

March 29, 2006

The Honorable Dean Florez
Chair, Senate Governmental Organization
Committee
State Capitol
Sacramento, CA 95814

Re: SB 1180 Oppose

Dear Senator Florez:

We represent the Association of National Advertisers, Inc. ("ANA"), which is the advertising industry's oldest trade association, and is the only organization exclusively dedicated to enhancing the ability of businesses to advertise on a national and regional basis. ANA represents many California companies and the vast majority of its members do extensive business in the state. **ANA hereby advises you of its opposition to SB 1180 (Migden).** In the event that a hearing does go forward on this bill, ANA requests an opportunity to testify at the hearing and otherwise submit more detailed written materials.

While ANA shares the sponsor's goal of reducing underage drinking, ANA objects to SB 1180 because of serious concerns under both the federal and California Constitutions. Among other things, the bill would impermissibly limit free speech and would violate the Dormant Commerce Clause. In addition, the bill would be unacceptably vague, particularly since it would impose criminal penalties on those who are deemed to have violated it. Equally important, the bill would not have a material impact on underage consumption. Rather, it would divert attention and resources from effective solutions to that problem.

While all the constitutional infirmities are important, this letter will focus primarily on the First Amendment issues. As a threshold matter, we note that the bill's reliance upon the court's decision in People ex rel. v. R.J. Reynolds Tobacco Co. is completely misplaced. That decision did not undertake any free speech analysis. Rather, the court determined that RJR had waived its First Amendment rights in the Master Settlement Agreement between the tobacco companies and certain states. As such, the decision does not provide any support for the constitutionality of SB 1180.

Free speech analysis of the bill must start with the United States Supreme Court's decision in Lorillard Tobacco Company v. Reilly, 533 U.S. 525 (2001). The Court struck down

restrictions on the advertising of tobacco products, which were adopted by Massachusetts for the asserted purpose of reducing underage use of tobacco products. The restrictions that were invalidated in Lorillard banned outdoor advertising for tobacco products in any location within a 1,000 foot radius of a public playground, elementary school or secondary school. Although Lorillard involved advertising for tobacco products, there can be no doubt that advertising for alcohol beverages would receive at least as much constitutional protection. Indeed, during the 1990s, the Supreme Court twice struck down restrictions on alcohol beverage advertising and labeling. 44 Liquormart v. Rhode Island, 517 U.S. 484 (1996); Rubin v. Coors Brewing Co., 514 U.S. 476 (1995).

In Lorillard, 44 Liquormart and Rubin, the Court analyzed the challenged speech restrictions under a constitutional test known as the Central Hudson test. The four-prong Central Hudson test first asks whether the challenged restriction applies to nonmisleading commercial speech concerning lawful activity (prong one) and, if it does, establishes three evidentiary burdens that government must satisfy to justify such speech restriction:

Prong two – the asserted governmental interest in regulating speech must be substantial;

Prong three – the regulation must directly and materially advance the governmental interest asserted; and

Prong four – the regulation must be no more extensive than necessary to serve that interest; this prong cannot be met if there are obvious less-burdensome alternatives to advance the government’s goal that would impose a lesser restriction on speech.

Although a government’s interest in reducing irresponsible consumption of alcohol beverages likely would be substantial, the proposed bill would fail both the third and fourth prongs of the Central Hudson test. Either failure would be fatal to its constitutionality.¹

Under the third prong of Central Hudson, the government would be required to prove in court that the harms allegedly caused by advertising of alcohol beverages are “real and that its restriction will in fact alleviate them to a material degree.” Edenfield v. Fane, 507 U.S. 761, 770 (1993). Put another way, the government must demonstrate that its speech regulations will “significantly advance” the asserted goal. 44 Liquormart, 517 U.S. at 505 (principal opinion).

Thus, if the government were to pass the bill, it would be required to prove that its restrictions on alcohol beverage advertising would in fact materially reduce underage consumption. The large volume of peer-reviewed scientific studies of alcohol beverage advertising, however, make plain that the government could not prove that causal relationship.

¹ While this letter focuses on the intermediate scrutiny of the Central Hudson test, case law under the California constitution supports applying the highest level of constitutional protection — strict scrutiny — to the proposed bill.

To the contrary, the available evidence indicates that alcohol beverage advertising serves to shift market share among various brands, and does not increase overall consumption. See Greater New Orleans Broadcasting Ass'n v. United States, 527 U.S. 173, 189 (1999). Just as an advertisement for soap does not cause people to wash more, but only to shift or maintain brand loyalties, so too alcohol beverage advertising does not cause increased drinking.

Even if the government could prove that alcohol beverage advertising has some causal effect on underage consumption – and the prevailing scientific view is that it does not – the government still would be unable to satisfy its burden of proof. More specifically, the government could not prove that its speech restriction would effectively reduce underage consumption because it would have no impact on the primary determinants of underage consumption – parental and peer influences. For this additional reason, the government would not be able to satisfy its burden of proof under the third prong of Central Hudson. See, e.g., Greater New Orleans, 527 U.S. at 190; City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417 (1993).

The government also would be unable to satisfy its burden of proof under the fourth prong of the Central Hudson test. The fourth prong would require the government to prove that its restriction on advertising is no more extensive than necessary to achieve its asserted goals. The fourth prong requires government to adopt obvious, less speech-intrusive alternatives for achieving its goal before it can restrict speech. Thompson v. Western States Medical Center, 535 U.S. 357, 373 (2002) (“If the First Amendment means anything, it means that regulating speech must be a last — not first — resort.”).

Here, the obvious alternatives available to the government to achieve its goal of reducing underage consumption of alcohol beverages include determined enforcement of existing laws such as those that make it illegal to sell alcohol beverages to minors, and implementation of educational programs that inform the public – both adults and minors – of ways to prevent underage drinking. Of course, these alternatives require expenditure of public funds. However, while speech restrictions may appear to be “free” (and thus are politically seductive), SB 1180 would be both ineffectual and unconstitutional – and ultimately expensive to defend.

Separately, the bill would fail the fourth prong because it unduly restricts communications between alcohol beverage companies and adult consumers. The so-called “safe harbor” provision in SB 1180 highlights this point because it only insulates advertising that has a youth audience of 15 percent or less. In other words, an advertiser could be attempting to communicate with an audience that is overwhelmingly adult – as much as 84 percent adult – yet would not fall within the “safe harbor” provision and could be subjected to criminal prosecution. In this additional respect, SB 1180 cannot be squared with Supreme Court law.

In Lorillard, the Court explained that the First Amendment rights of advertisers to communicate with adults cannot be diluted by a government that claims it must protect minors from messages concerning an “adult” product. Lorillard, 533 U.S. at 564. The Lorillard Court went on to hold, with extensive supporting citations, that “the governmental interest in

The Honorable Dean Florez

March 29, 2006

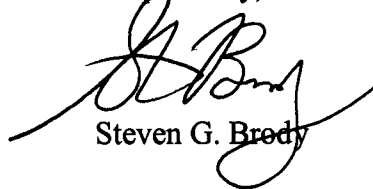
Page 4

protecting children from harmful materials . . . does not justify an unnecessarily broad suppression of speech addressed to adults.” Id. (citations omitted). Put another way, government may not “reduce the adult population . . . to reading only what is fit for children.” Id. (citation omitted); see United States v. Playboy Entm’t Group, Inc., 529 U.S. 803, 812-14 (2000) (reiterating that a governmental objective of shielding children does not suffice to support restrictions on adult-to-adult communications).

The Dormant Commerce Clause issues raised by the SB 1180 are also serious. Under the Pike test, a state law must be struck down if the burdens on interstate trade are clearly excessive in relation to the putative local benefits. Assuming that the Pike test would apply here, the government would have a difficult time defending the bill. That is because the bill, if passed, would have a huge impact on how alcohol beverages are marketed not only in California, but across the country. Fear of criminal prosecution would force alcohol beverage companies to alter their advertising and product development strategies nationwide in an attempt to accommodate California’s law. The burdens on interstate commerce would be exacerbated by the fact that the bill, as drafted, is so vague as to be incomprehensible.

This vagueness gives rise to separate constitutional concerns under the Due Process Clause. Particularly where a criminal statute is at issue, government must provide its citizens with a clear understanding of what conduct would offend the law. But the list of factors for determining whether a company is “targeting” minors, set forth in section (a)(2) is so vague as to invite wholly subjective and arbitrary enforcement. For this additional reason, SB 1180 could not withstand a constitutional challenge.

Respectfully,



Steven G. Brody

SGB/sec

cc: Daniel L. Jaffe, Esq.