Out of Home Advertising Association of America

Content Control

Message Points

- Outdoor Advertising is recognized as a medium of commercial and noncommercial speech
- Government attempts to restrict or prohibit the promotion of legal products can raise constitutional issues; the First Amendment protects speech
- The outdoor advertising industry practices self-restraint

Background

The courts have recognized outdoor advertising as an important medium of commercial and noncommercial speech; free speech is protected by the First Amendment to the United States Constitution.

In 2001, the United States Supreme Court issued a seminal ruling that upholds the right to disseminate information about legal products. In Lorillard Tobacco Company v. Reilly, the highest court in the land struck down government prohibitions on commercial speech.

The Lorillard case had the effect of resolving disputes about bans or attempted restrictions on alcohol advertising in outdoor formats.

Likewise, the Supreme Court upheld free speech in subsequent rulings; Thompson v. Western States Medical Center (2002) said that speech restrictions were unconstitutional. In 2006, a federal appeals court struck down a 2004 Missouri law that restricted outdoor advertising of sexually oriented businesses.

Tobacco

In the past, much of the debate about the content of outdoor advertising focused on promotion of cigarettes. However, major cigarette makers stopped using billboards to advertise their products as part of a settlement agreement with states that took effect in 1999:
http://academic.udayton.edu/health/syllabi/tobacco/summary.htm

Self-restraint

The outdoor advertising industry supports the First Amendment right of businesses to promote legal products and services.

The industry practices self-restraint. The OAAA *Code of Industry Principles* respects the right to reject advertisements that are misleading, violate community standards, or feature obscenity. Further, the industry recommends that advertisements for products that are illegal to be sold to minors should not be located in areas where children congregate (within 500 feet of schools, churches, and playgrounds). A separate OAAA issue brief is available on *Advertising to Children*.

The industry's Code can be downloaded from:
http://oaaa.org/AboutOAAA/WhoWeAre/OAAACodeofIndustryPrinciples.aspx

References

Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981)

Brody, Steven G., "New Judicial Precedents Expand Commercial Speech Protection," Legal Backgrounder, Washington Legal Foundation, April 5, 2002

Thompson v. Western States Medical Center, 535 U.S.357 (2002) "Case Summary," First Amendment Center

Summary of the Attorneys General Master Tobacco Settlement Agreement, Joy Johnson Wilson, Director of AFI Health Committee, National Conference of State Legislators (March 1999)

May, William; executive director and general counsel, Missouri Outdoor Advertising Association, "Federal Appeals Court Strikes down Billboard Content Ban," *Outdoor Outlook* newsletter, September 18, 2006

OAAA *Code of Industry Principles*

OAAA Legal Reports available upon request

Syllabus

SUPREME COURT OF THE UNITED STATES

---

453 U.S. 490

Metromedia, Inc. v. City of San Diego

APPEAL FROM THE SUPREME COURT OF CALIFORNIA

No. 80-195 Argued: February 25, 1981 --- Decided: July 2, 1981

Appellee city of San Diego enacted an ordinance which imposes substantial prohibitions on the erection of outdoor advertising displays within the city. The stated purpose of the ordinance is "to eliminate hazards to pedestrians and motorists brought about by distracting sign displays" and "to preserve and improve the appearance of the City." The ordinance permits on-site commercial advertising (a sign advertising goods or services available on the property where the sign is located), but forbids other commercial advertising and noncommercial advertising using fixed-structure signs, unless permitted by 1 of the ordinance's 12 specified exceptions, such as temporary political campaign signs. Appellants, companies that were engaged in the outdoor advertising business in the city when the ordinance was passed, brought suit in state court to enjoin enforcement of the ordinance. The trial court held that the ordinance was an unconstitutional exercise of the city's police power and an abridgment of appellants' First Amendment rights. The California Court of Appeal affirmed on the first ground alone, but the California Supreme Court reversed, holding, *inter alia,* that the ordinance was not facially invalid under the First Amendment.

Held: The judgment is reversed, and the case is remanded. Pp. 498-521; 527-540.

26 Cal.3d 848, 610 P.2d 407, reversed and remanded.

JUSTICE WHITE, joined by JUSTICE STEWART, JUSTICE MARSHALL, and JUSTICE POWELL, concluded that the ordinance is unconstitutional on its face. Pp. 498-521.

(a) As with other media of communication, the government has legitimate interests in controlling the noncommunicative aspects of billboards, but the First and Fourteenth Amendments foreclose similar interests in controlling the communicative aspects of billboards. Because regulation of the noncommunicative aspects of a medium often impinges to some degree on the communicative aspects, the courts must reconcile the government's regulatory interests with the individual's right to expression. Pp. 500-503.

(b) Insofar as it regulates commercial speech, the ordinance meets the constitutional requirements of *Central Hudson Gas & Electric Corp. v.* [p491] *Public Service Comm'n,* 447 U.S. 557. Improving traffic safety and the appearance of the city are substantial governmental goals. The ordinance directly serves these goals, and is no broader than necessary to accomplish such ends. Pp. 503-512.

(c) However, the city's general ban on signs carrying noncommercial advertising is invalid under the First and Fourteenth Amendments. The fact that the city may value commercial messages relating to on-site goods and services more than it values commercial communications relating to off-site goods and services does not justify prohibiting an occupant from displaying his own ideas or those of others. Furthermore, because, under the ordinance's specified exceptions, some noncommercial messages may be conveyed on billboards throughout the commercial and industrial zones, the city must allow billboards conveying other noncommercial messages throughout those zones. The ordinance cannot be characterized as a reasonable "time, place, and manner" restriction. Pp. 512-517.

(d) Government restrictions on protected speech are not permissible merely because the government does not favor one side over another on a subject of public controversy. Nor can a prohibition of all messages carried by a particular mode of communication be upheld merely because the prohibition is rationally related to a nonspeech interest. Courts must protect First Amendment interests against legislative intrusion, rather than defer to merely rational legislative judgments in this area. Since the city has concluded that its official interests are not as strong as private interests in on-site commercial advertising, it may not claim that those same official interests outweigh private interests in noncommercial communications. Pp. 517-521.

JUSTICE BRENNAN, joined by JUSTICE BLACKMUN, concluded that, in practical effect, the city's ordinance constitutes a total ban on the use of billboards to communicate to the public messages of general applicability, whether commercial or noncommercial, and that, under the appropriate First Amendment analysis, a city may totally ban billboards only if it can show that a sufficiently substantial governmental interest is directly furthered thereby, and that any more narrowly drawn restriction would promote less well the achievement of that goal. Under this test, San Diego's ordinance is invalid, since (1) the city failed to produce evidence demonstrating that billboards actually impair traffic safety in San Diego, (2) the ordinance is not narrowly drawn to accomplish the traffic safety goal, and (3) the city failed to show that its asserted interest in esthetics was sufficiently substantial in its commercial and industrial areas. Nor would an ordinance totally banning commercial billboards but allowing noncommercial billboards be constitutional, since [p492] it would give city officials the discretion to determine in the first instance whether a proposed message is "commercial" or "noncommercial." Pp. 527-540.

WHITE, J., announced the judgment of the Court and delivered an opinion, in which STEWART, MARSHALL, and POWELL, JJ., joined. BRENNAN, J., filed an opinion concurring in the judgment, in which BLACKMUN, J., joined, *post,* p. 521. STEVENS, J., while concurring in Parts I-IV of the plurality opinion, filed an opinion dissenting from Parts V-VII of the plurality opinion and from the judgment, *post,* p. 540. BURGER, C.J., *post,* p. 555, and REHNQUIST, J., *post,* p. 569, filed dissenting opinions. [p493]

NEW JUDICIAL PRECEDENTS EXPAND COMMERCIAL SPEECH PROTECTION

BY STEVEN G. BRODY

Last year saw the continued development of good law for commercial speakers and their audiences. The Supreme Court decided two commercial speech cases in 2001 – *Lorillard Tobacco Company v. Reilly*[1] and *United States v. United Foods, Inc*.[2] In both cases, free speech prevailed.

The victory in *Lorillard* is particularly impressive because – on the facts – plaintiffs had two strikes against them. First, the Massachusetts restrictions at issue concerned the most politically unpopular product in America – tobacco. Second, Massachusetts claimed to have adopted the restrictions for one of the most politically popular objectives – protection of children. According to Massachusetts, its speech restrictions were necessary to reduce underage use of tobacco products.

The regulations that were invalidated in *Lorillard* banned outdoor advertising for tobacco products in any location within a 1,000 foot radius of a public playground, elementary school or secondary school. The banned advertising included not only billboards, but also advertising located within a retail establishment that was visible from outside that establishment. The Court also struck down restrictions on point-of-sale advertising that required indoor advertising to be placed no lower than five feet from the floor of a retail establishment.

The Court's First Amendment analysis focused on cigars and smokeless tobacco, not cigarettes. The Court did not need to reach the First Amendment issues with respect to cigarettes because it found that Massachusetts was preempted from adopting such regulations by federal law.

Justice O'Connor wrote the majority opinion and she was joined by a shifting roster of justices in the various parts of her opinion. Only the third and fourth prongs of the *Central Hudson* test were at issue in *Lorillard*. Under the third prong, the government had the burden to demonstrate that its regulations would cause a direct and material reduction in underage use of tobacco products.

The Court found, in dicta, that Massachusetts had satisfied its third prong burden. Importantly, however, the Court discussed the third prong in a way that may be helpful to plaintiffs in future cases.

The Court pointedly did not rely on the so-called presumption that "advertising increases consumption" and its corollary that a reduction in advertising will cause a decrease in consumption. In the Supreme Court's prior cases, that presumption was

[1] 533 U.S. 525 (2001).
[2] 533 U.S. 405 (2001).

discussed in a way that, arguably, meant that the presumption had to be accepted as a matter of law.

Many commercial speech lawyers have been working to dislodge that presumption from commercial speech law. They have explained that advertising for mature products -- products that have been around for a long time such as soap or cigarettes -- does not operate to increase overall consumption of the advertised product. Rather, advertising primarily serves to maintain or expand market share.

In *Lorillard*, the Court took a step in the right direction. It characterized the idea that advertising increases consumption as merely a "theory," and then accepted its application only because Massachusetts cited "numerous studies to support this theory in the case of tobacco products." In other words, *Lorillard* downgrades the idea that advertising increases consumption from a non-rebuttable presumption to a theory that cannot be accepted unless government submits sufficient evidence specifically addressing the relevant product.

The Court's fourth prong discussion in *Lorillard* is even more helpful for commercial speakers. The fourth prong requires government to prove that its speech restrictions are no more extensive than necessary. *Lorillard*'s fourth prong analysis contains three significant enhancements for commercial speech protection.

First, the Court stated in the clearest terms yet that the fourth prong focuses on the process during which a government adopts speech restrictions, not after-the-fact justifications offered in the context of a lawsuit. The government must prove that it carefully calculated the scope of its restrictions before adopting them. As a practical matter, the legislative history of a speech restriction becomes the critical piece of evidence in a commercial speech case and it cannot be supplemented at trial by government witnesses.

Second, the *Lorillard* Court's fourth prong analysis focused on the burden imposed by Massachusetts on individual retailers. The restrictions were held unduly burdensome because they deprived small retailers of any effective means to communicate with passersby. This reasoning will be helpful whenever government deprives a commercial speaker of affordable, effective means of communicating with its potential customers.

Third, *Lorillard*'s fourth prong analysis significantly reduces the ability of government to restrict commercial speech by claiming that it is protecting children. For years, the Court has been stating that speech between adults cannot be limited to that which would be suitable for children. *Lorillard* explains what that principle means in practice.

For example, the Court held that Massachusetts' advertising restrictions were too broad because they banned outdoor advertising for an adult product in 87-91% of the State's urban areas. This holding cuts back substantially on the ability of government to restrict adult speech in the name of protecting children. It is now

clear that, if government is going to allow outdoor advertising within its jurisdiction, it must leave a substantial area available to advertisers of adult products and services.

Further, and perhaps most importantly, the *Lorillard* Court held that Massachusetts' speech restrictions were overbroad because they did not distinguish among tobacco advertisements based on their relative appeal to youth. Again, this ruling substantially reduces the ability of government to restrict adult speech in the name of protecting children. After *Lorillard*, government cannot enact any such restrictions unless it can define which advertisements for an adult product or service are most likely to appeal to youth.

In the five months since *Lorillard* was decided, it already has had an impact on several pending cases. For example, a federal district court in Ohio struck down Cleveland's restrictions on publicly visible advertising of alcohol beverages in August of this year.[3] Cleveland had banned outdoor advertisements, as well as advertisements inside stores that could be seen from the street, with limited exceptions for certain commercial and industrial districts. Eller Media – the outdoor advertising company – sued the City. On Eller's motion for summary judgment, the court relied on *Lorillard* to find that the City had failed to satisfy the fourth prong of *Central Hudson*. The court ruled that the ordinance was overly broad both because of its geographic reach and because the City had not attempted to identify particular advertising practices that might appeal to youth. The district court's decision is now on appeal to the Sixth Circuit.

Unlike Cleveland, the cities of Chicago and Los Angeles did not need a federal judge to teach them the significance of *Lorillard*. In both Chicago and Los Angeles, lawsuits were pending that challenged municipal restrictions on alcohol beverage advertising. In both cities, the legislatures repealed their ordinances in light of *Lorillard*.

The second commercial speech case decided by the Supreme Court this past term was *United States v. United Foods, Inc.* Justice Kennedy delivered the opinion of the Court. The Court invalidated an agricultural marketing order that required mushroom producers to fund generic advertisements promoting mushroom sales. Although this case involved commercial speech, it was not decided under *Central Hudson*. Instead, the Court relied on the *Abood* and *Keller* line of cases concerning compelled subsidies for speech.

The Court's decision in *United Foods* arguably is at odds with the Court's 1997 decision in *Glickman v. Wileman Brothers & Elliott, Inc.*[4] In *Glickman*, the Court rejected a First Amendment challenge to the constitutionality of agricultural marketing orders that required producers of certain California tree fruit to pay assessments for generic product advertising. Although mushrooms and tree fruit are different in many ways, none of those differences appear to have constitutional dimensions.

---

[3] *Eller Media Company v. City of Cleveland*, 161 F. Supp. 2d 796 (N.D. Ohio 2001).
[4] 521 U.S. 457 (1997).

In any event, the majority in *United Foods* did attempt to distinguish the facts in *United Foods* from those in *Glickman*. Basically, the Court distinguished the mushroom program from the tree fruit program on the ground that the mushroom advertising assessments were not part of a more comprehensive regulatory program that restricted market autonomy. Rather, almost all of the funds collected under the mandatory assessments at issue in *United Foods* were for one purpose – generic advertising.

This distinction led the Court to invalidate the mushroom program when it applied the *Abood* rule. *Abood* stands for the proposition that a person who has been compelled to associate with others, may also be compelled to fund speech, if the speech being funded is germane to a non-speech purpose that justified the compelled association in the first place. The Court struck down the mushroom order because it was not germane to a non-speech purpose -- it was not part of a larger regulatory program. Instead, the only program that the compelled contributions served was the advertising scheme at issue.

United Foods and *Lorillard* arose in peculiar factual contexts, but also have significance in the broader context of the commercial speech doctrine. In both *Lorillard* and *United Foods*, as in *Greater New Orleans Broadcasting* before them, the court acknowledged its internal debate as to whether commercial speech should continue to receive less constitutional protection than other expression, but in all three cases the Court determined that it did not need to reach that issue in order to rule in favor of plaintiffs.

Only a few years ago, most mainstream First Amendment lawyers considered it a pipe dream that commercial speech restrictions ever would be reviewed under strict scrutiny.

Now, the Court openly is debating whether to take that step. Regardless of whether commercial speech ever receives full constitutional protection, the current debate shows that commercial speech has come a long way since the dark days of *Posadas*, when it appeared that the Court was slipping back toward rational basis scrutiny of commercial speech restrictions.

The march toward strict scrutiny is not limited to federal law. Most state constitutions have their own free speech clauses. Since 1989, the Oregon courts have applied strict scrutiny to commercial speech restrictions under the Oregon Constitution. The next state to adopt strict scrutiny may be the biggest state of them all – California.

The California Supreme Court issued a decision late last year that makes adoption of strict scrutiny inevitable under the California constitution. The case is *Gerawan Farming, Inc. v. Lyons*.[5] *Gerawan* is yet another case challenging an agricultural

[5] *Gerawan Farming, Inc. v. Lyons*, 24 Cal. 4th 468, 101 Cal. Rptr. 2d 470 (Cal. 2000).

marketing order. It is a tree fruit case – this time involving plums – and concerns a marketing order much like the one upheld by the United States Supreme Court in *Glickman*.

The California court declined to adopt the reasoning in *Glickman* when it interpreted its own state constitution. The California Court explicitly rejected the dichotomy between commercial speech and noncommercial speech that currently exists under the First Amendment. Although the California Court did not specify the precise test that should be applied to the plum marketing order – leaving that issue for the California Court of Appeal on remand – its decision forbids the lower court from basing its selection of the test on the fact that commercial speech, rather than political speech, is at issue. The California Supreme Court's decision in *Gerawan* should be understood as requiring application of strict scrutiny to content-based restrictions on truthful, nonmisleading commercial speech.

The next important commercial speech decision will be rendered by the United States Supreme Court in *Western States Medical Center v. Thompson*. Oral argument was presented to the Court on February 26, 2002. *Western States* involves the constitutionality of two subsections of the Food and Drug Administration Modernization Act of 1997 ("FDAMA"). The challenged subsections restrict the advertising by pharmacies of drug compounding. Drug compounding is the dilution or alteration of prescription drugs in accordance with a physician's instructions. According to the government, compounded drugs can be dangerous because they have not been approved by the FDA. The challenged restrictions allowed pharmacists to advertise the general fact that they provide compounding services, but prohibited them from advertising particular compounded drugs.

The Ninth Circuit held that the government had failed to justify FDAMA's speech restrictions under the third and fourth prongs of *Central Hudson*.[6] Applying the third prong, the court held that the government failed to produce evidence to show that its restrictions will reduce harmful consumption of compounded drugs. The court also held that the third prong was not met because of the many exceptions in FDAMA, including its provision allowing pharmacies to advertise their compounding services generally.

Turning to the fourth prong, the Ninth Circuit held that FDAMA's speech restrictions could not withstand scrutiny because of the availability of alternatives for accomplishing the government's goal that would impose a lesser burden on pharmacists' speech rights. For example, the court found that the government's goal could have been advanced by placing disclaimers on compounded drugs explaining that they had not been subjected to FDA approval, or by requiring compounded drugs to go through a full-blown safety review.

Some have speculated as to why the Supreme Court accepted the *Western States* case for review. The easy – and probably correct – answer is that the Court generally

[6] *Western States Medical Center v. Shalala*, 283 F.3d 1090 (9th Cir. 2001).

reviews lower court decisions that invalidate federal laws. There are at least two other possible explanations – one each from the pro-commercial speech camp and the anti-commercial speech camp. From the perspective of the pro-speech forces, this case presents an opportunity to take another step forward on the road to strict scrutiny. This is yet another case where government has attempted to impose content-based restrictions on truthful, nonmisleading speech about a lawful product. Those in the pro-speech camp look forward to the Court making broad statements about how such speech restrictions are strongly disfavored and can rarely be upheld.

The anti-speech camp -- on the other hand -- will be hoping that the Court decided to review *Western States* in order to limit recent advances in commercial speech protection. As support for this view, the anti-speech folks might look to Justice Breyer's dissent in *United Foods*, where he stated that the First Amendment should not be used to invalidate regulatory requirements concerning health or safety information.

First Amendment lawyers, on both sides of the aisle, await the decision in *Western States* to see if the Supreme Court continues its trend, reinforced in 2001, toward enhanced constitutional protection of commercial speech.

Steven G. Brody is a partner in the New York City office of the law firm King and Spalding

Syllabus

SUPREME COURT OF THE UNITED STATES

THOMPSON, SECRETARY OF HEALTH AND HUMAN SERVICES, et al. *v.* WESTERN STATES
MEDICAL CENTER et al.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 01—344. Argued February 26, 2002–Decided April 29, 2002

Drug compounding is a process by which a pharmacist or doctor combines, mixes, or alters ingredients to create a medication tailored to an individual patient's needs. The Food and Drug Administration Modernization Act of 1997 (FDAMA) exempts "compounded drugs" from the Food and Drug Administration's (FDA) standard drug approval requirements under the Federal Food, Drug, and Cosmetic Act (FDCA), so long as the providers of the compounded drugs abide by several restrictions, including that the prescription be "unsolicited," 21 U.S.C. § 353a(a), and that the providers "not advertise or promote the compounding of any particular drug, class of drug, or type of drug," §353a(c). Respondents, a group of licensed pharmacies that specialize in compounding drugs, sought to enjoin enforcement of the advertising and solicitation provisions, arguing that they violate the First Amendment's free speech guarantee. The District Court agreed and granted respondents summary judgment, holding that the provisions constitute unconstitutional restrictions on commercial speech under *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.,* 447 U.S. 557, 566. Affirming in relevant part, the Ninth Circuit held that the restrictions in question fail *Central Hudson*'s test because the Government had not demonstrated that the restrictions would directly advance its interests or that alternatives less restrictive of speech were unavailable.

Held: The FDAMA's prohibitions on soliciting prescriptions for, and advertising, compounded drugs amount to unconstitutional restrictions on commercial speech. Pp. 8—19.

(a) For a commercial speech regulation to be constitutionally permissible under the *Central Hudson* test, the speech in

question must concern lawful activity and not be misleading, the asserted governmental interest to be served by the regulation must be substantial, and the regulation must "directly advanc[e]" the governmental interest and "not [be] more extensive than is necessary to serve that interest," 447 U.S., at 566. Pp. 8—9.

(b) The Government asserts that three substantial interests underlie the FDAMA: (1) preserving the effectiveness and integrity of the FDCA's new drug approval process and the protection of the public health it provides; (2) preserving the availability of compounded drugs for patients who, for particularized medical reasons, cannot use commercially available products approved by the FDA; and (3) achieving the proper balance between those two competing interests. Preserving the new drug approval process is clearly an important governmental interest, as is permitting the continuation of the practice of compounding so that patients with particular needs may obtain medications suited to those needs. Because pharmacists do not make enough money from small-scale compounding to make safety and efficacy testing of their compounded drugs economically feasible, however, it would not make sense to require compounded drugs created to meet the unique needs of individual patients to undergo the entire new drug approval process. The Government therefore needs to be able to draw a line between small-scale compounding and large-scale drug manufacturing. The Government argues that the FDAMA's speech-related provisions provide just such a line: As long as pharmacists do not advertise particular compounded drugs, they may sell compounded drugs without first undergoing safety and efficacy testing and obtaining FDA approval. However, even assuming that the FDAMA's prohibition on advertising compounded drugs "directly advance[s]" the Government's asserted interests, the Government has failed to demonstrate that the speech restrictions are "not more extensive than is necessary to serve [those] interest[s]." *Central Hudson, supra,* at 566. If the Government can achieve its interests in a manner that does not restrict commercial speech, or that restricts less speech, the Government must do so. *E.g., Rubin* v. *Coors Brewing Co.,* 514 U.S. 476, 490—491. Several non-speech-related means of drawing a line between compounding and large-scale manufacturing might be possible here. For example, the Government could ban the use of commercial scale manufacturing or testing equipment in compounding drug products, prohibit pharmacists from compounding more

drugs in anticipation of receiving prescriptions than in response to prescriptions already received, or prohibit them from offering compounded drugs at wholesale to other state licensed persons or commercial entities for resale. The Government has not offered any reason why such possibilities, alone or in combination, would be insufficient to prevent compounding from occurring on such a scale as to undermine the new drug approval process. Pp. 10—15.

(c) Even if the Government had argued (as does the dissent) that the FDAMA's speech-related restrictions were motivated by a fear that advertising compounded drugs would put people who do not need such drugs at risk by causing them to convince their doctors to prescribe the drugs anyway, that fear would fail to justify the restrictions. This concern rests on the questionable assumption that doctors would prescribe unnecessary medications and amounts to a fear that people would make bad decisions if given truthful information, a notion that the Court rejected as a justification for an advertising ban in*, e.g., Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 770. Pp. 15—18.

(d) If the Government's failure to justify its decision to regulate speech were not enough to convince the Court that the FDAMA's advertising provisions were unconstitutional, the amount of beneficial speech prohibited by the FDAMA would be. Forbidding the advertisement of compounded drugs would prevent pharmacists with no interest in mass-producing medications, but who serve clienteles with special medical needs, from telling the doctors treating those clients about the alternative drugs available through compounding. For example, a pharmacist serving a children's hospital where many patients are unable to swallow pills would be prevented from telling the children's doctors about a new development in compounding that allowed a drug that was previously available only in pill form to be administered another way. The fact that the FDAMA would prohibit such seemingly useful speech even though doing so does not appear to directly further any asserted governmental objective confirms that the prohibition is unconstitutional. Pp. 18—19.

238 F.3d 1090, affirmed.

O'Connor, J., delivered the opinion of the Court, in which Scalia, Kennedy, Souter, and Thomas, JJ., joined. Thomas, J.,

filed a concurring opinion. Breyer, J., filed a dissenting opinion, in which Rehnquist, C. J., and Stevens and Ginsburg, JJ., joined.

OAAA Outdoor Outlook, September 18, 2006

Guest Article:

Federal Court Strikes Down Billboard Content Ban

William May, Executive Director & General Counsel, MOAA

On August 21, the US Court of Appeals for the 8th Circuit issued a ruling declaring Missouri's attempt to restrict outdoor advertising of sexually oriented businesses unconstitutional on First Amendment free speech grounds. The 2004 Missouri statute prohibited any off-premise advertising by sexually oriented businesses, and severely restricted on-premise signs for such businesses. The statute defined a sexually oriented business as an establishment in which 10% or more of its inventory was sexually oriented, or a business in which employees appeared in a state of nudity or semi-nudity. Violation of the statute was a class C misdemeanor.

The statute was challenged in Federal District Court. The District Court judge declined to issue a preliminary injunction and ultimately issued a summary judgment upholding the statute. Appeals in the separate cases were consolidated in this challenge brought by Kansas City constitutional attorney, Richard Bryant. The ACLU filed an amicus brief in support of the appellants.

The legislation was filed in response to the opening of several adult cabarets and adult bookstores along Missouri's interstates, and the installation of billboards promoting those businesses. At hearings in both the Missouri House and Senate, the Missouri Outdoor Advertising Association testified that:

- its members voluntarily declined advertising which was obscene or likely to be offensive to the communities in which they operated
- the proposed state prohibition was clearly unconstitutional under prior federal opinions such as Central Hudson Gas & Electric Corp v. Public Service Comm., 447 U.S. 557 (1980).

In its analysis, the Federal Court of Appeals relied heavily on the Central Hudson case and applied the four-step commercial speech analysis outlined in that case by the Supreme Court. The court determined that the speech in question was clearly commercial speech protected by the First Amendment and that the state's asserted interest in mitigating the adverse secondary affects of sexually oriented businesses was substantial. There was some evidence that the regulation "directly and materially advanced the stated government interest of discouraging sexually oriented businesses as required by the third step." However, the court found that the statute failed the last test in Central Hudson, in that the regulation was not narrowly tailored to meet its asserted goals. A complete suppression of protected speech was more extensive than necessary to reduce the secondary adverse affects of sexually oriented businesses. The statute curtailed substantially more speech than was necessary to accomplish its purpose. The state failed to enact a statute that is "reasonable" and "narrowly tailored to achieve the desired objective" as required by

the Supreme Court decision in Lorillard Tobacco, 533 U.S. 556. The court specifically held "the state has failed to make a showing that a more limited speech regulation would not have adequately served the state's interest."