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COURT DECLINES TO RULE ON CHALLENGE TO CONTENT-BASED SPEECH RESTRICTIONS

(Federation of Advertising Industry Representatives v. Chicago)

The U.S. Supreme Court this week declined to reinstate a challenge to speech restrictions imposed by Chicago; the district court had dismissed the case as moot simply because Chicago lifted the restrictions on alcoholic beverage advertising after the challenge was filed.

The Supreme Court's refusal to review the lower court decision was a setback for the Washington Legal Foundation (WLF), which had filed a certiorari petition in July seeking review on behalf of its client, the Federation of Advertising Industry Representatives ("FAIR"), a group of Chicago advertisers. As is its usual practice, the Supreme Court provided no reasons for its decision not to hear the case.

Although the Chicago City Council repealed its alcohol advertising restrictions, it is considering the adoption of new restrictions. WLF has pledged to renew its challenge if new restrictions are adopted.

In its petition for review, WLF argued that to dismiss a suit as "moot" simply because a city voluntarily lifts challenged speech restrictions leaves a government free to re-impose the restrictions at any time. WLF argued that it is important for courts to enter injunctions against unconstitutional speech restrictions in order to ensure that such actions are not repeated.

The case involved an ordinance adopted by Chicago in 1997 that prohibited outdoor advertising of alcohol and tobacco products without imposing similar restrictions on advertising for other products. FAIR immediately filed suit against the Ordinance, alleging that it was an unconstitutional content-based speech restriction. Chicago denied that it had violated the First Amendment, and it vigorously defended the suit for four years. During that period, FAIR pared back its lawsuit so that it focused solely on the alcohol advertising restrictions.

In June 2001, the Supreme Court held in *Lorillard Tobacco Co. v. Reilly* that a similar Massachusetts speech restriction violated the First Amendment. FAIR filed a motion in the trial court, urging it to grant summary judgment to FAIR in light of the *Lorillard* decision. Rather than opposing the motion, Chicago filed a motion to dismiss the case as moot, on the ground that it

would soon be repealing the ordinance. Four months after FAIR filed its summary judgment motion -- on October 31, 2001 -- the Chicago City Council repealed the Ordinance, and the next week the district court dismissed the case as moot.

FAIR appealed from the dismissal, but the U.S. Court of Appeals for the Seventh Circuit affirmed. It held that although the general rule is that a defendant's voluntary cessation of challenged conduct does not render moot a claim for injunctive relief, the general rule is inapplicable when the challenged conduct takes the form of a statute or ordinance that is repealed by a governmental defendant.

In its certiorari petition, WLF argued that the appeals court's mootness ruling is contrary to established Supreme Court precedent. It argued that if a government voluntarily withdraws a policy after it has been challenged in court, the challenge should not be dismissed as moot unless the government can meet a "stringent" burden of establishing that its allegedly wrongful behavior could not reasonably be expected to recur.

"By entering an injunction against Chicago's blatantly unconstitutional content-based advertising restriction, the courts could have ensured that the City would adhere to First Amendment norms in the future," said WLF Chief Counsel Richard Samp after reviewing the Supreme Court's decision. "There simply cannot be any other adequate assurances that a city that has been battling for years for the right to trample on First Amendment rights will not decide once again to censor truthful speech," Samp said.

WLF also argued that FAIR is entitled to an award of attorney fees for successfully ridding Chicago of an unconstitutional ordinance, but that federal law will not permit a fee award unless a judgment is entered in FAIR's favor.

WLF is a nonprofit public interest law and policy center with supporters in all 50 states, including many in Illinois. WLF devotes a significant portion of its resources to defending the rights of individuals and businesses that have become the targets of unwarranted government regulation. WLF also filed briefs in support of FAIR when the case was in the lower courts.

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