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Business Tax Deduction Denial for Consumer Pharma Ads Is Unconstitutional

by Zac Morgan

Recently, strange bipartisan bedfellows were found amongst Secretary of Health and Human Services Robert F. Kennedy, Jr. and Senators Bernie Sanders and Josh Hawley. The three men all "agreed to support legislation to clamp down on direct-to-consumer pharmaceutical advertising." No doubt this will be lauded as a rare moment of coalition work in a divisive political period. After all, we must keep pesky and awful drug ads off the airwaves. We the People cannot be trusted to be responsible with cheery ads promoting new medications—the First Amendment be damned.

Senator Hawley has already introduced his first effort to carry out this mission. (In his own words: "HHS Secretary RFK, Jr. has made it clear that he wants to ban prescription drug commercials, and I'm proud to introduce legislation to do just that.") The senator's No Handouts for Drug Advertisements Act, co-sponsored by Democratic Senator Jeanne Shaheen, would amend the Internal Revenue Code to ban pharmaceutical companies from claiming commercial advertisements for their products as a business deduction. While counterintuitive as a matter of tax law—what is a more quintessential business expense than business advertising?—the Hawley-Shaheen bill is more than illogical, it is unconstitutional.

Senator Hawley has already boasted that the aim of this bill is censorship to force "consumers to make the health decision that is truly in their best interest." This runs directly counter to the First Amendment. As Judge Royce Lamberth aptly put it in *Washington Legal Foundation v. Friedman*, "[i]f there is one fixed principle in the commercial speech arena, it is that a State's paternalistic assumption that the public will use truthful, nonmisleading commercial information unwisely cannot justify a decision to suppress it."

Of course, one can imagine that Senator Hawley's attorney might offer a more nuanced take on her client's own words. Far from suppressing commercial speech, learned counsel might contend, the legislation would merely withdraw a tax benefit, and therefore the bill does not touch the First Amendment's free speech guarantee.

Learned counsel would be wrong. As I have written before (for this sort of unconstitutional sleight-of-hand is neither new nor novel):

> Congress *cannot* force the recipient of a federal benefit to choose between forfeiting her constitutional rights and receiving that benefit. The Bush administration could not have conditioned Hurricane Katrina relief on recipients ceasing to criticize the government's cleanup efforts in Louisiana, and the Obama administration could not have conditioned Fox News's broadcasting license upon its ceasing to air interviews with Donald Trump.

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> The Supreme Court has articulated "an overarching principle, known as the unconstitutional conditions doctrine, that vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013). "The doctrine prevents the Government from using conditions to produce a result which it could not command directly." *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 584 U.S. __; 138 S. Ct. 1365, 1377 n.4 (2018) (citation and quotation marks omitted). As the Court reasoned in *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), "if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited… Such interference with constitutional rights is impermissible." The Court [even] notes that the unconstitutional conditions doctrine applies even if the regulated target "has no entitlement to th[e] benefit." *United States v. Am. Library Ass'n*, 539 U.S. 194, 210 (2003) (quotation marks and citation omitted).
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> For example, the Supreme Court has ruled that the aforementioned Corporation for Public Broadcasting cannot condition disbursement of its funds to local stations upon a ban on editorializing. *Fed. Communications Comm'n v. League of Women Voters*, 468 U.S. 364 (1984). As Congress could not directly prohibit editorializing, it also could not do so indirectly.

When key figures in both parties and across branches agree on squelching speech, Americans ought to be on guard. The Bill of Rights doesn't exist to protect *popular* things that politicians would be rewarded for supporting. It was designed to safeguard against well-meaning politicians playing to crowds and trampling on liberty. What Alexander Hamilton wrote in The Federalist No. 1 still holds true today: "of those men who have overturned the liberties of republics, the greatest number have begun their career by paying an obsequious court to the people." And publics have rewarded censorship since time immemorial.

Thankfully, in America, commercial speech is protected against censorship—even if the Congress tries to outsource the role of censor to the Internal Revenue Service. As the Supreme Court wrote in the landmark case of *44 Liquormart v. Rhode Island*, "The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." The well-worn constitutional lesson still here rings true – the more a politician might think that speech is worthless, offensive, or counterproductive, the more likely it is to be protected by the highest law of the land.