

**RESHAPING THE CIGARETTE WITH LESS  
REGULATIONS AND MORE NICOTINE: HOW  
JUUL REVERSED A GENERATION OF WORK  
FOLLOWING THE CIGARETTE INDUSTRY  
PLAYBOOK\***

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\*See *Colgate v. JUUL Labs, Inc.*, 402 F. Supp. 3d 728, 738 (N.D. Cal. 2019) (“Plaintiffs allege that although JUUL markets itself as a device targeted toward people who already smoke cigarettes, it actually employed the *tobacco industry’s playbook* to sell its product to a new audience of non-smokers.”) (emphasis added); *id.* at 739, 743 (noting JUUL’s “strategy of marketing to young people to form their next *generation* of customers” and Surgeon General Dr. Jerome Adams’s warning JUUL “could condemn a *generation* to ‘a lifetime of nicotine addiction and associated health risks’”) (emphasis added).

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## I. A Swarm of Cases, Regulations, and Public Pressure: An Overview of JUUL's Messy Business Practices

Although JUUL is not the only e-cigarette or vaping company, it is the largest and it has seen the most pressure from regulators, legislators, litigants, and media, among others. The allegations against JUUL focus on the company's deceptive marketing practices to both minors and adults. With an estimated three-quarters of the e-cigarette market, JUUL *targeted* minors to become addicted.<sup>1</sup> Not only were JUUL's actions deliberate with their targeting approach, but they were deceiving their consumers about the risk of addiction.<sup>2</sup> JUUL advertised themselves as “not big tobacco” and on a mission to eliminate cigarettes.<sup>3</sup> In reality, JUUL promoted an e-cigarette without proper regulatory approval, which contained more nicotine than cigarettes, and ultimately reversed a generation of work—in regard to health concerns and regulation of tobacco use—resulting in an entire generation hooked on a stronger alternative.

Under regulatory framework from federal tobacco legislation, the Food and Drug Administration (FDA) approved regulatory guidelines for e-cigarettes in May 2016.<sup>4</sup> Pax Labs, the company that developed JUUL's product, was founded in 2007 and began making

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<sup>1</sup> Jeff Overley & Emily Field, *What Attys Should Know as JUUL Battles Blaze of Litigation*, LAW360 (Feb. 14, 2020, 7:15 PM) <https://www.law360.com/articles/1213895/what-attys-should-know-as-juul-battles-blaze-of-litigation>; see also Press Release, Dick Durbin et al., *Durbin & Senators to JUUL: You Are More Interested in Profits Than Public Health*, U.S. SENATOR DICK DURBIN OF ILLINOIS (Apr. 8, 2019), <https://www.durbin.senate.gov/newsroom/press-releases/durbin-and-senators-to-juul-you-are-more-interested-in-profits-than-public-health> (noting in 2019 JUUL owned three-quarters of the e-cigarette market).

<sup>2</sup> See Durbin et al., *supra* note 1.

<sup>3</sup> See Complaint at Ex. E, *Pennsylvania v. JUUL Labs, Inc.*, No. 200200962 (Pa. Ct. C.P. Phila. Cnty. Feb. 10, 2020) [hereinafter *Pennsylvania Complaint*], <https://www.attorneygeneral.gov/wp-content/uploads/2020/02/2020-02-10-JUUL-Complaint.pdf>.

<sup>4</sup> See Jonathan H. Adler et al., *Baptists, Bootleggers & Electronic Cigarettes*, 33 YALE J. ON REG. 313, 314 (2016).

electronic vaporizers.<sup>5</sup> JUUL Labs, Inc. (“JUUL”) officially formed in 2015,<sup>6</sup> and separated from Pax Labs in 2017.<sup>7</sup> In August 2017, JUUL began to feel the pressure from regulators and the media.<sup>8</sup> In the same month, by JUUL’s own accounts, the company banned online sales to anyone under the age of twenty-one.<sup>9</sup> Between April 2018 and November 2018, JUUL continued their advocacy by supporting legislation to restrict the federal minimum age to buy tobacco to twenty-one.<sup>10</sup> On December 20, 2019, President Donald Trump signed legislation to ultimately raise the federal minimum age for purchase of tobacco products to twenty-one.<sup>11</sup> Admittedly, JUUL worked to rectify its image and combat consumption by minors—the company even refrained from lobbying on regulatory reform for flavor vapes.<sup>12</sup> However, JUUL’s motives continue to merely be in response to public backlash, stricter regulations, and the company’s goal to maximize profits from their addicted consumers.

As expected, JUUL is facing a number of legal battles challenging the company’s practices and how their product affects consumers. In July 2019, JUUL faced a Congressional hearing

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<sup>5</sup> See *PAX Labs, Inc. Introduces Revolutionary Technologies with Powerful E-Cigarette JUUL*, BUSINESS WIRE (Apr. 21, 2015, 8:00 AM), <https://www.businesswire.com/news/home/20150421005219/en/PAX-Labs-Introduces-Revolutionary-Technologies-Powerful-E-Cigarette>.

<sup>6</sup> *Id.*

<sup>7</sup> Anne Marie Chaker, *Schools and Parents Fight a Juul E-Cigarette Epidemic*, WALL ST. J., <https://www.wsj.com/articles/schools-parents-fight-a-juul-e-cigarette-epidemic-1522677246> (Apr. 4, 2018, 4:49 PM).

<sup>8</sup> The use of e-cigarettes by youth and young adults became an increasing concern for regulators in the mid-2010s. See, e.g., OFF. SURGEON GEN., U.S. DEP’T HEALTH & HUM. SERVS., *E-CIGARETTE USE AMONG YOUTH AND YOUNG ADULTS* 5 (2016).

<sup>9</sup> *Our Actions to Combat Underage Use*, JUUL LABS, INC. (Aug. 29, 2019), <https://newsroom.JUUL.com/our-actions-to-combat-underage-use/> (providing timeline of JUUL’s “steps to combat youth access, appeal, and use”).

<sup>10</sup> *Id.*; see generally JUUL Labs, Inc., *Overview: Combating Underage Usage*, JUUL LABS, <https://www.juullabs.com/combating-underage-use/overview/> (last visited Oct. 18, 2020) (providing timeline of JUUL’s focus on “combating underage usage”).

<sup>11</sup> CTP Newsroom, *Newly Signed Legislation Raises Federal Minimum Age of Sale of Tobacco Products to 21*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/tobacco-products/ctp-newsroom/newly-signed-legislation-raises-federal-minimum-age-sale-tobacco-products-21> (last updated Jan. 15, 2020).

<sup>12</sup> JUUL Labs, Inc., *Statement Regarding FDA Guidance Announcement*, JUUL LABS, (Jan. 2, 2020), <https://newsroom.JUUL.com/statement-regarding-fda-guidance-announcement/> (noting JUUL’s understanding of the need to “[reset] the vapor category” to combat underrate smokers, and that JUUL “refrained from lobbying the Administration on its draft flavor guidance and pledged to support the final policy”).

regarding their practices.<sup>13</sup> By September 2019, the FDA warned JUUL of its bad conduct to ensure it complied with regulations and proper approval requirements—which JUUL had not done previously.<sup>14</sup> States’ Attorneys General sued JUUL “over a perceived *epidemic* of youth nicotine addiction, among other issues.”<sup>15</sup> An epidemic—as defined by the World Health Organization—is a “specific health-related behavior, or other health-related events clearly in excess of normal expectancy” in a specific region.<sup>16</sup> Addicted consumers are indeed facing an epidemic. The consumers were unfairly targeted due to JUUL’s deceptive marketing scheme, and many now face the same fate known from cigarette consumption: ailing health issues, lifelong addiction, and even death.<sup>17</sup> By February 2020, Americans had suffered 2,807 cases of hospitalization for lung injuries due to vaping related products and 68 vaping related deaths.<sup>18</sup>

The various cases in state and federal courts cover a broad range of legal claims, including alleged violations of consumer protection and fraud laws, negligence, design defects, failure to warn, and false advertising.<sup>19</sup> This array of claims indicates JUUL’s egregious behavior and is supported by Congressional testimony, evidence provided in the complaints of Attorneys General, and public backlash.<sup>20</sup> However, these claims are not simply for political clout—they are serious indications of JUUL’s undoing of a generation of

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<sup>13</sup> SUBCOMM. ON ECON. & CONSUMER POL’Y, H.R. COMM. ON OVERSIGHT & REFORM, 116TH CONG., UPDATE ON SUBCOMMITTEE’S E-CIGARETTE INVESTIGATION 2 (2020) [hereinafter SUBCOMMITTEE REPORT].

<sup>14</sup> See Pennsylvania Complaint, *supra* note 3, at Ex. H (providing warning letter from FDA).

<sup>15</sup> Overley & Field *supra* note 1 (emphasis added).

<sup>16</sup> See Humanitarian Health Action, *Definitions: Emergencies*, WORLD HEALTH ORG., <https://www.who.int/hac/about/definitions/en/> (last visited Mar. 28, 2020).

<sup>17</sup> See 2 States, 3 School Districts File Lawsuits Against JUUL for Youth Vaping, 33 Mealey’s Litig. Rep. Tobacco (LexisNexis) No. 9 (Feb. 2020).

<sup>18</sup> See *Id.* (discussing the Center for Disease Control and Prevention report on February 4, 2020, which provided the number of hospitalizations and deaths); see also *Outbreak of Lung Injury Associated with the Use of E-Cigarette, or Vaping, Products*, CDC [https://www.cdc.gov/tobacco/basic\\_information/e-cigarettes/severe-lung-disease.html](https://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html) (last updated Feb. 25, 2020).

<sup>19</sup> See Pennsylvania Complaint, *supra* note 3; See also Overley & Field *supra* note 1.

<sup>20</sup> See *supra* notes 13–15 and accompanying text, highlighting Congress and government agency responses, as well as state governments fighting JUUL.

change from the big tobacco litigation. JUUL and the vaping industry aimed to be a healthy alternative to cigarettes, but the results thus far have been quite different from their goal. For example, before JUUL came under the heightened awareness of the public eye, the company used a marketing campaign “Make the Switch.” In February 2020, JUUL argued that the campaign intended to transition adult cigarette smokers to the company’s *nicotine delivery system*.<sup>21</sup> Yet in July 2016, JUUL advertised themselves as “not big tobacco” and on a mission to eliminate cigarettes.<sup>22</sup> JUUL products have always included nicotine, specifically nicotine salts, which comes directly from tobacco leaves, and thus, JUUL advertised themselves for consumers to switch from one harmful addictive product to another. The company has since changed their tone on their mission statement, but the lawsuits will continue to expose their vulnerability.

Attorneys General from Arizona, California, Colorado, District of Columbia, Illinois, Massachusetts, Minnesota, New York, North Carolina, and Pennsylvania have all sued JUUL over its marketing practices.<sup>23</sup> North Carolina’s suit against JUUL is scheduled for trial in May 2021.<sup>24</sup> Pennsylvania and Massachusetts filed suits in February 2020.<sup>25</sup> 39 states have prompted official investigations into JUUL to examine their marketing practices, alleged nicotine content, and general safety of the product.<sup>26</sup> Similar to the opioid crisis litigation, the lawsuits argue JUUL is a public nuisance due to the company’s deliberate effect on public health and

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<sup>21</sup> See SUBCOMMITTEE REPORT, *supra* note 13, Attach. A at 10.

<sup>22</sup> See Pennsylvania Complaint, *supra* note 3, at Ex. E.

<sup>23</sup> See Overley & Field, *supra* note 1; Tiney Ricciardi, *Colorado Sues E-Cigarette Maker Juul for Deceptive Marketing Practices that Target Youth*, DENVER POST (July 7, 2020 4:28 PM), <https://www.denverpost.com/2020/07/07/colorado-attorney-general-juul-vaping-lawsuit/>.

<sup>24</sup> See Richard Craver, *Judge Denies JUUL’s attempt to have N.C. Attorney General’s Lawsuit Dismissed*, WINSTON-SALEM J. (Oct. 30, 2020) [https://journalnow.com/business/local/judge-denies-juuls-attempt-to-have-n-c-attorney-generals-lawsuit-dismissed/article\\_e8e5a6ac-1aef-11eb-8243-ab81e27d1fd7.html](https://journalnow.com/business/local/judge-denies-juuls-attempt-to-have-n-c-attorney-generals-lawsuit-dismissed/article_e8e5a6ac-1aef-11eb-8243-ab81e27d1fd7.html).

<sup>25</sup> See *Pennsylvania Sues Juul Over Marketing E-Cigarettes to Teens*, AP NEWS (Feb. 10, 2020), <https://apnews.com/article/06e7c7351604b5d3d95a3f92f4a699e2>; Steve LeBlanc, *Massachusetts Sues Juul Over E-Cigarette Marketing Tactics*, AP NEWS (Feb. 12, 2020), <https://apnews.com/article/5178a97d58d74c0bf66a971bc822f084>.

<sup>26</sup> See Julia Jacobo, *39 States Investigating JUUL over Health Claims, Marketing Practices*, ABC NEWS (Feb. 25, 2020) <https://abcnews.go.com/US/39-states-investigating-juul-health-claims-marketing-practices/story?id=69199969>.

safety, as well as the long-lasting impact states and individuals will endure.<sup>27</sup> Specifically, Pennsylvania describes JUUL's conduct as unreasonably interfering with the public's right to abstain from addictive substances.<sup>28</sup> In response to JUUL's public nuisance, Pennsylvania urged the court to order JUUL to fund educational programs about tobacco-related health risks and "tobacco product cessation programs . . . including the provision of nicotine replacement therapy and addiction counseling . . . ."<sup>29</sup> Minnesota's lawsuit also alleges JUUL's actions constitute a public nuisance.<sup>30</sup> The lawsuit highlights how Minnesota's effort to control and maintain nicotine addiction have now been eradicated due to JUUL's public nuisance.<sup>31</sup>

The federal courts have taken a multidistrict litigation (MDL) approach to handle the swarm of plaintiffs. The original named suit filed in April 2018, *Bradley Colgate v. JUUL Labs, Inc.*, has been consolidated to *In Re: JUUL Labs, Inc., Marketing, Sales Practices and Products Liability Litigation*,<sup>32</sup> which includes over 350 additional cases. As of March 2020, the consolidated case, has allowed the plaintiffs to separate their complaints against JUUL to two distinct complaints: one for personal injury, and one for class

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<sup>27</sup> See Overley & Field, *supra* note 1 (reviewing public nuisance).

<sup>28</sup> See Pennsylvania Complaint, *supra* note 3, at ¶ 205. Before Attorney General Shapiro filed suit on behalf of the state, Pennsylvania's Montgomery County and Bucks County District Attorneys filed suit against JUUL on November 6, 2019 and January 29, 2020, respectively. See Sam Wood, *Suburban DA Sues JUUL Saying It's Turned a 'Generation of Minors into Addicts'*, PHILA. INQUIRER, (Nov. 6, 2019), <https://www.inquirer.com/business/JUUL-lawsuit-big-tobacco-montgomery-county-da-pennsylvania-20191106.html>; see also Dist. Attorney of Bucks Cnty. v. JUUL Labs, Inc., No. 20-00621 (Pa. Ct. C.P. Bucks Cnty. filed Jan. 29, 2020).

<sup>29</sup> Pennsylvania Complaint, *supra* note 3, at ¶¶ 208, iv–v.

<sup>30</sup> See Complaint at ¶ 226, *Minnesota v. JUUL Labs, Inc.*, No. 27-CV019019888 (D. Minn. Dec. 4, 2019), [https://www.ag.state.mn.us/Office/Communications/2019/Documents/20191204\\_JUULComplaint.pdf](https://www.ag.state.mn.us/Office/Communications/2019/Documents/20191204_JUULComplaint.pdf).

<sup>31</sup> *Id.* at ¶¶ 277–78.

<sup>32</sup> See generally Consolidated Class Action Complaint, Doc. No. 387, *In Re: JUUL Labs, Inc.*, No. 3:19-md-2913-WHO (N.D. Cal. Mar. 11, 2020) [hereinafter California Consolidated Class Action Complaint].

action claims.<sup>33</sup> The context from the opening lines of the class action complaint is more than fitting for how urgent this epidemic is:

The battle to end nicotine addiction and its associated diseases and death has consumed our nation's public health resources for more than half a century. After five decades of tireless efforts by public health advocates, litigators, and regulators, the war on tobacco was on the path to victory. By 2014, rates of smoking and nicotine addiction in this country were finally at an all-time low, particularly among teenagers. Until now.<sup>34</sup>

Involuntary exposure is another matter argued against JUUL. This argument is similar to the litigation used against tobacco companies. The primary plaintiffs in these cases tend to be school districts, who have also joined the fight against JUUL to help protect impressionable children.<sup>35</sup>

The legal battle appears to have no end in sight. By all means, this is an epidemic—for direct and indirect consumers, concerned parents, uneducated minors who do not understand the repercussions, and adults who were duped by JUUL as a healthy cigarette alternative. Members of the United States House of Representatives Subcommittee on Economic and Consumer Policy published an update on their investigation in February 2020.<sup>36</sup> With cases in the courts pending, Congressional and administrative agencies are continuing to investigate and push for regulation. In this, it seems certain that JUUL will be forced into some form of settlement. Such a settlement could run parallel to the cigarette companies' master

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<sup>33</sup> See *generally id.* (addressing class action claims); Plaintiffs' Consolidated Master Complaint, Doc. No. 388, In Re: JUUL Labs, Inc., No. 3:19-md-2913-WHO (N.D. Cal. Mar. 11, 2020) (addressing personal injury claims).

<sup>34</sup> Consolidated Class Action Complaint, *supra* note 32, at ¶ 1.

<sup>35</sup> See, e.g., Chico Unified Sch. Dist. v. JUUL Labs, Inc., No. 20CV00183 (Cal. Super. Ct. Butte Cnty. filed Jan. 22, 2020); Davis Joint Unified Sch. Dist. v. JUUL Labs, Inc., No. CV-2020-93 (Cal. Super. Ct. Yolo Cnty. filed Jan. 22, 2020); Campbell Union High Sch. Dist. v. JUUL Labs, Inc., No. 20CV362049 (Cal. Super. Ct. Santa Clara Cnty. filed Jan. 22, 2020).

<sup>36</sup> See SUBCOMMITTEE REPORT, *supra* note 13.

settlement agreement (MSA) in 1998 which included forty-six states.<sup>37</sup>

This paper argues the litigation against JUUL—specifically the states’ suits—will not play out like the MSA. Part II of this paper discusses the history of the MSA and tobacco litigation, how the MSA provided anti-competitive measures, how federal regulation intervened during this time, and public health concerns over addiction to nicotine. Part III of this paper analyzes how JUUL followed the footsteps of the MSA and the tobacco industry, particularly how JUUL targeted and deceived consumers, how federal regulation is already intervening, and how public health concerns are far greater now due to JUUL’s action of reversing a generation of change. For these reasons, JUUL’s legal problems will not follow the same path as the MSA, which allotted funds for tobacco education programs and state taxes. Instead, Congress will intervene due to the nature of the e-cigarette epidemic, health experts’ concerns, and the federal government’s desire to stay involved in any potential litigation settlement—unlike the MSA. Ultimately, this paper makes the point that JUUL should admit its fault, which is widespread, and use its resources to develop a truly healthier alternative to smoking.

## II. The Master Settlement Agreement and the Danger of Cigarettes and Nicotine

Since the 1990s, local, state, and federal governments have enacted a number of ways to regulate and control tobacco consumption. Tobacco’s impact on one’s health is well known, and as a result, the regulations that came with the sale of tobacco were well understood. The Master Settlement Agreement (MSA) culminated in state-wide regulations throughout the country, but resulted from decades’ worth of studies, lobbying, and efforts from companies looking to profit, as well as those seeking to protect consumers’ health and understanding of tobacco products.<sup>38</sup>

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<sup>37</sup> See generally NAT’L ASS’N OF ATT’YS GEN., *MASTER SETTLEMENT AGREEMENT (MSA)* (1998) [hereinafter *MASTER SETTLEMENT AGREEMENT*].

<sup>38</sup> See Adler et al., *supra* note 4, at 327–31.

### **A. Big Tobacco Tries to Hold On: The Master Settlement Agreement**

Similar to the above listed Attorneys General who have recently filed suits against JUUL, the MSA involved state Attorneys Generals' suits against cigarette companies. Individual plaintiffs filing against tobacco companies were unsuccessful because cigarette consumption was widely known to be unhealthy.<sup>39</sup> For example, Congress enacted the Comprehensive Smoking Education Act in 1984 and the Comprehensive Smokeless Tobacco Health Education Act in 1986, both of which required specific health warnings be placed on tobacco products.<sup>40</sup> The Attorneys Generals' suits were different than individual plaintiffs' because they focused on reimbursing health care costs due to consumers' use of Medicaid.<sup>41</sup> Subsequently, the tobacco companies saw these lawsuits as a threat because the companies could not rely on the fact that cigarette consumption was dangerous. These suits also gave companies the opportunity to try to control their narrative regarding any future lawsuits and regulations, in order to maintain profits. The result: the MSA.

The most effective way for the tobacco industry to reap the benefits of a settlement was to increase the consumers' costs.<sup>42</sup> The settlement involved payments in the hundreds of billions of dollars—which was largely thought to still be insufficient.<sup>43</sup> Although there were discussions of Congressional action and FDA regulation, the federal government was left out. Ultimately, the monetary side of the settlement would go to the states, so Congress tried to become more

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<sup>39</sup> *Id.* at 327.

<sup>40</sup> See 2000 Surgeon General's Report Highlights: Warning Labels, CDC, [https://www.cdc.gov/tobacco/data\\_statistics/sgr/2000/highlights/labels/index.htm](https://www.cdc.gov/tobacco/data_statistics/sgr/2000/highlights/labels/index.htm) (last updated July 21, 2015).

<sup>41</sup> Adler et al., *supra* note 4, at 327.

<sup>42</sup> See BRION J. FOX ET AL., UCSF: CTR. FOR TOBACCO CONTROL RSCH. & EDUC., A PUBLIC HEALTH ANALYSIS OF THE PROPOSED RESOLUTION OF [THE 1997 UNITED STATES] TOBACCO LITIGATION app. F, at A-58 (1998) (appending the 1997 proposed resolution promoting the “pass through” rule where “the statute would provide for the Annual Payments to be reflected in the prices manufacturers charge for tobacco products”); see also Adler et al., *supra* note 5, at 328; see generally MASTER SETTLEMENT AGREEMENT, *supra* note 36.

<sup>43</sup> See Adler et al., *supra* note 4, at 328.

involved in reaping a federal benefit.<sup>44</sup> While the tobacco companies planned to pass along costs to the consumers, Congress also tried to add a \$1.10 federal tax on cigarette sales.<sup>45</sup> The combination of higher costs to the consumers and additional federal tax “was too much for the industry to stomach.”<sup>46</sup> The tobacco industry turned its attention solely on the lawsuits brought by the states, resulting in the MSA signed by forty-six states in 1998, with the other four states reaching separate agreements.<sup>47</sup> The MSA offered the states a choice:

[A]ccept the MSA in whole and be able to spend your state’s share of the billions of dollars raised from smokers, or reject the proposed statute, still have your state’s smokers pay the higher prices necessary to fund the deal, and lose your state’s claim on the money. Not surprisingly, every state legislature took the money.<sup>48</sup>

### 1. Benefits for Tobacco Industry

The MSA, to some extent, provided an opportunity for the tobacco industry to control its fate. The agreement included protections from new competition and future lawsuits, as well as limited FDA regulation. At the time, four major tobacco companies combined to make up over 99 percent of the market.<sup>49</sup> The companies knew increased prices to pay the MSA would result in “a loss of market share to marginal competitors or new entrants.”<sup>50</sup> Consequently, in an effort to limit competition, the MSA included a provision providing for each company to pay proceeds based on its market share, including any new competitors.<sup>51</sup>

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<sup>44</sup> *See id.*

<sup>45</sup> S. REP. NO. 105-180, at 12 (1998); *See Adler et al., supra* note 4, at 328.

<sup>46</sup> Adler et. al., *supra* note 4, at 328.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 329.

<sup>49</sup> *Id.* at 329 n.83 (“In 1997, Philip Morris, R.J. Reynolds, and Lorillard together held 99.6 percent of the cigarette market.”).

<sup>50</sup> *Id.*

<sup>51</sup> *See MASTER SETTLEMENT AGREEMENT, supra* note 37; *see also* Fox et al., *supra* note 42, at A-63.

## 2. Limits on Tobacco Industry

At the hands of regulators, the MSA also provided protections to consumers. For instance, the settlement limited cigarette advertisement to allow only public health-measure related ads. The goal of this limitation protects minors and adults from being targeted or influenced by tobacco products' solicitation. However, this provision also padded the anti-competitive aspect of the MSA against new competition trying to join the market and promote a new brand.<sup>52</sup> The ultimate goal was to limit advertising targeted towards youth smoking, including limitations by any tobacco company to "take any action the primary purpose of which is to initiate, maintain or increase the incidence of Youth Smoking within any Settling State."<sup>53</sup>

In addition, the MSA prohibited other actions by the tobacco industry such as reducing the companies' public influence in order to further limit consumers' addiction. Actions prohibited by the MSA included giving away free samples of any tobacco products, using outdoor advertising, and sponsoring events.<sup>54</sup>

Further, companies could not pay any person "to use, display, make reference to or use as a prop any Tobacco Product, Tobacco Product package . . . in any motion picture, television show, theatrical production or other live performance, live or recorded performance of music, commercial film or video, or video game" unless the audience was in an adult-only facility or the media was for private display.<sup>55</sup>

### **B. Federal Intervention: The Tobacco Control Act of 2009**

After the MSA, the first big wave of legislation and regulation occurred through the FDA under the Family Smoking Prevention and Tobacco Control Act of 2009 ("TCA").<sup>56</sup> Congress provided the

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<sup>52</sup> Adler et al., *supra* note 5, at 330.

<sup>53</sup> See *MASTER SETTLEMENT AGREEMENT*, *supra* note 37, at 19.

<sup>54</sup> *Id.* at 19-23, 26.

<sup>55</sup> *Id.* at 25.

<sup>56</sup> See generally Family Smoking Prevention and Tobacco Control Act of 2009, Pub. L. No. 111-31, 123 Stat. 1776; see also 21 U.S.C. § 387 (2012).

FDA with the authority under the TCA to regulate and control tobacco products. For example, the FDA banned flavored cigarettes—foreshadowing how e-cigarettes would be regulated. Flavored cigarettes directly target youths by providing an alluring flavor and attracting consumers to an addiction.<sup>57</sup> The TCA prohibited sales of cigarettes and smokeless tobacco to minors, prohibited tobacco sponsorships at social and entertainment events, and reemphasized the limitation on free samples and promotional items.<sup>58</sup>

More importantly, the TCA provided the FDA with the power to directly control both the products and marketing. The FDA now had “authority over product marketing and advertising, warning labels, and product ingredients.”<sup>59</sup> The FDA’s authority did not end there—Congress created the requirement for premarket approval of new tobacco products.<sup>60</sup> To pass a premarket review, a company must provide all information that is published, known, or should be known, regarding health risks, ingredients, samples, and labeling.<sup>61</sup> The TCA carved out a provision for modified risk products; these products include anything “for use to reduce harm or the risk of tobacco-related disease associated with commercially marketed tobacco products.”<sup>62</sup> This carried over for advertising and labeling as well—if the product directly or indirectly suggests there is a lower risk of cigarette-related disease, it is less harmful or it is safer than an alternative, then the product becomes a modified risk tobacco product.<sup>63</sup> Likewise, the TCA prohibited companies from promoting claims not independently verified.<sup>64</sup>

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<sup>57</sup> California Consolidated Class Action Complaint, *supra* note 32, at ¶ 137 (discussing news conference with Health and Human Services Assistant Secretary Howard Koh, MD, MPH).

<sup>58</sup> Complaint at ¶ 126, *Garavaglia v. JUUL Labs, Inc.*, No. CGC-20-582654 (Cal. Super. Jan. 31, 2020) [hereinafter *Garavaglia Complaint*].

<sup>59</sup> Wendy E. Parmet, *Paternalism, Self-Governance, and Public Health: The Case of E-Cigarettes*, 70 U. MIAMI L. REV. 879, 936 (2016) (discussing Congress’s intentions).

<sup>60</sup> See 21 U.S.C. § 387a (2012). Notably, there was a predicate date of February 2007, allowing approval of products that were substantially equivalent to one on the market as of this date. See Parmet, *supra* note 59.

<sup>61</sup> See 21 U.S.C. § 387j(b)(1) (2009).

<sup>62</sup> See 21 U.S.C. § 387k(g)(1)(A) (2009).

<sup>63</sup> See 21 U.S.C. § 387k(g)(2)(A)(ii) (2009).

<sup>64</sup> See *id.*

### **C. The Undoing of the Cigarette Policies: How Nicotine Controls Addiction**

Before the MSA, health issues arising from cigarette usage were well known. Decades of work made the MSA possible, but a 1988 report from the United States Surgeon General pushed the public against big tobacco. The report stated forms of tobacco are addictive, nicotine is the major chemical component in tobacco that causes this addiction, and the psychological and behavioral processes that determine tobacco addiction are similar to those that determine heroin and cocaine addiction.<sup>65</sup> Yet decades later, the battle rages on for how to best regulate and control this industry. One thing is clear—there has been a significant drop in cigarette smoking and nicotine addiction.<sup>66</sup> A 2014 United States Surgeon General report reviewed the *fifty years of progress*, including “public health initiatives, government intervention, impact litigation, consumer education and tobacco regulation to finally see” the drop in addiction.<sup>67</sup> The 2014 report concluded nicotine is the “fundamental reason” individuals use tobacco products, which contributes to millions of deaths, cardiovascular disease, chronic obstructive pulmonary disease, birth defects, and a number of different types of cancer.<sup>68</sup>

Nicotine is a stimulant and relaxant that affects the central nervous system, increasing blood pressure while relaxing muscles. “When nicotine is inhaled it enters the bloodstream through membranes in the mouth and upper respiratory tract and through the

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<sup>65</sup> See SURGEON GENERAL, U.S. DEP’T OF HEALTH & HUM. SERVS., *THE HEALTH CONSEQUENCES OF SMOKING: NICOTINE ADDICTION* (1988); see also Garavaglia Complaint, *supra* note 57, at ¶ 37 (discussing addictions to heroin and cocaine).

<sup>66</sup> See California Consolidated Class Action Complaint, *supra* note 32, at ¶¶ 56-57.

<sup>67</sup> See generally, OFF. OF THE SURGEON GEN., U.S. DEP’T OF HEALTH & HUM. SERVS., *THE HEALTH CONSEQUENCES OF SMOKING—50 YEARS OF PROGRESS* (2014).

<sup>68</sup> California Consolidated Class Action Complaint, *supra* note 32, at ¶ 56.

lungs.”<sup>69</sup> When nicotine is in the bloodstream and reaches the brain, it triggers effects of pleasure and reduces stress and anxiety through the release of chemicals such as dopamine and serotonin.<sup>70</sup> Over time, the more nicotine an individual consumes, the more nicotine he or she will need to achieve the same effects.<sup>71</sup>

Plaintiffs have argued that when an individual is addicted to nicotine, that individual develops “compulsive drug-seeking behavior, which, if not satisfied, results in withdrawal symptoms including anxiety . . . and intense cravings for nicotine.”<sup>72</sup> Studies suggest cigarette consumers do not enjoy smoking all the time but do so to avoid these symptoms.<sup>73</sup> Ultimately, nicotine causes permanent brain damage, and this exposure to developing minors can have lasting impacts.<sup>74</sup> Likewise, nicotine is associated with a number of lasting health issues, and it is a carcinogen.

Meanwhile, e-cigarettes and vaping were widely unregulated before the 2009 TCA, and slowly became more scrutinized by the public. In reality, e-cigarette devices fall under the TCA and thus require approval. Some research has shown the effects of e-cigarettes, including their chemical make-up and subsequent long-term health risks. Yet, it is difficult for public health administrators and regulators, to even theoretically determine how to regulate these products without more research.<sup>75</sup>

Nevertheless, nicotine comes from tobacco, and thus an e-cigarette with nicotine is a modified risk tobacco product. Regardless of the nicotine content, studies suggest e-cigarettes increase the risk

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<sup>69</sup>Garavaglia Complaint, *supra* note 58, at ¶ 38; *see also* Neal L. Benowitz, *Pharmacology of Nicotine: Addiction, Smoking-Induced Disease, and Therapeutics*, 49 ANN. REV. PHARMACOLOGY & TOXICOLOGY 57, 58 (2009).

<sup>70</sup> *See generally*, Benowitz, *supra* note 69.

<sup>71</sup> *See id.* at 60-61.

<sup>72</sup> Garavaglia Complaint, *supra* note 58, at ¶ 40.

<sup>73</sup> *See id.*

<sup>74</sup> *See id.* at ¶ 41 (noting nicotine use in minors results in “priming for use of other addictive substances, reduced impulse control, deficits in attention and cognition, and mood disorders”); *see also* U.S. Surgeon Gen. & CDC, *Know The Risks: E-cigarettes and Young People*, SURGEON GEN., <https://e-cigarettes.surgeongeneral.gov/> (last visited Nov. 17, 2020).

<sup>75</sup> *See* Parment, *supra* note 59, at 934 (discussing what little evidence there was on e-cigarettes).

of strokes and heart attacks.<sup>76</sup> Specifically, the research suggests e-cigarettes cause an increase in blood pressure, arterial stiffness, and oxidative stress, resulting in strokes and heart attacks.<sup>77</sup>

At first glance, creators of e-cigarettes intended them to be less harmful than smoking tobacco through traditional cigarettes.<sup>78</sup> Many of the toxic chemicals in a cigarette are combustion byproducts, and e-cigarettes do not require a combustion source.<sup>79</sup> For these reasons, earlier studies, such as those in 2016, argued the health risks associated with vaping were less than the risks posed by traditional cigarettes. Naturally there were risks. In 2014, the World Health Organization warned e-cigarettes could have an adverse effect during pregnancy, contribute to cardiovascular diseases and promote cancer growth.<sup>80</sup>

Even more notable is the effect nicotine exposure has on minors' development; specifically, "brain development, causes addiction, and might lead to sustained tobacco use."<sup>81</sup> What is also clear now, and was suggested in 2015, is "the possible health effects of toxic chemicals in e-cigarette vapor."<sup>82</sup> The tell-tale sign of this issue is the abnormally high voltage used to vaporize the chemicals, while typical voltage rates would yield less exposure to the chemicals, including formaldehyde.<sup>83</sup>

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<sup>76</sup> See, e.g., *E-cigarettes linked to higher risk of stroke, heart attack, diseased arteries*, AM. HEART ASS'N (Jan. 30, 2019), <https://newsroom.heart.org/news/e-cigarettes-linked-to-higher-risk-of-stroke-heart-attack-diseased-arteries>.

<sup>77</sup> Garavaglia Complaint, *supra* note 58, at ¶¶ 44-46.

<sup>78</sup> See Parmet, *supra* note 59, at 928 (providing literature on e-cigarettes benefits).

<sup>79</sup> See *id.* at 928-29.

<sup>80</sup> WORLD HEALTH ORG., ELECTRONIC NICOTINE DELIVERY SYSTEMS 3 (2014).

<sup>81</sup> René A. Arrazola et al., *Tobacco Use Among Middle and High School Students—United States, 2011-2014*, 64 MORBIDITY & MORTALITY WKLY. REP. 381, 382 (2015).

<sup>82</sup> Parmet, *supra* note 59, at 929-30.

<sup>83</sup> R. Paul Jensen et al., *Hidden Formaldehyde in E-Cigarette Aerosols*, 372 NEW ENG. J. MED. 392, 392 (2015).

### III. **JUUL Is Actually a Carefully Engineered Product for Nicotine Delivery and Addiction<sup>84</sup>: How JUUL Targeted and Deceived**

“Three tactics were central to decades of cigarette industry market dominance: product design to maximize addiction; mass deception; and targeting of youth. [JUUL] and its coconspirators adopted and mastered them all.”<sup>85</sup>

#### A. **Following the Tobacco Industry**

Public backlash focuses on allegations that JUUL created a nicotine product to maximize profit through addiction, which was the “magic behind cigarettes’ stratospheric commercial success.”<sup>86</sup> JUUL followed the cigarette industry’s success but created a product that would not carry the same stigma as cigarettes. James Monsees, prior Chief Executive Officer of JUUL and co-founder of Ploom, Inc., a predecessor company to JUUL, admitted to following the marketing strategies and product design from the MSA litigation.<sup>87</sup> Following the general path of the cigarette industry seems reasonable to an extent—JUUL is, after all, modeling itself as an alternative to the cigarette companies. The smoking gun is that the FDA obtained documents directly from JUUL, indicating that JUUL purposely and closely followed internal memorandum from the cigarette industry and reproduced chemical and physical similarities. Importantly, the documents also indicated JUUL knew of the adverse side effects cigarette smokers experienced from decades of lobbying, health

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<sup>84</sup> California Consolidated Class Action Complaint, *supra* note 32, at ¶ 63 (“The cigarette is actually a carefully engineered product for nicotine delivery and addiction.”).

<sup>85</sup> *Id.* at ¶ 4.

<sup>86</sup> *See id.* at ¶ 49.

<sup>87</sup> *Id.* at ¶ 62; *see also* Gabriel Montoya, *Pax Labs: Origins with James Monsees*, SOCIAL UNDERGROUND (2015), <https://socialunderground.com/2015/01/pax-ploom-origins-future-james-monsees/>.

concerns, and the MSA.<sup>88</sup> Monsees admitted the cigarette is “a carefully engineered product for nicotine delivery and addiction.”<sup>89</sup>

Specifically, JUUL followed cigarette company R.J. Reynolds’ process of combining nicotine with acid to create a neutralized compound called nicotine salts.<sup>90</sup> JUUL learned to manipulate nicotine, one of the most addictive chemicals, to maximize its addictiveness and subsequently increase sales.<sup>91</sup> JUUL’s reliance on such memorandum resulted in little throat hit due to the low free-base fraction in the aerosols—not to mention their creation of appealing flavors such as Fruit Medley and Crème Brûlée.<sup>92</sup> A reduced throat hit resulted in less irritation, which otherwise would serve as a deterrent to new users.<sup>93</sup> “With access to the trove of documents made public to curb youth smoking and aid research to support tobacco control efforts, [JUUL] was able to review literature on manipulating nicotine pH to maximize its delivery in a youth-friendly vapor with minimal ‘throat hit.’”<sup>94</sup> JUUL went even further by recruiting R.J. Reynolds’ scientists—who worked on nicotine salts in the 1970s—to develop nicotine salt cartridges for JUUL’s products, “a critical tool for addicting non-smokers.”<sup>95</sup>

JUUL’s entwinement with the cigarette industry went even further as it paired with Altria and Phillip Morris in 2018. Phillip Morris is a wholly owned subsidiary of Altria, and Altria invested roughly \$12.8 billion in JUUL for a 35 percent ownership stake.<sup>96</sup>

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<sup>88</sup> See California Consolidated Class Action Complaint, *supra* note 32, at ¶¶ 61-64.

<sup>89</sup> See *id.* at ¶ 63; see also Jordan Crook, *This is the Stanford Thesis Presentation That Launched JUUL*, TECH CRUNCH (Feb. 27, 2019, 7:51 AM), <https://techcrunch.com/2019/02/27/this-is-the-stanford-thesispresentation-that-launched-JUUL/>.

<sup>90</sup> See California Consolidated Class Action Complaint, *supra* note 32, at ¶ 64 (citing an R.J. Reynolds 1973 memorandum obtained from JUUL files by the FDA in 2018; the memo discussed attracting a “segment of the youth market” with a more “appealing and addictive” content).

<sup>91</sup> Garavaglia Complaint, *supra* note 58, at ¶ 4.

<sup>92</sup> California Consolidated Class Action Complaint, *supra* note 32, at ¶ 93-98 (noting study by Anna K. Duell et al.).

<sup>93</sup> Garavaglia Complaint, *supra* note 58, at ¶ 4.

<sup>94</sup> California Consolidated Class Action Complaint, *supra* note 32, at ¶ 63.

<sup>95</sup> *Id.* at ¶ 64 (discussing chemist Thomas Perfetti’s confidential memorandum which was eventually made public in the MSA).

<sup>96</sup> *Id.* at ¶ 45.

As if this was not enough for JUUL, the company added nearly three times as much nicotine as other e-cigarette companies.<sup>97</sup> Parties allege e-cigarettes previously struggled to deliver enough nicotine to satisfy smokers, as “most e-cigarettes used an alkaline form of nicotine called free-base nicotine.”<sup>98</sup> This process resulted in a bitter, harsh, and irritating throat hit. The higher the concentration, the harsher the hit. For previous smokers, this would not have much of an impact, but for new smokers, it would act as a deterrent. By 2015, most e-cigarettes had a concentration of free-base nicotine between 1 percent – 3 percent. When JUUL scientists switched to the cigarette industry’s playbook—focusing on the nicotine salts—the company was able to eliminate the throat hit, while simultaneously increasing the nicotine concentration. Specifically, a study found JUUL flavors had a nicotine content of 58 mg/ml, a fraction of free-base nicotine of 0.05, and roughly a 3-4 mg/ml of free base nicotine.<sup>99</sup> Another e-cigarette company had a nicotine content of 17 mg/ml, a free-base fraction of 0.84, and 14 mg/ml of free-base nicotine.<sup>100</sup> In fact, in 2018 the European Union banned the sale of JUUL products because the nicotine content, reported at 59 mg/ml, was nearly three times the allotted level of 20 mg/ml.<sup>101</sup>

While outside studies were conducted and JUUL itself faced public backlash, JUUL’s own scientists expressed concerns. Reports suggested JUUL delivered more nicotine per puff than cigarettes.<sup>102</sup> One employee stated about consumers, “[y]ou hope that they get what they want, and they stop,” because “a JUUL—unlike a cigarette—

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<sup>97</sup> See California Consolidated Class Action Complaint, *supra* note 32, at ¶¶ 93-98 (noting study by Anna K. Duell et al.); see generally, Anna K. Duell et al., *Free-Base Nicotine Determination in Electronic Cigarette Liquids by H NMR Spectroscopy*, 31 CHEM. RSCH. TOXICOL. 431 (2018) (further discussion on development, as well as high-pH nicotine with low-pH acid, free-base nicotine, and total nicotine content).

<sup>98</sup> California Consolidated Class Action Complaint, *supra* note 32, at ¶ 90.

<sup>99</sup> See *id.* at ¶¶ 93-98 (noting study by Anna K. Duell et al.).

<sup>100</sup> See *id.*

<sup>101</sup> See Julia Belluz, *JUUL, the Vape Device Teens are Getting Hooked On, Explained*, VOX (Dec. 20, 2018), <https://www.vox.com/science-and-health/2018/5/1/17286638/JUUL-vaping-e-cigarette>.

<sup>102</sup> See California Consolidated Class Action Complaint, *supra* note 32, at ¶ 105; Samantha M. Reilly et al., *Free Radical, Carbonyl, and Nicotine Levels Produced by JUUL Electronic Cigarettes*, 21 Nicotine Tobacco Research 1274 (Aug. 19, 2019), <https://www.ncbi.nlm.nih.gov/pubmed/30346584> (providing research that JUUL delivers more nicotine per puff than cigarettes).

never burns out,” so there is no indication of when to stop.<sup>103</sup> JUUL’s upper management rejected all concerns and never developed a product to limit nicotine intake. Combining all of these factors, JUUL had a powerful and addictive product.

### **B. The Product’s Design**

JUUL’s design itself is purposely sleek and stylish, mimicking iPhones and other tech devices with a built-in charger. Most e-cigarettes are similar, using a battery or chargeable heat source to vaporize liquid containing nicotine, flavorings, and other additives. Unlike cigarettes, JUUL can generally be used indoors without detection, and inhaled without having to relight or get a new one. This process makes it much more attractive to use. Packs of cigarettes contain twenty cigarettes that need to be lit and inhaled separately and may require going outside for a smoking break.

JUUL is also attractive for users because it does not smell like a cigarette—the smell of cigarettes has a largely negative distinct odor. The smoke from vaping JUUL is mostly undetectable due to reduced aerosol scents, allowing users to smoke indoors. JUUL’s products, conversely and purposely, were designed for users to take in much more nicotine than cigarettes because breaks are not needed, they can continuously be inhaled, and they are more socially accepted. As one complaint stated, “[J]ust Google ‘JUUL in school’ and find more than 23,000 videos on how to JUUL anywhere without detection. This is part of the appeal, fostered and bolstered by JUUL’s viral marketing campaigns using young models to make the products look cool and stylish.”<sup>104</sup>

### **C. Deceptive Marketing Practices**

JUUL deceptively marketed itself as safer than cigarettes, containing as much nicotine as a pack of cigarettes, and a cessation tool. JUUL did so without FDA approval, and as a result, violated several aspects of the MSA. JUUL has done all of this knowingly—

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<sup>103</sup> *Id.* at ¶ 109.

<sup>104</sup> Garavaglia Complaint, *supra* note 58, at ¶ 3.

the science and research suggest the company knew of its nicotine content and admitted to closely following the cigarette industry's playbook, including partnering with cigarette giant Altria and hiring former industry experts. JUUL likely accepted its fate by planning to violate the MSA all along, as it could succeed in claims that it did not fall under the agreement as a new competitor. However, JUUL also knowingly deceived consumers and likely planned to do so to control the efforts against e-cigarettes, while simultaneously making a profit and retrospectively trying to amend its wrongdoings.

JUUL falsely represented in its own advertisements, press releases, packaging, and websites that each pod contained as much nicotine as a pack of cigarettes.<sup>105</sup> Specifically, JUUL advertised its product to contain 0.7mL with 5 percent nicotine by weight, which it claimed to be the equivalent to 1 pack of cigarettes or 200 puffs. JUUL stated that “[e]very 5% strength JUUL pod package represents that one pod is equivalent to one pack of cigarettes.”<sup>106</sup> Not only would a reasonable consumer not understand what this means, but it was not even true. In fact, cigarettes delivered about 10 percent of nicotine to users,<sup>107</sup> while JUUL delivered roughly 82 percent of the nicotine.<sup>108</sup> Further, JUUL knows it is the efficiency of how their product delivers the nicotine that determines the effect, risk of addiction, and health risks.<sup>109</sup>

#### **D. Minor Consumption: Targeted Ad Campaigns**

The tobacco industry knew for decades that in order to remain profitable, the key to success was attracting new and younger users. Steps in this direction taken by tobacco companies was what

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<sup>105</sup> See *id.* at ¶ 86.

<sup>106</sup> California Consolidated Class Action Complaint, *supra* note 32, at ¶¶ 168, 181; *What is Vaping?* JUUL LABS, INC. (July 2, 2019), <https://www.JUUL.com/resources/Whatis-Vaping-How-to-Vape>.

<sup>107</sup> See Neal L. Benowitz & Jack E. Henningfield, *Reducing the Nicotine Content to Make Cigarettes Less Addictive*, TOBACCO CONTROL, May 2013, at i14, i14-17; see also Lynn T. Kozlowski and Janine L. Pilliteri, *Compensation for Nicotine by Smokers of Lower Yield Cigarettes*, 7 SMOKING & TOBACCO CONTROL MONOGRAPH 161, 164 (1983).

<sup>108</sup> See Samantha M. Reilly et al., *Free Radical, Carbonyl, and Nicotine Levels Produced by JUUL Electronic Cigarettes*, 21 NICOTINE TOBACCO RSCH. 1274, 1276 (2019).

<sup>109</sup> See Garavaglia Complaint, *supra* note 58, at ¶ 86.

ultimately led to the MSA. JUUL followed these steps and came into the public eye after massive trends in vaping rates increased. After fifty years of efforts to reduce tobacco consumption in minors, progress had been made until e-cigarettes and vaping made a push, led by JUUL.

The statistics show the significance of JUUL's undoing of a generation of work. "Nine out of ten smokers begin by age 18 and 80% who begin as teens will smoke into adulthood."<sup>110</sup> Vaping rates of minors more than doubled from 2017 to 2019, moving from 11.7 percent to 27.5 percent.<sup>111</sup> Nearly three-quarters of minors indicated their first JUUL was a flavored pod, over 80 percent said they had used a flavored pod in the past month, and over 80% said they used e-cigarettes because of the flavors.<sup>112</sup> There are countless studies supporting these trends over the last five to ten years, even with regulations limiting sales to minors. One study found minors were 16 times more likely to use JUUL than adults.<sup>113</sup> More recent regulations in January 2020 included an FDA ban on flavored e-cigarettes other than tobacco and menthol flavors, due to "epidemic levels of youth use."<sup>114</sup>

The entire premise of regulating tobacco consumption of teens is because they are more susceptible to long-term risks without fully understanding their decisions. JUUL took their messages and deceptive practices to schools.<sup>115</sup> In 2018, the FDA requested that JUUL provide documents about the design and marketing of its

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<sup>110</sup> California Consolidated Class Action Complaint, *supra* note 32, at ¶ 54; *see also* OFF. OF THE SURGEON GEN., U.S. DEP'T OF HEALTH & HUM. SERVS., PREVENTING TOBACCO USE AMONG YOUTH AND ADULTS (2012).

<sup>111</sup> *See* Pennsylvania Complaint, *supra* note 3, at ¶ 2 (reviewing Nielsen data on unit sales from National Youth Tobacco Survey).

<sup>112</sup> Karma McKelvey et al., *Adolescents' and Young Adults' Use and Perceptions of Pod-Based Electronic Cigarettes*, JAMA NETWORK OPEN, Oct. 19, 2018); Bridget K. Ambrose et al., *Flavored Tobacco Product Use Among US Youth Aged 12-17 Years, 2013-2014*, 314 JAMA 1871 (2015).

<sup>113</sup> *See generally* Donna M. Vallone et al., *Prevalence and Correlates of JUUL Use Among a National Sample of Youth and Young Adults*, 28 TOBACCO CONTROL 603 (2018) (discussing the incidence of minor-versus-adult use of e-cigarettes).

<sup>114</sup> *See* California Consolidated Class Action Complaint, *supra* note 33, at ¶ 137.

<sup>115</sup> *See* CTR. FOR TOBACCO PRODS., U.S. FOOD AND DRUG ADMIN., WARNING LETTER TO JUUL LABS (2019) *available at* <https://www.fda.gov/news-events/press-announcements/fda-warns-juul-labs-marketing-unauthorized-modified-risk-tobacco-products-including-outreach-youth> (discussing JUUL's statements made at schools);

products.<sup>116</sup> In response to public backlash of their marketing practices towards minors, JUUL began youth prevention programs, committing \$30 million in funding.<sup>117</sup> However, these programs seem unauthentic, and plaintiffs in the consolidated class action allege JUUL used the programs to increase sales to children.<sup>118</sup> JUUL presented at schools with messages about how their product was safe, provided demonstrations on how to properly use the product, provided snacks, and collected student information.<sup>119</sup> In 2018, a JUUL representative spoke at a high school stating that JUUL “was much safer than cigarettes,” was “totally safe,” was a “safer alternative than smoking cigarettes,” and that the “FDA was about to come out and say it [JUUL] was 99% safer than cigarettes . . . and that. . . would happen very soon.”<sup>120</sup> JUUL continued to promote its brand without disclosing its products were addictive, unsafe, and without FDA approval as a modified tobacco risk product.

JUUL also advertised itself in prominent media outlets that had large audiences of minors, including “kid friendly” websites and Nickelodeon and Cartoon Network.<sup>121</sup> Part of this advertisement campaign was called “Vaporized,” which included an express mission that was redacted from the consolidated cases.<sup>122</sup> One thing was clear though, the “campaign used stylish models, bold colors, and highlighted themes of sexual attractiveness,” essentially applying the “template for preying on teens” used by the tobacco industry.<sup>123</sup> Even after the “Vaporized” campaign, JUUL continued to use ads to foster its image as a “sleek, stylish, status symbol.”<sup>124</sup> Studies supported that JUUL’s efforts to target a younger audience were successful

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<sup>116</sup> See *id.* (noting FDA’s previous request in April 2018 for additional documents from JUUL).

<sup>117</sup> See California Consolidated Class Action Complaint, *supra* note 32, at ¶ 157.

<sup>118</sup> See *id.* at ¶¶ 399–401.

<sup>119</sup> See *id.* at ¶ 400.

<sup>120</sup> See CTR. FOR TOBACCO PRODS., *supra* note 115.

<sup>121</sup> See Adam Schrader, *JUUL Bought Ads on Cartoon Network, Nickelodeon to Target Kids, Lawsuit Claims*, N.Y. POST (Feb. 15, 2020), <https://nypost.com/2020/02/15/juul-bought-ads-on-cartoon-network-nickelodeon-to-target-kids-lawsuit-claims/>.

<sup>122</sup> California Consolidated Class Action Complaint, *supra* note 32, at ¶ 286.

<sup>123</sup> *Id.* at ¶¶ 287, 288.

<sup>124</sup> Garavaglia Complaint, *supra* note 58, at ¶ 154.

because “as much as half of JUUL’s Twitter followers were aged thirteen to seventeen.”<sup>125</sup>

All of JUUL’s ads indicated the product was safe and cool. Any advertisements used by JUUL that disclosed the nicotine content included warnings in “small print against low-contrast backgrounds,” whereas cigarette advertisements are required to display a high contrast health warning covering at least 20 percent of the images.<sup>126</sup> In fact, the “Vaporized” campaign did not disclose any health risks attributed to JUUL’s products until May 2018 when the company was required to warn of addiction.<sup>127</sup> JUUL even instructed retailers to display their product in stores with clear display cases to highlight the sleek packaging and flavors.<sup>128</sup> JUUL knew separating its products from other tobacco products would indicate to consumers their product “was safer than traditional cigarettes and that it was not an addictive drug,” all while in arms reach.<sup>129</sup> Now these same retailers—including Walmart, 7-Eleven, and Walgreens—face lawsuits as defendants blamed for JUUL’s practices.<sup>130</sup>

### E. “Make the Switch”

Naturally, JUUL’s flavors and ads not only targeted minors, but adults as well. JUUL made a separate push towards adults through its “Make the Switch” campaign. JUUL tried to be an alternative to cigarettes, but as noted above, JUUL’s products were more dangerous. There have always been efforts to develop nicotine alternative products, as cigarettes themselves are referred to as “cancer sticks.”<sup>131</sup> Ironically, after Altria invested in JUUL, they

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<sup>125</sup> Steven Reinberg, *Study: Half of JUUL's Twitter Followers are Teens, Young Adults*, HEALTHDAY NEWS, (May 20, 2019, 5:31 PM), [https://www.upi.com/Health\\_News/2019/05/20/Study-Half-of-JUULs-Twitter-followers-areteens-young-adults/1981558384957/](https://www.upi.com/Health_News/2019/05/20/Study-Half-of-JUULs-Twitter-followers-areteens-young-adults/1981558384957/).

<sup>126</sup> California Consolidated Class Action Complaint, *supra* note 32, at ¶ 294.

<sup>127</sup> *See id.* at ¶ 295.

<sup>128</sup> Garavaglia Complaint, *supra* note 58, at ¶ 213.

<sup>129</sup> *Id.* at ¶ 214.

<sup>130</sup> *See* Short-Form Complaint and Demand for Jury Trial, Doc. No. 397-2, In Re: JUUL Labs, Inc., No. 3:19-md-2913 (N.D. Cal. Mar. 11, 2020) (indicating Plaintiffs to check a box for which Defendants will be included in the lawsuit).

<sup>131</sup> *See* Adler et al., *supra* note 4, at 326.

started the “Make the Switch” campaign, which depicted former smokers and how JUUL helped them quit smoking.<sup>132</sup> Yet these statements were false because JUUL is not a cessation device. Advertisements included pictures of the text: “Quit. Start Smoking again” over thirty times to show how the average user tries to quit smoking thirty times.<sup>133</sup> Television ads included former smokers aged 37 to 54 years old talking about the switch they made and how it impacted their lives.<sup>134</sup> But nicotine comes from tobacco and is addictive, so by making the switch, they were really trading one dangerous product for another. JUUL still does not have FDA approval as a cessation product.

#### IV. Conclusion

Ideally, the public would debate this issue, place the backlash on the company, and Congress would provide regulatory guidelines.<sup>135</sup> Yet, sometimes the public needs intervention to determine the correct process. Here, not only has JUUL gone unregulated long enough, but it directly followed the cigarette industry playbook, which was already deemed dangerous and under strict guidelines. It would have made sense for JUUL to follow the same guidelines under the MSA, but Congress failed to act quickly enough. Now, millions of people are addicted, and many will face health issues due to their addiction for the rest of their lives. Though a new settlement agreement similar to the MSA would seem appropriate, a harsher approach needs to be taken.

In May 2016, the FDA determined to regulate e-cigarettes, deeming them to be tobacco products due to their nicotine content, subjecting them to FDA authority. Yet, the FDA and Congress failed to even address the MSA in regulations of e-cigarettes. If JUUL is to

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<sup>132</sup> Angelica LaVito, *JUUL Combats Criticism with New TV Ad Campaign Featuring Adult Smokers Who Quit After Switching to E-Cigarettes*, CNBC (Jan. 8, 2019), <https://www.cnbc.com/2019/01/07/juul-highlights-smokers-switching-to-e-cigarettes-in-adcampaign.html>.

<sup>133</sup> California Consolidated Class Action Complaint, *supra* note 32, at ¶ 211.

<sup>134</sup> See LaVito, *supra* note 132.

<sup>135</sup> See Parmet, *supra* note 59, at 961 (discussing the regulatory process, and how “delay allows populations to exercise their right of self-governance to protect their health”).

be brought under the MSA, the states need to “deem e-cigarettes as cigarettes under the [MSA] because they ‘contain . . . tobacco.’”<sup>136</sup> The MSA was a deal among the states and the cigarette industry, not Congress. Now, Congress needs to step in and take the lead on controlling e-cigarettes. One option is to subject e-cigarettes to a federal tax—which Congress tried to add to cigarettes but resulted in leaving Congress out of the MSA.<sup>137</sup> While Congress determines how it wants to face JUUL, state legislatures have been quick to subject JUUL and others to tobacco taxes.<sup>138</sup>

Over the last year, healthcare providers have noticed an increase of acute respiratory failure and lung injuries in patients using e-cigarettes.<sup>139</sup> In October 2019, the CDC issued guidelines to treat these injuries, and recognized them as a new condition referred to as E-cigarette, or Vaping, Product Use Associated Lung Injury illnesses (EVALI).<sup>140</sup>

Naturally, there is the option for JUUL to admit fault, face any penalties, settle its cases, and continue to market itself as a tobacco product. In doing so, JUUL could open the door for itself and other e-cigarettes to continue on a path towards a less hazardous alternative to consumers who wish to quit smoking. Nearly half a million people die in the United States each year from smoking.<sup>141</sup> However, admitting fault and facing the penalties may be too much of a confession for JUUL to make. If the MSA is any indication of how things will play out, it is likely that some settlement and tax will be imposed on the sale of JUUL’s products, and the states will have a wealth of funds to use for tobacco education programs. Finding a safer alternative to *make the switch* off of tobacco products seems like

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<sup>136</sup> Adler et al., *supra* note 4, at 343 (discussing MSA relative to e-cigarettes).

<sup>137</sup> *Id.*

<sup>138</sup> See Tripp Mickle, *States Dash to Regulate E-Cigarettes*, WALL ST. J. (Jan. 30, 2015), <http://www.wsj.com/articles/states-dash-to-regulate-e-cigarettes-1422668141>.

<sup>139</sup> California Consolidated Class Action Complaint, *supra* note 32, at ¶ 529.

<sup>140</sup> *See id.*

<sup>141</sup> See *Tobacco-Related Mortality*, CTR. FOR DISEASE CONTROL & PREVENTION (Feb. 6, 2014), [http://www.cdc.gov/tobacco/data\\_statistics/fact\\_sheets/health\\_effects/tobacco\\_related\\_mortality](http://www.cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/tobacco_related_mortality).

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the most compelling result—and then, consumers can make the decisions themselves on which products they prefer.