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COMPELLED "COUNTER-ADVERTISING" FOR ALCOHOL PRODUCTS WOULD TREAD ON FREE SPEECH

by

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For a number of years anti-alcohol advocates have promoted laws that would limit advertising by the alcohol industry. Many recent proposals call for "counter-advertising" campaigns that would compel someone to speak the advocates' message, but with someone other than the government or the advocates paying the bill.[1] While the advocates' message remains essentially unchanged — that the alcohol industry misleads the public with glamorized depictions of alcohol consumption[2] — they have been unable to solve the riddle of the First Amendment.

Groups like the Center for Science in the Public Interest ("CSPI"), the Center for Alcohol Marketing and Youth ("CAMY"), and the Marin Institute would likely support blanket bans on alcohol advertising. But a product-specific ban on alcohol advertising would be unconstitutional. With *44 Liquormart, Inc. v. Rhode Island* and *Lorillard Tobacco Co. v. Reilly*, the Supreme Court announced the right of producers of age-regulated products like alcohol to convey "truthful information about their products to adults."[3] Presumably,

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[1] *See* Gina Agostinelli & Joel W. Grube, *Alcohol Counter-Advertising & the Media,* 26 ALCOHOL RESEARCH & HEALTH 15 (2002), *available at* http://www.niaaa.nih.gov/publications/arh26-1/15-21.pdf; *see also Join Together*, *Advertising: Counter-Ads*, *at* http://www.healthpolicycoach.org/policyframe.asp?frame=print&id=120 (last visited Jul. 21, 2003).

[2] *E.g.*, Ctr. for Sci. in the Pub. Interest, *Current Project Initiatives*, *Advertising & Promotion Reforms*, *at* http://www.cspinet.org/booze/pdbooze.htm (last modified Feb. 2003) [hereinafter *Current Project Initiatives*].

[3] *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 510, 508-514 (1996) (the court concluded "that a state legislature does not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes"); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 564 (2001); *See also Eller Media Co. v. City of Cleveland*, 161 F. Supp. 2d. 796, 809 (N.D. Ohio 2001), *aff'd per curiam*, 2003 U.S. App. LEXIS 7425 (6th Cir. 2003) (In striking down an outdoor advertising ordinance directed at alcohol products, the court, citing *Lorillard*, observed "that a speech regulation cannot unduly impinge on the speaker's ability to propose a commercial transaction and the adult listener's opportunity to obtain information about products").

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calls for counter-advertising respond to these decisions by attempting to balance First Amendment concerns with the advocates' agenda.[4] As explained below, however, counter-advertising laws would still fail to overcome the First Amendment. *See generally* Kathryn Murphy, Note, *Can the Budweiser Frogs be Forced to Sing a New Tune?: Compelled Commercial Counter-Speech & the First Amendment*, 84 VA. L. REV. 1195 (1998).

One approach to counter-advertising would compel the alcohol industry itself to print or broadcast anti-alcohol messages in their advertisements. *See* Angostelli, *supra*, at 16-19. This direct approach, forcing the industry itself to speak, would not pass constitutional muster. Under the *Pacific Gas & Electric Co. v. Pacific Utilities Commission* line of cases,[5] the government may compel a commercial entity to speak only with regard to "purely factual and uncontroversial information … as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Zauderer*, 471 U.S. at 651-652 (the court permitted compelled disclosure of "purely factual and uncontroversial information" but warned "that unjustified or unduly burdensome disclosure requirements might offend the First Amendment"). This nexus between product and consumer regarding "purely factual and uncontroversial information" likely supports many existing disclosure requirements on alcohol labels. *See generally* Mandatory Label Information, 27 C.F.R. §§ 4.32, 5.32, 7.22. But *Pacific Gas* prohibits the government from compelling speech that is adverse to the speaker's interests, or compelling speech where the speaker would choose to otherwise remain silent. *See Pac. Gas*, 475 U.S. at 16, 17; *see also Wileman Bros.*, 521 U.S. at 469-471; *United Foods*, 533 U.S. at 410-412. Mandatory disclosure of undisputed and uncontroversial facts (*e.g.*, the producer's name and address) do not violate the First Amendment because they compel alcohol manufacturers to state only purely factual information reasonably related to preventing consumer deception. Such information relates to the consumption of the product itself and is uncontroversial because there is general agreement about its truthfulness. Such mandatory information does not appear to force the speaker into making or paying for policy statements adverse to its interests.

In contrast, the law is skeptical of restrictions that "penalize … the expression of particular points of view" or that "force … speakers to alter their speech to conform with an agenda they do not set." *See Pac. Gas*, 475 U.S. at 9. Courts deem laws unconstitutional that have the potential to chill speech or that may force a particular party to adopt a point of view it does not hold. *See id.* at 9-15. Industry-funded counter-advertising would force manufacturers to admit to the truthfulness of their purported "glamorization" of alcohol, then enlist them in disseminating highly subjective messages aimed at countering that alleged glamorization. *E.g.*, *Current Project Initiatives*, *supra*. By abridging alcohol manufacturers' "rights in order to 'enhance the relative voice' of [their] opponents," *Pac. Gas*, 475 U.S at 14, requiring mandatory counter-statements increases the likelihood that alcohol manufacturers will conclude that "the safe course is to avoid controversy" and not speak at all. *Id*. Industry-funded counter-ads, therefore, both cause alcohol manufacturers to adopt views adverse to their interests and chill their willingness to speak. Under *Pacific Gas*, this combination is unconstitutional. *See id.* at 16, 17 (as explained below, the "content-based grant" at issue in the case was significant to the development of the standard of review).

At present, talk of industry-funded counter-advertising seems to have receded, but conversation on a second front is alive and well. These recommendations call for "changing federal law to require television, radio and cable operators to provide equal time for counter-advertising." Join Together, *supra*; *see also*

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[4] *E.g.*, *Current Project Initiatives*, *supra* note 2 (as it relates to advertising and promotion CSPI states that "[t]ogether with dozens of other national groups, CSPI has promoted legislation to require all broadcast and print ads for alcohol to carry rotating health and safety messages and to mandate 'counter-ads' on television to balance advertising's glamorized view of drinking and provide information about the risks involved"); *c.f.*, CTR. FOR ALCOHOL MKTG. & YOUTH, STATE ALCOHOL ADVER. LAWS: CURRENT STATUS & MODEL POLICIES 1 (2003), *available at* http://camy.org/research/statelaws0403/.

[5] *See Pac. Gas & Elec. Co. v. Pac. Util. Comm'n*, 475 U.S. 1 (1985); *see also Zauderer v. Office of Disciplinary Council of Ohio*, 471 U.S. 626 (1985); *see also U.S. v. United Foods, Inc.*, 533 U.S. 405 (2001), *and Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1996).

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Current Project Initiatives, *supra*. This avenue attempts to outflank the First Amendment by compelling speech by the media, rather than drink producers themselves. But such an approach would infringe on the First Amendment rights of television, radio and cable operators. *See generally* Murphy, *supra*, at 1214-1221. While the constitutional analysis is somewhat complex as it radiates from three distinct lines of Supreme Court case law, the invariable conclusion, centered around the concept of content neutrality, is that a law requiring media-supported counter-advertising would be impermissible under the First Amendment.

The first line of potentially relevant case law arises from the 1969 decision in *Red Lion Broadcasting v. FCC*. *See* 395 U.S. 367 (1969). Directed at television and radio outlets broadcast over licensed wavelengths, *Red Lion* stands for the proposition that the government may compel broadcasters to offer both sides of a controversial issue of public interest. In justifying this imposition on broadcasters' rights, the Court relied on the limited nature of the broadcast spectrum. *See id.* at 388-390. The reliability of this "scarcity rationale" is a matter of significant debate. In *Turner Broadcasting System, Inc. v. FCC*, for example, the Court stated that "courts and commentators have criticized [*Red Lion's*] scarcity rationale since its inception," and *Turner* goes on to ignore *Red Lion* in its holding. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 637-638 (1994).

Even if today's Supreme Court would follow *Red Lion* in examining a narrow law compelling counter-advertising only by broadcast media, the very under-inclusiveness of such a scheme would likely doom it. *Rubin v. Coors Brewing Co.* and *Greater New Orleans Broadcasting Association, Inc. v. U.S.* establish that where "[t]he operation" of a statute "and its attendant regulatory regime is … pierced by exemptions and inconsistencies…the Government cannot hope to exonerate it." *Greater New Orleans Broad. Ass'n, Inv. v. U.S.*, 527 U.S. 173, 190 (1999); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486-91 (1995). Under the familiar test of *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980), "speech restriction[s]" must "directly and materially advance" the asserted state interest. A counter-advertising scheme that places substantial burdens on certain media outlets while leaving many others (*e.g.*, cable television, satellite television, print) unaffected certainly would be pierced by irrational exceptions and inconsistencies. The Supreme Court to date has not applied the "irrationality" reasoning of *New Orleans* and *Rubin* directly to compelled speech cases. Nevertheless, the lack of any logic (except avoiding the First Amendment) of a broadcast-only ban seems to merit extension of the Court's irrationality analysis to the compelled-speech arena. In short, *Red Lion* would not likely save even a broadcast-only counter-advertising law.

A second line of cases grows out of *Miami Herald Publishing v. Tornillo* and would apply if a counter-advertising law applied to traditional print media (newspapers, magazines, etc.). *See* 418 U.S. 241 (1974). *Tornillo* takes a broad view of the First Amendment protection against compelled speech, holding that the government, regardless of whether its regulations are "fair or unfair," can not "exercise editorial control and judgment" over the publishing process. *Id.* at 258. Where the "statute exacts a penalty on the basis of … content," that statute will be held unconstitutional. *Id.* at 256. Under *Tornillo*, imposing counter-ads on the print media would be unconstitutional.

Turner Broadcasting System, Inc. v. FCC represents the third line of relevant case law, and would likely prove central in examining current alcohol counter-advertising proposals. *See Turner Broad.*, 512 U.S. 622. First, as a practical matter, any limitation on alcohol advertising must include cable television to be effective.[6] Second, *Turner's* reasoning and its clarification of *Tornillo*, *Red Lion*, and *Pacific Gas, Turner Broad.*, 512 U.S. at 637-639, 653-655, make it the most complete statement of the Court's current view of compelled speech and the media. *C.f. Time Warner Entm't Co. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001) (in striking down an FCC regulation, the court applied *Turner* intermediate scrutiny). Its skepticism of *Red Lion's* "scarcity rationale" and its focus on *Tornillo's* and *Pacific Gas'* discussion of "content-basis" and "content-

[6] *See* Fed. Comm. Comm'n, *Annual Assess't of the Status of Competition in the Market for the Delivery of Video Programming*, 17 F.C.C.R. 26901, 26903 (2002) (the report concluded that cable, satellite, and other "multichannel video programming distributors" accounted for "89.9 million households" or "85.3%" of all "television households." Customers receiving programming directly from "franchised cable operator[s]" accounted for "76.5%" of these subscribers.).

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neutrality" — passing themes in those cases — are particularly telling. *See Turner Broad.*, 512 U.S. at 637-638, 653, 654. Given *Turner's* subject matter and methodology, it is unlikely that a counter-ad law could avoid it.

Turner holds that the level of judicial scrutiny of a requirement compelling speech depends on whether the statute is content-based or content-neutral. *Turner Broad.*, 512 U.S. at 642. In characterizing *Tornillo*, *Turner* states that the statute at issue in that case "imposed an impermissible content-based burden on newspaper speech." *Id.* at 653. Likewise, in describing *Pacific Gas*, *Turner* states that the statute was struck down because "the regulation conferred benefits to speakers based on viewpoint." *Id.* at 654. Such content-based statutes, the Court explained, must be analyzed with "the most exacting scrutiny" and will fail to meet First Amendment standards where the "Government action … stifles speech on account of its message or … requires the utterance of a particular message favored by the Government." *Id.* at 641, 642.

Turner holds further that the analysis differs where the "rules are content-neutral in application." *Id.* at 655. If a statute "exact[s] no content-based penalty" it is reviewed under "an intermediate level of scrutiny." *Id.* at 642, 655. This requires "that the chosen means do not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" *Id.* at 662. Where the government "defends a regulation on speech as a means to redress past harms or prevent anticipated harms," it must demonstrate "that the regulations will in fact alleviate th[e] harms in a direct and material way." *Id.* at 664.

Turner describes the distinction between content-based and neutral restrictions by explaining that,"[a]s a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based … By contrast, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral." *Id.* at 643.

A law compelling anti-alcohol counter-advertisements on television generally, or only on cable television, would be content-based and unconstitutional under the exacting scrutiny standard required by *Turner*. First, such a law would confer benefits based upon viewpoint. While media could refrain from airing alcohol ads, they could not refrain from airing counter-ads unless they also chose to refuse alcohol advertisements all together. Second, the viewpoint supported by the law would be one favored by the government: the law would compel speakers making one kind of statement to also make another government-sanctioned statement, definitively favoring one speech over another. Applying the exacting scrutiny standard, such a law would violate the First Amendment.

But even assuming that the law could merit intermediate scrutiny and assuming that the means did not "burden substantially more speech than [was] necessary," it is doubtful that such compelled speech would "alleviate the harms in a direct and material way." Alcohol abuse among both adults and youth predates the era of modern alcohol advertising. Not even Prohibition could contain alcohol abuse. Moreover, there is no proof that alcohol advertising increases consumption — studies tend to indicate that alcohol ads shift purchases between brands rather than increase overall alcohol purchases. *E.g.*, JON P. NELSON, *Alcohol Adver. & Adver. Bans: A Survey of Rsrch. Methods, Results, and Policy Implications*, *in* ADVER. & DIFFERN'D PRODUCTS 239 (Advances in Applied Microecon., Vol. No. 10, 2001). Indeed, the Supreme Court has expressed skepticism concerning the correlation of alcohol ads and increased consumption on at least one occasion. *See 44 Liquormart, Inc.*, 517 U.S. at 506-507. Such facts are hardly ringing endorsements for the alleviation of harms under the "direct and material" standard. As a result, the current anti-alcohol proposals would likely fail even intermediate scrutiny.

The First Amendment requires that society view restrictions on speech with extreme suspicion. So long as anti-alcohol advocates call for the government to compel parties to speak their partisan line, any resulting legislation will fail under the First Amendment. While it is doubtful that anti-alcohol advocates will give up their misguided crusade against alcohol advertising, the First Amendment will require that they adopt new strategies.

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