

NEW JUDICIAL PRECEDENTS EXPAND COMMERCIAL SPEECH PROTECTION

by

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Over the past year, federal and state Supreme Courts continued to develop legal precedents protective of commercial speakers and their audiences. The Supreme Court decided two commercial speech cases in 2001 — *Lorillard Tobacco Company v. Reilly*, 533 U.S. 525 (2001), and *United States v. United Foods, Inc.*, 533 U.S. 405 (2001). In both cases, free speech prevailed. The highest court in California also contributed to commercial speech law with a major decision.

Lorillard. The victory in *Lorillard* is particularly impressive because — on the facts — plaintiffs had two strikes against them. First, the Massachusetts restrictions at issue concerned a politically unpopular product — tobacco. Second, Massachusetts claimed to have adopted the restrictions for one of the most politically popular objectives — protection of children. According to Massachusetts, its speech restrictions were necessary to reduce underage use of tobacco products.

The regulations that the Court invalidated in *Lorillard* banned outdoor advertising for tobacco products in any location within a 1,000 foot radius of a public playground, elementary school, or secondary school. The banned advertising included not only billboards, but also advertising located within a retail establishment that was visible from outside that establishment. The Court also struck down restrictions on point-of-sale advertising which required indoor ads to be placed no lower than five feet from the floor of a retail establishment. The High Court did not need to reach the First Amendment issues with respect to cigarettes because it found that Massachusetts was preempted from adopting such regulations by federal law.

Justice O'Connor wrote the majority opinion joined by a shifting roster of justices in the various parts of her opinion. Only the third and fourth “prongs” of the test the Court adopted in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 444 U.S. 557 (1980) were at issue in *Lorillard*. Under the third prong, the government had the burden of demonstrating that its regulations would cause a direct and material reduction in underage use of tobacco products.

The Court found, in dicta, that Massachusetts had satisfied its third prong burden. Importantly, however, the Court discussed the third prong in a way that may be helpful to future plaintiffs. The Court pointedly did not rely on the so-called presumption that “advertising increases consumption” and its corollary that a reduction in advertising will cause a decrease in consumption. In the Supreme Court’s prior cases, that presumption was discussed in a way that, arguably, meant that the presumption had to be accepted as a matter of law.

Many commercial speech lawyers have been working to dislodge that presumption from commercial speech law. They have explained that advertising for mature products — products that have been around for a long time such as soap or cigarettes — does not operate to increase overall consumption of the advertised product. Rather, advertising primarily serves to maintain or expand market share.

In *Lorillard*, the Court took a step in the right direction. It characterized the idea that advertising increases consumption as merely a “theory,” and then accepted its application only because Massachusetts cited “numerous studies to support this theory in the case of tobacco products.” In other words, *Lorillard* downgrades the idea that advertising increases consumption from a non-rebuttable presumption, to a theory that cannot be accepted unless government submits sufficient evidence specifically addressing the relevant product.

The Court’s fourth prong discussion in *Lorillard* is even more helpful for commercial speakers. The fourth prong requires government to prove that its speech restrictions are no more extensive than necessary. *Lorillard*’s fourth prong analysis contains three significant enhancements for commercial speech protection.

First, the Court stated in the clearest terms yet that the fourth prong focuses on the process during which a government adopts speech restrictions, not after-the-fact justifications offered in the context of a lawsuit. The government must prove that it carefully calculated the scope of its restrictions before adopting them. As a practical matter, the legislative history of a speech restriction becomes the critical piece of evidence in a commercial speech case and it cannot be supplemented at trial by government witnesses.

Second, the *Lorillard* Court’s fourth prong analysis focused on the burden imposed by Massachusetts on individual retailers. The restrictions were held unduly burdensome because they deprived small retailers of any effective means to communicate with passersby. This reasoning will be helpful whenever government deprives a commercial speaker of affordable, effective means of communicating with its potential customers.

Third, *Lorillard*’s fourth prong analysis significantly reduces government’s ability to restrict commercial speech by claiming that it is protecting children. For years, the Court has been stating that speech between adults cannot be limited to that which would be suitable for children. *Lorillard* explains what that principle means in practice. For example, the Court held that Massachusetts’ advertising restrictions were too broad because they banned outdoor advertising for an adult product in 87-91% of the State’s urban areas. This holding cuts back substantially on the ability of government to restrict adult speech in the name of protecting children. It is now clear that if government is going to allow outdoor advertising within its jurisdiction, it must leave a substantial area available to advertisers of adult products and services.

Further, and perhaps most importantly, the *Lorillard* Court held that Massachusetts’ speech restrictions were overbroad because they did not distinguish among tobacco advertisements based on their relative appeal to youth. Again, this ruling substantially reduces the ability of government to restrict adult speech in the name of protecting children. After *Lorillard*, government should not enact any such restrictions unless it can define which advertisements for an adult product or service are most likely to appeal to youth.

Impact of *Lorillard*. *Lorillard* has already had an impact on several pending cases. For example, in August of last year, a federal district court in Ohio struck down Cleveland’s restrictions on publicly visible advertising of alcohol beverages. *Eller Media Company v. City of Cleveland*, 161 F. Supp. 2d 796 (N.D. Ohio 2001). Cleveland had banned outdoor advertisements, as well as advertisements inside stores that could be seen from the street, with limited exceptions for certain commercial and industrial districts. Eller Media — the outdoor advertising company — sued the City. On Eller’s motion for summary judgment, the court relied on *Lorillard* to find that the City had failed to satisfy the fourth prong of *Central Hudson*. The court ruled that the ordinance was overly broad both because of its geographic reach and because the City had not attempted to identify particular advertising practices that might appeal to youth. The district court’s decision is now on appeal to the Sixth Circuit.

Unlike Cleveland, the cities of Chicago and Los Angeles did not need a federal judge to teach them the significance of *Lorillard*. In both Chicago and Los Angeles, pending lawsuits that challenged municipal restrictions on alcohol beverage advertising were dropped when each State’s legislatures repealed their respective ordinances in light of *Lorillard*.

United Foods. The second commercial speech case the Supreme Court decided this past term was *United States v. United Foods, Inc.* In an opinion delivered by Justice Kennedy, the Court invalidated an agricultural marketing order that required mushroom producers to fund generic advertisements promoting

mushroom sales. Although this case involved commercial speech, it was not decided under *Central Hudson*. Instead, the Court relied on the *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977), and *Keller v. State Bd. of Cal.*, 496 U.S. 1 (1990), line of cases concerning compelled subsidies for speech.

The Court's decision in *United Foods* arguably is at odds with the Court's 1997 decision in *Glickman v. Wileman Brothers & Elliott, Inc.* 521 U.S. 457 (1997). In *Glickman*, the Court rejected a First Amendment challenge to the constitutionality of agricultural marketing orders that required producers of certain California tree fruit to pay assessments for generic product advertising.

The majority in *United Foods* attempted to distinguish the facts in *United Foods* from those in *Glickman*. Essentially, the Court distinguished the mushroom program from the tree fruit program on the ground that the mushroom advertising assessments were not part of a more comprehensive regulatory program that restricted market autonomy. Rather, almost all of the funds collected under the mandatory assessments at issue in *United Foods* were for one purpose — generic advertising.

This distinction led the Court to invalidate the mushroom program when it applied the *Abood* rule. *Abood* stands for the proposition that a person who has been compelled to associate with others may also be compelled to fund speech, if the speech being funded is germane to a non-speech purpose that justified the compelled association in the first place. The Court struck down the mushroom order because it was not germane to a non-speech purpose — it was not part of a larger regulatory program. Instead, the only program that the compelled contributions served was the advertising scheme at issue.

Stricter Scrutiny for Commercial Speech? *United Foods* and *Lorillard* arose in peculiar factual contexts, but they do have significance in the broader context of the commercial speech doctrine. In both *Lorillard* and *United Foods*, as in *Greater New Orleans Broadcasting, Inc. v. United States*, 527 U.S. 173 (1999), before them, the Court acknowledged its internal debate as to whether commercial speech should continue to receive less constitutional protection than other expression, but in all three cases the Court determined that it did not need to reach that issue in order to rule in favor of plaintiffs.

Only a few years ago, most mainstream First Amendment lawyers considered it a pipe dream that commercial speech restrictions ever would be reviewed under strict scrutiny. Now, the Court is openly debating whether to take that step. Regardless of whether commercial speech ever receives full constitutional protection, the current debate shows that commercial speech has come a long way since the dark days of *Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), when it appeared that the Court was slipping back toward rational basis scrutiny of commercial speech restrictions.

Commercial Speech in the States. The march toward strict scrutiny is not limited to federal law. Most state constitutions have their own free speech clauses. Since 1989, the Oregon courts have applied strict scrutiny to commercial speech restrictions under the Oregon Constitution. The next state to adopt strict scrutiny may be the biggest state of them all — California.

The California Supreme Court issued a decision late last year that should make adoption of strict scrutiny inevitable under the California Constitution. The case is *Gerawan Farming, Inc. v. Lyons*, 24 Cal. 4th 468, 101 Cal. Rptr. 2d 470 (Cal. 2000). *Gerawan* is yet another case challenging an agricultural marketing order. It is a tree fruit case — this time involving plums — and concerns a marketing order much like the one upheld by the United States Supreme Court in *Glickman*.

The California court declined to adopt the reasoning in *Glickman* when it interpreted its own state Constitution. The California Court explicitly rejected the dichotomy between commercial speech and noncommercial speech that currently exists under the First Amendment. Although the California Court did not specify the precise test that should be applied to the plum marketing order — leaving that issue for the California Court of Appeal on remand — its decision forbids the lower court from basing its selection of the test on the fact that commercial speech, rather than political speech, is at issue. The California Supreme Court's decision in *Gerawan* should be understood as requiring application of strict scrutiny to content-based restrictions on truthful, nonmisleading commercial speech.

Commercial Speech in the High Court, 2002. The next important commercial speech decision will be rendered by the United States Supreme Court in *Western States Medical Center v. Thompson*. Oral argument was presented to the Court on February 26, 2002. *Western States* involves the constitutionality of

two subsections of the Food and Drug Administration Modernization Act of 1997 (“FDAMA”). The challenged subsections restrict the advertising by pharmacies of drug compounding. Drug compounding is the dilution or alteration of prescription drugs in accordance with a physician’s instructions. According to the government, compounded drugs can be dangerous because they have not been approved by the FDA. The challenged restrictions allowed pharmacists to advertise the general fact that they provide compounding services, but prohibited them from advertising particular compounded drugs.

The Ninth Circuit held that the government had failed to justify FDAMA’s speech restrictions under the third and fourth prongs of *Central Hudson*. *Western States Medical Center v. Shalala*, 283 F.3d 1090 (9th Cir. 2001). Applying the third prong the court held that the government failed to produce evidence to show that its restrictions will reduce harmful consumption of compounded drugs. The court also held that the third prong was not met because of the many exceptions in FDAMA, including its provision allowing pharmacies to advertise their compounding services generally.

Turning to the fourth prong, the Ninth Circuit held that FDAMA’s speech restrictions could not withstand scrutiny because of the availability of alternatives for accomplishing the government’s goal that would impose a lesser burden on pharmacists’ speech rights. For example, the court found that the government’s goal could have been advanced by placing disclaimers on compounded drugs explaining that they had not been subjected to FDA approval, or by requiring compounded drugs to go through a full-blown safety review.

Some have speculated as to why the Supreme Court accepted the *Western States* case for review. The easy — and probably correct — answer is that the Court generally reviews lower court decisions that invalidate federal laws. There are at least two other possible explanations — one each from the pro-commercial speech camp and the anti-commercial speech camp. From the perspective of the pro-speech forces, this case presents an opportunity to take another step forward on the road to strict scrutiny. This is yet another case where government has attempted to impose content-based restrictions on truthful, nonmisleading speech about a lawful product. Those in the pro-speech camp look forward to the Court making broad statements about how such speech restrictions are strongly disfavored and can rarely be upheld.

The anti-speech camp — on the other hand — hope that the Court decided to review *Western States* in order to limit recent advances in commercial speech protection. As support for this view, the anti-speech folks might look to Justice Breyer’s dissent in *United Foods*, where he stated that the First Amendment should not be used to invalidate regulatory requirements concerning health or safety information.

First Amendment lawyers, on both sides of the aisle, await the decision in *Western States* to see if the Supreme Court continues its trend, reinforced in 2001, toward enhanced constitutional protection of commercial speech.