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Tobacco-Settlement: Consent Degrees

Tobacco – settlement – consent decrees

Public Citizen

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Joan Claybrook, President

MEMORANDUM

To: Members of Congress and Their Staffs

From: Joan Mulhern, Legislative Counsel, Public Citizen's Congress Watch
David Vladeck, Director, Public Citizen Litigation Group

Date: March 16, 1998

Re: **The Problem with Consent Decrees: Why Industry's Plan to Place Restrictions on the Advertising of Tobacco Products in Consent Decrees Is Not Likely to Foreclose Litigation Challenging the Restrictions.**

The tobacco industry's current position is that the linchpin of any national tobacco legislation must be a bargain between Congress and industry over liability limitations. Industry says that it will abide by advertising restrictions only if Congress enacts legislation giving the industry the limitations on civil liability it covets. We have explained before that Congress should reject this Faustian bargain because industry's fundamental premise -- that imposing strict advertising restraints without industry's consent would violate the First Amendment -- is wrong. Congress in fact has broad power to impose advertising restraints to prevent the tobacco industry from continuing illegally to market its deadly products to our nation's children.[1]

The purpose of this memorandum is to address the second flawed premise in the industry's argument. Industry maintains that the consent decree approach is superior to legislation because it would insulate advertising restraints from judicial attack, which could tie them up in court for years. As we now explain, the consent decree approach is seriously flawed and would likely not prevent litigation over the constitutionality of advertising restraints.

To see why the industry's approach is fraught with peril, it is important to understand just what it proposes. Industry says that any government-imposed restraint on its advertising violates the First Amendment, and hence that the only restraints that may lawfully be imposed are those to which industry consents. Because Congress cannot legislate on the basis of industry "consent," industry contends that the advertising restraints should be embodied principally in a series of "consent decrees" entered in pending cases brought against the industry by state attorneys general. These decrees, industry claims, would continue to constrain industry's advertising practices even if legislation imposing exactly the same restraints is struck down on constitutional grounds. Industry's point has some surface appeal, since it is true that consent decrees would not automatically be invalidated if litigation succeeds in setting aside legislation.

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[1] This position is set forth more fully in a Public Citizen memorandum distributed to members of Congress and their staffs on March 6, 1998 and in the testimony of David Vladeck before the Senate Commerce Committee on March 3, 1998.

For this reason, industry touts the consent decree approach as a simple way of making litigation over the constitutionality of advertising restraints irrelevant. Industry claims that the major tobacco companies will abide by the consent decrees, no matter what. For this concession, however, industry insists that Congress capitulate and grant it liability limitations.

The consent decree approach is fatally flawed. As we explain in Point I, the most glaring error is the contention that consent decrees will be immune from legal challenge. From a litigation standpoint, it makes no difference whether government imposes restraints through legislation or court approved consent decrees -- both constitute "state action" that provides a basis for constitutional attack. And consent decrees are no harder to challenge in court than statutes. Consent decrees only bind signatories; and any entity facing financial loss, like a billboard company, is likely to have standing to challenge the decrees on constitutional grounds. Thus, in terms of vulnerability to legal challenge, there is no meaningful difference between legislation and consent decrees. Moreover, as we note in Point II, the industry itself could challenge the consent decrees under the unconstitutional condition doctrine.

As we explain in Point III, the consent decree approach would also raise difficult, if not intractable, problems with federal enforcement of the advertising restraints. The federal government is not a party in any of the cases in which the consent decrees would be entered, even though, under industry's scheme, only the consent decrees would impose *enforceable* duties on the industry. Enforcement issues would thus be presented in a litigation context, which will be burdensome and time-consuming. This provides a further reason for Congress rejecting the consent decree approach.

I. A "Deal" With The Industry Would Not Foreclose Challenges By Entities Not Bound By The Consent Decrees.

The first and most obvious flaw in the proposal to have the industry "consent" to advertising restrictions in consent decrees is that the decrees would be binding on signatories and no one else. Any other entity adversely affected by the decrees would be free to challenge them. Thus, consent decrees would not achieve Congress' goal of avoiding a First Amendment challenge to the advertising restraints.

It is well-settled that, except for certain class actions, only *parties* are bound by consent decrees entered in litigation. Even those aware of litigation and affected by its outcome have no obligation to participate in the case or comply with any resulting decree. Non-parties are free to wait on the sidelines, and then, if they are unhappy with the result, come into court and challenge the decree collaterally by filing a separate action, or by intervening in the underlying action.

That is the teaching of *Martin v. Wilks*, 490 U.S. 755 (1989). In *Martin*, the City of Birmingham, Alabama, entered into a consent decree with minority firefighters, which gave minorities certain preferences in hiring and promotion to remedy alleged past discriminatory practices. White firefighters, who believed that they were unlawfully disadvantaged by the consent decree, waited until the decree became final and then sought to challenge the decree both by moving to intervene in the underlying case and by filing a separate action. The City's defense in both proceedings was that the white firefighters had notice of the initial suit and had

abandoned their rights by not seeking to participate in the case before the consent decree was finalized. Moreover, the City argued, any action the City took that might harm the white firefighters was authorized by the consent decree.

The Supreme Court ruled that the white firefighters had not forfeited their right to challenge the decree by waiting, even though they were aware of the proceedings and could have intervened before the decree was entered. The Court emphasized that its ruling was dictated by "our deep-rooted historic tradition that everyone should have his own day in court." *Martin*, 490 U.S. at 762 (citation omitted). The only way to insulate a judicial decree from attack, the Court observed, is to join all potential objectors as parties. *Id.* at 765. That option may be available in conventional litigation, but is plainly not available here.

The lesson of *Martin* is simple. While the tobacco companies might be barred from challenging the decrees they sign, that prohibition would not extend beyond the signatory companies. As a consequence, the consent decrees would be open to constitutional attack by a broad range of potential plaintiffs. Any commercial entity that is adversely affected by the new regime -- advertising agencies, billboard companies, magazines, periodicals, printers, etc. -- could seek to intervene in the consent decree proceedings or file a separate action to challenge the decrees on First Amendment grounds. [2]

There can be no doubt that the decrees would be subject to challenge on constitutional grounds in much the same way a party could challenge assertedly unconstitutional legislation. The key inquiry in determining whether a constitutional claim can be raised is whether there is "state action;" that is, whether the injury complained of in the litigation can be directly traced to government action. Obviously, if a restraint is imposed by legislation, the state action requirement is met. But it is equally clear that restraints imposed by consent decrees qualify as "state action." It has been settled law for at least fifty years that judicial enforcement of even a covenant between *private* parties constitutes state action. Thus, in the landmark case of *Shelley v. Kramer*, 334 U.S. 1 (1948), the Court held that judicial enforcement of a restrictive covenant forbidding the sale of property to Blacks constituted state action that could form the basis of a challenge to the constitutionality of the restraint. The case with respect to tobacco consent decrees would be far easier than in *Shelley*, since here the decrees would be entered into by state attorneys general on behalf of their states, not just private parties. Thus, from a legal standpoint, it would be entirely irrelevant whether the restraints were imposed by statute or consent decree to which the state is a party. In either case, they would constitute state action subject to constitutional attack.

It has been suggested that non-parties to the decree would lack "standing" because their injuries would arise from the "consent" of the tobacco companies to limit their speech and not from a government mandate that violates the First Amendment. But that argument would fail.

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[2] The requirements for intervention are not onerous. Applicants for intervention need show only that they are adversely affected by the decree and that their interests in the litigation are not adequately represented by any of the existing parties. *See* Rule 24(b), Fed. R. Civ. P. Under *Martin v. Wilks*, a district court judge would have little alternative but to let these non-parties mount their First Amendment challenge.

Standing doctrine under the First Amendment is especially broad to ensure that anyone affected by speech restraints may challenge them in court. *See, e.g., Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (First Amendment challenge may be brought by "listener" as well as speaker); *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980) (newspaper may challenge closing of judicial proceeding); *Airports Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987) (broad standing under First Amendment "overbreadth" doctrine); *Craig v. Boren*, 429 U.S. 190 (1976) (third party standing). Indeed, every challenge to restraints on tobacco advertising has been brought by advertisers or broadcasters, not the tobacco companies. *See, e.g., Packer v. Utah*, 285 U.S. 105 (1932) (billboard company challenged to city law forbidden outdoor advertising of tobacco products); *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582 (D.D.C. 1971) (three-judge court), *aff'd without opinion*, 405 U.S. 1000 (1972) (challenge to ban on broadcast advertising of cigarettes brought by broadcaster); *Penn Advertising of Baltimore, Inc. v. Mayor of Baltimore*, 101 F.3d 332 (4th Cir. 1996), *cert. denied*, 117 S.Ct. 1569 (1997) (challenge to city ordinance limiting outdoor advertising of tobacco products brought by billboard company). Even the challenges to the FDA's rule regulating the advertising and promotion of tobacco products to minors were made by advertisers and third parties, as well as by industry. *Coyne Beahm, Inc. v. United States Food and Drug Admin.*, 958 F. Supp. 1060 (M.D.N.C. 1997), *appeal pending sub nom. Brown & Williamson Tobacco Corp. v. United States Food and Drug Admin.*, No. 97-1604 and consolidated cases (4th Cir., argued August 11, 1997).

Nor is it certain that, if a collateral attack were brought, the tobacco industry would disavow an interest in shedding the terms of the consent decree. After all, the very existence of a consent decree suggests that, in its absence, the industry would continue to engage in the advertising practices forbidden by the decree. Industry candidly admits as much. Industry has *not* said that it is willing to restrict its advertising in the absence of liability limitations. In fact, the industry's offer is entirely conditional: Industry will *not* rein in its advertising practices unless legislation is enacted conferring broad liability limitations. Thus, if challenges to the decrees were brought by others, the tobacco industry might well contend that its consent was not volitional (but was given only to secure liability limitations) and that, if the decrees were overturned on constitutional grounds, the companies would reinstate some or all of their former advertising practices.

For these reasons, industry assurances that the consent decree process will somehow foreclose or reduce the likelihood of litigation over the constitutionality of advertising restraints are incorrect. Because litigation is likely to be filed against advertising restrictions regardless of how they are implemented, there is no reason for Congress to opt for consent decrees, which, as we explain in Point III, make participation by the federal government problematic, instead of legislation that places responsibility for implementing the restraints where it belongs -- in the hands of the federal government.

II. The "Unconstitutional Condition" Doctrine May Allow The Tobacco Industry Itself To Challenge The Decrees.

It is also possible that the tobacco industry itself could sign the decrees and then challenge their constitutionality under the "unconstitutional condition" doctrine. We do not

believe that this argument has merit because we disagree that the industry's First Amendment rights are at stake. However, the argument is not so dissimilar from the one accepted in other cases as to be summarily dismissed, and must be addressed by those who claim that Congress cannot restrict the tobacco companies' advertisements without violating the First Amendment.

The unconstitutional conditions doctrine dates back to *Speiser v. Randall*, 357 U.S. 513, 518-19 (1958), which involved a constitutional challenge to a state law that provided a tax preference to veterans, if, but only if, they signed a loyalty oath disavowing any belief in overthrowing the government by violence or force, which the First Amendment gave them a right to refuse to do. The plaintiff argued, and the Supreme Court agreed, that the government could not coerce an unconstitutional act -- making him sign a loyalty oath -- by conditioning the waiver of his First Amendment rights on the receipt of a benefit to which he was otherwise entitled. A simple example illustrates this point: Congress could not say that registered voters are entitled to $10, but only if they do not vote. *See generally* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1415 (1989).

Using this argument, the tobacco industry could claim that it was compelled to surrender its First Amendment rights in order to secure the benefits of limited liability -- benefits Congress dangled in front of the industry to coerce it to waive its First Amendment rights. Moreover, we recognize that in more recent cases the Court has rejected claims that the government "coerces" the surrender of constitutional rights by offering a benefit that one can freely accept or reject. *See Rust v. Sullivan*, 500 U.S. 173 (1991); *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 546 (1983). Nonetheless, because this is a potential avenue of attack, we urge Congress to consider carefully the possibility that this doctrine would be used by the tobacco industry to repudiate the consent decrees.

III. Consent Decrees Will Be Very Difficult for the Federal Government to Enforce.

Although industry has been remarkably silent on this point, the consent decree approach raises a host of difficult, if not intractable, enforcement issues. We understand that most of the bills now pending contemplate the enactment of legislation adopting advertising restraints, as well as having them embodied in consent decrees. But that does not guarantee that the industry would concede that the federal government has a role in *enforcing* the restraints.[3] Indeed, the industry's First Amendment position strongly suggests that it would resist any enforcement

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[3] We recognize that the settlement and some of the bills pending before the Senate contemplate the joint development of a "national protocol" by the United States Department of Health and Human Services and the tobacco industry to establish procedures to implement the legislation. Although the details on what form such a protocol would take are sparse, several of the bills suggest that the protocol would be a "contract" between the industry and the government. If that is the case, then the protocol would likely be enforced through the courts, as would any contract, and not through the administrative enforcement process. This only reinforces our view that it is necessary for Congress to explicitly lay out in statute the restrictions that govern the tobacco industry's advertising and promotional practices, and make it clear that the statute will be enforced by the relevant federal agencies, not through the judicial system.

efforts by the federal government, and would contend that only the consent decrees place enforceable obligations on the industry.

To bring the enforcement issue into focus, suppose that a tobacco company began running full color ads in a publication that the government (either the FDA or the FTC) decided did not qualify as an adult publication because it had either more than 2,000,000 readers under age 18 or because more than 15% of its readership were minors. And suppose that such advertising was forbidden by both statute and consent decree. In that case, if the government sought to enforce the statutory prohibitions against such advertising, the industry would likely raise its First Amendment objections to the legislation and insist that any enforcement take place through the consent decree process. The government would then be faced with a Hobson's choice -- either litigate the constitutionality of the legislation (the very litigation the consent decree approach was supposed to avoid) or enforce the restraints through the consent decree process.

Enforcing advertising restraints through the consent decree process would be an unwieldy and perhaps unworkable option for the government. In the first place, the government would have to seek to intervene in one or more of the consent decree cases. Then, instead of the FDA or the FTC imposing swift remedial action, as the agencies would be empowered to do under the legislation, the government would have to prove to the court that a violation took place. Because that determination would be made in a judicial proceeding, time-consuming trials and appeals might be required before corrective action could be imposed.

It makes little sense to channel every aspect of industry's compliance with the advertising restraints through the litigation process, but that is the inevitable consequence of using consent decrees to regulate the industry's conduct. Indeed, it is not surprising that this system was devised by an industry that would much to prefer have its compliance with advertising restrictions overseen through the cumbersome litigation process than by the FDA or FTC. The irony is that, although the consent decree process is being heralded as a way to avoid litigation, it guarantees virtually endless litigation over enforcement questions.

* * *

In sum, the notion that consent decrees would insulate advertising restraints from constitutional attack is in error. Indeed, from the standpoint of constitutional law, it makes no difference whether restraints on speech are imposed by the government through legislation or through a consent decree in terms of who can challenge them. But it is beyond question that the federal government would have a difficult time enforcing restraints that are set forth principally in consent decrees to which the federal government is not a party. For all of these reasons, we urge Congress not to travel down the consent decree path.

David Vladeck's recent testimony before the Senate Commerce Committee on the First Amendment implications of regulating the promotion of tobacco products and other documents related to the proposed tobacco deal are available at http://www.citizen.org/. For more information, call Joan Mulhern at (202) 546-4996.

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March 17, 1998

The Honorable Patrick J. Leahy
United States Senate
Washington, DC 20510

Dear Senator Leahy:

We represent Phillip Morris in connection with the national tobacco settlement. I am writing to you about your recent comments at the Senate Judiciary Committee hearing on March 6, 1998 concerning SBC Communications, Inc. v. FCC, 981 F. Supp. 996 (N.D. Tex. 1997). We do not read the SBC opinion to support the notion that third parties have standing to challenge the constitutionality of provisions in a consent decree to which they are not parties.

The SBC case did not involve a challenge to a consent decree by a non-party, or even a challenge to a consent decree at all. Instead it involved a challenge to sections of a statute, the Telecommunications Act of 1996, that directly applied to the plaintiffs (certain Bell Operating Companies) -- to the point of expressly identifying them by name as the parties to whom the sections of the statute at issue applied. See 981 F. Supp. at 1001. Indeed, the Court invalidated the challenged sections precisely because they applied to the plaintiffs in so direct and draconian a fashion as to amount to an unconstitutional Bill of Attainder. There can be no question that a party to whom a statute applies by name has standing to challenge that statute. That does not mean, however, that a non-party to

a voluntary consent decree has standing to challenge someone else's entry into that decree

In fact, the SBC case underscores the critical difference between (1) including measures in a consent decree as part of a settlement and (2) imposing those measures unilaterally through legislation on a non-consensual basis. The provisions of the Telecommunications Act invalidated by the Court had previously been part of the federal government's consent decree with AT&T, and were part of a settlement with AT&T by which the plaintiffs (who were then affiliated companies of AT&T) would comply with the provisions in return for certain benefits The provisions were fully operative and enforceable in the years that they were part of that decree In 1996, however, Congress "replaced" these provisions of the consent decree with "the restrictions and obligations of the Act" -- thereby imposing those provisions on the plaintiffs unilaterally while withholding the benefits the plaintiffs had gotten as part of the decree. 981 F Supp at 1000-01. The Court rejected the government's argument that there was no problem in moving the provisions from "the consent decree to the legislative realm," and held that it was precisely this transformation of the provisions from part of a consent decree into non-consensual legislation that created the constitutional defect. Id. at 1006

We respectfully submit that the SBC case thus teaches that measures which Congress could not constitutionally impose through legislation can be implemented through contract -- by consent decree and protocol -- precisely what the proposed tobacco settlement contemplates.

I am also enclosing a memorandum we have prepared on "Unconstitutional Conditions" that likewise addresses the issue of whether financially affected third parties would have standing to challenge the consent decrees or the protocol

Sincerely,

Meyer G Koplow

cc: The Honorable Orrin G. Hatch
The Honorable Strom Thurmond
The Honorable Edward M. Kennedy
The Honorable Chuck Grassley
The Honorable Joseph R Biden, Jr
The Honorable Arlen Specter
The Honorable Herbert Kohl

The Honorable Fred Thompson
The Honorable Dianne Feinstein
The Honorable Jon Kyl
The Honorable Russell D. Feingold
The Honorable Mike Dewine
The Honorable John Ashcroft
The Honorable Richard Durbin
The Honorable Spencer Abraham
The Honorable Robert Torricelli
The Honorable Jeff Sessions

The "Unconstitutional Conditions" Doctrine Does Not Leave the Advertising Restrictions in the State Consent Decrees and the National Protocol Open to a Legitimate First Amendment Challenge

In his February 10, 1998 testimony before the Senate Judiciary Committee, Professor Richard Daynard of Northeastern University School of Law stated that under the doctrine of unconstitutional conditions, Congress could not give tobacco product manufacturers civil liability protections in exchange for their voluntary commitments to refrain from certain forms of advertising, assuming that such advertising is constitutionally protected. Likewise, in his March 3, 1998 testimony before the Senate Commerce Committee, Federal Trade Commission Chairman Robert Pitofsky suggested that other financially affected entities might be able successfully to challenge the voluntary commitments unless the Proposed Resolution's advertising restrictions were narrowed. These statements are based on misunderstandings of the Proposed Resolution and the First Amendment. The Constitution does not preclude the tobacco product manufacturers from agreeing to refrain from certain forms of advertising, especially when such agreement is critical to a comprehensive Congressional plan aimed not at suppressing ideas or debate but at accomplishing a major public health objective -- the reduction of youth smoking.

The state attorneys general and public health advocates who negotiated the Proposed Resolution were in agreement that the only way to reduce youth smoking significantly without prohibiting tobacco is through a comprehensive and integrated plan that combines (1) price increases; (2) access restrictions; (3) counter-advertising and cessation programs; and (4) advertising restrictions that go beyond what the FDA promulgated. Because the First Amendment would preclude Congress from imposing unilaterally the Proposed Resolution's advertising restrictions, the parties to the Proposed Resolution agreed to an exchange -- tobacco product manufacturers that accepted the advertising restrictions would receive certain civil liability protections.

Both the "condition" and the "benefit" are essential to the successful functioning of this regulatory plan. Obviously, without civil liability protections, the tobacco product manufacturers would have no incentive to waive their First Amendment rights. But also, without such protections, the ongoing payment stream to the federal government -- money for funding of the enforcement of access restrictions, cessation programs, and counter-advertising -- would be at best an uncertainty. And, without such protections, the tobacco industry would be unable to compete effectively against new entrants that might not accept the advertising restrictions.

Congress and the Administration appear to agree with the attorneys general and public health advocates that advertising restrictions are an essential element of any sound regulatory plan. And, like the parties to the Proposed Resolution, the Administration recognizes that -- absent the industry's consent -- legislation of the Proposed Resolution's advertising restrictions would "raise significant constitutional concerns," making "[v]oluntary commitments" an effective solution. See Attachment to Letter from the White House to Senator John McCain, February 27, 1998, at 3, 10.

The First Amendment experts who have testified before the Senate Judiciary Committee reject the position of Professor Daynard, concluding that although an Act containing the Proposed Resolution's advertising restrictions would violate the First Amendment, such restrictions would be constitutional if placed in state consent decrees and a national protocol. As stated by David S. Versfelt, General Counsel of the American Association of Advertising Agencies, "[v]oluntary self-censorship is far different than government mandates." Testimony, Senate Judiciary Committee, February 10, 1998, at 12; Testimony of Laurence H. Tribe, Senate Judiciary Committee, July 16, 1997, at 11, 12 (Act containing Proposed Resolution's advertising restrictions would be "extremely problematic under the First Amendment" but such problems could be surmounted through "consent decrees and binding contractual protocols"); Testimony

of Floyd Abrams, Senate Judiciary Committee, February 10, 1998, at 2, 3 (Act containing Proposed Resolution's restrictions would be "destined to be held unconstitutional" but "completely voluntary consent decrees and contractual obligations . . . should raise no First Amendment issues at all (since parties are free to waive constitutional rights)"); Testimony of Martin H. Redish, Senate Judiciary Committee, February 10, 1998, at 2 (Act containing Proposed Resolution's restrictions would violate First Amendment but tobacco industry has "full power to contract away First Amendment rights").*

The conclusion of these First Amendment experts is sound: No party -- whether a signatory tobacco product manufacturer, a non-signatory tobacco product manufacturer, or anyone else -- could successfully challenge an Act conferring civil liability protections in exchange for the voluntary commitments of tobacco product manufacturers to accept the Proposed Resolution's sweeping restrictions on advertising.

By voluntarily entering the consent decrees and the protocol, the tobacco product manufacturers would waive their First Amendment objections to the advertising restrictions.

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* Chairman Pitofsky also acknowledged that it was "highly unlikely" that the Proposed Resolution's advertising restrictions could withstand First Amendment scrutiny if imposed legislatively in the absence of voluntary commitments. Testimony, Senate Commerce Committee, March 3, 1998, at 28, 29.

Such a waiver would be fully enforceable, since a party may waive constitutional rights, including First Amendment rights, provided that the waiver is knowing, voluntary, and intelligent. Curtis Publishing Co. v. Butts, 388 U.S. 130, 145 (1967); D.H. Overmeyer Co. v. Frick Co., 405 U.S. 174, 187 (1972); National Polymer Products, Inc. v. Borg-Warner Corporation, 641 F.2d 418, 423 (6th Cir. 1981) (party may waive First Amendment rights by consenting to a protective order). And the courts will not hesitate to find that a waiver was voluntary when the waiving party is a sophisticated entity represented by counsel who understand the significance of the waiver provision. See D.H. Overmeyer Co., 405 U.S. at 185 (enforcing corporation's waiver of due process rights); Leonard v. Clark, 12 F.3d 885, 890 n.6 (9th Cir. 1994) (enforcing union's waiver of First Amendment rights).

In enforcing a First Amendment waiver, it is of no moment that the United States or another government entity is a party to the underlying agreement. See, e.g., Snepp v. United States, 444 U.S. 507, 510 n.3 (1980) (enforcing secrecy agreement between CIA and CIA employee that prevented employee from publishing information about the agency without the agency's approval); Leonard, 12 F.3d at 889-90 (upholding on waiver grounds provision in collective bargaining agreement between fire fighters and City of Portland alleged to infringe First Amendment right to petition government); United States v.

International Brotherhood of Teamsters, 931 F.2d 177, 188 (2d Cir. 1991) ("by consenting to the Election Officer's power under the Consent Decree, the IBT waived any [First Amendment] objection"); Erie Telecommunications, Inc. v. City of Erie, 853 F.2d 1084, 1094-97 (3rd Cir. 1988) (holding that cable operator waived First Amendment rights in entering contract with city on finding that cable operator was a sophisticated corporation and had received a substantial benefit in exchange for its waiver).

Just as it is clear that a First Amendment challenge to the advertising restrictions by a signatory tobacco product manufacturer would fail on waiver grounds, it is equally clear that no tobacco product manufacturer -- whether a signatory or non-signatory -- could rely on the argument that, under the "unconstitutional conditions" doctrine, Congress lacks the power to confer civil liability protections in exchange for voluntary commitments by tobacco product manufacturers to refrain from certain forms of advertising. Any unconstitutional conditions challenge to the consent decrees and the protocol would be based on the argument that although Congress has the power to confer civil liability protections on all tobacco product manufacturers, it may not confer that benefit only on manufacturers engaged in favored speech (advertising consistent with the Proposed Resolution's restrictions), while denying

that benefit to manufacturers engaged in disfavored speech (advertising inconsistent with the Proposed Resolution's restrictions). This argument is directly contrary to Supreme Court precedent.

The Supreme Court has held that, while Congress may not penalize the exercise of a First Amendment right, there is no First Amendment violation merely because Congress chooses to confer a benefit upon entities engaged in certain protected speech while declining to confer that benefit upon entities engaged in other protected speech -- "a legislature's decision" not to support "the exercise of a fundamental right does not infringe the right[.]" See Regan v. Taxation With Representation, 461 U.S. 540, 549 (1983) (unanimously upholding against First Amendment challenge a provision of the Internal Revenue Code barring a nonprofit organization that engages in lobbying -- a constitutionally protected activity -- from receiving tax deductible contributions); see also Gunther & Sullivan, Constitutional Law, 1318 (13th ed. 1997) (government may refrain from conferring a benefit upon "speech with which it disagrees").

The Supreme Court followed Regan in Rust v. Sullivan, holding that because Congress has the power to "encourage certain activities it believes to be in the public interest," it had not impermissibly penalized speech by conditioning Title X

grants on the recipient not using the money for abortion advocacy and counseling. 500 U.S. 173, 193 (1990). The Supreme Court explained that benefits are just that, benefits. See id. at 199 n.5. So long as the potential recipient is free to "avoid the force of the regulation" by declining the benefit, Congress does not violate the First Amendment "simply by offering that choice." See id. at 199 n.5; Grove City College v. Bell, 465 U.S. 555, 575 (1984) (petitioner's First Amendment rights not violated because it "may terminate its participation in the [federal] program and thus avoid the requirements of [the federal program]").

Congress thus would have the power to encourage tobacco product manufacturers to refrain from certain forms of advertising by offering civil liability protections in exchange. And Congress would have no obligation to confer this benefit on tobacco product manufacturers that choose to continue advertising freely (thereby frustrating the public health objective). Because each tobacco product manufacturer could decide for itself whether it is better or worse off with the status quo, the proffered exchange would not constitute a "penalty" on First Amendment rights, since non-signatory tobacco product manufacturers would face no First Amendment obstacle of Congress's creation -- all that could be said is that they would continue to be subject to the same general laws applicable today. Compare Harris v. McRae, 448 U.S. 297, 316

(1980) ("although government may not place obstacles in the path of a [person's exercise of a constitutional right], it need not remove those not of its own creation.")

Those cases that have invalidated conditions as unconstitutional in no way suggest that Congress lacks the power to enact the exchange at the heart of the Proposed Resolution. As the First Circuit has held, "if a condition is germane -- that is, if the condition is sufficiently related to the benefit -- then it may validly be imposed." National Amusements, Inc. v. Town of Dedham, 43 F.3d 731, 747-48 (1st Cir.), cert. denied, 515 U.S. 1103 (1995). "The more germane a condition to a benefit, the more deferential the review; nongermane conditions, in contrast, are suspect." Id. (citation omitted) (upholding against First Amendment challenge town's condition on entertainment license banning exhibition of movies during certain hours where condition was "closely related" to legitimate purpose of preserving tranquility); see also, Kathleen Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1413, 1458-76 (1989).

Thus, if there is a close relationship between the benefit that the government provides and the restriction on speech that the speaker voluntarily accepts, the restriction has been upheld. In several leading cases, the Supreme Court has found First Amendment violations on an unconstitutional

conditions theory when the lack of relationship between the condition and the benefit reveals an illicit purpose. For example, in Speiser v. Randall, a California law required that veterans take an oath not to advocate the forcible overthrow of the United States to qualify for a tax exemption. 357 U.S. 513, 518 (1958). Since the oath was in no way germane to the State's denial of the exemption, the Supreme Court correctly concluded that the "denial is frankly aimed at the suppression of dangerous ideas." Id. at 519 (citation omitted) (holding that denial of the tax exemption was effectively "the same as if the State were to fine them for this speech").

Similarly, in FCC v. League of Women Voters, after determining that there was a sharp imbalance between the scope of the condition and the scope of the benefit, the Supreme Court invalidated as an impermissible penalty on speech an FCC regulation barring public stations that received public funds from editorializing. 468 U.S. 364, 399-401 (1984). The Supreme Court found that "a noncommercial education station that receives only 1% of its overall income from CPB grants is barred absolutely from all editorializing," since the regulation barred such entity from "using even wholly private funds to finance its editorial activity." Id. The Supreme Court found further that the agency could have accomplished its putative purpose -- preventing noncommercial broadcast stations

from becoming government "propaganda organs" -- by simply allowing public stations to establish "affiliate" organizations which could editorialize with "nonfederal funds." Id.

These cases in no way undermine Congress's recognized power to set reasonable terms when it offers a benefit. As Professor Tribe has explained, the power to offer a benefit "must be thought to include at least some power to restrict . . . other activities [that] bear a close enough relationship" to the benefit. See Tribe, American Constitutional Law, 783 (2d ed. 1988).

Thus, when the relationship between the condition and the benefit has not revealed an attempt to suppress debate or dangerous ideas, the Supreme Court has held that Congress could condition the benefit, even though the same condition, if imposed unilaterally, would violate the First Amendment. See, e.g., Lyng v. UAW, 485 U.S. 360, 366 (1988) (holding that Congress could preclude workers who choose to strike from becoming eligible for food stamps even though the right to strike is protected by the First Amendment); Buckley v. Valeo, 424 U.S. 1, 58-59, 99 (1976) (holding that Congress's power to restrict use of public campaign funds includes power to cap private campaign expenditures of those who accept such public funds even though unilateral cap on private campaign expenditures would be unconstitutional); CSC v. Letter Carriers, 413 U.S. 548, 554-64

(1973) (upholding provisions of the Hatch Act barring employees who accept federal employment from actively participating in political management and political campaigns -- a constitutionally protected activity -- where Congress could conclude that condition forwarded substantial interest in protecting fairness and efficiency of government).*

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* The Supreme Court also examines the relationship between the condition and benefit outside the First Amendment context. For example, although the Tenth Amendment precludes Congress from conscripting the use of state employees, Printz v. United States, 117 S. Ct. 2365, 2384 (1997), Congress may condition grants on state compliance with a federal mandate. South Dakota v. Dole, 483 U.S. 203, 208 (1987) (upholding Congress's authority to withhold federal highway funds from states that refused to raise the minimum drinking age to 21 on reasoning that "the condition imposed by Congress is directly related to one of the main purposes for which highway funds are expended -- safe interstate travel"). Likewise, in the takings context, the Supreme Court has explained that "[u]nder the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right -- here the right to receive just compensation when property is taken for a public use -- in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit." Dolan v. City of Tigard, 512 U.S. 374, 385-87 (1994) (city could condition grant of development permit on compliance with condition reasonably related to legitimate public purpose of preventing flooding and reducing traffic congestion); see also Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1007-08 (1984) (rejecting unconstitutional conditions challenge to statute requiring manufacturer to reveal data pursuant to the registration of pesticide; "as long as Monsanto is aware of the conditions under which the data are submitted, and the conditions are rationally related to a legitimate government interest, a voluntary submission of data by an applicant in exchange for the economic advantages of registration can hardly be called a taking" (emphasis added)).

It is clear that the condition and benefit here are closely related and work together to further the Congressional objective of reducing youth smoking. Like the attorneys general and public health advocates, Congress may conclude that the advertising restrictions are an essential -- and inseparable -- element of the plan to accomplish this public health objective, and that, to the extent tobacco product manufacturers do not make the voluntary commitments, the objective would not be accomplished. Congress may also conclude that the exchange at the heart of the Proposed Resolution achieves not only the advertising restrictions, but also (1) a secure payment stream to fund the enforcement of access restrictions, cessation programs, and counter-advertising; and (2) some measure of financial predictability for the tobacco industry, and the communities that depend on it, without which the industry would be unable to compete effectively against new entrants that might not accept the advertising restrictions. Because non-signatory tobacco product manufacturers would not be called upon to make payments that would fund the enforcement of the access restrictions, cessation programs, and counter-advertising, there is no government interest in cloaking them with civil liability protections.

Conferring civil liability protections only on signatory tobacco product manufacturers is vital to the proposed regulatory plan to reduce youth smoking. The Constitution does

not preclude the tobacco product manufacturers from making voluntary commitments to refrain from certain forms of advertising as part of that plan.

Finally, Chairman Pitofsky is wrong in suggesting that other financially affected entities might be able successfully to challenge the consent decrees and the protocol. Other financially affected entities such as advertising agencies and billboard operators would have no independent First Amendment claim, since neither the Act, nor the consent decrees, nor the protocol limits their speech. Moreover, even if financially affected entities had third party standing to assert the First Amendment rights of the signatory and non-signatory tobacco product manufacturers, their challenge would fail on the merits for the same reasons that it would fail if it were brought directly by the signatory and non-signatory tobacco product manufacturers.

In any event, it is clear that financially affected entities would not have third party standing. The "general rule" is that "a litigant only has standing to vindicate his own constitutional rights." See, e.g., City Council v. Taxpayers for Vincent, 466 U.S. 789, 796 (1984). As a threshold matter, "to bring actions on behalf of third parties . . . there must exist some hindrance to the third party's ability to protect its own interests" Powers v. Ohio, 499 U.S.

400, 410 (1991). The tobacco product manufacturers are, of course, fully capable of asserting their own First Amendment rights. See Shanahan v. City of Chicago, 82 F.3d 776, 780 (7th Cir. 1996) (no third party standing to raise First Amendment challenge where there was no showing that third parties "faced obstacles to bringing their own constitutional claim[]").

Moreover, as the Supreme Court has held, standing requires more than an "injury in fact." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). The party invoking federal jurisdiction also bears the burden of proving that the injury could be redressed by a favorable decision. Id. This showing is exceptionally difficult when a plaintiff tries to invoke the rights of third parties, since redressability "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or predict." Id. (citation omitted) (emphasis added). It is thus the "burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to . . . permit redressability of injury." Id. A financially affected entity could not possibly carry this burden here: A billboard operator, for example, simply has no right to require

a tobacco company to advertise on the operator's billboards if the tobacco company does not choose to do so.*

Consumers would likewise be unable to challenge successfully the voluntary commitments to accept the advertising restrictions. As Professor Tribe has explained, a listener has no possible First Amendment objection in the absence of a "willing speaker." Testimony, Senate Judiciary Committee, July 16, 1997.

We conclude, therefore, that the voluntary restrictions on advertising in the state consent decrees and the na-

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* Courts have relaxed the standing requirement in the First Amendment context when the plaintiff attacks a statute on "overbreadth" grounds. But other financially affected entities could not make an overbreadth attack on the consent decrees or protocol. First, the "justification for the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial context." Bates v. State Bar of Arizona, 433 U.S. 350, 380-81 (1977). Second, overbreadth attacks involve challenges both to a statute's application to the plaintiff and its "hypothetical" application to a third party whose speech could not be constitutionally burdened; overbreadth attacks do not involve the different sort of third party claim involved here in which the plaintiff challenges "a single application of a law" on the ground that it "both injures him and impinges upon the constitutional rights of third persons." See generally Bator, et al., Hart and Wechsler's the Federal Courts and the Federal System, 169-70 (3rd ed. 1988).

tional protocol conform fully to well-recognized First Amendment free speech standards.

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Stephen R. DiPrima

Meyer Koplow

Allude in statute to separate industry ag: "protocol"

could be in consent decrees

also could be w/ fed govt.

ind agree not to do X, Y, Z

enforcement, penalties

req that a protocol entered into by Secy would have to include X, Y, Z
more vaguely / more precisely.
Worked out terms.
⇓
penalty vs. benefits

Retailers - provide that anyone down the chain who forswears - that retailer won't be subject to any liability alone ~~[illegible]~~
+ provided they don't handle product of companies that ~~don't~~ sign on.

Do through K only?
But =
a) retailers don't K w/ manu directly

New mkt entrant / a one of cos. gets cold feet

. state-based - incentives to make sure they all come aboard.