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WLF FINDS TOBACCO AD RESTRICTIONS ARE BLATANTLY UNCONSTITUTIONAL

A Bill pending before a Senate Committee that would impose severe federal restrictions on the promotion of tobacco products is unconstitutional because it violates the First Amendment rights of those who wish to engage in promotion of tobacco products and of those who wish to receive such information.

That is the conclusion of the Washington Legal Foundation (WLF), which conducted a constitutional analysis of the legislation at the request of U.S. Senator Jeff Sessions, a member of the Senate Committee on Health, Education, Labor and Pensions. WLF's 18-page analysis, submitted on September 24, 2003, stated that the legislation (the Family Smoking Prevention and Tobacco Control Act) could not withstand First Amendment challenge because it would impose restrictions that are not narrowly tailored to the goal that the legislation hopes to achieve: a reduction in smoking.

The Act would grant the Food and Drug Administration (FDA) the authority to regulate tobacco products. In 1995, FDA asserted that it had such authority, and it attempted to impose burdensome restrictions on tobacco promotion. The Supreme Court ruled in 2000 that Congress had never granted FDA authority to regulate tobacco products. The Act would not only grant FDA authority to regulate tobacco, but would also put into place the burdensome restrictions that FDA had previously attempted to impose.

In its constitutional analysis, WLF noted that FDA critics (including WLF) have long argued that the proposed FDA promotion restrictions violate the First Amendment. The three courts that examined the FDA restrictions concluded that FDA lacked authority to impose any sort of regulations on the tobacco industry and thus there was no need for them to address the First Amendment issue. WLF told Senator Sessions that the failure of the courts to address the constitutional issue should not be viewed as an indication that the courts believed that FDA's regulations presented no constitutional problems. Indeed, WLF argued, a 2001 Supreme Court decision that struck down Massachusetts tobacco advertising restrictions on First Amendment grounds made clear that many provisions in the 1995 FDA regulations were unconstitutional.

The FDA advertising restrictions would, among other things, (1) require that any print advertising appear in a black-and-white text-only format unless the publication in which it appears is read almost exclusively by adults; (2) prohibit outdoor advertising within 1,000 feet of any public playground or school; (3) prohibit the distribution of any promotional items, such as T-shirts or hats bearing the manufacturer's brand name; and (4) prohibit a manufacturer from sponsoring any athletic, musical, artistic, or other social or cultural events using its brand name.

WLF also argued that several provisions of the Act would go beyond the FDA regulations and are similarly unconstitutional. The Act would greatly restrict any comparative health claims by tobacco manufacturers. WLF argued that the First Amendment bars restrictions on such claims so long as manufacturers can demonstrate that the claims are truthful. Some Members of Congress apparently want to prohibit comparative health claims because they fear that such claims might prompt some tobacco users to switch brands/products rather than to quit altogether; WLF argued that the First Amendment does not permit the government to suppress truthful information based simply on a fear that the public will make bad decisions with the information.

WLF noted that the First Amendment does not prevent speakers from voluntarily agreeing to limit their speech, as the major tobacco manufacturers have done in connection with the voluntary agreements they entered into with State attorneys general. However, the Constitution does not permit draconian speech restrictions of the type contained in the Act to be imposed involuntarily, WLF argued.

In its analysis, WLF stressed that it does not lobby and takes no position on whether Congress should adopt the Act or any other legislation providing for FDA oversight of the tobacco industry.

WLF is a nonprofit public interest law and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to protecting commercial free speech.

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For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302. A copy of WLF's analysis is posted on its website, www.wlf.org.