

Press Release

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FOR IMMEDIATE RELEASE

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WLF URGES COURT TO UPHOLD COMMERCIAL SPEECH RIGHTS

(People v. R.J. Reynolds Tobacco Co.)

The Washington Legal Foundation (WLF) this week urged the California Supreme Court to review (and ultimately overturn) a lower court decision that imposed significant sanctions on a company for engaging in nonmisleading commercial speech.

In a brief filed in *People of the State of California v. R.J. Reynolds Tobacco Co.*, WLF argued that the First Amendment protects a company's right to engage in such advertising and that tobacco companies have never agreed to waive such rights.

"California argues that it has the right to restrict nonmisleading advertising aimed at adults because of the likelihood that some of the advertising will be seen by children," said WLF Chief Counsel Richard Samp after filing WLF's brief. "But it is impossible to run an advertisement without it being seen by at least some children, and the Supreme Court has held repeatedly that the First Amendment does not permit states to reduce the adult population to reading only what is fit for children," Samp said.

The case arises in the aftermath of the 1998 Master Settlement Agreement (MSA) entered into between the major cigarette companies and 46 States, including California. Under the MSA, the tobacco companies agreed to reduce their advertising significantly; for example, they agreed to end virtually all outdoor advertising and not to sponsor football, basketball, baseball, hockey, and soccer events. They also agreed that none of their advertisements would "target" Youth (defined as those under 18).

California later filed suit against R.J. Reynolds Tobacco Co., claiming that Reynolds's magazine advertisements "targeted" Youth because Reynolds was placing advertising in magazines (such as *Sports Illustrated*) with Youth readership of up to 25%. (Other tobacco companies only advertise in magazines for which Youth readership is 15% or less.)

At trial, there was no evidence that Reynolds purposely intended its magazine advertisements to reach children; to the contrary, the evidence showed that Reynolds designed its advertising campaigns to reach a young adult audience. Nonetheless, the lower

courts held that Reynolds violated the bar on advertising "targeted" at Youth because it knew to a substantial certainty that the advertisements would be read by some children. The trial court entered an injunction against continued violations and imposed a \$20 million fine. The appeals court affirmed the trial court, except that it remanded the case for a new determination of the precise amount of the fine. Reynolds has asked the California Supreme Court to review the lower court decisions.

In its brief urging that review be granted, WLF argued that the First Amendment does not permit bans on nonmisleading commercial speech in the absence of evidence that the speaker intended to propose an illegal transaction (such as the sale of cigarettes to minors). WLF argued that one cannot be found to have "intended" one's advertisements to induce minors to buy cigarettes based merely on knowledge that some children will see the ads. Rather, WLF argued, a showing of intent requires that one consciously desire the consequences of one's actions. WLF argued that because the MSA bars only advertising "targeted" at Youth, Reynolds cannot be deemed to have waived its constitutional right to engage in nonmisleading commercial speech that it has no desire be read by Youth.

WLF also argued that the decision below, if allowed to stand, will throw into doubt the level of "intent" a plaintiff must demonstrate under numerous causes of action created by California law. WLF argued that most lower courts have interpreted such "intent" requirements as meaning that the plaintiff has not demonstrated the requisite intent merely by demonstrating that the plaintiff was aware of the likely consequences of his actions. WLF argued that the decision in this case, by imposing liability without any evidence that the defendant purposely intended the consequences of his actions, would massively expand potential liability under all such causes of action. WLF urged the California Supreme Court to grant review to resolve the conflict between the lower-court decisions in this case and those in other cases in which "intent" requirements have been interpreted.

WLF is a public interest law and policy center with members in all 50 States, including many in California. WLF regularly appears in court proceedings to support broad commercial speech rights.

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For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302. A copy of WLF's brief is posted on its web site, www.wlf.org.