UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DURK PEARSON, ET AL,	.	Docket Number: CA 95-1865
	.	
Plaintiff,	.	
	.	
v.	.	Washington, D.C.
	.	April 10, 2000
DONNA SHALALA,	.	10:00 a.m.
	.	
Defendant.	.	
	.	
. . . . .	.	

TRANSCRIPT OF PRELIMINARY INJUNCTION
BEFORE THE HONORABLE GLADYS KESSLER
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:

JONATHAN W. EMORD, ESQUIRE
CLAUDIA A. LEWIS-ENG, ESQUIRE
Emord & Associates, P.C.
Burke Professional Center
5282 Lyngate Court
Burke, Virginia 22015
(202) 466-6937

For the Defendant:

SUSAN STRAWN, ESQUIRE
Office of Consumer Litigation
Civil Division
U.S. Department of Justice
P. O. Box 386
Washington, D. C. 20044
(202) 524-0515

PATRICIA J. KAEDING, ESQUIRE
Office of the General Counsel
FDA
5600 Fishers Lane
GCF-1
Rockville, Maryland 20857

Court Reporter: SUSAN PAGE TYNER, CVR-CM
Official Court Reporter
Room 6824, U.S. Courthouse
Washington, D.C. 20001
(202) 371-2230

Proceedings reported by stenomask, transcript produced from dictation.

P R O C E E D I N G S

THE COURT: We are ready for our next case which is Durk Pearson, et al, versus Donna Shalala, Civil Action Number 95-1865. Would counsel please identify themselves for the record.

MR. EMORD: Jonathan Emord on behalf of the plaintiffs, Your Honor.

THE COURT: And with you is?

MR. EMORD: Claudia Lewis-Eng.

THE COURT: All right. For the defendants?

MS. STRAWN: Good morning, Your Honor. Susan Strawn for the government, and with me is Patricia Kaeding, of FDA.

THE COURT: Okay. This is here for a preliminary injunction and a request for expedition. I have read the papers, everybody. I have to say I have a clear recollection of struggling with the dispositive motions several years ago. I thought that this was one of the more difficult cases I had had.

The Court of Appeals came out differently than I did, although I actually think they may be right. And certainly whether they are right or not their opinion governs, I make that clear, and we are back now with the plaintiffs requesting expedition.

This is the plaintiffs' motion, so we will start with Mr. Emord. I have read the papers, everybody. I don't think that this is nearly as complex legally as the dispositive motions were the first time around. I would hope that in fifteen or twenty minutes at the most that the basic arguments could be made by each side, and I will undoubtedly have some questions.

Mr. Emord, please.

MR. EMORD: Thank you, Your Honor.

Your Honor, on April the 20th, 1999, this court issued its mandate to the Food and Drug Administration to implement the Pearson decision. That decision was handed down January the 15th, 1999.

Directly following the issuance of that mandate we waited for a time to see if the Food and Drug Administration would, within a reasonable period, issue an order authorizing the claims with the disclaimers that the court recommended, or at least publishing in the Federal Register --

THE COURT: Recommended or perhaps suggested would be more accurate, I think.

MR. EMORD: All right. The Food and Drug Administration did not publish any notice in the Federal Register revoking the rules that were invalidated by the United States Court of Appeals.

Those rules were invalidated. The court didn't simply remand the case for further rulemaking. It invalidated the rules based on a determination that those rules violated the First Amendment.

In particular those rules were the outward manifestation of the Food and Drug Administration's interpretation of the statute as it applied to the claims,

and the court held that interpretation invalid under the First Amendment.

Now when the court invalidated the rules it did so based primarily --

THE COURT: Let me interrupt you for a minute.

MR. EMORD: Yes.

THE COURT: Because I was -- I wanted to get the exact language of the Court of Appeals. They certainly invalidated the four regulations, but they did remand to me, with instructions for me to remand to FDA, for reconsideration of appellant's health claims.

That is an important distinction. They did not remand to me and then to FDA with order that the four health claims be put into effect. They clearly contemplated the word reconsideration, meaning that FDA should rethink its position.

MR. EMORD: No question about it, Your Honor. They contemplated reconsideration of the claims. However, they ruled those rules invalid. Those rules were its prohibition of the claims, and the invalidity was predicated on the fact that the agency lacked empirical evidence sufficient to satisfy the First Amendment standard.

The First Amendment standard is a condition precedent to government suppression of any commercial speech. It must satisfy that burden of proof in order for it to suppress speech.

The court held that the empirical evidence necessary to establish a basis for suppression, consistent with Ibanez and consistent with the progeny of In re R.M.J., was that the agency have empirical evidence to show that the harms it recited were real and that the restriction would elevate those harms to a material degree.

At the time of the Court of Appeals' decision, that empirical evidence was not present. To this day that empirical evidence is not present. The Supreme Court -- the First Amendment to the Constitution under obviously the Supremacy Clause, Article 6, Clause 2, is the supreme law of the land.

Agency construction to the contrary, and administrative convenience to the contrary notwithstanding, this agency may not, as a matter of constitutional law suppress these claims based on the invalidity of these rules, the constitutional invalidity of these rules.

The rules were merely the outward manifestation of the agency's interpretation of the statute. These rule makings --

THE COURT: Are you saying that the entire preclearance structure of the statutes, that that whole approach to the regulation is essentially unconstitutional in this case?

MR. EMORD: No. Not at all. That was not even an issue in the appeal, not at all.

THE COURT: I am well aware it wasn't, and that is why I asked you that question, because that is the government's argument. The government's argument is that you

cannot put these labels out there without having them precleared under the applicable statutory tests and constitutional tests, but without having them precleared by the government.

And I mean I am simplifying their argument, but that is step one, and step two is that they are going through that process, and step three of their argument is that they are not taking unduly long, and I guess their final step four is that they have made a promise to you, albeit only after great pressuring by you, appropriate pressuring by you, that they have made a promise that they will get them out in the 539 days I guess it is, which is actually a year and a half.

MR. EMORD: Actually, they have made no commitment to authorize the claims or allow them. They have made a determination that by October the 10th --

THE COURT: A decision will be made.

MR. EMORD: A decision will be made.

THE COURT: Right.

MR. EMORD: However, Your Honor, there is an important distinction that needs to be made here. These rules were not a product of the health petition, health claim petition process that they cite as a basis for their argument.

These rules were a part of a rule making ordered by Congress in the NLEA for ten specific nutrient disease relationship claims. Under that rule making that was pursuant to that statute, they made a determination not to authorize these claims predicated on an undefined significant scientific agreement standard.

The court held that standard invalid. They actually held that the interpretation of the statute was invalid, and that was the rule that the agency relied upon to disallow these claims.

Now so what we have is a distinction that is very important. The statutory provisions that they are relying on arose out of the FDA Modernization Act with respect to the time table, the 540 days, and the Nutrition Health Alliance decision, both of which post dated this proceeding and were not subject to attack in this proceeding.

In this proceeding we were looking at the separate statutory provision, the NLEA provision for FDA to review ten separate nutrient disease relationship claims, of which the four we sought to make were a subset of that ten.

THE COURT: Let me ask you something. In the Court of Appeals' argument, was any reference ever made to the 2nd Circuit decision?

MR. EMORD: In a footnote, there was a reference made to the 2nd Circuit decision, and it was distinguished. If you look on footnote four, the decision is distinguished in that footnote.

THE COURT: On the issue of ripeness?

MR. EMORD: Yes. Because the court there kicked out most of the challenge on ripeness grounds, and that challenge therefore was not affected by the decision in the

court's case.
THE COURT: But our Court of Appeals did note that the 2nd Circuit held on the merits that the 540 days time limit was not an unconstitutional prior restraint.
MR. EMORD: Correct. It noted that the 2nd Circuit so found. Now here, and this is very important. The Court of Appeals' decision, if you read it carefully you can see, for example, from 659 to 660 of the decision, and I will quote a segment here:
"While we are skeptical that the government could demonstrate with empirical evidence that this claim is similar to the ones we have suggested above would bewilder consumers and fail to correct for deceptiveness, we do not rule out that possibility."
The point here is that they remanded the case to the agency to develop empirical evidence, one way or the other, showing whether there would be deceptiveness or not. But as a matter of constitutional law, they ruled that these rules were invalid because the agency did not have that empirical evidence, did not satisfy its burden of proof, which is a condition precedent to suppression of speech under the commercial speech standard.
The government may not suppress speech and later decide whether it has evidence. Government must have the empirical evidence first, must meet its First Amendment burden of proof.
There is a long history of precedence, Supreme Court precedence establishing that it is the government's burden of proof to suppress speech. It is their burden in the first instance.
This statute may not be interpreted in a manner to conflict with the First Amendment without necessarily invalidating the statute. It is not necessary here. Why is that so?
It is not necessary here because the provision that the agency relies --
THE COURT: Let me interrupt you, Mr. Emord. Do you think in remanding to the agency for reconsideration that the Court of Appeals meant to preclude the FDA, which is the agency with the appropriate and relevant expertise, but meant to preclude them from considering what I gather from both your sets of briefs is a large number of new articles and peer review articles on the merits of the four health claims?
A lot has happened since you first filed your request with FDA.
MR. EMORD: Certainly not. As a matter of fact they can consider that at any time with regard to any of the food claims they have authorized, and so forth. At any point in time they can look at the science and reconsider their decision.
The fact is though that they are putting the cart

before the horse. The court here held these claims at worst potentially misleading on the scientific record that was before the court. At worst, potentially misleading.

Under the Supreme Court precedent, potentially misleading speech may not be suppressed outright but must be authorized with disclaimers if disclaimers can correct for misleadingness.

The agency's position has never been, even to this date, that there is no scientific evidence to support the claims. The agency's position has been that that scientific evidence is not conclusive.

The court's recommended disclaimers all begin with that recognition. The court's recommended disclaimers inform consumers that the claims are inconclusive.

THE COURT: Do you think that the Court of Appeals intended to limit the FDA to its preexisting record, or do you think that the Court of Appeals contemplated the development of -- again, what I gather from your respective brief is now a massive new record?

MR. EMORD: The Court of Appeals expressly stated that the rules were invalid, that that determination was invalid. They didn't -- they didn't say that it is invalid pending the development of further rulemaking. They said it was invalid as of that point of time, and they remanded to the agency to develop the empirical record.

They wiped out the prohibitions on this speech, and they gave it back to the agency and said, look, agency, you go ahead and look at the record, but as a matter of constitutional law, you have the burden of proof and you may not -- this government may not suppress protected commercial speech absent empirical evidence.

They don't have that evidence now. They don't have the empirical evidence to even show that the claim is misleading.

THE COURT: Doesn't that get you precisely into the 2nd Circuit opinion?

MR. EMORD: No.

THE COURT: And holding, which is that the agency can reasonably take the 540 days to develop the record and reconsider?

MR. EMORD: No. Because we would have then an endless loop in which the agency could continuously look at new evidence over and over again and never reach a final decision.

These claims were submitted to the agency in 1993 in the instance of the first three claims, and in 1996 in the case of the folic acid claim, and they were thoroughly evaluated over a far longer period than 540 days.

This agency has been dragging its feet the entire time. They have been dragging their feet since this decision was handed down.

We waited, and we waited a good long period before we came to this court expecting the agency to take action. We wrote to the agency repeatedly. Not until this case started did they even indicate that they would implement the

decision, and not until the eve of this hearing, the last week, did they first say that they would decide it by October the 10th.

This agency is involved in a serious failure to respect and implement this decision. This is no ordinary decision. It is a decision of constitutional import. The gravity of it is extraordinary.

We believe that --

THE COURT: How do you answer the government's argument that -- I think they argue that either a third or a quarter of the delay was due to your request that they keep the record open and allow you all, meaning all of the plaintiffs, to submit a lot more information for the record?

MR. EMORD: That argument is misplaced, because we have always argued to the agency consistently that the invalidity of these rules prevents the suppression. They can develop the record. They can find empirical evidence. Upon finding empirical evidence, if that evidence shows the claims to be inherently misleading, and the disclaimers that the court recommended to be ineffectual, they can suppress them, but they cannot put the cart before the horse. Without evidence they cannot suppress these claims.

This is what we have argued to them. Yes, we are participating --

THE COURT: They can't have evidence, Mr. Emord, until they develop a record.

MR. EMORD: Oh, they have an enormous record, Your Honor. Absolutely extraordinary record on each of these claims, and they have asked for the latest science concerning these claims, and the point here is --

THE COURT: But that record is --

MR. EMORD: -- that the claims are not absolute.

THE COURT: Excuse me a minute.

MR. EMORD: I am sorry.

THE COURT: That record is as -- the massive record is as a result of the proceedings that they started and held subsequent to the Court of Appeals' opinion.

MR. EMORD: No. That is not true. The massive record that they have developed is over the seven year period prior to it. The information that they cite to you in the decision, the numbers that they put there, that is a very small subset of the mass quantity of scientific evidence that is of record in this -- in the Court of Appeals' record.

The point here is, these claims, even if established by FDA, the science were established, the science does not establish -- even if you look at the science it would not establish that the claims were inherently misleading.

At best it would establish that the evidence is inconclusive. The Court of Appeals' disclaimer says that very thing. There is no potential for misleadingness unless the FDA does something that is herculean, and that is show that there is no scientific evidence to support the claims which it cannot do.

So when all is said and done, after the FDA reviews all of this evidence, it must either find that that scientific evidence completely eliminates the 200 plus articles on antioxidant vitamins, the extraordinary quantity of evidence on the omega 3 fatty acids, the extraordinary scientific evidence of fiber.

They have approved claims for these in foods in common form. Their position has been that the elements in those foods in common form are emersed in other elements that may effect disease risk, too.

The point here is, Your Honor, we should not be left in a situation where we endlessly await the agency's final, and then perhaps later final, and then perhaps later final decision as to what the science is. This has to end.

And while we fully respect that the agency should investigate the science, and we participate in that, and are participating in that scientific development, the fact of the matter is that this agency, like every other agency of the federal government and state governments, may not suppress protected commercial speech on the theory that evidence will arise.

It may only do so upon empirical evidence. It must establish that the harms it recites are real, and that its restriction will alleviate those harms to a material degree as a condition precedent to suppression.

That was the Court of Appeals' decision. That was the Supreme Court's unbroken line of decisions from In re R.M.J. forward, and this is why the Court of Appeals invalidated the prohibition.

It didn't just remand. It invalidated the prohibition and remanded to the FDA -- to this court and then to the FDA for further rulemaking on the issue of empirical evidence, allowing the agency to develop the record, but not allowing the agency, as as matter of constitutional law, not allowing this agency to continue to violate the constitution on the assumption that some day empirical evidence will arise.

THE COURT: Mr. Emord, if they didn't want the agency to develop a record, and then of course to consider what was in that record, and we are talking about a pretty massive record, then why didn't the Court of Appeals simply say on the existence of the record before them at that time we conclude that there is no justification for the agency's position, and therefore we remand with the specific order to the agency to put these health claims into effect? In other words, to allow the plaintiffs to use these health claims on their labels.

It seems to me that your position is basically inconsistent, and you know that I don't mean this in any kind of a personally insulting way, but these are difficult administrative law issues.

If they remand for agency consideration, then the agency has to do its job. And unless you can show that the agency is acting in bad faith -- they may be very slow. I am

certainly not going to argue that one with you, although they have been doing a lot more than you suggest.

But let's assume that they are being very slow. But if the case is remanded for the agency to reconsider and to develop new evidence, then they have got to be allowed to do their job, and that is what they are doing right now, with only six months to go by the way.

MR. EMORD: Had the court merely remanded it, Your Honor, I would agree with you entirely on this point. But the court invalidated the prohibitions. It held them unconstitutional.

That is a definitive determination that cannot be ignored or avoided. The unconstitutionality of the prohibitions renders them of no legal force and effect, and the court remanded the matter to the agency to develop an empirical record to determine whether, in fact, it had sufficient evidence to meet the First Amendment burden of proof.

Having not met it, it cannot suppress these claims. It cannot suppress these claims for the very same reason the court determined that it couldn't suppress them based on the record before it, because the empirical evidence was not presented.

The agency has presented no empirical evidence to this court. The agency presented no empirical evidence to the Court of Appeals. It may not continue a violation of the First Amendment without the empirical evidence.

What it is doing -- the Court of Appeals took an extraordinary step by writing, specifically crafting the disclaimers it believed would correct for this misleadingness, and then said to the agency, we don't rule out the possibility that you might find that these disclaimers don't work, but in the first instance they crafted those disclaimers.

And so as a matter of constitutional law, we have a determination in which the speech in issue is protected commercial speech because it is not inherently misleading. It is, according to the court, potentially misleading, which means that the speech may not be conveyed without disclaimers.

The court crafts the disclaimers and then says to the agency, we do not rule out the possibility that upon empirical evidence you may show our disclaimers insufficient.

They contemplated in that very action that those disclaimers would be put to use. They invalidated the rules, and they allowed the claims to be made with disclaimers.

The agency -- we waited months. The agency did not develop any empirical evidence. It only started on April 4th to hold a hearing on the subject matter. It planned -- it had planned to do extensive rule making, which would have lasted years. Then this hearing arose, and suddenly, October the 10th, 2000, becomes the date. That is progress. It is a movement down from years to months. But

it is still a violation of the First Amendment.
We do not rule out the possibility, nor did the court, that the agency may prove disclaimers effective, but that was the court's decision.
Thank you, Your Honor.
THE COURT: All right, thank you. Let me hear from the government, please.
MS. STRAWN: Good morning, Your Honor.
THE COURT: Good morning.
MS. STRAWN: Your Honor, I believe I can be relatively quick, because Your Honor has already amply summarized the government's position.
THE COURT: I don't know about amply.
MS. STRAWN: I believe that you are correct. Basically I want to make two points and then address a couple of things that Mr. Emord said.
The first point is as Your Honor pointed out, FDA is complying with the mandate of the Court of Appeals. The mandate was to reconsider the health claims, not to approve them.
The Court of Appeals -- I think it is important to note that the Court of Appeals specifically stated that the appellants at that point were not challenging the prescreening requirement, and therefore the court was not ruling on the prescreening requirement, and the court did note the Nutritional Health Alliance decision out of the 2nd Circuit which upheld that requirement.
My second point is that the agency is complying with the mandate without unreasonable delay. And with respect to the concern that I think Your Honor expressed about the agency being prodded to move as a result of this case, Ms. Kaeding just pointed out to me that FDA notified the plaintiffs before this action was filed that the agency would give them a date certain to rule on their claims after the record was closed and the public meeting was held, both of which occurred after this action was filed. So the agency's decision to give a date certain was not predicated on this action.
With respect to what Mr. Emord is arguing, and I have to give him credit, he argues it well, regarding the need for empirical evidence before the agency can ban the claim, I think that is precluded by the 2nd Circuit, and I will just read to you from the 2nd Circuit's opinion:
"The 540 day prior restraint is sufficiently narrowly tailored. It grants a limited but reasonable time within which the FDA can evaluate the evidence in support of labeling claims -- so that a court can determine whether the regulated speech is, in fact, truthful and non-misleading as required by the first prong of Central Hudson."
That is exactly what the agency is trying to do

here, and to require the agency to develop empirical evidence and to satisfy its burden of proof in advance of any action to prove the claim, or to, you know, prohibit the claim, would do away with the entire prescreening requirement, which was not at issue.

THE COURT: I am concerned about one thing. Is it correct, as Mr. Emord argues, that the Court of Appeals considered the case under one statute governing FDA, namely -- I guess it is the NLEA, and that your argument now primarily relies upon a different provision of the FDA statutes?

MS. STRAWN: Are you referring to the 540 day requirement?

THE COURT: Yes.

MS. STRAWN: It is correct that, in fact, the claims that plaintiffs wish to make were originally initiated by Congress, not by the petition process. And the 540 days is a Congressional limitation on the petition process.

I think -- our argument, though, is that the 540 days provides by analogy a reasonable time. In fact the time limit that Congress put on the agency to evaluate these claims was, I believe, longer than 540 days originally, so in effect not, you know, a binding restriction in the way that it would be if these claims had come in by the petition process.

But by analogy, and I think what some of the unreasonable delay cases of the D.C. Circuit say is that you look to the statute, you know, or at some analogous type mandates to discover whether or not the delay is reasonable, and I think that the 2nd Circuit has held that that is reasonable.

It might also be reasonable if the science were tremendously greater than normal. It might be reasonable to ask for more time or less time. But I think in this case the 540 days is a good analogy, and the agency is complying with that.

THE COURT: What is your position on one or two questions that I asked Mr. Emord, and that is, do you think that the Court of Appeals contemplated that its opinion contemplated the development of a new record by the FDA after the remand?

MS. STRAWN: Yes, Your Honor, I do, certainly. Certainly on the issue of disclaimers. I mean the Court of Appeals specifically referred to the idea that the agency might develop empirical disclaimers -- or I am sorry, empirical evidence that disclaimers don't work in certain situations, or do work in others. It remanded to the agency to come up with disclaimers that would work.

I think in order to come up with disclaimers that work, you have to have an understanding of the current state of the science, otherwise you don't know what it is that you want consumers to understand.

THE COURT: Does your administrative proceeding thus far focus on the science, or did it focus on consumer perceptions, or both? I thought that it was just on the

science.

MS. STRAWN: They are doing both simultaneously. There have been focus groups on disclaimers that have been held, and the public meeting, which was last week, I believe, also was -- had a panel that dealt with disclaimers, and the agency has been reviewing evidence with respect to the implementation of disclaimers.

THE COURT: All right.

MS. STRAWN: With respect to the -- to Mr. Emord's argument that, you know, this could be a never ending process, I don't think that there is any evidence that the agency has said it will issue a final decision.

That said, you know, obviously the FDA is in a position of protecting the public health, and if at some later point science comes in and there are studies done that impact on these disclaimers one way or the other, certainly Mr. Emord -- assuming that that agency were to deny the claim, for example, certainly Mr. Emord would be entitled to bring to the agency's attention new science that supported the claim, and likewise someone else, or the agency could address the claims again on the basis of new science that was unsupported by the claim.

So I think that that is within the agency's prerogative. That does not impact on the fact that there will be a final decision and that the record will close.

But to go back to Mr. Emord's main argument about the burden of proof at this point, if the government is required to show by empirical evidence that a claim is misleading before it takes action, then all claims could be made at this point, and the agency would be in the position of having to go forth and do rule makings on, you know, whatever claims might be out there.

I mean, you know, I could claim if I eat this pen it will prevent my cancer, and the agency, you know, would have to go back -- would have to go out and develop empirical evidence that that was not the case in order to ban the claim.

And that is not the law, and that is not what the 2nd Circuit held, and that is not what the Supreme Court has held in regard to prior restraints.

So to conclude, I would just conclude that I just think that the court's mandate is clear, that the agency was to reconsider the claims, and that the agency is in fact doing that in a timely manner.

THE COURT: All right, Mr. Emord, did you have anything else you wanted to add?

MR. EMORD: Thank you, Your Honor. On Ms. Strawn's last point, we don't contest that empirical evidence is necessary to support a claim in the first instance. We filed that empirical evidence, and the court determined that at worst it was potentially misleading. Therefore, it was protected commercial speech.

We did not challenge the prescreening process, nor is it applicable in this context. This is a NLEA driven direct nutrient disease relationship claim review under

their now invalidated significant scientific agreement standard.

But I think it is very important that --

THE COURT: The standard wasn't invalidated, was it? Didn't the Court of Appeals say it had to be clarified?

MR. EMORD: That is correct. That is correct, Your Honor.

THE COURT: I gather that they have done that, although I don't think that either one of you have really focused on what they have done in clarifying it.

MR. EMORD: We dispute that they have clarified it, Your Honor, but that is for another day I suppose.

THE COURT: All right.

MR. EMORD: But the court's decision -- there is a paragraph which I think is absolutely indispensable to proper evaluation of the case, and that is the paragraph -- and I have the actual decision before me, I don't have the page citation.

It is -- but the paragraph reads:

"The government disputes that consumers would be able to comprehend appellant's proposed health claims in conjunction with the disclaimers we have suggested. This mix of information would, in the government's view, create confusion among consumers, but all the government offers in support is the FDA's pronouncement that consumers would be considerably confused by a multitude of claims with differing degrees of reliability. Although the government may have more leeway in choosing suppression over disclosure as a response to the problem of consumer confusion where the product protects health, it must still meet its burden of justifying a restriction on speech. Here the FDA's conclusory assertion falls far short. See Ibanez, 'if the protection afforded commercial speech are to retain their force, we cannot allow rote invocation of the words potentially misleading to supplant the government's burden to demonstrate that the harms it recites are real, and that its restriction will, in fact, alleviate them to a material degree.'"

The point here is, Your Honor, the court reviewed

the evidence. It held as a matter of law that these claims were, at worst, potentially misleading. Disclaimers are therefore the focus of the remand necessarily. What disclaimer? Whether the Court of Appeals' disclaimer, based on empirical evidence, would be insufficient to avoid misleadingness.

In the first instance, though, the court wrote disclaimers, and it was the burden of proof then, as it is now for this agency, not to put the cart before the horse, not to presume the existence of evidence to justify suppression, but under the First Amendment they must have that evidence.

This is absolutely indispensable to the protection of the civil liberty that is our First Amendment. So we urge this court respectfully that it take very careful heed to the points pertaining to Ibanez and In re R.M.J.

Never has the Supreme Court ever authorized the suppression of commercial speech predicated on the promise of evidence. Never has it done so based on a recitation of facts without empirical evidence since In re R.M.J.

The court has required the evidence.

Many a case has been before the court in which the state has argued that it has an important need to suppress speech. But the court has unequivocally stated that the government must have evidence, must have empirical evidence to meet its standard before it may do so.

Thank you, Your Honor.

THE COURT: Well, thank you everyone. I am not going to rule today. I knew I wanted to hear from counsel so I could fully evaluate all of the arguments made. I don't intend to delay in ruling though.

I would hope that I could get a ruling out within two weeks, and I will do my best to do that, everybody. Your papers are really clear, and as you can tell I am familiar with the issues at this point. Thank you very much. Counsel may be excused.

MR. EMORD: Thank you, Your Honor.

MS. STRAWN: Thank you.

(Whereupon, the proceedings in the above-styled matter were adjourned.)

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CERTIFICATE OF COURT REPORTER

I certify that the foregoing is a correct transcript of the proceedings in the above-captioned matter.

_____

SUSAN PAGE TYNER, CVR-CM
OFFICIAL COURT REPORTER