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SUMMARY OF COVINGTON & BURLING ANALYSIS  
OF CONSTITUTIONALITY OF PROPOSED BAN ON  
TOBACCO PRODUCT ADVERTISING

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Covington & Burling has prepared an analysis of the constitutionality of the ban on tobacco product advertising proposed by the American Medical Association, and the restrictions proposed by the American Cancer Society, which are tantamount to a ban. Rep. Synar has introduced a bill (H.R. 4972) to implement the proposed ban.

The Synar bill would suppress truthful speech concerning lawful products -- something the Supreme Court has never sanctioned. Since extending the protections of the First Amendment to commercial speech in 1976,<sup>1</sup> the Supreme Court has not approved any commercial speech restriction unless the speech was deceptive or related to unlawful activity. The Court has repeatedly made clear that, where it is claimed that consumers are not being provided adequate information to make intelligent choices, the appropriate remedy under the First Amendment is more speech, not less.

The proposed ban would violate the First Amendment on its face. When the Supreme Court extended the First Amendment's guarantees to commercial speech, it based its decision on the fundamental principle that the government may not seek to "protect" consumers by keeping them in the dark, hoping to manipulate their choices by depriving them of information. "It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us."<sup>2</sup>

The proposed ban would violate this fundamental principle. It plainly reflects frustration that some members of the public, despite being informed of the views of the Surgeon General and others concerning tobacco products and health, have continued to purchase and use such products. But the fact that some members of the public have chosen to act in ways not approved by certain government officials and others cannot justify banning or restricting speech. Suppressing speech in order to control behavior is censorship.

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<sup>1</sup> Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

<sup>2</sup> Id. at 770. See First National Bank v. Bellotti, 435 U.S. 765, 791 n.31 (1978) ("Government is forbidden to assume the task of ultimate judgment lest the people lose their ability to govern themselves").

Even if the forbidden purpose of the proposed ban were ignored, the ban could not satisfy the four-part test established by the Supreme Court for assessing particular commercial speech restrictions.<sup>1</sup> The Supreme Court emphasized in Central Hudson that restrictions on commercial speech cannot be sustained unless, among other things, they "directly advance" a substantial governmental interest and the interest cannot be served by any "less restrictive" means. The burden of those showings rests squarely on those proponents of a commercial speech restriction.

The evidence that is available here indicates that the proposed ban would not achieve its stated goal -- curtailing the use of tobacco products. The purpose and effect of tobacco product advertising is to prompt people who already smoke to shift brands, or to remain loyal to the brand being advertised, rather than to attract new smokers. In fact, tobacco product consumption has actually increased in most countries in which cigarette advertising has been banned. The evidence also indicates that advertising is one of the least significant influences on the decision by young people to smoke. Thus, restrictions on such advertising would primarily interfere with competition rather than reduce overall demand for tobacco products.

The ban also would not satisfy the requirement that restrictions on commercial speech be no "more extensive than is necessary" to serve the government's asserted interest and "narrowly crafted" to serve that interest.<sup>2</sup> If a perceived problem can be addressed by providing more information, that alternative is conclusively less restrictive than an alternative limiting communication. Time and again, the Supreme Court has applied Justice Brandeis's famous dictum that "the fitting remedy for evil counsels is good ones" -- not "silence coerced by law."<sup>3</sup> In case after case, the Court has emphasized that "the preferred remedy is more disclosure, rather than less."<sup>4</sup>

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<sup>1</sup> Central Hudson Gas & Electric Corp. v. PSC, 447 U.S. 557 (1980).

<sup>2</sup> Zauderer v. Office of Disciplinary Counsel, 105 S. Ct. 2265, 2278, 2280, 2282 n.14 (1985).

<sup>3</sup> Whitney v. California, 274 U.S. 357, 375 (1927) (concurring opinion joined by Holmes, J.).

<sup>4</sup> Bates v. State Bar, 433 U.S. 350, 375 (1977). Some state courts and lower federal courts have upheld liquor advertising restrictions, but in all of these cases the courts relied heavily on the power to regulate traffic in alcoholic beverages specifically conferred on the states by the Twenty-First Amendment.

Even it could be shown definitively that "more speech" could not reduce tobacco product consumption, there is strong reason to believe that the courts would invalidate the proposed ban. As noted, a majority of the Supreme Court has unequivocally endorsed the principle that the government may not suppress a disfavored message merely because it fears its effect upon the listener. Going further, three Justices have specifically admonished that, if "more speech" cannot curtail demand for or use of a product, the government's only recourse is to attack the perceived problem openly and directly -- by forbidding or restricting use of the product itself -- not by coerced silence.<sup>1</sup>

The proposed ban on tobacco product advertising is "regulation by stealth" -- designed to permit lawmakers to do indirectly, through manipulation inconsistent with the First Amendment, what they are unwilling to do openly and directly. If Congress wishes to discourage tobacco product consumption, its only options under the First Amendment are to restrict the sale or purchase of such products or to foster speech that promotes the antitobacco point of view. It may not seek to manipulate consumer choice by suppressing nondeceptive commercial speech.

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<sup>1</sup> See Central Hudson, 447 U.S. at 573-79 (Blackmun, J., joined by Brennan, J., concurring in judgment); id. at 581 (Stevens, J., joined by Brennan, J., concurring in judgment).