

June 1, 2001

COURT URGED TO STRIKE DOWN COMPELLED ADVERTISING PROGRAM

(*Gerawan Farming, Inc. v. Lyons*)

Today the Washington Legal Foundation (WLF) filed a brief with the California Court of Appeal, opposing a California law that compels farmers to pay for advertisements generically promoting California peaches and nectarines.

In its brief filed with the Court of Appeal, WLF argued that the Free Speech Clause of the California Constitution should be interpreted so as to give the same high protection to commercial speech as it does to every other form of speech. The California Supreme Court left no doubt in an earlier decision in this case that the California Constitution fully protects commercial speech. For that reason, WLF urged, the Court of Appeal should apply the same high standard of constitutional protection—strict scrutiny—to any alleged infringement of California's Free Speech Clause, regardless of whether the speech is commercial or not. WLF added that even if the court were not to apply strict scrutiny in this case, it should nonetheless craft its opinion narrowly, so as not to call into question the constitutional protection generally available to businesses challenging government restrictions on truthful, nonmisleading advertising.

"The California Court of Appeal has a golden opportunity to establish a single standard of state constitutional law that would fully protect all forms of speech, whether commercial or otherwise," said WLF Senior Counsel for Litigation Affairs R. Shawn Gunnarson. "Common sense dictates that the government should not be given a longer leash when regulating advertising than it is given when regulating any other form of speech."

This case is before the Court of Appeal on remand from the California Supreme Court, which had ruled in November 2000 that the California Plum Marketing Program, which requires plum growers to subsidize generic advertising for California plums, "implicates" the freedom of speech protected under Article I of the California Constitution. To arrive at this conclusion, the court reasoned that the state constitution offers greater protection for free speech than the federal constitution. It also held that the freedom of

speech protected under the state constitution "would *not* allow compelling one who engages in commercial speech to fund speech in the form of advertising that he would otherwise not, when his message is about a lawful product or service and is not otherwise false or misleading." Rather than squarely deciding whether the generic advertising program actually violated the state constitution, however, the California Supreme Court remanded the case to the Court of Appeal to answer that question in the first instance.

This case arose when Gerawan Farming, Inc., a family-owned business that grows plums, challenged a mandatory program requiring all plum growers and handlers to pay for advertisements generically promoting the sale of California plums. Gerawan objected to paying for such advertisements because it had invested heavily in developing a distinctive, high-quality plum, while the generic advertisements promoted the message that *all* California plums are high-quality. Gerawan thus objected to paying for advertisements that would benefit its competitors.

The Washington Legal Foundation is a public interest law and policy center with supporters in all 50 states. It devotes a significant portion of its resources to defending and promoting the principles of free enterprise and business civil liberties. To that end, WLF has long been active in promoting commercial free speech by filing briefs in such landmark U.S. Supreme Court cases as *Glickman v. Wileman Bros. & Elliott, Inc.* and *Pacific Gas & Electric Co. v. Public Utilities Commission of California*. WLF filed its brief with the *pro bono* assistance of Steven G. Brody and Jeanette M. Viggiano of King & Spalding, with John R. Walton acting as local counsel.

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