

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

R.J. REYNOLDS TOBACCO COMPANY;
LORILLARD TOBACCO COMPANY;
COMMONWEALTH BRANDS, INC.;
LIGGETT GROUP LLC; and SANTA FE
NATURAL TOBACCO COMPANY, INC.,

CIVIL ACTION NO: 11-1482(RCL)

Plaintiffs,

v.

UNITED STATES FOOD AND DRUG
ADMINISTRATION; MARGARET
HAMBURG, Commissioner of the United
States Food and Drug Administration; and
KATHLEEN SEBELIUS, Secretary of the
United States Department of Health and
Human Services,

Defendants.

**MOTION OF WASHINGTON LEGAL FOUNDATION
FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT
OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

The Washington Legal Foundation (WLF), through undersigned counsel, hereby moves for leave to file the attached brief as *amicus curiae* in support of Plaintiffs' motion for preliminary injunction (Dkt. 11). In support of its motion, WLF states as follows:

1. Founded in 1977, WLF is a public interest law and policy center with supporters in all 50 states. WLF regularly participates as *amicus curiae* in litigation to promote economic liberty, free enterprise, and a limited and accountable government. In particular, WLF has devoted substantial resources over the years to defending free speech rights, both of individuals and of the business community. To that end, WLF has regularly appeared before this and other federal and state courts in cases raising important First Amendment issues, especially those involving

compelled speech. *See, e.g., Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005); *United States v. United Foods, Inc.*, 533 U.S. 405 (2001); *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997).

2. WLF strongly objects to government efforts to compel individuals or corporations to speak against their will. WLF believes that Plaintiffs have a high probability of success on the merits and supports each of the arguments made in Plaintiffs' memorandum in support of the motion for preliminary injunction (Dkt. 11). WLF desires to file separately, however, to address the Government's contention that *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), supplies the appropriate level of First Amendment scrutiny in this case. Simply put, the new graphic warnings the FDA seeks to impose in this case are not ordinary disclosure requirements of the kind upheld in *Zauderer*. Rather, they are the sort of controversial, nonfactual disclosures of which *Zauderer* very clearly did not approve. Such ideological messages have *nothing* to do with protecting consumers from being misled—a bedrock requirement of *Zauderer*. If anything, *Zauderer* actually highlights the constitutional defect in the FDA's position.

3. WLF also doubts the empirical effectiveness of the FDA's new warnings regime. 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," there can be no justification for drastically commandeering the packaging and advertising of a perfectly legal product.

4. WLF has no financial interest in the outcome of this case. Accordingly, WLF can provide the Court with a unique perspective that is not shared by any of the parties. In particular, WLF can point out the dangers of government efforts to compel individuals or corporations to speak against their will, especially when no credible empirical evidence exists that the proposed speech would accomplish the Government's stated goals.

5. WLF contacted counsel for all parties to ascertain whether they would consent to the filing of WLF's brief. Counsel for Plaintiffs provided their consent for the filing of WLF's brief. Counsel for Defendants stated that Defendants had no objection to the filing of WLF's brief.

WHEREFORE, WLF respectfully requests that this motion for leave to file its proposed *amicus curiae* brief be granted.

Respectfully submitted,

/s/ Richard A. Samp

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LCvR 7.1 DISCLOSURE

Case No. 10-1529, *R.J. Reynolds Tobacco Co. v. FDA*

This is the Certificate required by LCvR 7.1 of the Local Rules of the United States District Court for the District of Columbia. The moving party—the Washington Legal Foundation—is a corporation organized under Section 501(c)(3) of the Internal Revenue Code .

I, the undersigned counsel of record for the Washington Legal Foundation, certify that WLF is a non-profit corporation that issues no publicly held stock, and has no parent company, subsidiary, or affiliate that has any outstanding securities in the hands of the public.

These representations are made in order that judges of this Court may determine the need for recusal.

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