

High court to hear tobacco case

By Wendy Koch
USA TODAY

WASHINGTON — The Supreme Court agreed Monday to take on a politically explosive dispute over the Food and Drug Administration's right to restrict cigarette advertising and sales.

The court's decision could have a far-reaching impact on federal efforts to curb youth smoking.

The Clinton administration had appealed a lower-court ruling that the FDA lacks authority to regulate cigarettes and chewing tobacco.

The administration and the tobacco industry will argue their cases before the Supreme Court later this year. A decision is likely next year.

The industry says Congress never intended to give the FDA authority, but the administration says industry documents on nicotine's addictiveness give the agency the right to consider nicotine a drug and tobacco products as "delivery devices."

In its appeal, the government called the FDA's proposed tobacco restrictions an "unparalleled opportunity" to stop kids from smoking. The agency proposal, made in 1996, would ban most vending machine sales, limit outdoor ads and restrict ads in youth-oriented publications to black-and-white text.

The FDA never implemented any of the advertising restrictions because the industry immediately and

Justices to rule on noncitizens' rights

WASHINGTON — The Supreme Court on Monday agreed to decide a case that could have major impact on the civil rights of the more than 10 million noncitizens living legally in the United States.

The case will test whether a federal civil rights law protects noncitizens from discrimination on the basis of their alien status in employment and private contracts.

Civil rights advocates say noncitizens, even those residing here legally, often face discrimination when they apply for jobs, buy insurance or open bank accounts.

The law at issue, enacted 133 years ago primarily to aid former slaves, says all people within the United States "shall have the same right in every state and territory to

make and enforce contracts . . . as is enjoyed by white citizens."

Lower courts have split over whether the law protects noncitizens against bias on the basis of their noncitizen status, or was just meant to protect racial minorities from racial discrimination.

"In the current anti-immigrant climate, this statute has been a crucial civil rights protection for legal aliens," says Lucas Guttentag of the American Civil Liberties Union. Job bias against immigrants is also barred by other laws, but the civil rights statute has been used in a range of private situations.

The case before the court involves Linden Anderson, who was elected in 1992 as an official for a New York City local of the United

Brotherhood of Carpenters and Joiners. Anderson, a Jamaican citizen who has lived in the USA since 1968, was fired when his noncitizen status was revealed. A union rule, dating to Cold War efforts to root out communist influence, required that officials be U.S. citizens.

"We are a nation of immigrants," says Anderson's lawyer, Paul Schachter. "This is an important test of our panoply of rights."

An appeals court ruled that the 1866 law does cover noncitizen immigrants. The union appealed to the Supreme Court.

The court will hear the case in the fall. A decision is unlikely before next year.

By Tony Mauro

successfully challenged them in court. The agency has been able to enact a ban on sales to minors, also forbidden by the 50 states.

"I remain firmly committed to the FDA rule," President Clinton said Monday in welcoming the court's review. Anti-smoking activists also hailed the court's move. They were concerned that Congress would refuse to give FDA authority if the

court refused to hear the case.

Industry officials, who have argued that FDA authority could lead to a ban on cigarettes or limits on its nicotine levels, said they are confident the Supreme Court will affirm the 2-1 ruling last August by the Fourth Circuit Court of Appeals.

Mark Smith, spokesman for Brown and Williamson Tobacco Corp., said the FDA's attempt to as-

sert its authority could put other industries at risk. "This is precisely the sort of government overreaching that the Supreme Court has struck down in the past."

Among the current justices, only Chief Justice William Rehnquist and Antonin Scalia are believed to be regular cigarette smokers. Justice Clarence Thomas smoked cigars but said last year that he had quit.

JUSTICES TO DECIDE F.D.A.'S AUTHORITY TO LIMIT TOBACCO

BATTLE OVER 1996 RULES

Industry Raises Constitutional Issues, Saying Congress Should Make Decision

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By LINDA GREENHOUSE

WASHINGTON, April 26 — The Supreme Court offered itself today as the next battleground in the tobacco wars, announcing that it would decide whether the Food and Drug Administration has authority to regulate tobacco products as drugs and cigarettes as "drug delivery devices."

In accepting an appeal by the Clinton Administration, the Court kept alive the prospect that the extensive regulations the Federal agency issued in 1996, aimed at deterring smoking by minors through restrictions on cigarette sales and advertising, may yet take effect.

The regulations were struck down last year by the Federal appeals court in Richmond on the ground that Congress had not given the Food and Drug Administration the authority to regulate tobacco products.

In its appeal to the Supreme Court, the Administration said the 2-to-1 ruling last August by the United States Court of Appeals for the Fourth Circuit would "deprive the public of an unparalleled opportunity to prevent millions of children from acquiring a highly addictive habit that often leads to premature death."

The appeal, filed by Solicitor General Seth P. Waxman, said the regulations were a result of "the most important public health and safety rule-making that F.D.A. has conducted in the past 50 years."

The tobacco industry, which had brought the suit to block the regulations as soon as they were issued, tried to dissuade the Justices from taking the case by arguing that the settlement reached last fall between the industry and 46 states already included an array of restrictions.

In addition, the industry argued, the question of the Food and Drug Administration's jurisdiction remained before Congress. In his State of the Union speech in January, President Clinton renewed his request to Congress for legislation "to reaffirm" the agency's authority — authority that the appeals court's majority found had never existed.

The case, *Food and Drug Administration v. Brown and Williamson Tobacco Corp.*, No. 98-1152, is likely to be argued in November, with a decision some time next spring. Even if the agency prevails, however, the

ci will be far from over. The tobacco industry has raised a variety of statutory and constitutional objections to the regulations, including a First Amendment challenge to the advertising restrictions. Having concluded that the agency lacked authority to issue the regulations, the appeals court did not address these specific issues but would have to do so if the Supreme Court disagreed with its jurisdictional conclusion.

In the Food, Drug and Cosmetic Act of 1938, Congress gave the Food and Drug Administration jurisdiction over drugs and "devices," both of which the law defined as items "intended to affect the structure or any function of the body." For years the agency viewed this language as not conveying authority to regulate tobacco products.

But it changed its mind in the mid-1990's after studying the issue in light of new disclosures from tobacco industry witnesses and documents showing that manufacturers carefully controlled the amount of nicotine in cigarettes and viewed their product as a means for delivering doses of a habit-forming chemical. Thus, the agency concluded, nicotine not only had obvious effects on bodily functions but was also "intended" by the cigarette industry to have those effects. Judge William L. Osteen Sr. of Federal District Court in Greensboro, N.C., agreed, upholding the F.D.A.'s authority in a 1997 ruling that the appeals court then overturned.

The appellate panel's majority said that while a "mechanical reading" of the statute appeared to support the agency's assertion of jurisdiction, the overall structure of the Food, Drug, and Cosmetic Act did not. The court said that since the F.D.A. had concluded that cigarettes were fundamentally unsafe, its only option under the law was not to regulate them but to ban them, as it would ban any other unsafe drug — something Congress had clearly not intended, in the majority's view.

While acknowledging that the outlook at the Supreme Court is uncertain, antismoking advocates greeted the Court's announcement today with relief. Matthew L. Myers, executive vice president of the Campaign for Tobacco-Free Kids, said the Court's decision to take the case "has to be interpreted as an appreciation of the public health importance of the issues raised."

Mr. Myers, a lawyer, said the outcome might well be determined by whether the case strikes the Justices as "about an agency that reached out for authority it was never given or about an industry seeking to be rewarded for decades of hiding the truth."

Thirty-nine states filed a brief urging the Justices to hear the Administration's appeal. They said that despite last year's multistate settlement, the Federal agency's regulations "address matters that cannot be effectively addressed by the states alone."

Like the regulations, the terms of the settlement include specific provi-

sions aimed at smoking by minors, but the F.D.A. regulation had broader restrictions on outdoor signs, other advertising and certain retail practices, including limits on vending machines, self-service sales, and coupon redemptions.

The Court granted a second case today, agreeing to decide whether a Reconstruction-era civil rights law bars discrimination against noncitizens in the making of private contracts.

The lower Federal courts have been in dispute on the question for years, and the Justices' effort to decide it four years ago was thwarted when the parties settled a case the Court had agreed to decide. The case today, *United Brotherhood of Carpenters v. Anderson*, No. 98-958, is an appeal by a labor union that dismissed its business manager, a legal immigrant from Jamaica, because he was not a United States citizen.

The United States Court of Appeals for the Second Circuit, in Manhattan, ruled last year that the man was entitled to bring a discrimination suit under the Federal law known as Section 1981, which guarantees to "all persons" the same right to make and enforce contracts "as is enjoyed by white citizens." While that law, derived from the Civil Rights Act of 1866, clearly applies to race, the question is whether it also bars discrimination against aliens.

Nine years ago, Congress revisited the law and strengthened its protects to overturn a Supreme Court decision that had narrowed it. Among other things, Congress made clear that the law barred private as well as state-sponsored discrimination. But Congress did not address the question of the law's application to citizenship in the first place. This case was evidently the subject of unusual behind-the-scenes activity among the Justices, who considered what to do with it at eight successive closed-door conferences before issuing today's order.

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