

September 14, 1999

COURT URGED TO STRIKE DOWN FDA TOBACCO REGULATIONS

(Brown & Williamson v. FDA, No. 98-1152)

The Washington Legal Foundation ("WLF") this week urged the U.S. Supreme Court to strike down the Food and Drug Administration's ("FDA") proposed regulations on tobacco and tobacco product advertising.

In a brief filed in *Brown & Williamson Tobacco Corp. v. Food and Drug Administration*, WLF argued that FDA lacked legal authority for its proposed regulations. WLF said that Congress had made clear both in legislation establishing FDA and in legislation addressing tobacco regulations that it had not authorized FDA to regulate the tobacco industry.

"FDA's proposed regulations represent one of the most extraordinary grasps for regulatory power by a federal agency in our nation's history," said WLF Chief Counsel Richard Samp after filing WLF's brief. "Important policy issues of this sort ought to be decided by Congress, not by some unelected bureaucrats," Samp said.

WLF's brief explained that in the more than 60 years since passage of the Federal Food, Drug, and Cosmetics Act, Congress has always assumed that the Act did not allow FDA to regulate tobacco, and FDA itself had conceded repeatedly that the Act did not give it such authority. WLF also cited legislative history demonstrating that Congress relied upon FDA's representations that it did not have authority to regulate tobacco, and Congress responded by passing other comprehensive legislation to address tobacco and related health issues which provided no role for FDA.

WLF argued that the FDCA authorizes FDA to address tobacco products only when the manufacturer claims that the product has a beneficial effect on a person's health, such as if a tobacco company claimed that its cigarettes can help with weight loss or stress reduction. But the tobacco industry has never made any such health-related claims, WLF said.

WLF's brief also argued if the FDCA were interpreted in the broad manner suggested by FDA, it would be unconstitutional, because it would then amount to a

wholesale delegation of power from Congress to FDA to take whatever actions FDA believes would promote public health. The "nondelegation doctrine" is a longstanding constitutional principle that prohibits Congress from delegating its legislative powers to another body. WLF argued that FDA's interpretation of the FDCA must be rejected because Congress should be presumed not have have legislated in an unconstitutional manner.

WLF filed its brief on behalf of itself and two U.S. Representatives from North Carolina: Cass Ballenger and Howard Coble.

The Washington Legal Foundation is a public interest law and policy center with supporters nationwide. It devotes a substantial portion of its resources to defending the rights of individuals and businesses to go about their affairs without undue interference from government regulators.

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