Regulating Tobacco by Trampling on the Constitution

In an effort to protect young people and regulate the tobacco industry, federal lawmakers, unfortunately, are about to act on a sweeping piece of legislation that we believe directly violates the First Amendment and severely threatens commercial speech protections long upheld by the U.S. Supreme Court.

The Family Smoking and Tobacco Control Act (S. 982), which passed the House and is being considered by the U.S. Senate, contains unprecedented advertising restrictions. The proposal gives the Food and Drug Administration (FDA) virtually complete regulatory control over all aspects of the marketing of tobacco products. More importantly, its crushing provisions drastically censor the ability to communicate to adults and allow the states and thousands of localities to impose additional and potentially inconsistent advertising restrictions.

Eminent legal scholars from across the political spectrum have stated that … the provisions mandated in S.982 are unconstitutional.

The Association of National Advertisers (ANA), which represents hundreds of our nation's largest advertisers, therefore feels compelled to speak out and express our deep concerns about this well-intentioned but misguided and damaging proposal.

Over the years as this legislation has been developed, numerous eminent legal scholars from across the political spectrum have stated that the advertising rulemaking provisions mandated in S.982 are unconstitutional. These individuals include Judge Robert Bork; Burt Neuborne, Professor of Law at New York University School of Law; and First Amendment expert Floyd Abrams – all of whom have publicly testified regarding the constitutional problems with legislating these types of speech restrictions.[1] [2] [3]

In addition, one of the most vocal critics of the tobacco industry, Harvard Law School Professor Laurence Tribe, has argued that the tobacco advertising rule, if legislated, would raise serious First Amendment concerns. Professor Tribe stated that "…it would be difficult to defend the sweeping restrictions on advertising as being narrowly tailored to an important governmental interest. The paternalistic view that tobacco advertising must be restricted because adult consumers might find it persuasive is antithetical to the assumptions on which the First Amendment is based."[4]

The American Civil Liberties Union also has spoken out forcefully against the provisions of the mandated rule as has the Washington Legal Foundation. The United States Supreme Court in *Lorillard Tobacco Company v. Reilly* and in numerous other decisions has made clear that these types of overly broad advertising restrictions cannot meet constitutional muster.

We urge members of the Senate to drop what we fear are the unconstitutional advertising provisions from S.982. The Congress should, at the very least, require a new and open rulemaking by the FDA, one that provides a fair hearing to those groups impacted by these restrictions and takes into account the many important Supreme Court and other judicial decisions affecting commercial speech.

Ultimately, we believe that, if legislated, the advertising provisions of S.982 are almost certain to be thrown out by the courts – a result that protects no one. In the meantime, however, national attention to a vital public health issue will be diverted by a prolonged, expensive and unnecessary legal battle. Our government can and should take strong steps to regulate tobacco sales and access to minors, but it must do so without trampling on the First Amendment to the U. S. Constitution.

ANA

Leading the Marketing Community

Paid For By

Lorillard TOBACCO COMPANY

1 Robert H. Bork, "Activist FDA Threatens Constitutional Speech Rights," Washington Legal Foundation Legal Backgrounder, January 19, 1996, Vol. 11 No. 2.
2 Burt Neuborne, Testimony on Behalf of Association of National Advertisers, U.S. Senate Committee on the Judiciary, May 13, 1998.
3 Floyd Abrams, Statement before the U.S. Senate Committee on the Judiciary, February 10, 1998.
4 Laurence H. Tribe, Testimony before the U.S. Senate Committee on the Judiciary, July 16, 1997.

Disclaimer: Lorillard Tobacco Company is a member of the Association of National Advertisers. The views expressed are solely of the ANA.