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COURT DECLINES TO ALLOW CHALLENGE TO CONTENT-BASED SPEECH RESTRICTIONS

(Federation of Advertising Industry Representatives v. Chicago)

The U.S. Court of Appeals for the Seventh Circuit this week declined to reinstate a challenge to speech restrictions imposed by Chicago but then lifted after the challenge was filed. The decision was a setback for the Washington Legal Foundation (WLF), which argued that repeal of a challenged law while a lawsuit is pending is not valid grounds to dismiss the challenge.

In a brief filed in *Federation of Advertising Industry Representatives, Inc. v. City of Chicago*, WLF had argued that to dismiss a suit as "moot" in such circumstances leaves a government free to re-impose the speech restrictions at any time. WLF argued that it is important for courts to enter injunctions against unconstitutional speech restrictions in order to ensure that such actions are not repeated.

The plaintiff in the suit is considering filing a petition for review in the U.S. Supreme Court. WLF has pledged its support to the appeal effort.

The case involves an ordinance adopted by Chicago in 1997 that prohibited outdoor advertising of alcohol and tobacco products without imposing similar restrictions on advertising for other products. The Federation of Advertising Industry Representatives, Inc. ("FAIR"), a group of Chicago advertisers, immediately filed suit against the Ordinance, alleging that it was an unconstitutional content-based speech restriction. Chicago denied that it had violated the First Amendment, and it vigorously defended the suit for four years.

However, in June 2001, the U.S. Supreme Court held in *Lorillard Tobacco Co. v. Reilly* that a similar Massachusetts speech restriction violated the First Amendment. FAIR then filed a motion for summary judgment in the Chicago case, based on the *Lorillard* decision. Rather than opposing the motion, Chicago filed a motion to dismiss the case as moot, on the ground that it would soon be repealing the ordinance. Two months later -- on October 31, 2001 -- the Chicago City Council repealed the Ordinance, and the next week the district court dismissed the case as moot.

WLF filed its brief in support of FAIR's appeal from the dismissal. WLF argued that the

district court's mootness ruling is contrary to established Supreme Court precedent. It argued that if a government voluntarily withdraws a policy after it has been challenged in court, the challenge should not be dismissed as moot unless the government can meet a "stringent" burden of establishing that its allegedly wrongful behavior could not reasonably be expected to recur.

WLF argued that Chicago had failed to meet that burden in this case. WLF noted, for example, that following the dismissal of this lawsuit, legislation has been introduced into the Chicago City Council to impose a new set of restrictions on outdoor advertising.

The appeals court rejected WLF's proposed test for "mootness" and established a directly contrary rule. The appeals court held that repeal of a challenged law presumptively renders the challenge subject to dismissal on mootness grounds, unless the plaintiff can establish that the government is acting in bad faith and intends to re-adopt the law as soon as the lawsuit is dismissed.

"By entering an injunction against Chicago's blatantly unconstitutional content-based advertising restriction, the appeals court could have ensured that the City adheres to First Amendment norms in the future," said WLF Chief Counsel Richard Samp after reviewing the court's decision. "There simply cannot be any other adequate assurances that a city that has been battling for years for the right to trample on First Amendment rights will not decide once again to censor truthful speech," Samp said.

WLF also argued that FAIR is entitled to an award of attorney fees for successfully ridding Chicago of an unconstitutional ordinance, but federal law will not permit a fee award unless a judgment is entered in FAIR's favor. No such judgment can be entered, of course, after a suit has been dismissed as moot.

WLF is a nonprofit public interest law and policy center with supporters in all 50 states, including many in Illinois. WLF devotes a significant portion of its resources to defending the rights of individuals and businesses that have become the targets of unwarranted government regulation.

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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 website, www.wlf.org.