June 1, 2009

United States Senate
Washington, DC 20510

Re: ACLU Calls for Narrowing Advertising Restrictions in S. 982, The Family Smoking Prevention and Tobacco Control Act

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Dear Senator:

We are writing on behalf of the American Civil Liberties Union (ACLU) to express our concern over the advertising restrictions contained in S. 982, The Family Smoking Prevention and Tobacco Control Act (hereinafter the '2009 Tobacco Control Bill'). The ACLU is America's largest and oldest civil liberties organization, having over half a million members, countless additional activists and supporters, and 53 affiliates nationwide. We last commented on the issue of tobacco advertising regulation when S. 2626, the Youth Smoking Prevention and Public Health Protection Act of 2002 (hereinafter the '2002 Youth Smoking Bill'), was introduced during the 107th Congress. As in 2002, we continue to believe that the advertising restrictions in this year's bill are not drawn narrowly to achieve the stated public purpose and, as such, fail to comply with the free speech protections of the First Amendment. In the absence of a much more substantial narrowing of the advertising restrictions in a manner directly tied to the goal of reducing youth smoking, we urge the removal of the advertising restrictions set forth in Section 102 of the bill. It is our understanding that such an amendment is likely to be offered when the bill comes to the floor for consideration and we urge you to support it.

History

In 1995 the Food and Drug Administration (FDA) proposed regulations to restrict the sales and distribution of cigarettes and smokeless tobacco products to children and adolescents. In March of 2000, in *FDA v. Brown & Williamson Tobacco Corp.*[1], the Supreme Court ruled that Congress had not granted the FDA jurisdiction to regulate tobacco products as customarily marketed and the regulations were consequently revoked. The 2002 Youth Smoking Bill would have amended the Federal Food, Drug, and Cosmetic Act to give the Secretary of Health and Human Services (HHS) regulatory authority over tobacco products. In

[1] 529 U.S. 120 (2000).

doing so the legislation would have codified the past restrictions (61 Fed. Reg. 44398, Aug. 28 1996). In the statement we submitted to the Senate Health, Education, Labor and Pensions Committee on September 18, 2002, we argued that:

1. The restrictions imposed by S. 2626 on advertising and other promotions of tobacco were inconsistent with the First Amendment; and

2. Restrictions on speech intended to reduce the number of children who begin smoking must be narrowly defined so as not to infringe on the rights of adults.[2]

The 2009 Tobacco Control Bill would now impose most of the same restrictions as the 2002 Youth Smoking Bill. The only significant change impacting commercial speech restrictions is the acknowledgment of the ruling in *Lorillard Tobacco Co. v. Reilly*[3]. In *Lorillard*, the Supreme Court struck down a state tobacco advertising regulation similar to the FDA's proposed rule. The Massachusetts regulation would have prohibited outdoor ads within 1,000 feet of schools, parks and playgrounds and also restricted point-of-sale advertising for tobacco products. Writing for the majority, Justice O'Connor found the Massachusetts regulation was not narrowly tailored enough to meet constitutional scrutiny. She also suggested the FDA regulation faced the same problem.

Section (102)(2)(E) of the 2009 Tobacco Control Bill responds to the *Lorillard* ruling by requiring new regulations to:

> Include such modifications to section 897.30(b) [of 61Fed. Reg. 44615-44618], if any, that the Secretary determines are appropriate in light of governing First Amendment case law, including the decision of the Supreme Court of the United States in *Lorillard Tobacco Co. v. Reilly*.

While we agree this is a step in the right direction, there is no affirmative adjustment to the prohibited restriction and only an implicit acknowledgement of the First Amendment implications of the ruling. Moreover, the remaining restrictions were left largely intact and we do not believe they are any more narrowly tailored to the public purpose of reducing youth smoking than the outdoor ad restriction addressed in *Lorillard*. The remaining restrictions would, among other things:

1. Restrict all advertising to black and white format;
2. Allow unrestricted advertising in only those publications which have an 85% or more adult readership, and fewer than 2 million youth readers;
3. Restrict labeling and advertising in an audio format to words without music, and limit video format to static black text on a white background;
4. Ban logo and brand names on race cars, driver uniforms, and the like;

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[2] ACLU Statement for the Record to the Senate Health, Education, Labor and Pension Committee on FDA Regulation of Tobacco (2002 ACLU Statement) (Sept. 18, 2002) found at http://www.aclu.org/freespeech/commercial/11064leg20020918.html.

[3] 533 U.S. 525 (2001).

5. Ban the use of tobacco brand names on non-tobacco products (e.g. t-shirts, caps, lighters);
6. Ban the use of tobacco brand names associated with non-tobacco products;
7. Ban brand-name event sponsorships; and
8. Ban distribution of free product samples, either in person or through the mail.[4]

Under First Amendment analysis, any such speech limitation must be no more restrictive than necessary and must directly advance the government's objective in reducing smoking by youths.[5] In 2002, we noted that neither FDA studies nor legislative findings were sufficient to meet the *Liquormart* test.[6] Nothing in the 2009 record causes us to change our opinion in that regard. Regulating commercial speech for lawful products only because those products are widely disliked – even for cause - sets us on the path of regulating such speech for other products that may only be disfavored by a select few in a position to impose their personal preferences through misuse of the regulatory process. Instead, we suggest a determined application of the laws prohibiting false advertising and a continuation of the vigorous and successful efforts to warn the American public – including its children – of the harms associated with the use of tobacco products. Usually, the antidote to harmful speech can be found in the wisdom of countervailing speech – not in the outright ban of the speech perceived as harmful.

We urge you to support any amendment that would remove the advertising restrictions in Section 102 of S. 982.

Sincerely,

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[4] S. 892 at §102 (111th Congress).
[5] *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996) (plurality opinion applying strengthened test for commercial speech).
[6] *See* 2002 ACLU Statement.