

SENATE PROPOSAL ON DRUG IMPORTATION TRENDS ON CONSTITUTIONAL RIGHTS

by

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On April 8, 2004, Senator Charles Grassley introduced the Reliable Entry for Medicines at Everyday Discounts through Importation with Effective Safeguards Act of 2004 (S.2307). The bill, one of several introduced this year which the Senate may take up for debate soon, establishes a framework that would facilitate legal importation of drugs from Canada. One key enforcement provision of the bill, Section 9, would deny tax deduction of otherwise allowable advertising expenses for any pharmaceutical company failing to certify that it “has not taken any action, directly or indirectly, during such taxable year to prevent the authorized importation of a qualifying drug into the United States from a registered exporter to a pharmacy . . . or has otherwise conditioned the terms by which a qualifying drug is imported into the United States from a registered exporter under such section.”

In my opinion, any effort to condition the tax deductibility of advertising expenses on a taxpayer’s certification of compliance with government policy would violate the First Amendment. Under our system of free speech, government may not impose a financial penalty on constitutionally protected speech as a sanction for failing to toe the line in cooperating with government policy, especially when, as in Senator Grassley’s bill, the penalized speech is unrelated to the taxpayer’s conduct.

Before describing this First Amendment analysis in detail, two aspects of the proposed bill that render the current provisions clearly unconstitutional should be noted. First, the proposed statute requires a taxpayer to certify that it has not acted “directly or indirectly” to prevent the “authorized” re-importation of prescription drugs. The complex authorization process for re-importation as

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described in the Grassley bill runs to more than 55 printed pages. The certification requires a taxpayer to speculate on the impact of its activities on an array of participants in the authorized re-importation process, and to assess whether its behavior in the past year has “directly or indirectly” impeded the “authorized” re-importation of any “qualified drug” by a “registered exporter” in a foreign country to a “qualified pharmacy” in the United States. With respect, it is impossible for any taxpayer to make the required certification. Behavior as diverse as pricing policy, credit policy, safety rules, quality controls, and language barriers might affect the actions of participants in the process. Given the scope of the required certification, the targeted behavior is so vast and so poorly defined that the certification is almost certainly unconstitutionally vague. Especially where, as here, a failure to certify would trigger penalties on constitutionally protected speech, the range of proscribed activities must be defined with greater precision to survive constitutional scrutiny.

Second, the statute makes no effort to distinguish between a taxpayer’s lawful and unlawful conduct. Thus, if a taxpayer engages in perfectly lawful activity that has the “indirect” effect of impeding the authorized importation of prescription drugs, the taxpayer’s constitutionally protected speech is penalized. The First Amendment flatly forbids the government from using speech regulation as a means of controlling lawful behavior. The Supreme Court has repeatedly held that if behavior is to be regulated, it must be regulated directly; not indirectly through the placement of conditional limitations on constitutionally protected speech. Thus, while direct regulation of activity affecting the re-importation of prescription drugs would be constitutional under the foreign commerce clause, government may not seek to impose such regulation indirectly by punishing commercial speakers who do not comply with the government’s wishes.

Even if the statute were narrowed to limit the certification to unlawful activity, its current form would render the statute unconstitutional. If the targeted conduct were limited to behavior by taxpayers that actually violates the law, the due process clause would preclude the imposition of a penalty on the taxpayer’s speech in the absence of a hearing process designed to provide the taxpayer with procedural due process of law.

Thus, as drafted, the proposed statute is rife with constitutional violations. But even an ideal statute that narrowed the targeted behavior and provided adequate due process protections would violate the First Amendment. Government can never use the tax deductibility of advertising as a lever to control the taxpayer’s unrelated behavior. In the commercial speech context, such an effort to manipulate the tax consequences of protected speech as a device to control unrelated behavior would almost certainly violate the fourth prong of *Central Hudson Gas & Electric Corp. v. Public Svc. Comm’n.*, 447 U.S. 557 (1980), which permits regulation of commercial speech only when no less drastic alternative is available to the government. Direct regulation of the behavior in question would always be a preferable, less drastic alternative.

By now, it is a non-controversial proposition that commercial speakers are fully protected by the First Amendment. *See, e.g., Virginia State Board of Pharmacy v. Virginia*, 425 U.S. 748 (1976) (advertising of prescription drugs protected by First Amendment); *Central Hudson* (setting forth four part commercial speech test); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (applying *Central Hudson* test to invalidate overly broad commercial speech regulation); *Thompson v. Western States*

Medical Center, 535 U.S. 357 (2002) (requiring use of least drastic means to regulate commercial speech).

The Supreme Court has recognized that two great institutions of American society — political democracy and market capitalism — depend upon a free flow of information needed to permit both voters and consumers to exercise informed choice free from undue government control. See Neuborne, *Free Speech, Free Markets, Free Choice: An Essay on Commercial Speech* (ANA 1987). Thus, as long as commercial speech is truthful and the advertised conduct is lawful, the Supreme Court has afforded it First Amendment protection roughly comparable to the protection afforded to political and artistic speech. While the verbal tests may vary slightly from politics to commerce, the reality has been the development of a vibrant commercial speech doctrine that unquestionably protects the advertising at issue in Senator Grassley’s proposed bill. See *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (discussing similarity of commercial and non-commercial speech protection).

First Amendment protection of commercial speech flows from two crucial findings by the Supreme Court. First, the Court has consistently recognized that it is impossible to maintain an efficient market structure without the free flow of information concerning the attributes of goods and services that permit consumers to make informed choices in the marketplace. The Court has realized that the price of restricting commercial speech is a less informed consumer, and a consequent decline in the ability of the free market to assure efficient outcomes. Indeed, the hallmark of inefficient economies all over the world is ignorance and the lack of informed consumer choice.

Moreover, it is recognized that government intrusion into the free market should be an exception, and should occur only after full political consideration of the consequences of the action. Restrictions on commercial speech are, therefore, particularly dangerous because they permit government to regulate the economy covertly by controlling the flow of information to consumers without full political discussion of the effort to manipulate consumer behavior.

Of course, government is under no obligation to subsidize commercial speech merely because the First Amendment protects it. *Regan v. Taxation With Representation*, 461 U.S. 540 (1983). Advertising expenses are clearly a legitimate cost of producing a product, so it is questionable whether Congress could single out advertising expenses for non-deductible status, while permitting expenses unconnected with speech to remain deductible. Moreover, I know of no one who urges that taxable income be calculated on gross income without permitting deductions for any legitimate expenses. Thus, it would be folly for Congress to seek to ban the deductibility of advertising expenses across the board.

But the Grassley bill does not deny a tax deduction for *all* advertising costs. Rather, it seeks to pick and choose among advertisers, rewarding those advertisers who comply with government policy with a tax deduction, while penalizing dissenting taxpayers by denying them a generally available tax deduction for the cost of informing consumers. Advertisers who toe the government line would be permitted to deduct advertising expenses; advertisers who displease the government by engaging in behavior that is inconsistent with the government line would be denied the ability to

deduct advertising expenses. Such a regime, which uses selective taxation of protected commercial speech as a lever to enforce the government's will in non-speech areas, is flatly violative of the First Amendment. See *Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (invalidating discriminatory taxation of speech); *Minneapolis Star & Tribune v. Minnesota Comm'n of Rev.*, 460 U.S. 575 (1983).

Even if one views tax rules permitting the deductibility of advertising expenses as a form of tax subsidy, government may not allocate speech subsidies only to those persons who agree to follow the government line. I question whether the decision to permit the deduction of legitimate costs of production in calculating taxable income can be viewed as a subsidy, since it merely recognizes economic reality; but even if it is treated as a subsidy, the First Amendment forbids the government from using selective speech subsidies as a form of social control. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (invalidating discriminatory speech subsidy); *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001) (invalidating content-based speech subsidy). If Congress wishes to regulate the lawful behavior of pharmaceutical companies, it must do so directly, not by allocating speech subsidies only to those companies who agree to toe the government line. In short, under existing First Amendment doctrine, Congress may not seek to couch its regulation in the form of a law that grants favorable status to the speech of companies whose conduct pleases the government, while penalizing the speech of companies whose otherwise lawful behavior displeases the government.

Finally, even if such a selective speech regulation policy were constitutional (it is not), the Supreme Court has repeatedly forbidden Congress from regulating commercial speech when other, less restrictive means of advancing the government's interests are available. *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002) (invalidating effort to limit speech when behavior could be regulated directly). Here, the obvious less drastic alternative is the imposition of direct regulation over the re-importation of prescription drugs. Where, as here, Congress may regulate directly, it may not seek to achieve the regulatory goal indirectly by the selective regulation of constitutionally protected speech.

Regulations seeking to use the selective deductibility of advertising expenses as a lever to force taxpayers to support the government even when the behavior in question is unconnected with the advertising, pose a serious threat to American institutions. First, by imposing an arbitrary financial penalty on commercial speech, such regulations will inevitably limit the flow of truthful information to consumers concerning economic choices, resulting in less informed consumers who are less able to make efficient market choices. Equally important, such a device would vest immense power in the government to manipulate the behavior of taxpayers by rewarding them for supporting the government, and penalizing them for opposing it. How long would it be before government rewarded its friends and penalized its foes by selectively taxing their speech?

For these reasons, S.2307 is unconstitutional, and any similar effort to use selective deductibility of advertising expenses as a means of controlling unrelated behavior would be both unwise, and a violation of the First Amendment.