STATE OF TEXAS
HOUSE OF REPRESENTATIVES

BRANDON CREIGHTON

April 8, 2013

RQ-1120-GA

The Honorable Greg Abbott
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Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

Dear General Abbott:

As State Representative of House District 16, I respectfully request a formal opinion concerning the legality and constitutionality of the outdoor tobacco "advertising fee" under Subchapter K of Chapter 161 of the Texas Health & Safety Code (the "Advertising Fee Statute"). Specifically, is the Advertising Fee Statute preempted under the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1334(b)? Alternatively, does the Advertising Fee Statute amount to an unconstitutional infringement of rights protected by the First and Fourteenth Amendments to the United States Constitution and Article I, Sections 3 and 8 of the Texas Constitution?

The Advertising Fee Statute was enacted over 15 years ago, in 1997, when tobacco advertising practices were very different than they are today. On its face, the Statute provides: "A purchaser of advertising is liable for and shall remit to the comptroller a fee that is 10 percent of the gross sales price of any outdoor advertising of cigarettes and tobacco products in this state." TEX. HEALTH & SAFETY CODE § 161.123(a). Prior to entering into a Comprehensive Settlement Agreement and Release with the State of Texas in 1998, major tobacco companies may have purchased outdoor advertising space with a sales price by entering into contracts for billboard and transit advertising. In such circumstances, the "advertising fee" statute would require the company that purchased the outdoor advertising on billboards or busses to remit to the State an amount equal to 10% of the gross "sales price" of that outdoor advertising. But in accordance with the Settlement Agreement, the signatories to that Agreement no longer conduct any billboard or transit advertising in Texas. Indeed, until late last year, it is my understanding that the Comptroller's office had not enforced or collected the advertising fee for over ten years.

Recently, however, the Comptroller's office has expressed renewed interest in the Advertising Fee Statute. The Comptroller's position is that the Advertising Fee Statute applies to the small outdoor signs displayed on gas pumps at gas stations or in some parking lots at retail stores in Texas. These signs communicate, in a truthful and non-misleading manner, that the particular retail establishment offers the particular lawful product for sale to adults, and typically also includes the price charged by that retailer. In some instances, tobacco companies provide such signs to retailers in Texas, which the retailers then choose to display outside of their retail establishments.

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Philip Morris USA ("PM USA"), U.S. Smokeless Tobacco Brands ("USSTB"), and John Middleton Co. ("JMC"), have variously submitted payments *under protest* to the Comptroller's Office. The payments made constitute 10% of the cost of outdoor signage that may have appeared in Texas during the relevant period. The amounts of these payments are comparably quite small. For instance, PMUSA's payments under protest on October 22, 2012 and January 18, 2013 were for $2,420.42 and $1,797.24, respectively; and USSTB's payments under protest for the same reporting periods were $426.42 and $542.59, respectively. JMC's payments under protest have been even smaller. Nonetheless, the legal principles at stake are not small.

While I understand that various tobacco companies have met with the Office of the Comptroller in an informal effort to reach consensus on this issue, those efforts have been unsuccessful. As a result, the affected companies may be forced to take their preemption and First Amendment arguments to the courts, and the need for such costly litigation could be averted by an Attorney General Opinion on the topics raised. Moreover, the tobacco companies may be entitled to attorneys' fees awards if they prevailed in the courts and established constitutional violations of their civil rights, so an Attorney General Opinion seems particularly warranted. Accordingly, I now make this formal request for an Attorney General Opinion, pursuant to Government Code § 402.042(b):

- ***Preemption***: First, is the Advertising Fee Statute preempted by the express preemption provision in the FCLAA, 15 U.S.C. § 1334(b), given that the Advertising Fee Statute imposes requirements or prohibitions under state law based on smoking and health with respect to the advertising or promotion of cigarettes? If the Advertising Fee Statute is preempted as applied to cigarette manufacturers, is the entire statute preempted because provisions regarding manufacturers of "other tobacco products" are not severable?

- ***First Amendment***: In addition to federal preemption, does the imposition of a "fee" on truthful and non-misleading outdoor advertising for a lawful product, such as cigarettes and other tobacco products, violate the protections afforded to speech under the United States and Texas Constitutions? Given First Amendment protections, our country – including this State – has never been in the business of selectively imposing "fees" on speakers, including commercial speakers, depending on the content of what they say or the lawful products they truthfully promote. Whether analyzed under strict judicial scrutiny applicable to any content-based speech provision, or under the intermediate scrutiny applicable to content-neutral restrictions on commercial speech, doesn't the Texas Advertising Statute fail to survive constitutional muster under the governing Supreme Court authorities?

To facilitate your analysis of these issues, I have attached two short legal analysis pieces that were provided to me by representatives of PMUSA, USSTB and JMC. Thank you for your careful consideration and assessment of these important issues. We look forward to your response. If you have any questions, please feel free to contact me or my office for further information.

Sincerely,

Brandon Creighton

SECTION 161.123 IS PREEMPTED

I. To the Extent That Section 161.123 Applies to Cigarette Advertising, It Is Expressly Preempted

To the extent it applies to cigarettes, Section 161.123 is preempted by Section 5 of the Federal Cigarette Labeling and Advertising Act ("FCLAA"), 15 U.S.C. § 1334(b).

By its plain terms, Section 5(b) preempts state law when three conditions are satisfied: (1) the state law "impose[s]" a "requirement or prohibition" (2) "with respect to the advertising or promotion" of cigarettes and (3) the requirement or prohibition is "based on smoking and health." *See* 15 U.S.C. § 1334(b). All three elements are satisfied with respect to Section 161.123.

- **Section 161.123 "impose[s]" a "requirement or prohibition"**

  - In *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), the Supreme Court held that the phrase "'requirement or prohibition' sweeps broadly" and includes both "*positive enactments* and common law." 505 U.S. at 521 (plurality) (emphasis added); *id.* at 548-49 (opin. of Scalia, J.) (concurring on this point).

  - Section 161.123 "impose[s]" its requirements: compliance with the Section is not voluntary or optional, but is mandatory and backed up by explicit penalties. *See* Texas Health & Safety Code § 161.125 (imposing administrative penalties for noncompliance with Section 161.123); *cf. S&M Brands, Inc. v. Caldwell*, 614 F.3d 172, 179 (5th Cir. 2010) (Master Settlement Agreement was not preempted because plaintiffs "are not compelled to join the MSA").

- **Section 161.123 imposes requirements "with respect to the advertising or promotion" of cigarettes**

  - In *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), the Supreme Court held that the phrase "with respect to the advertising or promotion of … cigarettes" includes, at a minimum, regulations that "expressly target cigarette advertising." *Id.* at 547. By contrast, Section 5(b) does not preempt taxation of *cigarettes*—which regulates cigarette sales rather than cigarette advertising. *Id.* at 552 & n.*.

  - Section 161.123 on its face imposes a fee, not on cigarettes, but the "advertising of cigarettes." *See* Texas Health & Safety Code § 161.123(a). Because Section 121.163 "expressly target[s] cigarette advertising," it imposes requirements "with respect to the advertising or promotion of … cigarettes." *Reilly*, 533 U.S. at 547.

- **Section 161.123's requirements are "based on smoking and health"**

  - In *Reilly*, the Supreme Court held that "regulations targeting cigarette advertising" are "inevitably motivated by concerns about smoking and health" and are

therefore "based on smoking and health" within the meaning of FCLAA. 533 U.S. at 550. By contrast, advertising regulations "that apply to cigarettes *on equal terms with other products*" are not "based on smoking and health" and are not preempted. *Id.* at 552 (emphasis added). *See also Altria Group, Inc. v. Good*, 555 U.S. 70, 83-84 (2008) (noting that the regulations in *Reilly* were "based on smoking and health" because they targeted cigarette advertising and did not apply generally to all advertising). Because, as in *Reilly*, Section 161.123 singles out cigarettes for special treatment that is not applied to products generally, it is "based on smoking and health."

II. Because the Provisions of Section 161.123 Are Not Severable, the Entire Section Is Preempted

Although FCLAA's preemption provision only applies to laws with respect to the advertising of "cigarettes," Section 161.123 falls in its entirety, because the provisions of that section governing cigarettes are not severable from the remainder of the provision.

The question of severability is "'a matter of state law,'" and under Texas law, an invalid provision is severable "'[i]f, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected.'" *National Federation of the Blind of Texas, Inc. v. Abbott*, 647 F.3d 202, 210, 215 (5th Cir. 2011) (citations omitted). For two reasons, that standard is not met here.

- **First, as the text of Subchapter K makes clear, the Legislature's clear intent was to establish a regulatory regime that would apply *equally* in *all* respects to both "cigarettes" and "tobacco products."**

  - There is no indication whatsoever of any legislative intent to apply a different, and stricter, set of rules to smokeless tobacco products. Accordingly, the striking of Section 161.123 as to cigarettes must also extend to other tobacco products as well. *See Lorillard Tobacco Co. v. Reilly*, 76 F. Supp. 2d 124, 134 n.11 (D. Mass. 1999) (applying similar reasoning in holding that provision preempted as to cigarettes was not severable as to smokeless tobacco products), *aff'd in part and rev'd in part on other grounds*, 218 F.3d 30 (1st Cir. 2000), *aff'd in part and rev'd in part on other grounds*, 533 U.S. 525, 553 (2001) (declining to reach severability issue and instead invalidating provisions as to smokeless tobacco on First Amendment grounds).

  - Where, as here, the invalid and valid aspects of the provision "are mutually dependent and *together* make up the legislative intent," the provisions are not severable. *Rylander v. Bandag Licensing Corp.*, 18 S.W.3d 296, 305 (Tex. App. 2000) (emphasis added).

- **Second, application of the advertising fee only to tobacco products other than cigarettes produces an oddly asymmetrical regime in which *anti-smoking* activities would be funded by advertising fees on *smokeless* products.**

  - Under the statute, the advertising fee is to be used "for administration and enforcement of this section, enforcement of law relating to cigarettes and tobacco products, and the education advertising campaigns and grant program established under Subchapter O, Chapter 161." Texas Health & Safety Code § 161.124(b). The focus of the enforcement activities and education campaigns is the use of *cigarettes* by minors, *see id.*, § 161.301(a) (Subchapter O's education program against "tobacco use by minors"), because the State's own studies contend that the rate of cigarette use by minors is approximately 2-3 times the rate of use of smokeless tobacco. Texas Dept. of Health, *Texans and Tobacco: A report to the 78th Texas Legislature*, p.8 (January 2003). Severance would thus produce a regime in which fees collected from *smokeless* tobacco would be used to fund *anti-smoking* activities.

  - As a result, the statutory regime that would be created by severing cigarettes from the remainder of Section 161.123 "'does not present an independent, complete and workable whole without it.'" *Ex Parte Progreso Ind. School Dist.*, 650 S.W.2d 158, 163 (Tex. App. 1983) (citation omitted). Where, as here, the relevant provisions "'are essentially and inseparably connected in substance,'" the remaining provision cannot be said to be "'complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected.'" *Geeslin v. State Farm Lloyds*, 255 S.W.3d 786, 797 (Tex. App. 2008) (citation omitted). "The interconnectedness of the provisions makes it unclear whether the legislature would have enacted" Section 161.123 if cigarettes were left out. *Association of Texas Professional Educators v. Kirby*, 788 S.W.2d 827, 831 (Tex. 1990). As such, Section 161.123 is not severable, and the entire section must be stricken.

SECTION 161.123'S TOBACCO ADVERTISING FEE IS UNCONSTITUTIONAL

Section 161.123 – which imposes an "advertising fee" on "any outdoor tobacco advertising" – is unconstitutional under the First and Fourteenth Amendments to the United States Constitution and Article I, Section 8 of the Texas Constitution.

Whether analyzed under the strict scrutiny applicable to discriminatory content-based speech regulations, or the intermediate scrutiny applicable to commercial speech regulations, Section 161.123 is clearly unconstitutional and the State of Texas cannot satisfy its heavy burdens to justify the law's impermissible regulation.

I. Section 161.123's Content-Based Fee On Constitutionally Protected Speech Cannot Survive Strict Scrutiny

- As the United States Supreme Court has held, any "statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech." *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 115 (1991); *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid"); *see also Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664-65 (2011) (state laws that "impose a specific, content-based burden on protective expression" are subject to "heightened judicial scrutiny").

- Content-based speech regulations are "particularly repugnant" to the First Amendment and, therefore, subject to strict scrutiny – which requires the State "to show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229 (1987); *see also Simon & Schuster, Inc.*, 502 U.S. at 118; *R.A.V.*, 505 U.S. at 395. "'Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.'" *Arkansas Writers' Project, Inc.*, 481 U.S. at 230 (citation omitted).

- Section 161.123 is a "content-based" regulation of speech. On its face, and as applied by the Comptroller, it imposes a financial burden on outdoor advertising by tobacco manufacturers or retailers due to the *content* of their speech – *i.e.*, *because* they are advertising tobacco products.

    - Section 161.123's advertising fee is not "content neutral"; speech regulations are "content neutral" only where they are justified entirely without reference to the content of the regulated speech. *See, e.g.*, *Sorrell*, 131 S. Ct. at 2664.

    - Here, whether a particular outdoor advertisement is subject to Section 161.123's advertising fee depends *entirely on the content* of the outdoor signage and what it says. If it advertises cigarettes or tobacco products, the advertising fee applies. If it advertises beer or cars or anything other than cigarettes and tobacco products, the

advertising fee does not apply. Indeed, even if the outdoor signage concerns tobacco products but does not promote the products and instead advocates a message against using tobacco products, the fee does not apply.

- As such, Section 161.123 is a decidedly content-based, viewpoint-based, and speaker-based speech regulation, which therefore is subject to the most exacting judicial scrutiny. *Compare Sorrell*, 131 S. Ct. at 2664-65 (state law subject to "heightened judicial scrutiny" where it "imposes a burden based on the content of speech and the identity of the speaker" and "is directed at certain content and is aimed at particular speakers").

- The State of Texas cannot possibly prove that Section 161.123's discriminatory content-based speech regulation survives strict scrutiny.

  - Even assuming that the State could demonstrate that its interests underlying Section 161.123's advertising fee were "compelling" state interests, the State could not possibly prove that its advertising fee is "*necessary* to serve" those interests, *R.A.V.*, 505 U.S. at 395 (emphasis in original), much less that its advertising fee is the "least restrictive means" available to do so.

  - Hence, there is simply no way that the State of Texas can hope to overcome the presumptive invalidity of its discriminatory and content-based burden on the exercise of constitutionally protected speech rights.

II. Section 161.123 Is Unconstitutional Even Under The Intermediate Scrutiny Established In *Central Hudson*

- While Section 161.123's content-based advertising fee cannot survive strict scrutiny, the result is the same under the intermediate level of scrutiny established in *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562-63 (1980). *See also Sorrell*, 131 S. Ct. at 2667 (emphasizing that the challenged state law is invalid under either strict or intermediate scrutiny; "the outcome is the same whether a specific commercial speech inquiry or a stricter form of judicial scrutiny is applied").

  - Under *Central Hudson*, commercial speech is entitled to First Amendment protection so long as it concerns lawful activity and is not misleading. *Central Hudson*, 447 U.S. at 562-63. Where a state law burdens the exercise of commercial speech rights, the State must prove that (1) the law is supported by a "substantial" state interest; (2) the law "directly advances" such interests to a material degree; and (3) the law is "narrowly drawn" to further such interests. *Id.* at 566.

- **Outdoor Tobacco Advertising Is Entitled To First Amendment Protection**

  - As a threshold matter, the speech at issue – outdoor tobacco advertising – is clearly entitled to First Amendment protection. After Section 161.123 was enacted in 1997, the United States Supreme Court decided *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), which squarely held that tobacco manufacturers and retailers have a constitutionally protected right to convey truthful information about their products to adults, and adults have a corresponding interest in receiving truthful information about tobacco products. *Id.* at 564. Thus, so long as the sale of tobacco products to adults is lawful in Texas – which it is – then, under *Reilly*, tobacco manufacturers and retailers have a constitutionally protected interest in communicating to potential adult consumers in Texas. Because there is nothing untruthful or misleading about the outdoor tobacco advertising to which Section 161.123 applies, there can be no question that the speech at issue here is entitled to First Amendment protection under *Central Hudson*.

- Section 161.123 was enacted in 1997 as part of Senate Bill 55, which purported to establish a comprehensive approach to reducing children's access to and use of tobacco products. As *Reilly* acknowledged, no one "contests the importance of the State's interest in preventing the use of tobacco products by minors." 533 U.S. at 555.

- But **Texas cannot bear its burdens under the last two prongs of the *Central Hudson* test** – which require the State to demonstrate that (i) Section 161.123's advertising fee "directly advances" to a material degree the State's interest in reducing youth access to and use of tobacco products, and (ii) there exists the constitutionally required "fit" between the means chosen and ends sought to be achieved. The State can do neither.

  - **Texas cannot prove that Section 161.123's advertising fee directly and materially advances any substantial and important state interests**. At most, Section 161.123 provides indirect, remote, ineffectual, and speculative assistance in furthering Texas' stated interest in reducing youth access to and use of tobacco products.

    - As the Supreme Court has repeatedly insisted, this aspect of the *Central Hudson* test requires the State to prove that its law "'directly and materially advanc[es] the asserted governmental interest,'" which is a "'burden [that] is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its [challenged law] will in fact alleviate them to a material degree.'" *Reilly*, 533 U.S. at 555 (quoting *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 188 (1999)).

    - Here, Texas cannot carry its burden to satisfy *Central Hudson*'s direct advancement requirement. Indeed, Section 161.123's advertising fee does not *directly* advance any state interest in combating youth access to or use of tobacco

products; rather, the fee just increases to cost of tobacco advertising that proposes lawful transactions with adults, while doing nothing directly and materially to advance the state's goal of reducing youth access to or use of tobacco products. Recently, in *Sorrell*, the United States Supreme Court confirmed that a State's use of "*indirect* means" in seeking to achieve otherwise valid policy goals fails *Central Hudson*'s requirement that the means chosen "'*directly* advance[] a substantial governmental interest.'" 131 S. Ct. at 2667-68, 2670 (emphases added; citation omitted).

- Moreover, given Texas' recent enactment of legislation that permits the appropriation of funds collected under Section 161.123 to be re-directed from their initial earmarked purposes and instead used for different purposes – such as to "pay the principal or interest on a bond" issued on behalf of the Cancer Prevention and Research Institute of Texas (Tex. Gov't Code § 403.105(b-1); Tex. Const., art. III, § 67) – the connection, *if any*, between Section 161.123's advertising fee and the State's interests in combating youth smoking and youth access to tobacco products is even more remote, attenuated, and speculative. *See also Central Hudson*, 477 U.S. at 564 (commercial speech regulation cannot be sustained if it provides only "remote" support for the government's purpose).

- **Texas cannot prove that Section 161.123 satisfies *Central Hudson*'s tailoring requirement**. Texas cannot satisfy its burden to prove the requisite "fit" between means and ends given the existence of non-speech restrictive alternatives to further the State's interests without burdening First Amendment rights.

  - *Central Hudson*'s final prong requires the State to prove that its burden on speech "is not more extensive than necessary," which "requires a reasonable '"'fit between the legislature's ends and the means chosen to accomplish those ends, ... a means narrowly tailored to achieve the desired objective.'"'" *Reilly*, 533 U.S. at 556 (quoting *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 632 (1995), quoting *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)).

  - On this score, the Supreme Court has repeatedly clarified that *Central Hudson*'s tailoring requirement is not satisfied if other options exist "which could advance the Government's asserted interest in a manner less intrusive to ... First Amendment rights." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 492 (1995); *accord 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996) (plurality); *see also Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061 (10th Cir. 2001) (striking down state restrictions on liquor advertisements where state had "not shown that nonspeech [alternatives] would be an ineffective means to accomplish the ends it desires").

  - Here, to the extent the State tries to justify Section 161.123's advertising fee by reference to Senate Bill 55's purpose of reducing children's access to and use of

tobacco products, there exist numerous non-speech related alternatives to further the State's interest in combating youth access to tobacco products – including, most obviously, vigorous and strengthened enforcement of Texas' existing laws prohibiting the sale or provision of tobacco products to minors, *see* Health & Safety Code § 161.082, as well as increased penalties imposed on those who violate the law. *See, e.g., Pitt News v. Pappert*, 379 F.3d 96, 108 (3d Cir. 2004) (Alito, J.) (law banning payments for alcohol advertising in university publications was not properly tailored under *Central Hudson*, because the state "can seek to combat underage and abusive drinking by other means that are far more direct and that do not affect the First Amendment," including increased "enforcement of the alcohol beverage control laws on college campuses"). The myriad ways in which Texas could directly address the problem of illegal sales and provision of tobacco products to minors prevent the State from establishing that Section 161.123's indirect and attenuated means of addressing the matter is "narrowly tailored" and reflects the constitutionally required "fit" between means chosen and ends sought to be achieved. *See also Fox*, 492 U.S. at 480 ("since the State bears the burden of justifying its [commercial speech] restrictions, it must affirmatively establish the reasonable fit we require").

- Moreover, to the extent that the advertising fee is based on the premise that it will discourage the outdoor placement of tobacco advertising and might thereby have the effect of reducing the incidence of youth smoking, any such theory is at war with basic First Amendment principles. Consistent with the First Amendment, the State cannot impose financial or other undue burdens on truthful and non-misleading outdoor tobacco advertising proposing lawful transactions with potential adult consumers based on concerns that minors will be exposed to such advertising and might be influenced to try to purchase the products illegally. *See, e.g., Reilly*, 533 U.S. at 564 (confirming, in tobacco advertising context, that the "'level of discourse reaching a mailbox simply cannot be limited that which would be suitable for the sandbox,'" and that state laws cannot permissibly "reduce the adult population ... to reading only what is fit for children'") (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 (1983), and *Butler v. Michigan*, 352 U.S. 380, 383 (1957)); *see also National Ass'n of Tobacco Outlets, Inc. v. City of Worcester*, 851 F. Supp. 2d 311, 320 (D. Mass. 2012) (invalidating city ordinance restricting outdoor tobacco advertising; "[n]either the City's goal to prevent tobacco related health problems among adults nor its correlative goal regarding minors provides a basis for the Ordinance to meet all four prongs of the *Central Hudson* test").

- Finally, Texas' enactment last session of legislation, which among other things permits the appropriation of funds collected under Section 161.123 for purposes other than their initial earmarked purposes of funding youth-related anti-tobacco programs, further undermines the State's ability to satisfy its burdens under both the third and final prongs of the *Central Hudson* test. In any event, the State

cannot satisfy its burden to prove that Section 161.123 is narrowly tailored under *Central Hudson*'s final prong given the existence of non-speech restrictive alternatives to underwrite the cost of youth-related tobacco initiatives – such as increased excise taxes on the *sale* of tobacco products to fund the state's initiatives, rather than a fee imposed on protected *speech* about the products – which would further the state's interests just as well and in fact better. *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996) (plurality) (striking down state statutes regulating liquor price advertising where there existed "alternative forms of regulation that would not involve any restriction on speech," including "increased taxation" of liquor products, that "would be more likely to achieve the State's goal"); *Arkansas Writers' Project*, 481 U.S. at 231-32 ("interest in raising revenue" cannot justify content-based fees imposed on constitutionally protected speech).