Litigation Update

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April 22, 2013

Court Declines To Review New Commercial Speech Restrictions

(American Snuff Company v. United States)

United States Supreme Court

In a one-sentence order issued today, the U.S. Supreme Court declined without explanation to review the 2009 federal law that imposes a near-total ban on all tobacco advertising. The order leaves in place a decision by the U.S. Court of Appeals for the Sixth Circuit, which largely rejected a facial challenge to the law.

The decision in *American Snuff Co. v. United States* was a setback for the Washington Legal Foundation (WLF), which filed a brief urging the Court to hear the case. WLF argued that the ban violates the First Amendment rights of tobacco companies to speak truthfully and the First Amendment rights of consumers to hear such speech. WLF argued that while the federal government has a strong interest in reducing use of tobacco products, the First Amendment does not permit the government to use speech restrictions as its primary means of achieving that goal.

The Supreme Court almost surely will address the First Amendment issue in the near future. The Sixth Circuit decision conflicts with a decision last year by the U.S. Court of Appeals for the D.C. Circuit, which held that regulations issued by the Food and Drug Administration to implement the law were unconstitutional because they violated the free speech rights of tobacco companies. FDA declined to seek review in that case and instead promised to start from scratch to come up with a new set of regulations.

"Rather than imposing direct restrictions on sale and use of tobacco products, Congress has chosen to focus its restrictions on speech-related activities," said WLF Chief Counsel Richard Samp said in response to the Supreme Court's action. "The Supreme Court has stated unequivocally in prior cases that such an approach to sales regulation is constitutionally impermissible; the Constitution requires government to turn to restrictions on truthful speech as a last resort, not – as here – as a first resort," Samp said.

Congress adopted the Family Smoking Prevention and Tobacco Control Act in 2009. The Act purports to cut off virtually all means by which tobacco companies can communicate with potential customers and the public at large. The Act: (1) requires all labeling and virtually all advertising to be presented in a "tombstone" format (*i.e.*, a black-and-white, text-only format, bereft of all color and imagery); (2) imposes an effectively total ban on outdoor advertising except in rural areas; (3) prohibits brand-name sponsorship of athletic, musical, artistic, or other social or cultural events; and (4) prohibits use of logos on non-tobacco products. Moreover, the top half of the label for all tobacco products must be turned over to the federal government for the display of health warnings of the

government's choice. When combined with the pre-existing ban on television and radio advertising, the Act essentially silences tobacco companies.

In a March 2012 decision, the Sixth Circuit in Cincinnati struck down two provisions of the law on First Amendment grounds (including the ban on color and graphics in labels and advertising) but upheld the law's most significant provisions. Today's U.S. Supreme Court order leaves the Sixth Circuit's decision in place.

In its brief urging the Supreme Court to grant review, WLF argued that the Act's speech restrictions do not comply with the Supreme Court's requirement that restrictions on commercial speech be "narrowly tailored." There are any number of non-speech marketing restrictions and law enforcement initiatives that Congress could have adopted that would have been just as effective in preventing underage tobacco use, WLF asserted.

WLF further argued that Congress does not have a legitimate interest in controlling truthful speech based on a fear that adults might make bad decisions in response to the information conveyed to them. For example, the law prohibits claims that a tobacco product poses fewer health risks than other tobacco products, even if the statement is fully truthful. (There is a scientific consensus that use of smokeless tobacco, although dangerous to health, poses far fewer health risks than smoking cigarettes. But Congress has prohibited manufacturers from reporting on that consensus.) If the government has reason to believe that consumers may be misled by truthful information, it has the right to insist that the speaker add disclaimers designed to minimize that possibility, WLF said. Alternatively, the government is free to discourage tobacco use by increasing its own warnings regarding the health effects of tobacco use or by imposing restrictions on the sale of tobacco products. But it may not completely prohibit truthful commercial speech about a legal product, WLF asserted. WLF also urged the Court to review the Sixth Circuit's decision upholding a provision that requires manufacturers to display gruesome images on their packaging.

WLF is a public interest law and policy center with supporters in all 50 states. WLF devotes a significant portion of its resources to defending free-enterprise, individual rights, and a limited and accountable government. Aaron J. Silletto, an attorney with the Kentucky law firm of Goldberg Simpson, LLC, provided *pro bono* assistance in connection with the filing of WLF's brief.

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.