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## COURT DECLINES TO REVISIT DECISION DENYING COMPELLED SPEECH PROTECTION

*(R.J. Reynolds Tobacco Co. v. Shewry)*

The U.S. Court of Appeals for the Ninth Circuit in San Francisco this week declined to rehear a decision that rejected First Amendment claims that individuals and corporations have a right not to be compelled to speak against their will. The 2-1 decision to deny rehearing was a setback for the Washington Legal Foundation (WLF), which filed a brief in the case, *R.J. Reynolds Tobacco Co. v. Shewry*, urging that the court rehear a case that it originally decided last October. WLF argued that the First Amendment prohibits a State from forcing a company to pay for advertisements that vilify the company.

WLF argued that the First Amendment protects the right not to speak -- including the right not to be compelled to provide financial support for others' speech -- just as strongly as it protects the right to speak. The appeals court disagreed, holding that a state may use tax revenues virtually any way it sees fit -- even if the state raises the taxes from a single source and uses the revenues for the sole purpose of vilifying the taxpayer. A silver lining for WLF: Judge Stephen Trott, in his dissenting opinion, explicitly cited WLF's arguments regarding why the First Amendment had been violated in this case.

In response to the appeals court decision, WLF Chief Counsel Richard Samp stated, "The U.S. Supreme Court recently ruled that the government has broad latitude when deciding how it intends to speak through the use of tax revenues. But there have to be some limits on how the government uses funds collected from identifiable taxpayers; the government clearly crossed that line when it uses funds collected from a handful of taxpayers for the purpose of trying to destroy those taxpayers," said WLF Chief Counsel after reviewing this week's decision. "The case cries out for further review by the Supreme Court," Samp said.

The case arose in connection with an advertising campaign being conducted by the State of California. California spends \$25 million per year in a campaign designed to prevent smoking by vilifying the tobacco industry. The advertisements have repeatedly called the tobacco industry "deceptive," a "dangerous enemy," and indifferent to the health of its customers, and have routinely accused the industry of lying to the public. The campaign is funded entirely by the tobacco industry: the funding comes from a 25 cent per-pack tax on cigarette sales, imposed on distributors of tobacco products.

Two of the distributors, R.J. Reynolds Tobacco Co. and Lorillard Tobacco Co., filed suit against the advertising campaign in federal district court in California. The district court rejected their First Amendment claim, and they appealed to the Ninth Circuit. WLF filed a brief in support of that appeal, as well as a brief in support of the plaintiffs' petition for rehearing.

WLF's briefs argued that the First Amendment protection against compelled financial support of speech to which one objects has been recognized repeatedly by the Supreme Court and applies just as strongly when the speaker is the government as it does when the speaker is a private party. WLF conceded that the compelled speech doctrine does *not* apply when the government funds speech out of its general revenues because otherwise dissenting taxpayers would have the ability to prevent the government from speaking out on issues of public importance. But WLF argued that the government may not use funds obtained from a small group of citizens to finance ideological speech to which those citizens object. The Ninth Circuit disagreed, stating that a state's power to use tax revenues as it sees fit is not subject to limitations simply because the revenues come from an extremely small group of taxpayers.

"More than two centuries ago, Thomas Jefferson said, 'To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical,'" WLF's Samp said after reviewing the Ninth Circuit's decision. "Jefferson's words are as true today as they were when spoken at the time of the First Amendment's adoption," Samp said. Samp noted that the Supreme Court has cited Jefferson's quote repeatedly in cases upholding First Amendment protections against compelled speech.

WLF said that the First Amendment would not interfere with California's vilification campaign if it were paid for out of general revenues. But because the campaign is paid for with funds that are easily identifiable as coming from the tobacco industry, the campaign is unconstitutional, WLF argued.

WLF is a public interest law and policy center with supporters in all 50 States, including many in California. WLF devotes a substantial portion of its resources to promoting free speech rights, both of individuals and of the business community.

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