

The FDA Tobacco Legislation Fully Complies with the First Amendment decisions of the Supreme Court in *Central Hudson* and *Lorillard v. Reilly*

The First Amendment issues related to the FDA tobacco legislation largely concern the advertising restrictions that FDA issued in its 1996 regulations, which the bill reinstates. Those regulations were reviewed and cleared by the Department of Justice, which defended them in court against numerous challenges, including claims they violated the First Amendment.¹

In 2001, the U.S. Supreme Court issued *Lorillard Tobacco Co. v. Reilly*, which struck down a Massachusetts state provision restricting the placement of tobacco billboards near schools, a provision that is similar to one of the provisions in the FDA regulation. The Supreme Court held that these restrictions were unconstitutional because they failed the fourth part of the *Central Hudson* test. The Court found that Massachusetts failed to provide an adequate factual basis to justify the restrictions and failed to consider whether the restrictions left the tobacco sellers with adequate means to communicate truthful information to its adult customers. The court upheld Massachusetts' restrictions on retailers' sales practices, such as a ban on self-service displays. These restrictions are also similar to restrictions in the FDA rule.²

The factual record created by Congress and the FDA is more extensive and considers broader issues than the record reviewed by the Court in *Lorillard*. The FDA tobacco legislation also contains a severability clause which will protect the entire bill should a single provision be held unconstitutional.

1. In contrast to the situation in *Lorillard*, there is an overwhelming factual record in support of the FDA tobacco legislation's restrictions on tobacco marketing that is more extensive than relied upon by Massachusetts and that has ever previously considered by Congress or the courts.

Congress relied on the extensive record developed by the FDA in 1996 and substantial, significant new information, including:

- August 2008 Monograph by the National Cancer Institute, "The Role of the Media in Promoting and Reducing Tobacco Use;
- 2007 Report of the President's Cancer Panel, "Promoting Healthy Lifestyles: Policy, Program and Personal Recommendations for Reducing Cancer Risk",
- 2007 Report of the Institute of Medicine on Tobacco, "Ending the Tobacco Problem: A Blueprint for the Nation", and

¹ In *Central Hudson v. Public Service Commission*, the Supreme Court set out a four part test for evaluating the constitutionality of restrictions on commercial speech. First, to qualify for any First Amendment protection, the commercial speech must concern lawful activity and not be misleading. Second, the government's asserted interest in restricting the speech must be substantial. Third, the restriction must directly advance the government's asserted interest. Fourth, the restriction must not be more extensive than necessary to serve the asserted government interest.

²The Court also held that a provision requiring that advertising could not be placed lower than 5 feet from the floor of retail establishments did not meet the *Central Hudson* test, but the FDA rule does not include a similar provision

- The findings of the U.S. District Court in United States v. Philip Morris in 2006.

Each found a continuing serious problem and concluded that additional restrictions on tobacco marketing are essential to reduce tobacco use, including among youth and concluded that restrictions like those contained in the FDA tobacco legislation are necessary.

2. The marketing restrictions comply with *Lorillard* case.

In its ruling in *Lorillard Tobacco Co. v. Reilly*, the Supreme Court confirmed that preventing and reducing tobacco among youth is a substantial government interest.

The Court in *Lorillard* also found that even the Massachusetts restrictions passed the third-part of the *Central Hudson* test – despite a less substantial record than the FDA relied upon – because there was ample evidence that “preventing targeted campaigns and limiting youth exposure to advertising will decrease underage use.”

Thus, it is only Part Four of the *Central Hudson* test that is likely to be the focus of judicial scrutiny. The FDA tobacco legislation complies with the Part Four of the *Central Hudson* test.

The Court in *Lorillard* found that while Massachusetts cited the FDA record in support of the first three parts of the *Central Hudson* test, it didn’t present any evidence that it had considered the impact of the proposal in Massachusetts. In contrast, the FDA tobacco legislation builds on the exhaustive record reviewed by FDA in 1996, but adds substantial new evidence that takes into account what has occurred since 200 and the impact of the marketing changes and restrictions since *Lorillard*.

In addition, Congress and the FDA gave specific consideration to the issues raised by the Part Four of *Central Hudson*. For example:

- The fact that the FDA restrictions are more comprehensive than those considered in Massachusetts strengthens the argument that it meets the First Amendment standard because it fully considers the marketing problems being addressed and considers the ability of manufacturers to communicate with consumers. The specific restrictions on outdoor, point-of-sale, and certain magazine cigarette and smokeless tobacco advertising that limit these ads to black print on white background do not restrict what can be said about the tobacco products in these ads – and the restrictions do not apply to tobacco ads in adult-only locations or in magazines with small or nonexistent youth readerships. In this way, the FDA tobacco legislation’s overall approach does not block the transmission of product information to adults.
- The FDA legislation’s prohibition on outdoor tobacco-product advertising is also less restrictive than the Massachusetts proposal considered in *Lorillard*. It does not reach, as the Massachusetts law did, oral statements or ads inside retail establishments that are visible from outside, thus making certain that tobacco sellers have alternative mechanisms to communicate with adult consumers.

There is a final point. The FDA tobacco legislation comes after many legislative and litigation efforts at less restrictive restrictions on tobacco marketing that have not succeeded. If there is ever a situation where marketing restrictions meet First Amendment standards, it is in this case.