The State of South Carolina

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March 5, 1991

Sally M. Rentiers, Esq.
General Counsel
S.C. Department of Agriculture
Post Office Box 11280
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RE: Your January 8, 1991 Opinion Request

Dear Ms. Rentiers:

Your above-referenced request asked whether it is legal for the Department of Agriculture to require proof of a negative Coggins test be submitted before it publishes any equine advertisement in its Market Bulletin. It mentions that a few advertisers have suggested the requirement violates the equal protection clause of our state and federal constitutions because the Department has no similar prerequisites for publishing advertisements for other animals, "(i.e. rabies for dogs, pseudorabies for hogs, brucellosis for cattle, etc.)."

However, it does not appear that there are equal protection or other legal infirmities with your requirement.

Equal protection analysis may be appropriate because access to the governmental privilege of free advertising in the Bulletins involves a classification under which similarly situated individuals (livestock advertisers) receive the dissimilar treatment discussed. Note, however, that no true class upon whom a privilege or immunity is bestowed or withheld, and certainly no "suspect" class, is created. For one thing, the government does not coerce or otherwise force members into any of these "classes." An individual freely chooses to belong to the horse advertising "class," as opposed to belonging to none or to one of the other animals' advertis-

ing "classes," and any individual could often, and easily, belong to more than one such "class." cf. Look v. Green, 100 Or. App. 16, 784 P.2d 442, 443 (1989). (Gasoline "retailers" choose "the class" of retailers, the government did not place them in it, as opposed to the "non-retailers class.")

Furthermore, a statute is not constitutionally suspect simply because it results in some inequality. Supra, 758 P.2d at 1371. Indeed, the inequality involved here may be so minimal that further equal protection analysis is of questionable applicability.

In any case, the dissimilar prerequisite to horse owners' advertising would pass the appropriate standard of constitutional review. Which standard to apply depends upon the importance or significance of the horse owners' right to this free advertising without supplying proof of the negative Coggins test. City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985). Since there is no right to advertise horses with Equine Infectious Anemia (EIA) without so disclosing (caveat emptor), and thus no First Amendment right to this free advertising, and no significant chilling effect of the requirements; this is not a very important or significant right or privilege, as opposed to a fundamental right or right created by statute or regulation. Even a court which considered it to be more substantial would most probably apply the least stringent standard, the "rational basis test." Under this standard, a court would generally defer to the Legislature and Department and presume the EIA Law, and the Department's actions in furtherance thereof, to be constitutional. Id. Under the "rational basis test", "it has long been settled that a classification, though discriminatory, is not arbitrary or violative of the Equal Protection Clause of the Fourteenth Amendment if any state of facts reasonably can be conceived that would sustain it." Allied Stores v. Bowers, 358 U.S. 522, 528 (1959). The additional requirement for horse advertisers would probably pass this test, because it is based upon a conceivable, rational basis and does not involve a classification which is "palpably arbitrary." Id. at 527.

The Department's purpose for the requirement, to further and support the purposes of the EIA Law, § 47-13-1310, S.C. Code Ann. (1990), and the law, have the same valid governmental health related purpose, which may even approach the highest "compelling interest" standard. The requirement is consistent with similar § 47-13-1310 requirements and does further and support the EIA Article's purposes of controlling the spread of EIA For instance, § 47-13-1315 authorizes the State Veterinarian and the Livestock-Poultry Health Service of Clemson University to make regulations (which are currently before the Legislature) requiring EIA testing before sale

at public places (which is somewhat analogous to the instant issue, as sale through the Market Bulletin resembles, and has characteristics of, a public sale) and to require proof of freedom from EIA before an animal is permitted to remain on public premises. Section 47-13-1370 requires written proof of an approved negative test before a horse may enter any public assembly of horses. These, and the Department's similar requirements, clearly further, and thus bear a rational relationship to, the government's legitimate purpose of controlling the spread of this highly infectious, incurable, and generally fatal disease. It is indicative thereof that, ultimately, a horse which has received two positive or confirmatory tests must be killed or permanently isolated not less than two hundred (200) yards from other unaffected horses. §47-13-1365.

An additional legitimate rational purpose is that the negative test requirement is in furtherance of the Department's legislative mandate, under which it provides the free advertising service in the Bulletin, for the dissemination of agricultural information to assist producers and consumers of agricultural products, including livestock. Publishing only advertisements for horses with negative Coggins tests disseminates this information and thus assists consumers in their purchasing EIA free horses.

Although, the court may not find additional "rational basis" scrutiny necessary, such would involve an analysis of the respective seriousness, infectiousness, danger and costs associated with the respective animals and diseases to which they are subject, and whether these comparative analyses would "conceivably" justify the Department's distinctions among these diseases. This analysis would involve complex, specialized questions of medical facts which are beyond the scope of opinions of this Office. Indeed, the Department, with its expertise in the area, is far more qualified to conduct this analysis than is this Office. Similarly, a court may be reluctant to second-guess such an analysis by the Department. Elements of this analysis which would support the Department's distinctions, however, would include the relatively recent nature of the present EIA resurgence and of these particular government (and most other states') efforts to address it, compared with rabies, pseudorabies, brucellosis, etc. For instance, vaccinating dogs for rabies has long been prevalent -- if not required. Certainly, the current EIA law is new and the accomplishment of its purposes will involve greater public notification and emphasis than long standing programs now require. The greater value of the horse, its herd nature, and the EIA's greater and readier risk of contagion than that of rabies would also be factors. The distinction that there is no vaccine, cure or treatment whatsoever for EIA, whereas there is a vaccine for the other diseases, is extremely important and constitutes justification in itself. Similarly

germane, whatever its exact scientific relevance, is the fact that EIA is caused by a virus which is identical in this and many other respects to the human AIDS virus (e.g. in its methods of transmission and membership in the same pleomorphic retrovirus), and there is no proof that EIA can not be transmitted by blood (such as by female horsefly bites) to humans, in which tragic case it could be AIDS. All of these factors are readily "conceivable" and demonstrate that the Department's distinction is not "palpably arbitrary."

Furthermore, this analysis/justification would be buttressed by the defense that equal protection of the laws does not require the government to address all evils at once, or with the same vigor and stringency.

In the course of upholding a classification scheme which discriminated against retail sellers of gasoline in favor of non-retail sellers, the Court of Appeals of Oregon stated "[t]he legislature is not required to address problems all at once, and may legislate on a piecemeal basis, addressing problems in the order that it sees fit." Look v. Green, supra, citing Norwest v. Presbyterian Intercommunity Hosp., 293 Or. 543, 657, P. 2d 318 (1982). Parrish v. Lamar, 758 P. 2d 1356 (1988) quotes the United States Supreme Court's slightly different phraseology in Williamson v. Lee Optical, 348 U.S. 483, 489 (1955). The government is not required to solve all problems at once, but may "take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative [or administering] mind." Id., at 1371.

This doctrine and Williamson were also cited as controlling in the rate schedule, equal protection case of State of North Carolina v. Edmisten, 294 N.C. 598, 612, 242 S.E.2d 862, 871 (1978). See also L. Tribe, American Constitutional Law, at 1447, 1450 (2d ed. 1988).

The ills addressed, and the manner of addressing them hereinabove, indicate that this doctrine is applicable in the instant context. Consequently, the Department, when acting in furtherance of the EIA, need not require the extra protection of proof of a negative infectious disease test for other animals, in order to require it for horses, when, or because, the legislature and/or the Department believe such protection for the buying public is advisable concerning EIA and horses.

In short, if equal protection considerations are applicable, equal protection analysis indicates that there is no true, let alone forced or suspect, class; the inequality is minimal; the

privilege involved, and the burden imposed thereon, are minimal; "rational basis scrutiny", if any, is appropriate; ample conceivable justifications for the distinction exist, and it is not arbitrary. Indeed the governments purposes for controlling E.I.A. are ostensibly compelling, and neither the Legislature nor the Department is required to attack the ills of these various infectious diseases in the same manner. Consequently the requirement is most probably not violative of any rights to equal protection of the laws which horse advertisers in the Bulletin may have.

Sincerely,

James W. Rion
Assistant Attorney General

JWR/rl

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