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COURT URGED TO INVALIDATE FDA'S EFFORT TO COMPEL COMMERCIAL SPEECH

(R.J. Reynolds Tobacco Co. v. FDA)
U.S. District Court for the District of Columbia

The Washington Legal Foundation (WLF) this week urged the U.S. District Court for the District of Columbia to invalidate the federal government's efforts to force tobacco manufacturers to surrender 50% of the front and back panels of each cigarette package and the top 20% of all printed advertising for the purpose of displaying nine new graphic warnings containing anti-smoking advocacy.

In a brief filed in support of summary judgment in *R.J. Reynolds Tobacco Co. v. FDA*, WLF argued that the First Amendment protects not only the right to speak but also the right not to speak, and that forcing a business to convey and associate with speech with which it disagrees violates the free speech protections of the U.S. Constitution.

"Restrictions on compelled speech should not be relaxed simply because, as here, the speaker being compelled is a commercial entity," said WLF Senior Litigation Counsel Cory Andrews after filing WLF's brief. "If the government wishes to convey a message, it should do so by using its own property and resources, not by commandeering the private property of others who disagree with that message," Andrews said.

The case involves a challenge to the Food and Drug Administration's (FDA) Final Rule implementing the Family Smoking Prevention and Tobacco Control Act of 2009. The FDA's new regulatory regime would require all tobacco manufactures to include graphic, anti-smoking warnings on all cigarette packages and advertising. Five tobacco manufacturers filed suit challenging the warnings, which urge consumers not to use tobacco products. Each graphic label includes warnings about the various adverse effects of tobacco use and the directive "QUIT-NOW," as well as one of nine shocking, color images depicting the potential effects of tobacco use: e.g., decaying teeth and gums, diseased lungs, and even a dead body on an autopsy table.

In its brief urging the Court to grant the Plaintiffs' motion for summary judgment, WLF argued that the First Amendment fully protects the right to refuse to speak, and that forcing someone to convey the government's message using their own private property is

constitutionally suspect. WLF also urged the Court to reject the Government's claim that a relaxed First Amendment standard should apply to the imposed warnings. In its brief, WLF argued that the new graphic warnings the FDA seeks to impose in this case are not ordinary disclosure requirements of the kind previously upheld by the Supreme Court. Rather, they are the sort of controversial, nonfactual disclosures of which the Supreme Court very clearly does not approve. Because such ideological messages have nothing to do with protecting consumers from being misled, WLF argued, the FDA's new Rule cannot survive First Amendment scrutiny.

WLF also challenged the empirical effectiveness of the FDA's new warnings regime, by pointing out that no credible evidence exists that the proposed graphic warnings would accomplish the Government's stated goal of reducing smoking rates among adults and children. Indeed, FDA's own regulatory impact analysis concluded that the estimated impact the new warnings will have on smoking rates is "not statistically distinguishable from zero." In the absence of any evidence that the new warnings will "have a significant, positive impact on public health," WLF argued that there can be no justification for drastically commandeering the packaging and advertising of a perfectly legal product.

Last week, the court issued a preliminary injunction that blocked implementation of the FDA's controversial new rule. The district court agreed with WLF that while the government is permitted to mandate warning labels on packaging to ensure that consumers are not misled, it may not require manufacturers to include government speech (including graphics) whose sole purpose is to advocate for the government's own policy views. Having granted preliminary relief, the court must now reach the merits of the case by resolving the parties' competing summary judgment motions.

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

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For further information, contact WLF Senior Litigation Counsel Cory Andrews, (202) 588-0302. A copy of WLF's brief is posted on its web site, www.wlf.org.