Proposed requirement to include price information in drug ads is unconstitutional

An amendment* sponsored by Senators Richard Durbin and Charles Grassley would constitute a congressional grant of authority to the Secretary of Health and Human Services to require manufacturers of prescription drug and biological products to include government dictated language in their advertisements. The only limit placed on this authority is the maximum of $1 million that HHS is provided to spend from fiscal 2019 appropriated funds on implementation of this mandated speech. The language raises several troubling issues about the authority and the role of the federal government to tell a private business what it must say in its advertising. The U.S. Supreme Court has narrowly limited government regulation of commercial speech.

- In the current term, the U.S. Supreme Court struck down a California statute that mandated speech by requiring pro-life clinics that offer pregnancy-related services to tell women in California that the state offers free or low-cost services including abortions, and to give them a phone number to call. Nat’l Inst. Of Family & Life Advocates v. Becerra, 138 S.Ct. 2361 (2018).

- The Court also said in a 2018 decision that content-based laws “target speech based on its communicative content” and are “presumptively unconstitutional.” To survive, they must be narrowly tailored to serve compelling state interests. Reed v. Town of Gilbert, 576 U.S. _____ (2018).

- No hearings have been held nor is there any legislative history or research that would explain the objective to be achieved from including drug pricing information in these advertisements. It is a complex challenge to accurately present the price of a drug without confusing viewers with the complexity of insurance and government payments for prescription medicines.

- The U.S. Supreme Court has recognized and defined the protection accorded to advertising under the First Amendment for more than 40 years. A principal early case, Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980), said the government interest in imposing any restriction on speech must be substantial, and the restriction must directly advance that interest. The government regulation also may not be more extensive than needed to serve that interest.

- The Court has narrowly extended First Amendment protection to government mandates to include speech in certain advertising. When the State of Ohio disciplined an attorney for failing to disclose in an ad for “free” legal services that clients would have to pay court costs, the Court said it would allow the restriction only if the state interest is substantial and the restriction on speech directly advances that interest. The Court went on to say the required speech must be factual and not controversial, and not more extensive than needed to serve the state’s interest, and limited to correcting the false or deceptive part of the ad. Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 651 (1986).

In view of the parameters that the Supreme Court has placed on state limits for commercial speech, it does not appear that the proposed amendment would pass muster. We do not know what the interest of the government is in the absence of hearings or any other explanation, and apart from the $1 million spending limit the Congress has given the HHS Secretary no guidance for implementation. There likely would be substantial debates about whether a price presented in a drug advertisement was “factual,” and it would be very difficult for the sponsors of the amendment to assert that it is noncontroversial.

* Not more than $1,000,000 shall be used by the Secretary of Health and Human Services in furtherance of the existing statutory authority of the Secretary to issue a regulation requiring that direct-to-consumer prescription drug and biological product advertisements include an appropriate disclosure of pricing information with respect to such products.