

June 9, 2004

COURT QUESTIONS CONSTITUTIONALITY OF COMPELLED ADVERTISING PROGRAM

(Gerawan Farming, Inc. v. Kawamura)

The California Supreme Court this week issued a decision that sets tough free-speech standards for review of a California law that compels farmers to pay for advertisements generically promoting California plums. The court did not strike down the law, however; rather, it remanded the case for a trial during which the California Supreme Court's new standards would be applied.

The decision was a partial victory for the Washington Legal Foundation (WLF), which filed a brief in the case, *Gerawan Farming, Inc. v. Kawamura*, arguing that forcing individuals to fund advertising with which they disagree violates their free-speech rights. WLF had asked the California court to strike down the law without ordering a trial.

The court's decision was based on the Free Speech Clause of the California Constitution, not on the First Amendment to the U.S. Constitution. In finding the Free Speech Clause applicable to the plum promotion program, the court agreed with WLF's argument that challenges to compelled commercial speech should be judged under the same strict standards applicable in challenges to *restrictions* on commercial speech.

The ruling makes clear that the California Constitution protects speech somewhat more broadly than does the U.S. Constitution. In a series of recent decisions involving compelled funding of generic advertising campaigns for agricultural products, the U.S. Supreme Court has held that compelled funding programs violate the First Amendment in some instances but not others. The U.S. Supreme Court will revisit the issue yet again next year, in connection with a challenge to compelled funding of a beef promotion campaign.

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 of equally high quality. Gerawan thus objected to paying for advertisements that would benefit its competitors.

This is the second time the case has reached the California Supreme Court. The case was before the court on appeal from a 2002 California Court of Appeal decision that struck down the plum promotion program. While agreeing with much of the appeals court's legal analysis, the California Supreme Court vacated the appeals court's decision -- explaining that final resolution of the case must await full development of the factual record at trial. WLF has pledged to continue its support of the plum producers' free-speech rights in the upcoming court proceedings.

The Washington Legal Foundation is a public interest law and policy center with supporters in all 50 states, including many in California. It devotes a significant portion of its resources to defending and promoting the principles of free enterprise and business civil liberties. WLF filed its brief with the *pro bono* assistance of Steven G. Brody of the New York office of King & Spalding, with Susan Liebeler acting as local counsel.

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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.