
No. 11-5332

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

R.J. REYNOLDS TOBACCO COMPANY, *et al.*,

Plaintiffs-Appellees,

v.

UNITED STATES FOOD AND DRUG ADMINISTRATION, *et al.*,

Defendants-Appellants.

*On Appeal from the United States District Court for the District of Columbia,
District Court No. 11-148 (Hon. Richard J. Leon)*

**NOTICE OF INTENT OF THE CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA TO FILE *AMICUS CURIAE* BRIEF ON
CONSENT IN SUPPORT OF PLAINTIFFS-APPELLEES**

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**DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST**

Pursuant to Circuit Rule 29(b), Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, *Amicus Curiae* Chamber of Commerce of the United States of America (the “Chamber”) makes the following disclosures:

1. The Chamber is the world’s largest business federation and routinely represents the interests of its members in matters before Congress, the Executive Branch, and the courts, including this Court.

2. The Chamber has no parent corporation. No publicly held corporation owns any portion of the Chamber, and the Chamber is neither a subsidiary nor an affiliate of any publicly owned corporation.

s/Bert W. Rein

Bert W. Rein

**NOTICE OF INTENT OF
THE CHAMBER OF COMMERCE OF THE UNITED STATES OF
AMERICA TO FILE *AMICUS CURIAE* BRIEF ON CONSENT IN
SUPPORT OF PLAINTIFFS-APPELLEES**

Pursuant to Circuit Rule 29(b), the Chamber of Commerce of the United States of America (the “Chamber”) hereby notifies the Court of its intent to file an *amicus curiae* brief in this case in support of Plaintiffs-Appellees.

1. The Chamber is the world’s largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber routinely represents the interests of its members in matters before Congress, the Executive Branch, and the courts, including this Court.

2. All of the parties to this appeal have consented to the filing of the Chamber’s proposed *amicus curiae* brief.

3. This case presents questions of significant importance to the Chamber’s members concerning the standard of review applicable to speaker- and content-based, government-compelled commercial speech and, specifically, the legitimacy of the government’s asserted interest in using compelled speech to discourage fully informed consumers from choosing to buy lawfully available products.

4. The free speech guarantee in the First Amendment is integral to the work of American businesses, and critical to an economy that allocates resources based on consumer sovereignty. Businesses face a serious threat if, as Defendants-Appellants argue here, the government has broad latitude to require the producers of goods and services to use their own packaging and marketing materials to disseminate government-mandated graphics that are designed to persuade consumers to reject the very goods and services on which they appear. The Chamber strongly supports the reasoning set forth in the district court's decision below, because the Chamber is vitally interested in ensuring that the First Amendment is consistently interpreted and applied to safeguard the free speech rights of commercial entities; that government regulation of speech by commercial entities is narrowly confined to legitimate purposes like the prohibition of fraud and deception; and that businesses that are lawfully engaged in commerce are not subjected to government-mandated speaker- and content-based discrimination.

5. Consistent with Circuit Rule 29(d), counsel for the Chamber has consulted with counsel for *amici curiae* the Association of National Advertisers, Inc. and the American Advertising Federation (collectively, the "Advertising Associations") and the Washington Legal Foundation ("WLF") regarding the possibility of filing a joint brief but has concluded that it is not practical to do so.

Although the Chamber supports the positions that the Advertising Associations and WLF propose to advance, the Chamber has unique interests in the legal issues presented on appeal, and does not intend to repeat the arguments that are being advanced by the Advertising Associations and the WLF.¹

6. *First*, the Chamber wishes to file separately to demonstrate that, in the wake of the Supreme Court's recent decision in *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011), the continuing validity of the deferential "intermediate scrutiny" test adopted in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), is doubtful.

7. *Second*, even if the *Central Hudson* test retains validity in circumstances where the government has intervened to correct or amend a private commercial speaker's statements on the grounds that *the private speaker's* statements are objectively false or misleading by inclusion or omission, *Central Hudson* and its progeny do not remotely support the position that the government has advanced here. Instead, *Sorrell* compels the conclusion that the *Central Hudson* test is inadequate to protect the fundamental First Amendment interests that are implicated by government efforts to control consumer choice by engaging

¹ *Amicus curiae* Defending Animal Rights Today & Tomorrow has filed an *amicus curiae* brief in support of neither party. Because that brief has already been submitted and the Chamber does not agree with the positions expressed therein, joinder with that *amicus curiae* is not possible.

in speaker- and content-based discrimination and commandeering private packaging and marketing materials to convey government-mandated messages.

January 20, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of January, 2012, the foregoing Notice of Intent to File *Amicus Curiae* Brief in Support of Plaintiffs-Appellees was filed and served upon all counsel of record electronically by filing a copy of the document with the Clerk through the Court's ECF system.

s/Bert W. Rein

Bert W. Rein