U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

December 23, 2004

Patricia Mack Bryant, Esquire
Senate Legal Counsel
United States Senate
Washington, D.C. 20510-7250

Re: ACLU v. Mineta, No. 04-0262 (DDC)

Dear Ms. Bryant:

I am writing to advise you that I have determined not to appeal the district court's decision in the above case.

As a condition of federal funding, Congress has specified that mass transit authorities may not be involved directly or indirectly in any activity that promotes the legalization or medical use of any substance listed in schedule I of section 202 of the Controlled Substances Act. By virtue of that condition, a mass transit authority that accepts federal funding may not permit the display of an advertisement that promotes the legalization or medical use of a schedule I substance, such as marijuana.

The plaintiffs in this case sought to purchase space from the Washington Metropolitan Area Transit Authority (WMATA) to run an advertisement promoting the legalization of marijuana. WMATA rejected the advertisement because it did not want to jeopardize its federal funding. The plaintiffs then filed suit challenging the federal funding condition that led to the rejection of their advertisement. The district court held that, under well established Supreme Court precedent, the funding condition amounted to viewpoint discrimination in violation of the First Amendment. The court therefore enjoined enforcement of the condition.

A local transit authority presumably could comply with the viewpoint-based funding condition by adopting a viewpoint-neutral policy banning the acceptance of advertisements, including, for example, those discouraging the use of schedule I substances. An argument could be made that the possibility that the transit authority could prohibit a broader swath of advertisements than Congress specified would be enough to justify the narrower

condition's facial constitutionality. There are, however, two interrelated difficulties with the argument. First, it seems likely, in the context of this statute, that the Court would focus only on the viewpoint-specific funding condition imposed by Congress, rather than the broader policy a fund recipient could adopt. Cf. United States v. American Library Association, 539 U.S. 194, 203 n.2 (2003). Second, it is not at all clear that Congress would have preferred the broader restriction that the statute would effectively require fund recipients to adopt. Implementation of a federal statutory provision having the effect of imposing such a broader policy would raise additional policy issues for Congress, because the result could be to require a ban on anti-drug advertisements and perhaps other similar public service advertisements. I have therefore determined that the government does not have a viable argument to advance in the statute's defense and will not appeal the district court's decision holding the provision as currently drafted unconstitutional.

The government filed a protective notice of appeal to the D.C. Circuit. The government's brief is currently due on December 27, 2004, but the government has asked for an extension of time until January 26, 2005, in light of the statutory provision requiring the Department of Justice to inform Congress of a determination not to take an appeal in a case such as this.

A copy of the district court's decision and order are attached. If you have any questions, please feel free to contact me.

Sincerely,

Paul D. Clement
Acting Solicitor General

Enclosures