

March 21, 2000

## COURT STRIKES DOWN FDA TOBACCO REGULATIONS

(*FDA v. Brown & Williamson*, No. 98-1152)

The U.S. Supreme Court today struck down the Food and Drug Administration's ("FDA") proposed regulations on tobacco marketing and advertising.

The decision was a major victory for the Washington Legal Foundation (WLF), which had filed a brief in the case, *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, arguing that FDA lacked legal authority for its proposed regulations. The Supreme Court agreed, finding that Congress had made clear both in legislation establishing FDA and in legislation addressing tobacco regulations that it had not authorized FDA to regulate the tobacco industry.

"FDA's proposed regulations represented one of the most extraordinary grasps for regulatory power by a federal agency in our nation's history," said WLF Chief Counsel Richard Samp after the Court's decision. "Important policy issues of this sort ought to be decided by Congress, not by some unelected bureaucrats," Samp said.

In its ruling, the Supreme Court explained that in the more than sixty years since passage of the Federal Food, Drug, and Cosmetics Act (FDCA), Congress always assumed that the Act did not allow FDA to regulate tobacco, and FDA itself had conceded repeatedly that the Act did not give it such authority. The Court also cited legislative history demonstrating that Congress relied upon FDA's representations that it did not have authority to regulate tobacco, and Congress responded by passing other comprehensive legislation to address tobacco and related health issues which provided no role for FDA.

The Court also said that if FDA really had the authority to regulate tobacco as a drug, it would have had no choice but to ban cigarettes because the FDCA requires FDA to ban dangerous drugs, and there are no means by which cigarettes could be made safe for their intended use. Yet, the Court noted, Congress's record demonstrates that it did not intend to ban cigarettes.

In its brief, WLF argued that the FDCA authorizes FDA to address tobacco products only when the manufacturer claims that the product has a beneficial effect on a

person's health, such as if a tobacco company claimed that its cigarettes can help with weight loss or stress reduction. But the tobacco industry has never made any such health-related claims, WLF said.

WLF's brief also argued if the FDCA were interpreted in the broad manner suggested by FDA, it would be unconstitutional, because it would then amount to a wholesale delegation of power from Congress to FDA to take whatever actions FDA believes would promote public health. The "nondelegation doctrine" is a longstanding constitutional principle that prohibits Congress from delegating its legislative powers to another body. WLF argued that FDA's interpretation of the FDCA must be rejected because Congress should be presumed not to have legislated in an unconstitutional manner. Because it struck down FDA's regulations on other grounds, the Court did not need to reach WLF's nondelegation argument.

While noting that Congress is the appropriate body to make decisions regarding the extent to which tobacco is to be regulated, WLF asserted that many of the legislative proposals now being put forward are unconstitutional. "The government may not impose wholesale prohibitions on truthful tobacco advertising without violating the First Amendment," Samp said. "Proposed advertising restrictions can withstand First Amendment challenge only if they are voluntarily agreed to by the tobacco and retail industries. The speech restrictions proposed by FDA could never have passed First Amendment muster," Samp said.

WLF filed its brief on behalf of itself and two U.S. Representatives from North Carolina: Cass Ballenger and Howard Coble.

The Washington Legal Foundation is a public interest law and policy center with supporters nationwide. It devotes a substantial portion of its resources to defending the rights of individuals and businesses to go about their affairs without undue interference from government regulators.

\* \* \*

For further information, contact WLF Chief Counsel Richard Samp at (202) 588-0302.