

[ORAL ARGUMENT SCHEDULED IN NO. 11-5332 FOR APRIL 10, 2012]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

R.J. REYNOLDS TOBACCO)	
COMPANY, et al.,)	
)	
Plaintiffs-Appellees,)	
)	
v.)	Nos. 11-5332, 12-5063
)	
UNITED STATES FOOD AND)	
DRUG ADMINISTRATION, et al.,)	
)	
Defendants-Appellants.)	
_____)	

MOTION TO CONSOLIDATE APPEALS

The Family Smoking Prevention and Tobacco Control Act (Tobacco Control Act) requires new health warnings for cigarette packages and advertising. By statute, those warnings are scheduled to take effect on September 22, 2012. The district court issued a preliminary injunction on November 7, 2011. The government appealed and moved for expedited review. That appeal, No. 11-5332, is fully briefed and scheduled for argument on April 10.

On February 29, 2012, the district court entered summary judgment for plaintiffs and permanently enjoined the warnings. The government's appeal from that order has been docketed as No. 12-5063. The First Amendment analysis in

the summary judgment opinion requires no additional briefing. Accordingly, we ask that our appeal in No. 12-5063 be placed on the same schedule as appeal No. 11-5332, and that the briefs in No. 11-5332 be treated as the briefs in No. 12-5063 as well. We ask only that the parties be permitted to file, by March 16, supplemental briefs of no more than 1,000 words to address a remedial issue described below. Plaintiffs plan to oppose this motion.

STATEMENT

1. Plaintiffs are cigarette manufacturers that challenge new cigarette health warnings mandated by Congress in the Family Smoking Prevention and Tobacco Control Act. Congress specified the text of nine new health warnings that must appear on each cigarette package and comprise the top half of the front and back panels of the package. 15 U.S.C. § 1333 Note. Congress directed the Secretary of Health and Human Services to issue regulations that require color graphics depicting the negative health consequences of smoking to be included as part of each warning. *Ibid.* Congress directed the Secretary to issue the regulations identifying the particular graphics by June 22, 2011, and provided that the Tobacco Control Act's revised cigarette health warnings will take effect 15 months after issuance of the regulations, *i.e.*, on September 22, 2012. *Ibid.*

Pursuant to that statutory directive, the Secretary selected the nine images, one for each statement, by regulations issued on June 22, 2011. *See* 76 Fed. Reg. 36,628 (June 22, 2011). Thus, by the terms of the Tobacco Control Act, the cigarette health warnings are due to take effect on September 22, 2012.

2. The district court entered a preliminary injunction on November 7, 2011, that blocked enforcement of the Tobacco Control Act's cigarette health warnings for fifteen months after issuance of final judgment. *See* R.39 (order). The court held that the warnings are subject to strict scrutiny under the First Amendment and that their size, placement, and graphics do not satisfy strict scrutiny. *See* R.38 (opinion). The government appealed. This Court granted the government's motion for expedited briefing and, on December 7, 2011, the Court announced that oral argument will be heard on April 10, 2012 before Circuit Judges Rogers and Brown and Senior Circuit Judge Randolph. Briefing on the appeal was complete on February 13.

3. Shortly after this Court scheduled oral argument on the preliminary injunction appeal, plaintiffs moved the district court to issue an expedited summary judgment decision. *See* R.48 (plaintiffs' motion, filed 12/12/11). Plaintiffs advised the district court that this Court would consolidate the appeal

from the summary judgment ruling with the appeal from the preliminary injunction ruling.¹

The district court granted plaintiffs' request and, on February 29, 2012, the court entered summary judgment for plaintiffs. *See* R.59 (order), R.58 (opinion). The accompanying opinion largely tracks the reasoning of the preliminary injunction opinion. The government filed a notice of appeal on March 5, 2012.

ARGUMENT

1. The government respectfully asks this Court to consolidate the preliminary injunction appeal with the summary judgment appeal, and to treat the preliminary injunction briefs as the briefs on the merits in Appeal No. 12-5063. The government does not request further briefing on the First Amendment issues, which are exhaustively addressed in the preliminary injunction briefs.

The need for expedited review in this case has never been in doubt. The district court has enjoined important public health warnings mandated by

¹ Plaintiffs' expedition motion stated: "Because this Court addressed the merits of the parties' claims in great detail in its preliminary injunction ruling, Plaintiffs believe that this Court could rule on the summary judgment cross-motions expeditiously. A prompt ruling would, moreover, (a) provide the Court of Appeals with the benefit of this Court's resolution of the merits of this case and (b) give the Court of Appeals the opportunity to consolidate the summary judgment appeal with the Government's current appeal of the PI Order." R.48 at 1-2.

Congress to take effect this September. There is no reason to move the April 10 oral argument date established in this case, and any delay would seriously compromise the public interest.

2. The government requests only that the parties be permitted to file supplemental briefs of no more than 1,000 words to address a discrete remedial issue. The district court enjoined FDA from enforcing any newly issued rule “until 15 months following the issuance of new regulations . . . that are substantively and procedurally valid and permissible under the United States Constitution and federal law.” R.59. By its terms, that order will have no impact if the district court’s merits ruling is reversed. But even assuming *arguendo* that the merits ruling is correct, the court could not properly determine the effective date of regulations that have not been issued. The government proposes that supplemental briefs addressing this remedial issue be filed simultaneously on March 16. Alternatively, if this Court believes that the parties should be given a broader opportunity to address any new material contained in the summary judgment decision, we would ask that the Court permit the filing of supplemental briefs not to exceed 5,000 words by March 19.

Respectfully submitted,

TONY WEST

Assistant Attorney General

Of Counsel:

WILLIAM B. SCHULTZ

Acting General Counsel

BETH S. BRINKMANN

Deputy Assistant Attorney General

ELIZABETH H. DICKINSON

Associate General Counsel

Food and Drug Division

MARK B. STERN

s/ Alisa B. Klein

ALISA B. KLEIN

ERIC M. BLUMBERG

Deputy Chief Counsel, Litigation

SARANG V. DAMLE

DANIEL TENNY

KAREN E. SCHIFTER

Senior Counsel

Department of Health & Human
Services

Office of the General Counsel

10903 New Hampshire Ave.

Silver Spring, MD 20993-0002

LINDSEY POWELL

(202) 514-1597

Attorneys, Appellate Staff

Civil Division, Room 7235

Department of Justice

950 Pennsylvania Ave., NW

Washington, DC 20530

MARCH 2012

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of March, 2012, I caused the foregoing motion to be filed with the Court and served on counsel through the Court's ECF system.

s/ Alisa B. Klein
Alisa B. Klein