.9	15.1
Mexican/Mexicano	22.5	8.3
Puerto Rican	28.5	21.7
Cuban American	22.1	14.0

Source: National Health Interview Surveys, 1999 and 2000, Aggregate Data¹⁵

¹⁰ See, e.g., Amy E. Gotwals, Jay Hedlund, & George A. Hacker, *Take a Kid to Beer: How NCAA Recruits Kids for the Beer Market 2-3 (Coveted Youth Market)*, 10-11 (*Ads Affect Kids*)(Center for Science in the Public Interest, 2005), www.cspinet.org/booze/2005/pdf/NCAA_Beer_Report.pdf.

¹¹ See, e.g., Mabel Valdivia, *Más Vino Por Favor*, *LCAT Quarterly Newsletter* 7 (Summer 2005).

¹² See Maria Luisa Alaniz, Ph.D., *Alcohol Availability and Targeted Advertising in Racial/Ethnic Minority Communities*, *Alcohol Health & Research World* 286 (1998).

¹³ LCAT, *Latinos and Tobacco Fact Sheet* (Aug. 2001), www.nlcatt.org/Clearinghouse/documents/LATINOSUpdated.pdf; Raúl Caetano & Frank Hector Galván, *Alcohol Use and Alcohol-Related Problems Among Latinos in the United States*, Ch. 14, Marilyn Aguirre-Molina, Carlos W. Molina & Ruth Enid Zambrona (Eds.), *Health Issues in the Latino Community* 383-407 (2001).

¹⁴ *Id.* (LCAT, *Latinos and Tobacco*).

¹⁵ See Francisco O. Buchting, Ph.D., *Tobacco Research & The False Assumptions About Latinos*, Vol. 7, No. 1 *Burning Issues: Tobacco-Related Disease Research Program Newsletter* 2 (Dec. 2004).

- With regard to young Latinos, the most recent HHS *Leading Health Indicators* report showed that:

Adolescent rates of cigarette smoking have *increased* in the 1990s among white, African American, and Hispanic high school students after years of declining rates during the 1970s and 1980s. In 1999, 39% of White high school students currently smoked cigarettes compared with 33% for Hispanics and 20% for African Americans.¹⁶

- These indicators of increasing Latino youth smoking are very troublesome, as smoking during youth increases the likelihood of addiction and greatly increases the risk of lung cancer and other life-threatening diseases.¹⁷

With regard to alcohol abuse and associated problems, LCAT reports, “Latinos drink more than other ethnic groups, and put themselves and their children at greater risk of death by consuming alcohol and driving.”¹⁸ Alcohol is a major social problem for the Latino community. As in the case of many issues, better research is needed with regard to the impact on the Latino community, and Latino health experts consider that the currently reported statistics are low.¹⁹ In his 1999 special report on mental health among various race/ethnic groups, the Surgeon General reported that:

In general, Hispanic Americans have rates of alcohol use similar to non-Hispanic whites. However, Hispanic women/Latinas have unusually low rates of alcohol and other drug use, while Latino men have relatively high rates. Rates of substance abuse are higher among U.S.-born Mexican Americans compared to Mexican-born immigrants. Specifically, substance abuse rates are twice as high for U.S.-born Mexican American men than for Mexican-born men, but seven times higher for U.S.-born Mexican American women than for Mexican-born women.²⁰

Although the government reported “rates of alcohol abuse similar to non-Hispanic Whites,” other studies have found that:

- In 1995, episodes of frequent, heavy drinking were reported at 12% for Whites, 15% for Blacks, and 18% for Hispanics;²¹
- Latino men in their 30s have higher rates of drinking and alcohol problems than Whites in the same age group;
- Mexicans in particular have higher rates of heavy drinking and drink larger quantities of alcohol in each sitting;

¹⁶ HHS, Healthy People 2010, *Leading Health Indicators* (accessed 6/28/05), at 8 (emphasis added).

¹⁷ See, e.g. Campaign for Tobacco-Free Kids, *The Path to Smoking Addiction Starts at Very Young Ages* (last updated 1/10/05), www.tobaccofreekids.org/research/factsheets/pdf/0127.pdf, citing scientific research. (“The earlier a kid first tries smoking the higher his or her chances of ultimately becoming a regular smoker and the less likely he or she is to quit. Research also shows that the earlier people begin to smoke the higher the risk they have of contracting lung cancer or experiencing a wide range of risk factors and health problems in adulthood. Overall, roughly a third of all kids who become regular smokers before adulthood will eventually die from smoking. If current trends [of increasing youth smoking] continue more than five million of the kids, under 18, who are alive today will die from tobacco-related causes.”)

¹⁸ Mabel Valdivia, *Más Vino Por Favor*, *supra*. n. 11.

¹⁹ See, e.g., Researching Latino Alcohol Abuse, Vol. 9, No. 2 *LCAT Quarterly Newsletter* 6 (Summer 2005)(data outdated & does not take into account many Latinos; newer, more comprehensive research being funded).

²⁰ See Substance Abuse and Mental Health Services Administration (SAMHSA), *Latinos/Hispanic Americans, Fact Sheet 2* (Aug. 2005), summarizing U.S. Surgeon General’s Report, *Mental Health: Culture, Race, Ethnicity-Supplement* (1999), www.mentalhealth.samhsa.gov/cre/fact3.asp.

²¹ Galván & Caetano, Alcohol Use and Related Problems Among Ethnic Minorities in the United States, Vol. 27, No. 1 *Alcohol Research & Health* 88, 89 (2003).

- In Los Angeles, 41% of those who died from alcohol-related problems were Mexican American, while 30% were non-Hispanic Whites;
- Chronic liver disease and cirrhosis are the 6th and 7th leading causes of death among Latinos, but only 9th among the general population;
- 12% of all Latino homicide victims are killed in bars;
- Motor vehicle crashes are the leading cause of death for Hispanics between the ages of 1 and 34, and Hispanic children ages 5 to 12 are 72% *likelier* to die in a motor vehicle crash than non-Hispanic children;²²
- Alcohol also leads to increasing domestic violence in Latino families, and Latinas suffer nearly 3 times as many social consequences of drinking as White women;²³
- Latino youth are more likely to drink and get drunk at an earlier age than Black or White youth;²⁴
- Lack of access to prevention and intervention renders the impact of alcohol abuse more severe in Latino communities.²⁵

Moreover, recent evidence indicates that alcohol and tobacco use *increases* as Latino immigrants become acculturated to the United States. About 40% of Latinos are immigrants.²⁶ While U.S. media has stereotyped Latinos, and particularly Latino immigrants, in roles in which criminality, alcohol and drug abuse are prevalent,²⁷ the truth is that recent Latino immigrants engage in *less* alcohol and drug use than those who have spent more time in the U.S. In the landmark Mexican American Prevalence and Services Study (MAPSS) interviewing more than 4,000 Mexican Americans in California in the 1990's, Dr. Sergio Águilar-Gaxiola found that rates of alcohol and drug abuse more than doubled for Mexicans born in the U.S. as compared to Mexican immigrants, and that substance abuse increased over time spent in the U.S.²⁸ This finding has been reconfirmed by various nationwide studies.²⁹

Similarly, in 1988, the U.S. Surgeon General reported that various studies have found smoking among Latinos in the U.S. to be positively associated with acculturation.³⁰ One study found that among smokers, "more acculturated Latinos had higher levels of addiction and lower levels of self-sufficiency than did less acculturated Latinos."³¹ Another study found that Latinas with an English or bilingual orientation

²² See Bill Gallegos, *Our Culture Is Not For Sale: A Campaign to Reclaim Cinco de Mayo from the Alcohol Industry 4*, in *Case Histories in Alcohol Policy* (The Trauma Center, 2002); LCAT, *Latinos and Alcohol* (2005), www.nlcatp.org (citing various studies).

²³ LCAT, *Latinos and Alcohol*; Raúl Caetano, M.D., Ph.D., John Schafer, Ph.D. & Carol B. Cunradi, M.P.H., Ph.D, Alcohol-Related Intimate Partner Violence Among White, Black, and Hispanic Couples in the United States, Vol. 25, No. 1 *Alcohol Research & Health* 58 (2001).

²⁴ *Id.* (LCAT, *Latinos and Alcohol*).

²⁵ Surgeon General's Report on *Mental Health: Culture, Race, Ethnicity*, *supra*. n. 20; Caetano & Galván, *supra*. n. 21.

²⁶ U.S. Census Bureau, *Profile of the Foreign-Born Population of the United States: 2000* (Dec. 2001).

²⁷ See, e.g., Angela Arboleda, et. al., *Lost Opportunities: The Reality of Latinos in the U.S. Criminal Justice System* (NCLR, 2004).

²⁸ Dr. Águilar-Gaxiola & Dr. William Vega, Highlights of Mexican American Prevalence Survey, reported in National Technical Assistance Center for State Mental Health Planning (NTAS), *Cultural Diversity Series: Creating Culturally Competent Mental Health Systems for Latinos* (2001) at 26-29.

²⁹ See, e.g., Amado M. Padilla, The Role of Acculturation and Biculturalism in Hispanic Research, Ch. 3.3, *Hispanic Psychology* (2002); Mariaelena Lara, et.al., Acculturation and Latino Health in the United States, 26 *Annual Review of Public Health* 367-97 (2005)(both sources discuss various studies showing that alcohol abuse increases with acculturation).

³⁰ U.S. Dept. of Health & Human Services (HHS0, Tobacco Use Among U.S. Racial/Ethnic Minority Groups: A Report of the Surgeon General (1988).

³¹ LCAT, *Latinos and Tobacco Fact Sheet*, *supra*. n. 13, at n. 42 (citing *U.S. Surgeon General Report*). Note that the health status of Latinas significantly impacts their families and communities, as Latinas are making important contributions to the financial security of their households, but face lower wages and lack of benefits (therefore less access to health care) in comparison to Latino men and White women. See NCLR News Release, *NCLR Analysis*

were much less likely than Latinas with a Spanish-language orientation “to acknowledge the dangers of smoking the occasional cigarette or recognize the difficulty in quitting.”³² In sum, both alcohol and tobacco abuse are shown to *increase* with the acculturation of Latinos in the U.S.

C. Alcohol & Tobacco Advertising Targeting Latinos

Mounting evidence demonstrates that alcohol and tobacco companies target Latinos through their advertising and marketing, and that Latinos face higher rates of exposure to alcohol and tobacco advertising.³³ According to one expert, “tobacco and alcohol industries have dubbed the Latino community as ‘the hottest emerging market,’” and are redoubling their already disproportionate marketing campaigns.³⁴ The content of media campaigns indicate that advertisers may also be exploiting negative, stereotypical images of Latino culture as a marketing tool to promote increased beer drinking,³⁵ with little concern for the consequences of alcohol abuse in the Latino community.³⁶ As this section will discuss, alcohol and tobacco companies are targeting the Latino community through their advertising in ways that are extremely troublesome from a Latino civil rights perspective.

In 2004, just before *Cinco de Mayo* (a U.S. holiday in which alcohol has been featured), *Tecate* (a Mexican beer company owned by Labatt, USA) and Clear Channel (a U.S. media conglomerate) posted a controversial billboard in predominately Hispanic neighborhoods. The billboard showed a *Tecate* beer bottle suggestively reclining, stating: “Finally, a cold Latina.” The billboard was posted near the Robert F. Kennedy Charter High School in Albuquerque, New Mexico, where Hispanic students protested its offensiveness to their cultural heritage and to Latinas. The High School students called the company, enlisted the aid of Latino civil rights leaders at the University of New Mexico, and soon thereafter the company removed the offensive billboards.³⁷ Their activism sparked outcry by Latina leaders,³⁸ and led to increased awareness of such advertising tactics by beer companies. Professor Marilyn Aguirre-Molina of Columbia University and Zelenne A. Cárdenas, Director of Prevention Programs at Social Model Recover Systems, wrote that:

The advertisement, displayed on billboards in Latino communities across the country, signals an unprecedented low for the beer industry, which has long exploited images of nearly naked Latin women (Latinas) to sell its products. The billboards unabashedly suggest that Latinas as a group are promiscuous (*i.e.* “hot”) and hyper sexed. It is chilling in its blatant use of a stereotype that dehumanizes each of us, from Dominican schoolgirls to Mexican American

Highlights Economic Impact of Latina Workers on Hispanic Families and the U.S. Economy (July 29, 2005); *Cf. Impact Considering Health Disparities*, §I.D., *infra*.

³² *Id.*, at n. 42 (citing Kevin M. Campbell & Celia P. Kaplan, Relationship Between Language Orientation and Cigarette Smoking Beliefs of Latinas, *American Journal of Health Behavior* 21 (1)(Jan./Feb. 1997)).

³³ *See, e.g.*, Pacific Center for Violence Prevention, *Exploitative Alcohol Advertising in the Latino Community* (citing studies, examples, statistics).

³⁴ Mabel Valdivia, *Más Vino Por Favor*, *supra*. n. 11.

³⁵ *See* Bill Gallegos, *Our Culture Is Not For Sale*, *supra*. n. 22. Also note that media stereotypes have some influence over public policy—for example, recent research indicates that media stereotypes of Latinos as “criminal” are tied to increased, disproportionate targeting of Latino youth by the criminal justice system. *See, e.g.*, Angela Arboleda, et. al., *Lost Opportunities: The Reality of Latinos in the U.S. Criminal Justice System*, *supra*. n. 27. Further research is needed to determine whether media images of Latinos stereotyped as alcohol and drug users also skews public health decisions.

³⁶ *See* Maria Luisa Alaniz, Ph.D., *Alcohol Availability and Targeted Advertising in Racial/Ethnic Minority Communities*, *supra*. n. 12.

³⁷ Frank Zoretich, *Booze Tie-ins Spark Protests*, *Albuquerque Tribune* (May 5, 2004)(also noting that “*Cinco de Mayo* has no connection to alcohol except for the linkage implied in seasonal advertising by beer and liquor companies.”)

³⁸ *See, e.g.*, Marisa Trevino, *It’s Time to Stop Shaming Latinas*, *Puerto Rico Herald* (Jan. 25, 2005).

grandmothers, but it is particularly damaging to our youth, who are more exposed to alcohol advertisements than adults or children of other ethnic groups.³⁹

Cárdenas and Aguirre-Molina also discussed the social consequences for Latino communities:

The billboards are sparking outrage in our communities because they reflect an even broader problem: the aggressive targeting of Latino youth by the beer industry—with dire consequences for our young people.

A recent report by The National Academies, *Reducing Underage Drinking: A Collective Responsibility*, points out that Latino girls are initiating alcohol use at a younger age than any other group in the country. And the younger a person begins heavy drinking, the more likely they are to become addicted to alcohol, as well as to suffer possible permanent learning deficits. Furthermore, alcohol use contributes to three major causes of death among Hispanic youth: unintentional injuries (including car crashes), homicide and suicide.

*Other research has shown that America's Latino communities have five times as many alcohol advertisements as predominantly white communities. And when alcohol advertisements depict Latinas as sexual objects, there are additional consequences. One study shows that the concentration of such ads leads to violence against Latinas between the ages of 15 and 18.*⁴⁰

The potential legal consequences of this case will be analyzed in Section II of this paper. It is part of a pattern documented by the Center for Alcohol Marketing and Youth at Georgetown University, which found that in 2002, alcohol advertisers spent more than \$18 million to place ads on 12 of the 15 TV programs that are most popular with Latino youth, and that Latino youth saw nearly 25% more magazine ads for beer than other children.⁴¹ Furthermore, as will be discussed in Section II of this paper, *Cinco de Mayo* has been trivialized by the alcohol industry in ways that are quite damaging to the Latino community.

Tobacco companies have also targeted Latinos. Cigarettes are much more prevalent on Spanish-language television than on mainstream stations. For example, popular *telenovelas* show smoking in the opening scenes every night on national Spanish-language TV.⁴² Federal law prohibits advertising tobacco on television; therefore, cigarettes are not directly advertised on Spanish-language TV.⁴³ However, images in programming send signals that smoking is acceptable and even glamorous to viewers of Spanish-language TV. Such images are not seen on “mainstream” American TV.

Cigarettes are also marketed through print media, billboards, in-store advertising, and at clubs and events, in ways that may be improperly targeting Latino youth. As will be discussed in Section II of this paper, anti-smoking activists won litigation against youth-oriented tobacco advertising in the late 1990's. As the Legacy Foundation reports, targeted advertising still heavily impacts the growing Latino youth population.⁴⁴ Studies show the incidence of smoking among Latino youth may be *lower* than among non-Hispanic Whites; however, reliable studies show that tobacco use among Latino youth has *increased* since the late 1990's, when the tobacco industry became subject to legally-enforceable settlements in which they agreed to cease and desist from targeting youth.⁴⁵ Similarly, reliable studies have demonstrated that tobacco

³⁹ Marilyn Aguirre-Molina & Zelenne L. Cárdenas, *Latinas Hot Over Tasteless Beer Ad*, *Join Together Online*, www.jointogether.org (May 24, 2004)

⁴⁰ *Id.* (emphasis added).

⁴¹ Rep. Lucille Roybal-Allard (D.-Cal.), *Cinco de Mayo Not Cinco de Drinko: A Warning from Congresswoman Roybal-Allard*, Vol. 9, No. 2 *LCAT Quarterly Newsletter* 6 (Summer 2005)(discussing Georgetown Univ. study).

⁴² See, e.g., www.univision.com for program information on *La Madastra* (reviewed July/Aug. 2005).

⁴³ See *Public Health Cigarette Smoking Act of 1969*, 15 U.S.C. §1331 *et. seq.*

⁴⁴ American Legacy Foundation, *Exposure to Pro-Tobacco Messages Among Teens and Young Adults (Results from Three National Surveys)* 9, 15, 20 (Nov. 2003).

⁴⁵ See §II.A.1, *infra*.

use *increases* the longer Latino immigrants are in the U.S.⁴⁶ The acculturation of Latino youth and immigrants towards more tobacco use could be a product of media targeting with disregard for the health consequences. As will be discussed in the legal analysis in Section II of this paper, the harm caused by tobacco advertising in the Latino community is significant, and the Latino community is entitled to the same respect for their rights to health as “mainstream” America.

As the aforementioned evidence makes clear, exposure to U.S. culture leads to increasing alcohol and tobacco use among Latinos. Alcohol and tobacco advertising targeting Latinos may be exploiting negative stereotypes in their marketing of addictive behaviors and substances that harm Latino communities. Even if negative stereotypes were not used in alcohol and tobacco advertising, the mere act of targeting the Latino community leads to predictable health damages that are troubling from a Latino civil rights perspective.

D. Impact Considering Health Care Disparities

The impact of alcohol and tobacco advertising on Latino communities must be analyzed in the context of discrimination in the nation’s health care system, including “differential delivery of health care services based on race, ethnicity, and gender; inability to access health care because of lack of financial resources, culturally incompetent providers, language barriers, and the unavailability of services; and exclusion of minority and female populations from health-related research.”⁴⁷ In 1999, the U.S. Civil Rights Commission reported that such discrimination in the health care system resulted in “striking disparities in health status between minorities and nonminorities,” with a harsh impact on the Latino community.⁴⁸

For many Latinos with Limited English Proficiency (LEP), these disparities are exacerbated by failure to provide federally funded health services in Spanish as required by Executive Order 13166, which was issued in 2000 to ensure compliance with Title VI of the Civil Rights Act.⁴⁹ As the Civil Rights Commission reported in 1999, “lack of interpretive services ultimately results in inequities in treatment and service utilization rates.”⁵⁰ In addition, reforming structural inequities, language access, and cultural competency are also needed to end health disparities for Latinos, especially in the mental health field.⁵¹

It is a well-known fact, reported by the U.S. Departments of Health and Human Services (HHS), its Office of Minority Health (OMH), and the Center for Disease Control (CDC), that for Latinos, severe disparities in access to federally funded health programs, with severe health consequences, continue today.⁵² Due to compounded discrimination based on gender as well as race/ethnicity, Latinas are even more at risk

⁴⁶ See Sources cited at notes 30-32, *supra*.

⁴⁷ U.S. Commission on Civil Rights, *The Health Care Challenge: Acknowledging Disparity, Confronting Discrimination, and Ensuring Equality*, Vol. I, p. iii (1999).

⁴⁸ Id. at iii & 36-42.

⁴⁹ Executive Order 13166, *Improving Access to Services for Persons With Limited English Proficiency* (August 11, 2000).

⁵⁰ U.S. Civil Rights Commission, *supra* n. 47, at Vol. I, p. 53.

⁵¹ See, e.g., Elaine Viccora & John D. Kotler (Ed.), *Creating Culturally Competent Mental Health Systems for Latinos: Perspectives from an Expert Panel*, National Technical Assistance Center for State Mental Health Planning (2001).

⁵² See, e.g., Office of Minority Health, *About Minority Health* (“Compelling evidence that race and ethnicity correlate with persistent, and often increasing, health disparities among U.S. populations... Indeed, despite notable progress in the overall health of the Nation, there are continuing disparities in the burden of illness and death experienced by blacks or African Americans, Hispanics or Latinos, American Indians... compared to the U.S. population as a whole.”)(accessed 6/28/05); CDC, MMWR Weekly, *Health Disparities Experienced by Hispanics—United States* (Oct. 15, 2004)(“...ethnic disparities persist among leading indicators of good health identified by the national objectives for 2010”); CDC, MMWR Weekly, *Access to Health Care and Preventive Services Among Hispanics and Non-Hispanics—United States, 2001-2002* (Oct. 15, 2004)(“Although Hispanics are the largest ethnic minority population, they are underserved in the health-care system.”).

for experiencing health care disparities and lack of access to federally funded health care programs.⁵³ Federally funded health programs include alcohol and tobacco prevention programs, addiction treatment and smoking cessation programs, as well as the health services needed due to damage caused by alcohol and tobacco.⁵⁴ Considering the proven health disparities and lack of equal access to federally funded health care, Latinos whose health is affected by alcohol and tobacco are at a distinct disadvantage; therefore, alcohol and tobacco are more damaging to the Latino community as a whole.

Latino access to health is also significantly limited by the 1996 federal immigration and welfare law reforms that prohibited provision of federally funded services to immigrants. Under the 1996 reforms, all immigrants, even Legal Permanent Residents, are now excluded from most federally funded health programs. Since about 52% of the nation's immigrants are Latinos, these reforms had a severe impact on the Latino community's health.⁵⁵ The National Hispanic Leadership Agenda (NHLA), a broad-based association of 40 national Latino groups, reported that:

For immigrant families who are low income, the current federal restrictions severely undermine access to health care and contribute to the rampant level of uninsurance that plagues this nation's Latino population. According to a report by The Robert Wood Johnson Foundation, more than half of all Latinos were uninsured at some point during the past two years, and recent Census data has shown that a quarter of Latinos who go without health coverage are children, and 59% are immigrants.⁵⁶

At the state level, the post-9/11 anti-immigrant backlash is exemplified by Arizona's Proposition 200, voted into law during the November 2004 election. Proposition 200 prohibits provision of state services to immigrants, and requires state officials to report undocumented immigrants who attempt to utilize state services, including health services.⁵⁷ Proposition 200 is being legally challenged on constitutional grounds, as it is similar to California's Proposition 187 that was overturned in federal court and sparked Latino activism in that state.⁵⁸ However, anti-immigrant groups have taken advantage of 9/11 to push their agenda, and copycat versions of the Arizona anti-immigrant measure have been introduced in at least seven other states, including California.⁵⁹ According to "Protect America Now," copycat initiatives are being planned in 24 states in total, all of which would severely limit immigrant access to health care and many other government services.⁶⁰ Protect America Now is run by Numbers USA and other national anti-immigrant groups with ties to the White supremacy movement. The current anti-immigrant backlash is directed at all Latinos and is even

⁵³ U.S. Commission on Civil Rights, *The Health Care Challenge: Acknowledging Disparity, Confronting Discrimination, and Ensuring Equality*, *supra*. n. 47, at Vol. I, p. 54.

⁵⁴ See §II.B.1., *infra*.

⁵⁵ See, e.g., Tanya Broder, Immigrant Eligibility for Public Benefits, *American Immigration Lawyers' Association (AILA) Immigration & Nationality Law Handbook* 759 (2005)(discussing severe restrictions post-1996); NCLR Census Information Center, *Hispanic Health in California* (Mar. 2004)(immigrants disproportionately lack health coverage and services; Latino immigrant children especially not likely to receive physician services; disparity in health coverage endangers lives of Latinos).

⁵⁶ NHLA, *How the Latino Community's Agenda on Immigration Enforcement and Reform Has Suffered Since 9/11*, 25 (2004).

⁵⁷ See www.pan2004.com for text of Proposition 200 (the "Protect Arizona Now" Initiative) and information on the campaign that won its enactment. The Arizona legislature has not stopped with Proposition 200. See, e.g., Elvia Díaz, Bill to Cut Migrant Benefits, *Arizona Republic* (Mar. 25, 2005) ("The state House of Representatives agreed Thursday to build on Proposition 200 by denying undocumented immigrants child-care subsidies, adult classes, public housing and other government-funded benefits.")

⁵⁸ See, e.g., *Friendly House v. Napolitano, Order Denying Plaintiff's Application for Preliminary Injunction*, CV-0469 TUC DCB (D.Ariz. 2004, Dec. 22, 2004); on appeal before the 9th Circuit, *See Order No. 0515005p*, (9th Cir. Aug. 9, 2005)(appeal from denial of preliminary injunctive relief denied for want of jurisdiction, to be resubmitted by Plaintiffs as constitutional challenge of implementation of Prop. 200).

⁵⁹ See, e.g., Michael Scherer, Scrimmage on the Border, *Mother Jones* 50, 54 (July/August 2005)(discussing actual initiatives).

⁶⁰ See www.pan2005.com.

affecting Puerto Ricans, whose access to government services is decreasing due to stereotypical, racist presumptions that all Latinos are suspect as immigrants.⁶¹

Immigration issues are highly relevant to the Latino community's health, because many Latino communities are "mixed status," *e.g.*, some family and community members are citizens, but many are immigrants, some of which are undocumented. Fear of retaliation against immigrant family members causes entire Latino families to be denied access to health services. Therefore, increasing prohibitions on health services to immigrants harm not only immigrants but also entire Latino families and communities.⁶² In sum, anti-immigrant measures cause entire Latino families and communities affected by alcohol and tobacco to have less access to health care, including education, prevention, and addiction treatment, than non-Hispanic White and other nonimmigrant communities.

This is just one example of how alcohol and tobacco advertising targeting Latinos predictably has a harsher impact than among other ethnic groups. Other factors include discrimination in the federally funded health care system, lack of access to insurance, lack of access to quality providers, lack of access to language and culturally competent services, and compounded risk of these factors for Latinas and youth. As will be discussed below, corporations and the media should be aware of the severe health care disparities experienced by the Latino community, and the law may imply a duty to act accordingly and refrain from targeting Latinos in alcohol and tobacco advertising.

II. U.S. Legal Analysis

Alcohol and tobacco advertising are governed by a complex set of federal statutes and regulations, and by precedents set through litigation. To date, the health impact of alcohol and tobacco advertising as a civil rights issue has not been the subject of direct federal regulation. In the U.S. legal system, much of civil rights law is limited in its applicability to governmentally funded, rather than private entities.⁶³ Alcohol and tobacco advertising is of course funded by private corporations. Moreover, any regulation is limited by First Amendment protections, as they apply to advertising.⁶⁴ However, as will be discussed herein, despite these challenges, there are many ways to use civil rights law to expand statutory protections to help alleviate targeting of Latinos by alcohol and tobacco companies.

In addition to statutory or regulatory measures, the health impact of alcohol and tobacco upon individuals has been the subject of litigation under various legal theories, under which companies may be held accountable for damages. In contrast to other legal systems, there is no *per se* right to health under the U.S. Constitution.⁶⁵ Therefore, damages to one's health have been litigated as class action product liability cases, or as violations of specific statutes governing corporate responsibilities. Each of these will be discussed in turn below. In order to cover both alcohol and tobacco issues, Section A will analyze potential litigation strategies for tobacco-related damages, and Section B will analyze potential statutory remedies for alcohol-related damages to Latino communities. Note that because courts have consistently held that there is

⁶¹ See, *e.g.*, Southern Poverty Law Center (SPLC), Arizona Showdown, Issue 118 *Intelligence Report* 16-31 (Summer 2005)(discussing anti-Latino racism in anti-immigrant organizations); NHLA, *How the Latino Community's Agenda on Immigration Has Suffered Since 9/11*, *supra*. n. 56, at 7-22.

⁶² *Id.* at 24-26.

⁶³ Note that private entities that are open to the public such as social clubs may also be held to civil rights standards. See, *e.g.*, *Board of Directors of Rotary Int'l. v. Rotary Club of Duarte*, 481 U.S. 537 (1987)(Rotary Club not "private" therefore First Amendment does not permit it to exclude women, which discrimination is prohibited under California law); *Poole and Geller v. Boy Scouts of America*, 93-030(PA) and 93-031-(PA), Final Decision and Order (D.C. Hum. Rts. Comm., June 18, 2001)(illegal to revoke membership based on sexual orientation).

⁶⁴ See Discussion of First Amendment protections in §II.B., *infra*.

⁶⁵ *Cf.*, Art. 25, *Universal Declaration of Human Rights*, U.N. Doc. A/810, at 71 (1948).

no constitutional right to smoke under the Due Process or the Equal Protection clause,⁶⁶ the analysis below will focus on the remaining, valid legal questions.

A. Litigation Strategies

Tobacco companies have been held accountable for causing health damage and required to take steps to compensate victims and prevent further damages, principally through litigation strategies. As will be discussed below, tobacco litigation has not included a civil rights law as a primary strategy; however, civil rights perspectives can and should be added to improve tobacco litigation strategies. In the analysis below, major tobacco litigation strategies will be reviewed, and then a Latino civil rights analysis will be added. Although this section will focus on tobacco, the litigation strategies discussed below may also be applicable to the issue of alcohol advertising targeting Latinos.

1. Negligence Arguments

Tobacco litigation has centered on the fact that tobacco companies knew nicotine was addictive and that smoking causes serious health damage, yet they withheld this information from the public. For over 50 years, tobacco companies concealed and lied about these facts. Documents proving the major tobacco companies' knowledge of the serious, negative health consequences of cigarettes were received unsolicited by a Stanford University law professor in 1994, just a few weeks before tobacco companies testified in Congressional hearings that nicotine was "not addictive."⁶⁷ These documents, along with other facts found in the litigation "discovery" process, have been the basis of suits by state Attorney Generals (AGs).⁶⁸ Their main legal argument was a classic strict liability argument, meaning that because tobacco was proven to be a dangerous product, tobacco companies were held strictly liable for damages caused. As will be explained below, a classic negligence argument, meaning that the defendants either knew or should have known that their actions or omissions would cause damage to the Latino community, could be added to this type of tobacco litigation. Because tobacco is a dangerous product, tobacco companies could also be held strictly liable for targeting the Latino community. Neither of these arguments was included in past tobacco litigation.

In the 1990's tobacco litigation, the 50 state AGs sued on behalf of their clients, the states who lost money by paying for health care for the damages done by cigarette smoking. The legal claims were based on the fact that tobacco companies knew the health consequences of cigarettes yet marketed this dangerous product to the American public. In addition to this product liability argument, states brought claims under their anti-trust, consumer protection, and anti-fraud statutes. In 1998, these cases were settled for \$206 billion in damages to be paid out over 25 years.⁶⁹ Under the settlement agreements, tobacco companies have been required to fund public education programs on the dangers of smoking and smoking cessation programs. They have also been required to put warning labels on cigarettes, to cease from misrepresentative advertising, and to submit to ongoing monitoring and enforcement of the terms of the settlement agreements.⁷⁰

The state AGs tobacco litigation emphasized that targeting of youth was especially egregious, because tobacco companies were fully aware of the consequences. For example, the 1990's tobacco litigation uncovered that in 1974, the Vice President of Marketing made a presentation to RJR Industries Board of Directors, explaining that:

⁶⁶ See Samantha K. Graff, *There is No Constitutional Right to Smoke: A Law Synopsis by the Tobacco Control Legal Consortium* (July 2005).

⁶⁷ See American Legacy Foundation, *Legacy Tobacco Documents Library (Introduction)*, n. 3, *supra*.

⁶⁸ In 1998, 46 State AGs signed onto a Master Settlement Agreement, and the remaining 4 states (Florida, Minnesota, Mississippi, and Texas) has already settled their suits against tobacco companies. See, e.g., Calif. Legislative Analyst's Office, *The Tobacco Settlement: What Will It Mean for California?* (1988), www.lao.ca.gov/1999/011499%5Ftobacco%5Fsettlement.html.

⁶⁹ *Id.*

⁷⁰ See, e.g., Calif. Dept. of Justice, Office of the AG, *Master Settlement Agreement* (1999), <http://caag.state.ca.us/tobacco/resources/msasumm.htm>.

This young adult market, the 14-24 group....represent(s) tomorrow's cigarette business. As this 14-24 age group matures, they will account for a key share of the total cigarette volume for at least the next 25 years.⁷¹

Tobacco companies specifically targeted youth through cartoons, giving away brand-name products, branded sponsoring of sports and other youth-oriented events, and targeting youth-oriented movies such as *The Muppet Movie* and *Who Framed Roger Rabbit*.⁷² Knowing that the “young adult market, the 14-24 group” would likely become addicted and suffer health damages made tobacco companies liable under product liability law. Therefore, targeted advertising of youth was banned by settlement agreements, and tobacco companies were required to take measures to reduce youth smoking, include warnings about its dangers.

Today, it could be harder to prove that the public has not been warned by tobacco companies about the dangers of smoking, although the facts may show that warnings have been insufficient to the Latino community. Moreover, tobacco companies may have otherwise acted negligently with regard to Latinos, for example, with regard to their targeting of youth. Facts in the public record discussed in Section I indicate that tobacco companies know or should know that the Latino population is very young, and that the rapid Latino population increase and predicted future increases are highest among the young. Tobacco companies must know that smoking among Latino youth is increasing. Negligence theory permits that even if tobacco companies did not actually know these facts, they should have known them because there is much public information about the growing Latino population and its youth. In addition, documents could be procured during the discovery process showing that tobacco companies have this information and they have probably made specific, relevant marketing plans, as nearly all U.S. companies have new strategies due to the importance of the growing Latino community. Tobacco companies would also be held liable because the likelihood of becoming addicted and being a smoker for life is highest if the person starts smoking in their youth. Furthermore, they would be strictly liable for any targeting of Latino youth, because underage smoking is illegal.

An additional negligence argument centers on the fact that Latinos are more likely to be affected by life-threatening diseases that may be caused by smoking. As LCAT has reported:

Cigarette smoking is the single most preventable cause of disease and premature death in the U.S. Smoking is related to a variety of health problems, including cancers, cardiovascular diseases, and respiratory diseases. This is significant, since the leading causes of death for Latinos include heart disease, cancer, and pulmonary/respiratory problems.⁷³

Significant health disparities for the Latino community were also discussed in Section I. Tobacco companies should know that health disparities are severe for Latinos, and that access to health information and health care is markedly lower in Latino communities. Therefore, it is logical and tobacco companies must be aware that the negative health impact of smoking will be predictably harsher in Latino communities.

Finally, tobacco companies would have to know that new Latino immigrants smoke *less* than those who have spent more time in the United States. It is also relevant that new Latino immigrants are younger than the U.S. Latino population, and that these young immigrants are the fastest-growing segment of the booming Latino population. This set of facts indicate that something in the young Latino immigrant experience of U.S. culture—including tobacco advertising—increases the likelihood of smoking, becoming addicted, and suffering health and other damages related to smoking. As demonstrated in Section I of this paper, these and other relevant facts are well-known facts found in public records. Specific Latino marketing plans might also be found in tobacco industry documents. Tobacco either knew or should have known the serious, negative health impact of marketing cigarettes to the Latino community, especially the youth. Under

⁷¹ *Id.*, citing Presentation of C.J. Tucker.

⁷² *Id.*

⁷³ LCAT, *Latinos and Tobacco* (2001), *supra*. n. 13.

negligence law, this means the damages were legally foreseeable, and therefore defendants may be held liable for causing such damages. Furthermore, tobacco companies would be considered strictly liable for marketing a dangerous product to the Latino community, implicating a lower threshold of proof.

It may be that tobacco companies have made payments or otherwise influenced Spanish-language TV to continue to show smoking on prime-time *telenovelas*. Considering that cigarette smoking is no longer shown on mainstream prime-time TV shows, this type of evidence would demonstrate discriminatory targeting of the Latino community. In the context of negligence claims, the legal system would evaluate whether tobacco companies and the Spanish-language TV networks either knew or should have known that portraying smoking in prime-time *telenovelas* would have a damaging and discriminatory impact on the Latino community. This means that both cigarette companies and Spanish-language TV networks could possibly be held liable for foreseeable damages. In the context of product liability litigation, tobacco companies were enjoined from advertising on television, but it seems that they may have been doing what is tantamount to advertising on Spanish-language TV. Therefore both tobacco and Spanish-language television companies could be ordered to cease and desist from the tactic, compensate for damages done, and provide “forward-looking remedies” such as public education programs on Spanish-language TV about the dangers of smoking and how to get help to stop smoking. This type of case could either be brought by state AGs and/or by plaintiff’s lawyers and civil rights attorneys representing the individuals and class members affected by the negligent and illegal behavior. If the suits were substantially similar, they could be joined.

2. U.S. Department of Justice Tobacco Litigation

The major tobacco suits discussed above have been litigated primarily by state Attorney Generals, in conjunction with private attorneys representing individuals harmed by smoking and their families or estates. The U.S. Department of Justice (DOJ) was involved in providing legal support for the state AGs as well as negotiating a Master Settlement Agreement, which was approved by Congress and former President Clinton in 1997, then signed by the tobacco industry in May 1998. The DOJ has also been involved as plaintiff in tobacco litigation alleging rights to recover damages for Medicare claims, as well as violations of federal anti-fraud and racketeering legislation. On September 22, 1999, the DOJ filed a Complaint alleging that tobacco companies are liable for damages to those harmed by smoking and/or their families, and arguing that federal courts should require defendants to take preventive measures against further harm.⁷⁴ Such measures are termed “forward-looking measures,” and they are probably the only way to adequately fund the smoking prevention and cessation programs needed to protect public health.

In the meantime, the defendant major cigarette manufacturers filed a Motion to Dismiss. On September 28, 2000, D.C. District Court Judge Gladys Kessler dismissed claims under the Medical Care Recovery Act and Medicare Secondary Payer provisions, but found that the DOJ Complaint properly stated claims of Racketeering Influence and Corrupt Organizations (RICO) Act violations.⁷⁵ The two currently viable claims are that tobacco companies allegedly violated the RICO Act by: (1) numerous acts of racketeering through mail fraud and wire fraud, by false and misleading statements as well as cover-ups, as they knew that nicotine is addictive, cigarettes cause serious health damage and are potentially lethal, but concealed evidence and said otherwise, even in contravention of the Master Settlement Agreement and in state and federal government oversight hearings, and (2) through conspiracies to commit all the aforementioned violations and a pattern of racketeering activity.⁷⁶ In its legal arguments, the DOJ emphasized that RICO violations have been especially egregious through targeting of youth. In particular, while tobacco companies knew for many years that it is illegal to sell cigarettes to persons under 18, and while they publicly pledged to avoid advertising directed at young people, they “were aggressively marketing

⁷⁴ U.S. DOJ, Civil Division, *Litigation Against Tobacco Companies*, www.usdoj.gov/civil/cases/tobacco2/.

⁷⁵ *U.S. v. Phillip Morris, et. al.*, Memorandum Opinion, Civ. No. 99-2496 (G.K.)(D.D.C., Sept. 28, 2000).

⁷⁶ *U.S. v. Phillip Morris, et. al.*, First Amended Complaint, Civ. No. 99-C V-02496 (GK) 73-89 (D.D.C., Feb. 28, 2001)(alleging violations of 18 U.S.C.A. §§ 1341 (fraud) and 1343 (conspiracy)).

cigarettes to young people through advertising.”⁷⁷ In its Amended Complaint of February 28, 2001, the DOJ set forth compelling evidence that:

The Cigarette Companies have long known that recruiting new smokers when they are teenagers ensures a stream of profits well into the future because these new smokers will become addicted and continue to smoke for many years, and the young smokers are “replacements” for older smokers who will either reduce or cease smoking or die.

Recognizing the profits to be had from this illegal market, the Cigarette Companies researched how to target their marketing at children and actively marketed cigarettes to children.⁷⁸

A trial and a long post-trial evidence production phase ensued, and on July 21, 2004, the Court issued sanctions against tobacco company executives who had concealed and spoiled evidence, even after the Court had ordered evidence to be produced.⁷⁹ Then on June 7, 2005, the DOJ announced that it would seek only 8% of the funding recommended by its own expert for national smoking cessation programs.⁸⁰ Advocates believe this may have been because high-level Bush Administration officials, including Karl Rove, Attorney General Alberto Gonzales’ Chief of Staff, and his Chief Counsel, have ties to tobacco companies.⁸¹ Therefore, advocates are urging the D.C. Circuit to make an independent judgment about what level of remedies payments are appropriate.

To complicate matters, the defendant tobacco companies appealed mid-trial, and the U.S. Court of Appeals ruled that the D.C. District Court does not have jurisdiction to issue the full scope of remedies under Section 1964(a) of the RICO Act. Specifically, the appeals court ruled that the district court does not have authority to order disgorgement of illegally-obtained proceeds from cigarette sales, under its jurisdiction to issue equitable remedies to “prevent and restrain” violations of the RICO Act.⁸² The court’s authority to issue equitable remedies to “prevent and restrain” further RICO Act violations implicates both: (1) disgorgement of illegally obtained proceeds (from cigarette sales), and (2) forward-looking measures needed to protect public health.⁸³ Accordingly, after the appeals court ruling, defendants immediately filed a motion urging that the district court deny the government’s request for funding for remedial measures, including a national smoking cessation program and a public education and counter-marketing campaign.⁸⁴

Fortunately, despite suspicions that the DOJ was mishandling the trial, on July 18, 2005, the DOJ submitted a well-drafted petition to the Supreme Court, urging the Court to overturn the appeals court ruling that would limit RICO remedies, and emphasizing that this is an “extraordinarily important case.”⁸⁵ If the Supreme Court rules favorably, this may help guide the District Court to independently judge what remedies

⁷⁷ *Id.* at 39.

⁷⁸ *Id.* at 39-40.

⁷⁹ Tobacco Products Liability Project (TPLP), *TPLP Issues a Freedom of Information Act Request to U.S. Department of Justice in Tobacco Over Dramatic Retreat in RICO Trial* (June 16, 2005), <http://tobacco.neu.edu/litigation/cases/pressreleases/foia.htm>.

⁸⁰ *Id.*

⁸¹ TPLP, *Government Takes Crucial Step to Reform Big Tobacco by Appealing Ruling that Eviscerated its Civil RICO Powers* (July 18, 2005), <http://tobacco.neu.edu/litigation/cases/pressreleases/certpetitionfiled.htm>.

⁸² *U.S. v. Phillip Morris, et. al.*, 396 F.3d 1190 (4th Cir., 2005).

⁸³ See, e.g., *U.S. v. Phillip Morris, et. al.*, *Petition for a Writ of Certiorari*, -- S.Ct. --, 22-23 (July 18, 2005). The Administration apparently reviewed the conflict-of-interest issue, and the petition was filed by Acting Solicitor General Edwin S. Kneedler, as the Solicitor General is disqualified in this case. *Id.* at 28.

⁸⁴ *U.S. v. Phillip Morris, et. al.*, *Joint Defendants’ Motion for Judgment on Partial Findings Pursuant to Fed.R.Civ.P. 52(c) with Respect to Certain Remedies Sought by the United States* No. 99-CV-02496 (GK) (D.D.C., July 20, 2005).

⁸⁵ *Id.* at 20-23.

are needed and to perhaps issue a more appropriate level of remedies than the drastically reduced amount the DOJ requested in June.⁸⁶

In this case, the DOJ set forth allegations of youth targeting, but it did not mention targeting of minorities by cigarette companies in its litigation. On July 21, 2005, LCAT joined with the National African American Tobacco Prevention Network (NAAPT), Praxis Project, National Tribal Tobacco Prevention Network (NTTPN), Asian Pacific Partners for Empowerment, Advocacy and Leadership (APPEAL), National Coalition for Lesbian, Gay, Bisexual and Transgender Health (NCLGBTH), and Professor Vernellia R. Randall, to attempt to participate in the litigation. The parties filed an *amicus* brief in the RICO litigation, urging the federal court to provide compensation and forward-looking remedies for minority communities.⁸⁷ The brief emphasized that cigarette smoking, the #1 cause of preventable death, is still responsible for millions of deaths in the United States, and that significant investment in prevention and smoking cessation is still needed. Moreover, the *amici* parties allege, minority communities have been targeted. In the case of Latinos, the health risks of tobacco marketing on the Latino community negatively impact millions; therefore, equitable remedies must include research, prevention and smoking cessation programs in Latino communities.⁸⁸ Recently, on August 1st, defendants filed their opposition, alleging that the organizations having demanded relief shows that they are not acting as *amici* but instead as *de facto* plaintiffs. .⁸⁹ The organizations answered with compelling arguments as to why affected minority groups have rights to participate in the litigation as *amici*.⁹⁰ Unfortunately, on August 10th, Judge Kessler, who is overseeing the case, denied the request by the minority groups for *amici* status.⁹¹

One minority group, NAAPT, has participated as plaintiff-intervenors in the case, along with Tobacco-Free Kids Action Fund, American Cancer Society, American Heart Association, American Lung Association, and Americans for Nonsmokers' Rights. However, the intervenors allege that the defendants have made it difficult to access all the litigation records needed to fully participate in the case.⁹² Their post-trial brief on the remedies that the Court should order in this case includes recognition that: "youth and minorities" have been particularly targeted by the tobacco industry;⁹³ "racial/ethnic minority populations have been targets of tobacco industry marketing efforts, including sponsorships of cultural events and funding of organizations;"⁹⁴ and "racial and ethnic minorities typically have less access than non-Hispanic Whites to appropriate cessation and prevention assistance."⁹⁵ Although Latino groups are not represented among the intervenors, with further advocacy and depending on the Court's decision in this case, this language about "minorities" may help ensure that Latinos receive their fair share of resources with regard to the smoking cessation and prevention remedies that the Court may order and oversee during the next 20 years.

⁸⁶ See, e.g., Statement of William V. Corr, Exec. Dir., Campaign for Tobacco-Free Kids, *Supreme Court Puts Disgorgement Back on Table in Tobacco Lawsuit* (July 18, 2005).

⁸⁷ *Brief of Amicus Curiae*, No. 99-CV-02496 (GK) (D.D.C., July 21, 2005).

⁸⁸ *Id.* at 16, 31.

⁸⁹ See, e.g., *U.S. v. Phillip Morris, et. al., Joint Defendants' Opposition Memoranda, Docs. 5578 & 5579*, Civ. No. 99-C V-02496 (GK)(D.D.C., Aug. 1, 2004).

⁹⁰ *U.S. v. Phillip Morris, et. al., Reply Memorandum to Joint Defendants' Opposition Memoranda*, Civ. No. 99-C V-02496 (GK)(D.D.C., Aug. 5, 2004).

⁹¹ *U.S. v. Phillip Morris, et.al., Order Denying Motion for Leave to Appear as Amicus Curaie*, Civ. No. 99-CV-02496 (GK)(D.D.C., Aug. 10, 2005).

⁹² See, e.g., *United States and Tobacco-Free Kids Action Fund, American Cancer Society, American Heart Association, American Lung Association, Americans for Nonsmokers' Rights & National African American Tobacco Prevention Network v. Philip Morris USA, Inc. et. al., Plaintiff-Intervenors' Opposition to Defendants' Motion to Clarify Order #987 to Exclude Plaintiff-Intervenors From Obtaining Sealed and Confidential Information*, No. 99-CV-02496 (GK) (D.D.C., Aug. 5, 2005).

⁹³ See, e.g., *Post-Trial Brief of the Plaintiff-Intervenors Concerning the Remedies That the Court Should Impose in This Case*, No. 99-CV-02496 (GK) (D.D.C., Aug. 30, 2005), at 3, 6.

⁹⁴ *Id.* at 12 (citing *Surgeon General Carmona*, 4/27/05, 16:6-14)

⁹⁵ *Id.* at 13.

In sum, further evidence from Latino perspectives, and certain Latino civil rights strategies, were not included in the DOJ tobacco litigation to date, and should be considered in the future. First, evidence that Latino adolescent smoking is increasing, along with evidence that smoking increases as new Latino immigrants spend more time in the U.S., indicates that millions more Latinos will become ill or die from smoking unless comprehensive measures are taken. This evidence should be documented in future briefs before federal courts. Also, federal court and DOJ oversight of any forward-looking remedies ordered must include monitoring to ensure against targeting of Latinos, especially Latino youth and recent immigrants.

Secondly, internal company documents about the Latino market received through “discovery” in litigation processes may provide further evidence of intentional targeting of Latinos. The current public record of internal marketing documents produced under order of the AG litigation (discussed above) contains some evidence of targeting Latinos; however, the Industry Documents databases are not searchable, and funding is needed to thoroughly comb the record for proof of targeting Latinos.⁹⁶ Due to lack of attention to Latino perspectives, the existing record has never been examined in this regard. The ability of the DOJ to urge federal courts to require document production may also be needed, as tobacco companies have a long history of concealing and destroying evidence.⁹⁷ The DOJ is now under the leadership of Attorney General Alberto Gonzales, who says he embraces diversity. Therefore, the DOJ should update its strategy to include civil rights issues in its tobacco litigation.

Third, arguments about disparate impact should be explored. Disparate impact of youth-oriented tobacco advertising on the Latino community (considering its youth), disparate impact of targeting Latino immigrants (considering proof of increasing vulnerability to smoking with time spent in the U.S.), and disparate impact on the health of the Latino community (considering the proven health disparities), should be explored in future litigation strategies. The Latino community has unique characteristics that are apparent to Latino civil rights experts, but these factors have been left out of the legal analysis to date. Such evidence would help further demonstrate the type of fraud, conspiracy and racketeering that is currently being argued by the DOJ in its RICO claims based on targeting of young people.

Finally, rather than relying solely on the *amici* strategy, Latino civil rights advocates should directly urge the new Attorney General to include targeting of Latino youth as an issue in its current and future litigation strategies, and advocates should also consider the potential impact of bringing their own suit. Moreover, funding should be sought to improve research on the impact of tobacco marketing on the Latino community, and according to precedent from the tobacco settlements, tobacco companies should themselves fund such research.

This section on U.S. legal remedies discussed two litigation strategies: (1) state product liability claims and (2) litigation of federal statutory violations. Tobacco litigation is a fairly recent phenomenon, having been first undertaken in the early 1990’s. The discussion above illustrates an underlying issue, which is that Latino inclusion in tobacco litigation strategies has been low, and the Latino civil rights aspects of the issue have not been fully explored. Part of the reason could be that many Latino groups receive funding from tobacco companies, and this may have influenced Latino leadership. It is very commendable that the *National Council of La Raza* (NCLR) decided to no longer accept tobacco funding, and as the Latino community is becoming increasingly aware of this issue, other groups should consider following suit.⁹⁸ Certainly, the damage done by cigarette marketing is ongoing and increasing in the Latino community. For all these reasons, Latino civil rights litigation strategies should be developed to help stop tobacco companies targeting Latinos, remedy the damages done to Latino health, and ensure a healthier community in the future.

⁹⁶ See, e.g., UCSF Galen Library, Inside Tobacco Control, *Industry Documents*, <http://galen.library.ucsf.edu/collres/reflinks/tobacco/industry.html>.

⁹⁷ See, e.g., *U.S. v. Phillip Morris, et. al.*, Order #600, Civ. No. 99-C V-02496 (GK)(D.D.C., July 21, 2004)(ordering sanctions for spoiling evidence).

⁹⁸ See *LCAT 4th Annual Conference Agenda* discussing NCLR award (Sept. 15, 2005).

B. Potential Statutory Remedies

While the previous section focused on the damage tobacco is doing to the Latino community, this section will change the focus to potential legal remedies for the damage done by alcohol advertising targeting the Latino community. This section will also change the focus from litigation strategies to potential statutory remedies. While these statutory remedies may also be applicable to tobacco-related legal issues, the main focus will stay on statutory remedies for alcohol companies targeting Latinos. The offensive *Tecate* billboard posted during last year's *Cinco de Mayo* promotional campaign, as well as the recent Miller beer advertising campaign in Spanish-language TV will be discussed as case examples.

Part 1 will analyze federal civil rights legislation, Part 2 will analyze federal consumer protection law, Part 3 will analyze state regulation, and Part 4 will discuss possible new federal legislation.

1. The 1964 Civil Rights Act

The 1964 Civil Rights Act prohibits not only intentional discrimination, but also discriminatory impact. Federal courts have repeatedly held that the language of §2000d of Title VI demonstrates that Congress intended that Title VI be used to establish a disparate impact claim.⁹⁹ Title VI applies to every federally funded health program, as well as any other federally funded program relevant to alcohol and tobacco.¹⁰⁰ As will be discussed below, the anti-discrimination norms in Title VI are *indirectly* applicable to the legal issue at hand, which is whether and how alcohol and tobacco companies may be held accountable for targeting and discriminatory impact in the Latino community.

The Department of Health and Human Services (HHS) implements Title VI through a variety of measures, which need to improve in order to correct the extreme health disparities experienced by women and minority communities. Concurrently, HHS has a number of research, prevention and treatment programs related to alcohol abuse.¹⁰¹ Under Title VI, these programs must take into account Latino civil rights perspectives, and they should be improved accordingly.¹⁰² At the intersection of these two types of programs—the direct Title VI programs and the alcohol-related research, prevention and treatment programs—lies the area of law that must be further developed to help alleviate alcohol companies' targeting of Latino communities. While this analysis could be applied to any federal department involved in alcohol-related issues (such as the Department of Transportation, or the Justice Department, for example), this paper will focus on the HHS.

In 1985, Former HHS Secretary Margaret Heckler published a special report on minority health, which was the first major government report on health disparities in the U.S. Her *Report of the Secretary's Task Force on Black and Minority Health* "revealed large and persistent gaps in health status among Americans of different racial and ethnic groups," and prompted HHS to create the Office of Minority Health (OMH) in 1985.¹⁰³ The Centers for Disease Control and Prevention (CDC) created its own Office of Minority Health in 1988 in response to the same report.¹⁰⁴

⁹⁹ See, e.g., *Guardians Assn. v. Civil Service Commission*, 463 U.S. 582 (1983); *Elston v. Talladega County Board of Education*, 997 F.2d 1394 (11th Cir. 1993)(discussing 42 U.S.C. §2000d: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.")

¹⁰⁰ *Id.*

¹⁰¹ See U.S. Commission on Civil Rights, *The Health Care Challenge: Acknowledging Disparity, Confronting Discrimination, and Ensuring Equality*, *supra*. n. 47, Vol. II.

¹⁰² See 42 U.S.C. §2000d (1964).

¹⁰³ www.cdc.gov/omh/AMH/AMH.htm.

¹⁰⁴ See U.S. Commission on Civil Rights, *The Health Care Challenge: Acknowledging Disparity, Confronting Discrimination, and Ensuring Equality*, Vol. I., *supra*. n. 47.

In the resulting HHS system, OMH along with the Office of Civil Rights (OCR) have primary authority to ensure that all other HHS departments provide for equal access to government funded programs under Title VI.¹⁰⁵ The public may file complaints with the OCR to enforce their rights to equal access to federal programs under Title VI. Under Title VI, programs such as the National Institutes of Health (NIH) research programs, the National Health Information Center (NHIC), and the Substance Abuse and Mental Health Services Administration (SAMHSA), for example, must take the measures necessary to ensure that Latinos have equal access to health benefits, including those measures necessary to ensure against disparate impact, even if such impact is due to targeting or other outside factors.¹⁰⁶

Moreover, under Title VI, civil rights checks and balances must operate systemically. OCR and OMH must ensure that HHS programs are aware of civil rights concerns and undertake remedial measures.¹⁰⁷ Therefore, OCR and OMH must ensure awareness that the impact of alcohol and tobacco advertising on the Latino community needs further study, and OCR and OMH must also ensure that NIH take all measures to ensure that these studies occur. Similarly, OCR and OMH must ensure awareness that culturally competent public education about the dangers of alcohol and tobacco abuse in the Latino community is needed, and that NHIC and SAMHSA conduct such public education programs. All relevant HHS programs, especially OMH, should be involved in ensuring that Latinos are not misled and discriminated against with regard to their health by alcohol and tobacco advertising. Countering, limiting or restricting alcohol and tobacco advertising targeting Latinos should be part of all relevant HHS programs, and new programs should be created if those already in existence are not capable. OMH and SAMHSA, along with the CDC, among other programs, must become deeply involved in such endeavors.

As discussed above, because of health disparities, millions of Latinos are without access to addiction prevention and treatment, as well as treatment of alcohol- and smoking-related diseases; therefore, the need for corrective measures is even greater. Under Title VI, the HHS has a direct legal responsibility to strive to correct health disparities.¹⁰⁸ If the cost is prohibitive, HHS should consider becoming involved in litigation in order to recoup the costs of treatment and prevention programs made necessary by industry targeting of Latinos. All of these measures and many more are needed to help reduce the predictable deaths and disease that will result if the campaigns advertising alcohol and tobacco in Latino communities go unchecked.

In sum, under federal civil rights law, the government must take all appropriate measures necessary to end health disparities suffered by Latinos,¹⁰⁹ including those suffered due to being targeted by alcohol and tobacco advertising. Since all of the aforementioned programs are federally funded, they themselves must take measures to comply with Title VI's requirement that no one be denied the benefits of the programs because of their Hispanic ethnicity, whether this is due to direct discrimination or discriminatory impact. Furthermore, the federal programs must take measures to ensure that the millions of federal grants they distribute are only provided to programs that do not have discriminatory impact.¹¹⁰ It will be up to HHS, working closely with Latino experts, to create new programs to counter and limit industry targeting of the Latino community. In the alternative, individual plaintiffs who have been injured by the failure of the HHS or other federally funded programs to adequately protect them against such targeting, could bring suit in federal court.¹¹¹ For all these reasons, the HHS should be held accountable to use its substantial authority to help alleviate and remedy the targeting of Latinos by alcohol and tobacco companies.

¹⁰⁵ See *Acknowledging Disparity, Confronting Discrimination, and Ensuring Equality* Vol. II, Chs. 2 & 3.

¹⁰⁶ *Id.* at Ch. 5.

¹⁰⁷ *Id.* at Ch. 3 (OCR Rulemaking and Policy Development).

¹⁰⁸ *Id.* at 56-57.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 205-15.

¹¹¹ See, e.g., *Guardians Assoc. v. Civil Service Commission*, 463 U.S. 582 (1983).

2. Federal Consumer Protection Regulation

In the U.S. legal system, any form of communication is traditionally protected under the First Amendment.¹¹² In order to protect basic consumer rights, unfair or deceptive advertising is prohibited by the Federal Trade Commission (FTC) Act, but FTC regulation must not unduly limit constitutional protections of free speech. Given these challenges, the FTC summarizes the law as follows:

A governmental restriction on speech that proposes a commercial transaction must satisfy four criteria to survive First Amendment scrutiny: (1) the speech must concern lawful activity and not be misleading; (2) the asserted governmental interest in restricting it must be substantial; (3) the restriction must directly and materially advance the governmental interest asserted; and (4) the restriction must be no more extensive than necessary to serve that governmental interest.¹¹³

This is a four-pronged test that federal courts and the FTC use to determine the balance between obligations to protect consumers and First Amendment rights. To apply the test to cases of alcohol and tobacco advertising, (1) certain ads do not “concern lawful activity,” because they are directed primarily at youth, and underage smoking and drinking are illegal. Therefore, (2) the law considers that there is substantial interest in restricting such ads. For example, in the 1996 “Baltimore Billboard Cases,” a Baltimore City Ordinance against billboard and similar placard advertising of alcohol was found to be constitutional, because of the City’s substantial interest in preventing underage drinking. The Fourth Circuit found that (3) the restrictions directly and materially advanced the government’s interest and (4) were no more extensive than necessary, considering that the prohibited liquor ads were subjecting the children to “involuntary and unavoidable solicitation” while *en route* to school or playing in their neighborhood, but liquor ads were still permitted in other places such as the downtown business area.¹¹⁴

This analysis applies to numerous cases in which Latino youth are targeted by alcohol advertising. For example, in the case of the sexist *Tecate* billboards, High school students in New Mexico led the campaign against the offensive *Tecate* billboard seen *en route* to their school during the 2004 *Cinco de Mayo* campaign. Although the beer company voluntarily withdrew the billboards, an FTC complaint could still be filed and the federal government should take measures to ensure against such exploitative advertising in the future. Furthermore, the *Tecate* billboards are not only unlawful because they targeted youth; they were also offensive to fundamental constitutional principles prohibiting discrimination, as well as federal law and policy acknowledging the contributions of the Latino community.¹¹⁵ For all these reasons, the FTC has an even more substantial interest in restricting such offensive advertising campaigns; therefore, any reasonable regulatory actions it takes to restrict such ads will pass the four-prong constitutionality test.

a. Deceptive or Unfair Advertising

As discussed above, the FTC Act expressly provides that the federal government may restrict deceptive or unfair advertising.¹¹⁶ Deceptive or unfair advertising restrictions also fit within the

¹¹² See, e.g., *Lindmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 96 (1977); *Carey v. Population Services Int’l.*, 431 U.S. 678, 701 (1977).

¹¹³ FTC, *Self-Regulation in the Alcohol Industry: A Review of Industry Efforts to Avoid Promoting Alcohol to Underage Consumers*, n. 7 (Sept. 1999), www.ftc.gov/reports/alcohol/alcoholreport.htm#N_7 (“*Central Hudson Gas & Elect. Corp. v. Public Serv. Comm’n of New York*, 447 U.S. 557, 566 (1980). See also *Greater New Orleans Broadcasting Association, Inc. v. United States*, No. 98-387, 1999 U.S. LEXIS 4010 (June 14, 1999) (striking down FCC regulation prohibiting broadcast advertising of lawful private casino gambling); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (striking down state ban on alcohol price advertising).”)

¹¹⁴ *Anheuser-Busch v. Schmoke*, 101 F.3rd 325, 327 (4th Cir. 1996), upholding *Anheuser-Busch v. Schmoke*, 63 F.3d 1305 (4th Cir. 1995).

¹¹⁵ For more detailed analysis of the case, as well as discussion of State-level remedies that should be undertaken, See Part 3 of this Section, *infra*.

¹¹⁶ §5 FTC Act

constitutional analysis discussed above. The *FTC Policy Statement on Deception of 1983*, still in force, clarified that: “Certain elements under gird all deception cases.”¹¹⁷ These elements can be briefly summarized as follows:

First, there must be a representation, omission or practice that is likely to mislead the consumer... Second, we examine the practice from the perspective of a consumer acting reasonably in the circumstances. If the representation or practice affects or is directed primarily to a particular group, the Commission examines the reasonableness from the perspective of that particular group... Third, the representation, omission, or practice must be a “material” one. The basic question is whether the act or practice is likely to affect the consumer’s conduct or decision with regard to a product or service.¹¹⁸

The FTC also clarified that specific cases of deceptiveness “include false oral or written representations,” and “sales of hazardous or systematically defective products or services without adequate disclosures.”¹¹⁹ These factors could apply to some of the new Spanish-language TV campaigns aggressively marketing Miller, Bud Light, Heineken, and *Tecate* to the Spanish-speaking Latino community, who are mostly newer immigrants. The beer commercials have few, if any, warnings about drinking responsibly, and they strongly imply a sense of well being with no danger in sight. To apply the above test, these commercials are likely to affect the average consumer’s decision about whether it is safe to drink Miller or Bud Light frequently. The average consumer might also be influenced to believe that drinking Heineken helps one interact with non-Hispanic women and accelerates acculturation, or that drinking large quantities of *Tecate* is a way to honor one’s Mexican heritage. The “basic question” for the FTC will be whether these ads campaigns are likely to affect the average new Latino immigrant’s conduct or decision with regard to the product. Arguably, these ads are deceptive and misleading because they make frequent beer drinking seem very appealing while failing to disclose the risks of drinking, which are more serious in the Latino community.¹²⁰

Furthermore, considering the youth of the new Latino immigrant population, it may be that such ads target Latino youth, and therefore there are elements of unlawfulness as well as deception. Finally, since the same beer companies typically provide more consumer protection when marketing their products on mainstream TV, these ads may be unlawful because they are discriminatory.

Under the FTC Act, the power to regulate against “unlawful” ads falls under the power to regulate against “unfair” advertising practices.¹²¹ Just as the FTC has formally clarified its interpretations of what constitutes “deceptiveness,” it has done the same to help define what constitutes “unfairness.” The elements of unfairness were first clarified through a 1964 *FTC Statement of Basis and Purpose, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking*, explaining that the criteria for unfairness are as follows:

- (1) whether the practice injures consumers;
- (2) whether it violates established public policy;
- (3) whether it was unethical or unscrupulous.¹²²

¹¹⁷ [Former] FTC Chairman James C. Miller III, *FTC Policy Statement on Deception*, Submitted to House Committee on Energy & Commerce (Oct. 14, 1983), www.ftc.gov/bcp/policystmt/ad-decept.htm.

¹¹⁸ *Id.* at 1-2.

¹¹⁹ *Id.* at 1.

¹²⁰ See, e.g., LCAT and other expert reports in Section I.B, *supra*.

¹²¹ 15 U.S.C. §5 (1890).

¹²² [Former] FTC Chairman Michael Pertschuk & Commissioners Paul Rand Dixon, David A. Clanton, Robert Pitofsky & Patricia B. Bailey, *FTC Policy Statement on Unfairness* (Dec. 17, 1980), www.ftc.gov/bcp/policystmt/ad-unfair.htm, at 2, n. 8 (citing *FTC Statement of Basis and Purpose, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking*, 29 Fed. Reg. 8324, 8355 (1964)).

Since 1964, the FTC clarified that the third element is “largely duplicative.”¹²³ The following analysis will therefore include only the first two elements.

The Supreme Court approved of the above criteria in its 1972 decision on FTC regulation of “S&H green stamps.” The Court found that unfair practices are not only defined by express statutory language making certain trading practices illegal. Citing the FTC regulation on *Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking* as good precedent, the Supreme Court ruled that the FTC Act also gave the agency flexible authority to itself to determine which practices are “unfair.”¹²⁴ Therefore, when considering whether advertising practices are “unfair,” the FTC not only considers if they are illegal under state or federal statutes, it also considers whether the ads violate public policy as established by “common law, industry practice, or otherwise.”¹²⁵ This standard also permits the FTC to “reach conduct that violates generally recognized standards of business ethics.”¹²⁶

In the case of the aggressive beer marketing campaigns on Spanish-language TV, industry practice has been to include warning messages such as “drink responsibly” in mainstream TV. It is patently unfair to leave these warnings out of Spanish-language TV ads, or to make the warnings less frequently or less clearly than in mainstream TV. The FTC has legal authority to restrict this unfair practice, which is injurious to Spanish-speaking consumers.¹²⁷ The FTC should take immediate action to stop these discriminatory advertising tactics.

Moreover, under FTC regulations, when public policy has been clarified through judicial or legislative measures, the case is even stronger and the element of consumer injury need not be proven.¹²⁸ Both judicial and legislative measures have made it extremely clear that targeting underage drinkers is unlawful, and it is likely that many Spanish-language TV beer ads are targeted at Latino youth, especially if they are shown during sports events in which most of the audience is under the legal drinking age. The FTC and the beer industry must take into account that the Spanish-speaking Latino population is significantly younger than other U.S. audiences.¹²⁹ Therefore, beer companies should be even more cautious about refraining from aggressive advertising on Spanish-language TV, but unfortunately, they are being even less cautious and the government has not stepped in to stop them from targeting Latino youth. For all these reasons, advocates and Spanish-language television stations should urge the FTC to take action and determine what restrictions are proper, and the beer industry should cooperate fully in developing and implementing a set of regulatory guidelines that will protect Latino consumer rights.

b. FCC Regulation

Federal communications policy is somewhat of a challenging arena for civil rights advocacy. Equal access to the media and equal treatment in the media have been the subject of federal communications policy requiring diversity in television and radio broadcast programming. Unfortunately, these federal communications policies promoting diversity in the media have been largely undone by recent Supreme Court decisions, as well as disinterest on the part of the Administration.¹³⁰ However, Latino civil rights

¹²³ *Id.* at 5 (noting that this element meant that the FTC could “reach conduct that violates generally recognized standards of business ethics,” which is encompassed in the public policy element).

¹²⁴ *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244-45 (1972)(citing *FTC Statement of Basis and Purpose, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking*, 29 Fed. Reg. 8324, 8355 (1964)).

¹²⁵ *FTC Policy Statement on Unfairness, supra.* n. 119, at 4 (discussing the *S&H* case standards).

¹²⁶ *Id.*

¹²⁷ *See, e.g.,* LCAT & other reports discussed in Section I.B, *supra.*

¹²⁸ *FTC Policy Statement on Unfairness, supra.* n. 122, at 5.

¹²⁹ *See, e.g., Demographic Data*, Section I.A, *supra.*

¹³⁰ *See, e.g., Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), requiring that all race-based classifications be subjected to strict scrutiny, overturning inconsistent portions of *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547

advocates could argue that certain forms of alcohol industry targeting of Latinos violate the most fundamental principles of the Equal Protection clause prohibiting discrimination, which have not been undone by recent Supreme Court decisions. Furthermore, in its 2003 decision in the University of Michigan case, the Supreme Court clarified that the law still allows that the government may have a compelling interest in promoting diversity.¹³¹ Arguably, federal communications policy should be updated as there is a growing public interest in ensuring equal access to quality broadcast material and consumer protection for Spanish-speakers.

Furthermore, in some cases of alcohol and tobacco advertising targeting Latinos, the Federal Communications Commission (FCC) has ample authority to step in to regulate under its statute. According to former Attorney General Janet Reno, the FCC serves a “unique role in ensuring that the public interest is not undermined by certain uses of public airwaves.”¹³² The “public airwaves” include Spanish-language TV broadcasts, and since TV stations require licensure, they are subject to the terms of the license as well as FCC regulation. The FCC uses its public interest regulatory power to prohibit cigarette advertising on television and other electronic media.¹³³ This authority of the FCC to regulate for public interest policy reasons is, for all practical purposes, the same governmental authority that the FTC has to restrict advertising for public policy reasons.¹³⁴

In addition, the FCC Act provides explicit statutory authority to restrict “obscene, profane, or indecent” broadcasting. Alcohol advertising has not been “obscene” or “profane,” but some of the sexist ads directed at the Latino community could be considered “indecent.” While “obscene” or “profane” ads may be banned, indecent ads cannot be entirely prohibited, due to First Amendment considerations. For broadcasting to be considered “indecent,” the content must be about sexual or excretory functions, and it must be “patently offensive as measured by contemporary community standards for the broadcast medium.”¹³⁵ The community standard is measured not by one person’s sensitivities, but instead by the average broadcast viewer or listener.¹³⁶ Under federal law, indecent broadcasting is limited to between 10:00 p.m. and 6:00 a.m., and even outside of those hours, if concern for the well being of children is at issue.¹³⁷ This basis for regulation has been upheld by recent Supreme Court decisions confirming that ads on broadcast TV or radio that are overtly sexualizing and offensive may be restricted by the FCC.¹³⁸ This may not be the preferred civil rights

(1990)(holding that the Communications Act authorized FCC to promote diversity in broadcast, therefore FCC measures designed to increase diversity were subject to “intermediate scrutiny” and were held to be constitutional).¹³¹ See *Gratz et.al. v. Bollinger, et.al.*, 000 U.S. 02-516 (2003). In the Court’s 5-4 Opinion permitting narrowly-tailored higher education policies designed to promote diversity in the student body, Justice Renquist relied upon *Regents of Univ. Cal. v. Bakke*, 438 U.S. 265, 317 (1978), in which Justice Powell clarified that diversity programs may be constitutional as long as race is not the only factor under consideration. Justice Renquist emphasized that: “Such a system, in Justice Powell’s view, would be ‘flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant.’” *Id.* at §I.B., citing *Bakke*, 438 U.S. at 307. The *Gratz* decision indicates that race-based discrimination, such as permitting aggressive alcohol advertising on Spanish-language but not English-language TV, will still be subject to strict scrutiny. However, even under a strict scrutiny test, the FCC may enact narrowly-tailored measures to forward its compelling interest in diversity, as long as race (or Hispanic ethnicity) were not the only factor considered, and as long as the measures could otherwise pass the test of strict scrutiny.

¹³² FCC News Release, *Statement of [Former] FCC Chairman Reed Hundt on Broadcast Advertisements of Hard Liquor* (July 9, 1997), quoting former Attorney General Janet Reno.

¹³³ *Id.* at n. 6, citing *Capital Broadcasting Co. v. Mitchell*, 333 F.Supp. 582 (D.D.C. 1971), *summarily aff’d sub nom. National Assoc. of Broadcasters v. Kleindienst*, 405 U.S. 1000 (1972)(upholding *Public Health Cigarette Smoking Act of 1969*, 15 U.S.C. § 1331 et seq.).

¹³⁴ See, e.g., *Anheuser-Busch v. Schmoke*, 101 F.3d 325, *supra* n. 114, at n. 6.

¹³⁵ *Industry Guidance On the Commission’s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd 7999 (2001), at §III., *Indecency Determinations, I.A., Analytical Approach*.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ See *Denver Area Educ. Telecommunications Consortium, Inc. v. FCC*, 116 S.Ct. 2374, 000 U.S. U20031 (1996); *FCC v. Pacifica Foundation*, 438 U.S. 726, 750-51 (1978).

strategy, due to Latino community concerns about freedom of expression, but if indecent ads are shown on Spanish-language and not English-language broadcast media, then certain civil rights concerns are at stake.

The advantages of FCC over the FTC are that the FCC's hearings are public, whereas the FTC hearings are private. The main disadvantage of the FCC is that it must not duplicate FTC actions and regulations, and since the FTC has already occupied most of the applicable field of regulation, much of FCC regulation could be pre-empted.¹³⁹ However, it is arguable that the FTC has not preempted regulation of alcohol advertising in Spanish-language media, and that therefore FCC's statutory power to regulate broadcast media, would permit it to take action against unconscionable advertising.

c. Industry Self-Regulation

In cases when deception, unfairness or indecency cannot be proven, the First Amendment is likely to prohibit government regulation. In 1995, the Supreme Court held that a federal law limiting a brewer's "right to provide the public with accurate information" about the alcoholic content of malt beverages was unconstitutional.¹⁴⁰ But even in cases when deception, unfairness, or indecency cannot be proven, there may be other remedies. The FTC can and does investigate consumer complaints based on public policy reasons alone. For example, at the moment, the FTC website solicits complaints about violence in the media.¹⁴¹ Such FTC investigations can result in self-regulation on the part of industry, in which the industry cooperates in order to avoid offensive and potentially illegal practices. For example, the alcohol industry has engaged in various self-regulation agreements designed to refrain from targeting those under the legal drinking age of 21. As the FTC explained in its 1999 review of the industry's self-regulatory scheme:

In the last 10 years, the beverage alcohol industry has responded voluntarily to FTC staff investigations with changes to its codes. In addition to the changes addressing college marketing described above, examples of voluntary industry responses to problematic practices include:

- *Withdrawing ads from television programs with majority underage audiences:* In the mid-1990's, FTC staff investigated the placement of beer ads on cable network programming that had majority underage audiences. The companies withdrew the ads from the programming at issue, and the Beer Institute adopted the requirement that demographic data be reviewed periodically to reduce the likelihood that the problem would recur.¹⁴²

The FTC has since urged that the Beer Institute change its code, because the requirement that greater than 50% of viewers be over 21 has not been effective. The FTC explained that:

Only 30% of the U.S. population is under the age of 21, and only 10% is age 11 to 17. The 50% standard, therefore, permits placement of ads on programs where the underage audience far exceeds its representation in the population. Given this age composition of the population, large numbers of underage consumers can be exposed to alcohol ads even though a majority of the audience is of legal age.¹⁴³

¹³⁹ *Statement of [Former] FCC Chairman Reed Hundt on Broadcast Advertisements of Hard Liquor, supra. n. 132.*

¹⁴⁰ *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 491 (1995).

¹⁴¹ The FTC Consumer Complaint Form states as follows: "Use this form to submit a complaint to the Federal Trade Commission (FTC) Bureau of Consumer Protection about a particular company or organization. This form also may be used to submit a complaint to the FTC concerning media violence." FTC Consumer Complaint Form, OMB #3084-0047, [https://rn.ftc.gov/pls/dod/wsolcq\\$.startup?Z_ORG_CODE=PU01](https://rn.ftc.gov/pls/dod/wsolcq$.startup?Z_ORG_CODE=PU01).

¹⁴² FTC, *Self-Regulation in the Alcohol Industry: A Review of Industry Efforts to Avoid Promoting Alcohol to Underage Consumers* 8 (1999), www.ftc.gov/reports/alcohol/alcoholreport.htm.

¹⁴³ *Id.* at 9.

In consideration of the youth of the Latino population, the above analysis becomes even more compelling. Census data shows that 34.4 % of the Latino population is under age 18.¹⁴⁴ The median age of Hispanics is 25, while the median age for non-Hispanic Whites is 34.¹⁴⁵ Therefore, a disproportionate number of Latinos are in the market that beer manufacturers say they intend to refrain from targeting. Moreover, as the PEW Hispanic Center reports, the newer, younger Hispanic population has higher fertility levels; therefore, these trends will make youth marketing even more skewed towards disproportionately impacting Latinos in the future.¹⁴⁶ For all these reasons, the Beer Industry's current self-regulation scheme will be highly ineffective in the Latino community.

In the case of the aggressive new beer campaigns on Spanish-language TV, the FTC should investigate and monitor this phenomenon in the same manner that it has been monitoring the Beer Institute's promise to take certain measures to avoid targeting youth in general. The investigations that led to the current self-regulation precedent illustrate that the FTC can and should investigate the targeting of Latinos and urge new industry standards to alleviate the dangers that alcohol abuse presents to the Latino community. Finally, the Beer Industry standards must be designed to be effective in ensuring that underage audiences are not targeted by their advertising campaigns—and given the relative youth of the Latino population, stricter measures will be needed in relation to campaigns that reach a significant Latino audience.

3. Twenty-first Amendment State Regulation

State regulation of alcohol advertising may be permitted under various legal theories, with the most important being state authority under the 21st Amendment. The 21st Amendment of the U.S. Constitution repealed prohibition, but it gave the states regulatory power over the delivery or use of liquor within their borders. The Supreme Court has made clear that the 21st Amendment “does not license the States to ignore their obligations under other constitutional provisions.”¹⁴⁷ This section will analyze constitutional limits on state restrictions of alcohol advertising. Next, it will analyze how, given these limits, states may restrict aggressive alcohol advertising targeting the Latino community, especially during *Cinco de Mayo* and similar campaigns, while still respecting constitutional protections.

The Supreme Court has consistently held that 21st Amendment-based restrictions on alcohol may not infringe upon other constitutional rights and provisions. For example, in 1976, the Supreme Court invalidated an Oklahoma law making the minimum drinking age 21 for men and 18 for women, although the state alleged that young men caused more drunk driving accidents than young women and that the law was permissible under the 21st Amendment.¹⁴⁸ The Supreme Court ruled that:

Neither the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment [including its Equal Protection clause] where the sale or use of liquor is concerned.¹⁴⁹

Given this requirement for constitutional balance, the essential protections of the First Amendment and the Equal Protection clause of the Fourteenth Amendment will be analyzed below.

In 1996, in a 5-4 decision, the Supreme Court held that Rhode Island laws banning the advertisement of retail liquor prices except at the point of sale violated the First Amendment.¹⁵⁰ The Rhode Island laws prohibited distributors and retailers, and even Rhode Island press, from advertising liquor prices. The state

¹⁴⁴ LCAT, *Latino Youth & Tobacco Fact Sheet supra.* n. 9.

¹⁴⁵ Roberto Suro, Ed., *Hispanics: A People in Motion, supra.* n. 8, at 5.

¹⁴⁶ *Id.* (noting that the median age of second-generation Hispanics is 11).

¹⁴⁷ *See, e.g., Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712 (1984).

¹⁴⁸ *Craig v. Boren*, 429 U.S. 190 (1976).

¹⁴⁹ *Id.* at 209-10.

¹⁵⁰ *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

argued that these laws were valid under its 21st Amendment interests in “the promotion of temperance.”¹⁵¹ The Supreme Court discussed that “commercial speech” is protected under the First Amendment. However, states may regulate commercial speech more than other types of protected speech, by requiring warnings, disclaimers or additional information to prevent it from being deceptive, or by restricting aggressive sales tactics that may exert “undue influence” over consumers.¹⁵²

The Court then discussed that in 1980, in the *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, the Supreme Court found that there are “serious First Amendment concerns that attend to blanket advertising prohibitions that do not protect consumers from commercial harms.”¹⁵³ Even though *Central Hudson* was not a 21st Amendment case, this is the standard the Court decided to apply to the Rhode Island law restricting advertising of retail liquor prices. The Court summarized the *Central Hudson* rule as follows:

When a state regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review.¹⁵⁴

Therefore, state advertising restrictions for valid consumer protection purposes may be constitutional. However, the Court clarified that bans designed to keep truthful, nonmisleading commercial speech from the public in order to protect them are subject to “rigorous” judicial review.¹⁵⁵ The Court reasoned that:

...when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the fair bargaining process, there is far less reason to depart from rigorous review that the First Amendment generally demands.¹⁵⁶

Moreover: “The First Amendment directs us to be especially skeptical of regulations that keep people in the dark for what the government perceives to be for their own good,” and the Court extended “that teaching” to commercial speech cases.¹⁵⁷ Under this new analysis, in cases where the advertising is truthful and not misleading, even under the 21st Amendment, the state bears the burden of proving its advertising restrictions will be materially effective at reducing alcohol abuse. Mere speculation or conjecture that the limits would serve the purpose would not pass the test. Under the new test set forth by the 1996 Supreme Court, a state must show that its regulation “will significantly reduce alcohol consumption.”¹⁵⁸ Also, the restriction must not be “more extensive than necessary.”¹⁵⁹ Rhode Island could not pass such a strict test; therefore, its laws were found to be unconstitutional.

Federal court precedents also include the 1996 Baltimore billboard cases, in which the *Central Hudson* test was also applied. The City ordinance was upheld as the 4th Circuit ruled that it could be

¹⁵¹ *Id.* at 490 (citing R.I. Supreme Court decision).

¹⁵² *Id.* at 498, citing cases.

¹⁵³ *44 Liquormart, Inc. v. Rhode Island, supra.* n. 147, at 499, discussing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n. of N.Y.*, 477 U.S. 557 (1980).

¹⁵⁴ *Id.* at 501.

¹⁵⁵ Note that the Court effectively overturned its prior ruling in *Posadas de Puerto Rico Associates v. Tourism Co. of P.R.*, 478 U.S. 328 (1986), which upheld a casino advertising ban. The 1996 Court reasoned although Puerto Rico has an interest in curbing gambling, the banned commercial speech was not untruthful or misleading, and therefore Puerto Rico’s ordinance should be reviewed rigorously, and without such deference to the judgment of the legislature. 517 U.S. at 508-13.

¹⁵⁶ *Id.* at 501.

¹⁵⁷ *Id.* at 503.

¹⁵⁸ *Id.* at 505 (emphasis in Court’s Opinion).

¹⁵⁹ *Id.* at 507.

distinguished from the Rhode Island case.¹⁶⁰ This is because Baltimore billboard ordinances were designed to promote the welfare of minors, which is a weightier interest, as underage drinking is illegal.¹⁶¹ The 4th Circuit held that in such cases, under the *Central Hudson* balancing test, the government interest is compelling and subject to less rigorous review. Therefore a complete ban, rather than a more narrowly-tailored alternative, is permissible.¹⁶²

Given the above rulings, how could state regulation help alleviate beer advertisers' targeting of the Latino community? Suppose that the State of New Mexico, for example, were to ban increased alcohol advertising targeting the Latino community around *Cinco de Mayo*. Would beer companies enjoy unrestricted rights to advertise, due to First Amendment protections? Or does the state have the right to protect its people from targeted advertising? The answer is yes, even under the strict test set forth by the Supreme Court in its 1996 decision, as long as the state could demonstrate that the advertising restriction materially or significantly advances a legitimate state interest, and that it is not more extensive than necessary.

In the case of targeting Latinos around *Cinco de Mayo*, the state could demonstrate that the holiday *as currently celebrated* is a U.S. marketing concept created in large part by alcohol companies.¹⁶³ Through the use of Spanish and an invented connection with Latino culture, the alcohol industry has targeted Latinos and this has increased alcohol abuse among the Latino community around this date.¹⁶⁴ New Mexico has a high interest in regulating alcohol companies' *Cinco de Mayo* advertising campaigns, because it has a significant Latino population, which is in fact the intended target population. The state may also be able to demonstrate an increased rate of alcohol-related accidents and injuries on *Cinco de Mayo*, tied to the fact that since alcohol companies undertook aggressive *Cinco de Mayo* promotional campaigns, alcohol is heavily advertised as a main part of the events.¹⁶⁵ As Bill Gallegos has documented:

Major brewers, led by Philip Morris, Coors, and Anheuser-Busch, developed a sophisticated marketing strategy to target Latinos. Their strategy included heavy promotional investment in *Cinco de Mayo*...

Mexican breweries soon joined in the competition for the lucrative *Cinco de Mayo* market, with profitable results. *Corona* more than doubled its U.S. beer sales between 1990 and 1995. Corporate marketing strategy linked investment in *Cinco de Mayo* festivities, massive point-of-sale promotions..., and continual ads on Spanish-language radio and TV....

A beverage industry journal noted in 1992 that the *Cinco de Mayo* "season" had become "one of the tops sales periods of the year, a great kick-off to summer, and a time when restaurants and bars of all varieties are finding profits in promotion." At the center of the profits were the alcohol manufacturers.

The *Cinco de Mayo* alcohol ad campaigns trivialized and demeaned Mexican culture, denigrated women by including sexist images, and pitched overconsumption.¹⁶⁶

In confronting this reality, the State of New Mexico has a number of legitimate goals at stake. Courts consider protecting the public health and public safety to be "one of the most essential functions of [state]

¹⁶⁰ *Anheuser-Busch v. Schmoke*, 101 F.3rd 325 (4th Cir. 1996), upholding *Anheuser-Busch v. Schmoke*, 63 F.3d 1305 (4th Cir. 1995).

¹⁶¹ *Id.* at 327.

¹⁶² *Id.*

¹⁶³ See, e.g., Bill Gallegos, Our Culture Is Not For Sale: A Campaign to Reclaim Cinco de Mayo from the Alcohol Industry, in *Case Histories in Alcohol Policy* (The Trauma Center, 2002).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 3, citing L. Paxton, *Cinco de Mayo Promos Hit Gringos*, *Supermarket News* 126 (May 4, 1992).

government.”¹⁶⁷ New Mexico not only has an interest in reducing alcohol abuse to promote the public health and safety, but also in promoting respect for Latino culture.¹⁶⁸ Alcohol companies marketing *Cinco de Mayo* as a drinking holiday undermines both goals. In fact, New Mexico law honors Hispanic Culture Day for the following statutory reasons:

The second Tuesday of February of each odd-numbered year shall be known and celebrated as "Hispanic culture day" in recognition of the many contributions, sacrifices and accomplishments of Hispanic people from throughout the world who have built New Mexico into a beautiful and dynamic mosaic of cultural diversity. This day shall be observed with celebrations that honor all past, present and future Hispanic citizens and leaders in ways that enhance relationships among all the people of New Mexico.

These legitimate state goals are seriously undermined by advertisements characterizing *Cinco de Mayo* as a drinking holiday. Therefore, a state law that beer advertising be limited during *Cinco de Mayo* could pass constitutional muster, as long as the restriction were not “more extensive than necessary.” Beer advertising should not be banned completely; however, beer advertising should be limited to more reasonable, much less aggressive campaigns. Celebrations that are family-oriented should be alcohol-free. The state could also require that beer companies use the same advertising tactics on *Cinco de Mayo* as those used during comparable holidays, such as perhaps the 4th of July, because the state legislation demonstrates a definite interest in protecting against discrimination against Latinos and corrupting Latino culture.¹⁶⁹

The state must also uphold and preserve the protections against discrimination found in the Equal Protection clause of the U.S. Constitution. The *Craig v. Boren* decision prohibiting gender discrimination with regard to state alcohol regulation makes it abundantly clear that the Equal Protection clause must be respected and upheld in state alcohol regulation schemes.¹⁷⁰ Unfortunately, in the case of the *Tecate* ad, both race/ethnic and gender discrimination are involved. As Professors Cárdenas and Aguirre-Molina summarized:

... research has shown that America's Latino communities have five times as many alcohol advertisements as predominantly white communities. And when alcohol advertisements depict Latinas as sexual objects, there are additional consequences. One study shows that the concentration of such ads leads to violence against Latinas between the ages of 15 and 18.¹⁷¹

The above makes clear that the *Tecate* billboards were not an isolated incident, but instead part of a trend, which the state should take action to control. Under the Equal Protection clause of the U.S. Constitution as well as the New Mexico Human Rights Act, the state has a compelling interest in regulating against the compounded race/ethnic and gender discrimination found in many beer ads directed at the Latino community.¹⁷²

¹⁶⁷ Samantha K. Graff, *There Is No Constitutional Right to Smoke, A Law Synopsis by the Tobacco Control Legal Consortium*, *supra*. n. 66, at 5 (discussing legal validity of smoking bans), citing *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905) (“According to settled principles, the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and public safety.”)

¹⁶⁸ See, e.g., *National Hispanic Cultural Center Act*, 18 N.M.S.A. 12 (2003); §13 *Hispanic Culture Day, Public Holidays*, 12 N.M.S.A. 5 (2003).

¹⁶⁹ *Id.*

¹⁷⁰ See *Craig v. Boren*, *supra*. n. 148.

¹⁷¹ Marilyn Aguirre-Molina & Zelenne L. Cárdenas, *Latinas Hot Over Tasteless Beer Ad*, *supra*. n. 39 (emphasis added).

¹⁷² See, e.g., *New Mexico Human Rights Act*, 28 N.M.S.A. 1 (2000).

Finally, as in the Baltimore billboard cases, the *Tecate* billboards were subjecting children to “involuntary and unavoidable solicitation” while *en route* to school or playing in their neighborhood.¹⁷³ Therefore, the state may ban the billboards in areas where Latino youth are likely to see them. The state should also be concerned about alienation of Latino youth due to media stereotyping of their culture as a drinking culture, resulting in various negative outcomes, such as increased mental health problems, including but not limited to alcohol abuse.¹⁷⁴ For both youths and adults, this is not only a concern for the well-being of the people, it is also likely to result in increased highway safety problems and health care costs for the state. Therefore, New Mexico law could require that beer advertisements targeting the adult Latino community include warnings about the dangers of alcohol abuse, and that beer companies pay for public education programs promoting healthier lifestyle alternatives in the Latino community. Due to the compelling public policy reasons behind the state’s concerns regarding the *Tecate* billboard as well as *Cinco de Mayo* promotional campaigns, any of the aforementioned state regulations would pass constitutional muster.

4. New Legislation

This analysis would not be complete without mentioning that statutory remedies may also include new legislative initiatives by concerned lawmakers. As long as restrictions on alcohol and tobacco advertising targeting Latinos meet the requirements of the First Amendment, and as long as no prohibited discrimination is involved, Congress may enact new laws to protect public health at the national level, and state legislatures may enact new laws to protect the Latino community’s right to health on the state and local level.

One exemplary initiative is being undertaken by Congresswoman Lucille Roybal-Allard. The Congresswoman has co-sponsored the *STOP (Sober Truth on Preventing) Underage Drinking Act*, which would create an Interagency Coordinating Committee on underage drinking, authorize an additional \$1 million to continue the national Ad Council media campaign to educate parents about the dangers of underage drinking, and authorize \$16 million for prevention and research grants, and she has worked to ensure that relevant appropriations go to Latinos.¹⁷⁵ Representative Roybal-Allard has also continuously spoken out against alcohol companies’ targeting Latino youth, and criticized their hijacking of Latino culture, eloquently stating that:

Many of the [*Cinco de Mayo*] parties are wonderful celebrations of our Mexican culture that highlight the many contributions we of Mexican descent have made to our great nation. As a mother, a grandmother, and a Member of Congress, I am proud of my family’s Mexican heritage. However, I am deeply disturbed by the way *Cinco de Mayo* is often transformed by the drinking industry into “Cinco de Drinko”—a holiday that serves less as an expression of ethnic pride than as an excuse to drink alcohol.

All too often, *Cinco de Mayo* celebrations are hijacked by the alcohol industry and exploited as a means of increasing sales of beer and hard liquor. Alcohol advertisers promote *Cinco de Mayo* celebrations as a reason to drink. This message poses serious dangers to the health of the Latino community, especially our children.¹⁷⁶

Congresswoman Roybal-Allard has acted on her words by introducing legislation and providing appropriations to help remedy this serious problem. Congress should follow through by continuing to

¹⁷³ *Anheuser-Busch v. Schmoke*, 101 F.3rd at 327.

¹⁷⁴ See, e.g., See, e.g., Amado M. Padilla, *The Role of Acculturation and Biculturalism in Hispanic Research*, Ch. 3.3, *Hispanic Psychology*, *supra*. n. 29.

¹⁷⁵ Press Release, *Congresswoman Lucille Roybal-Allard was Joined Today by Senate and House Colleagues in Introducing “The STOP (Sober Truth on Preventing) Underage Drinking Act* (July 21, 2004), www.house.gov/roybal-allard/press/pr040721.html.

¹⁷⁶ *Cinco de Mayo Not Cinco de Drinko: A Warning from Congresswoman Roybal-Allard*, *supra*. n. 41.

approve the appropriations she recommends, passing her bill, and also by considering further legislation. New Latino civil rights oriented legislation should be introduced either independently, or as part of other measures, in order to emphasize that the targeting of Latino youth by alcohol and tobacco companies is offensive to American public policy. As discussed in this Section, such targeting is illegal under a number of theories of law. Since the alcohol and tobacco companies are not following the law, prohibitions against targeting Latinos should be clarified in more precise legislation directed specifically at ending the offensive practice. A legislative strategy would also help raise awareness of the issue and help build a movement demanding much better treatment and equal access to health for the nation's growing Latino community.

III. Conclusions & Recommendations

Considering that the Latino population is young and rapidly growing, this is a critical time in history, as underage drinking and smoking will either be prevented or increased by the actions and omissions undertaken with regard to the Latino community. Section I of this paper analyzed the demographics and incidence of alcohol and tobacco use in the Latino community, and discussed emerging proof of targeting of the Latino community by alcohol and tobacco companies, with severe and sometimes deadly health consequences. Section I also documented that alcohol and tobacco abuse are increasing among Latino youth, and in Latino immigrants upon acculturation. Along with evidence of targeting, this indicates that alcohol and tobacco advertising has led to increasing incidence of alcohol and tobacco abuse, which has serious community health consequences. In addition, Section I discussed that some advertising has trivialized Latino culture and used offensive, sexist images of Latinas. Moreover, some of the advertising tactics used in Spanish-language media are tactics that alcohol and tobacco companies now refrain from using in "mainstream" advertising.

Section II analyzed some of the legal strategies used to control the past abuses of alcohol and tobacco companies, as well as new civil rights strategies that should be added, considering the targeting of the Latino community. Part A discussed litigation strategies, with a focus on tobacco litigation. In particular, states' Attorney Generals conducted tobacco litigation resulting in the 1998 Master Settlement Agreement. This litigation rested upon product liability claims and a showing of targeting of youth, but it did not include Latino civil rights perspectives. Given that tobacco companies have been targeting Latinos with disregard for the health consequences, especially considering the relative youth of the Latino population, new claims could possibly be developed to recoup damages that were not compensated for in the prior settlement agreements.

Part A also analyzed the current, controversial DOJ tobacco litigation under the RICO Act. This June, in this litigation before the D.C. District Court, the DOJ dramatically reduced its request for damages to 8% of what its own expert recommended. Then in July, in a seemingly contradictory move, the DOJ presented a well-drafted appeal to the Supreme Court for the right to damages from disgorgement of improperly obtained profits. As discussed, that the defendant tobacco companies targeted youth is the main basis for the RICO litigation; however, for all practical purposes, the targeting of Latino youth by tobacco companies has not been included in the litigation strategy. Minority groups filed an *amicus* brief with the D.C. District Court regarding the DOJ litigation, but that brief was effectively opposed by the defendants and recently rejected by the court. Tobacco-Free Kids Action Fund, American Cancer Society, American Heart Association, Americans for Nonsmokers' Rights, and the National African American Tobacco Network have participated as plaintiff-intervenors in the DOJ RICO litigation, and the latest plaintiff-intervenors' brief mentions targeting of minority communities, but it does not directly address the concerns of the Latino community. For all these reasons, Latino civil rights advocates should seriously consider further litigation strategies to redress illegal targeting of the community by tobacco companies. The litigation strategies discussed in this paper could also possibly be applied to the alcohol advertising targeting Latinos.

Part B of Section II analyzed potential statutory or regulatory means of redressing the problem. While the focus was on statutory remedies for alcohol companies' targeting the Latino community, these remedies might also be applicable to certain forms of targeted tobacco advertising as well. Four potential statutory remedies were discussed: (1) remedies under Title VI of the 1964 Civil Rights Act, as applicable in the Department of Health and Human Services; (2) federal consumer protection remedies via the Federal

Trade Commission and the Federal Communications Commission; (3) state-level regulation under the 21st Amendment and other state legal authorities; and (4) new legislation to clarify that targeting of Latinos is prohibited. Part B emphasized that restrictions on advertising must not violate the First Amendment protections of free speech. The discussion of the potential statutory remedies included analysis of the most recent Supreme Court and other federal court decisions regarding alcohol advertising restrictions. In particular, the Baltimore billboard cases demonstrate that restrictions on alcohol advertising targeted at youth pass even the strictest constitutional tests. Part B also included an analysis of the civil rights aspects of this issue, and demonstrated that targeting the Latino community implicates numerous legitimate governmental interests in restricting offensive, unfair or misleading advertising. Moreover, the targeting in and of itself implicates constitutional rights that the government is obliged to protect. The case of the *Tecate* billboard and the case of aggressive *Cinco de Mayo* beer campaigns were examined, and the legal analysis demonstrated that state and federal government restrictions of such ads can pass constitutional muster.

Given the complexity of this emerging Latino civil rights issue, this paper only contains a brief analysis of some potential legal remedies for alcohol and tobacco targeting of the Latino community. There may be other remedies in addition to the two potential litigation strategies and four potential statutory remedies discussed above, and even those strategies suggested will need to be further refined as the evidence develops. Actual implementation of these strategies will depend on more resources for investigation and interdisciplinary expertise becoming available. As discussed in the Introduction, it is only recently that the law has stepped in to control abusive alcohol and tobacco advertising. Not only is the legal issue fairly new; as with so many other issues, study of the impact on the Latino community has only just begun.

In sum, the analysis of various legal approaches demonstrated that a Latino civil rights strategy has been lacking in attempts to remedy the damages done by alcohol and tobacco. LCAT has done essential advocacy work in defining the issue as one of importance to the Latino community. The next steps of launching a legal advocacy strategy to protect the community's rights will take energy and resources. In this case, the health damage being done is severe and merits new energy and resources, along with the commitment of Latino leadership. State and federal governments must also become committed to putting an end to the damage being done by alcohol and tobacco advertising targeting the Latino community in deceptive, unfair, offensive, and/or discriminatory manners.

As demonstrated in this paper, state and federal government entities have ample legal authority to take appropriate, constitutional actions to remedy alcohol and tobacco advertising targeting Latinos. This is especially true in the case of advertising that reaches young Latinos. Considering the relative youth of the population, the law requires that much of alcohol and tobacco advertising targeting Latinos must be restricted or even banned, as underage drinking and smoking is illegal. However, instead of complying with the law and protecting Latino youth, the reality of what is being marketed to the community is targeted towards addicting young Latinos. Moreover, because of health care disparities, especially in the case of immigrant families, the damage being done by such targeted advertising has even further disparate impact on the Latino community.

Latino media also has a role. Alcohol and tobacco companies are using advertising tactics that are more aggressive and therefore more dangerous to the community's health than what they use in "mainstream" media. This fact alone should compel Spanish-language media owners to question the tactics being used and the damage being done to their community. Latino business leaders should be the first to confront the advertisers about the discriminatory treatment of the community. Considering the importance of the growing Latino market, Spanish-language media should use their substantial bargaining power to insist that alcohol and tobacco companies remedy the wrongs done and treat the community's health with respect. Experts in Latino health matters will be needed to help design appropriate and culturally-sensitive remedies, and the legal system should take their expertise into account in designing both compensatory remedies as well as forward-looking, preventive remedies. As discussed in Section II, remedies may also be designed through industry self-regulation, but given the industries' record to date and the lack of general knowledge about the Latino community among many potential consultants, this would require extensive consultation with Latino community health experts.

In conclusion, safeguarding the health of the Latino community in the face of aggressive alcohol and tobacco advertising is a critical civil rights issue. The health of the Latino community, especially its youth, must not be neglected, as the future well being of the community is at stake. This paper demonstrated that, although the U.S. legal system does not provide a “right to health,” the Latino community certainly deserves the same legal protections of its health as other communities. According to the Latino civil rights analysis set forth in this paper, aggressive advertising campaigns of alcohol and tobacco companies targeting Latinos and playing under a different set of rules than in “mainstream” America can and must be stopped.

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