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COURT URGED TO STRIKE DOWN OUTDOOR ADVERTISING BAN

(Lorillard Tobacco Co. v. Reilly)

The Washington Legal Foundation (WLF) today urged the U.S. Court of Appeals for the First Circuit in Boston to strike down Massachusetts regulations that ban outdoor advertising of tobacco products while imposing virtually no restrictions on other products' advertising.

In a brief filed in the case, *Lorillard Tobacco Co. v. Reilly*, WLF argued that the First Amendment prohibits a state or local government from deciding what advertising is acceptable based solely on the message conveyed by the advertisement.

"While cities should be permitted to impose reasonable restrictions on advertising based on aesthetic and traffic-safety concerns, the First Amendment demands that any such restrictions be imposed in a content-neutral fashion -- unless the government can produce strong evidence demonstrating why advertising conveying certain truthful messages needs to be suppressed," WLF Chief Counsel Richard Samp said after filing WLF's brief. "Massachusetts has failed to produce any such evidence in this case," Samp said.

The regulations in question ban virtually all outdoor tobacco signs within populated areas of Massachusetts, as well as indoor signs that are visible from the street. The regulations are being challenged by Massachusetts businesses that display tobacco advertising on the front of their stores, as well as cigarette, cigar, and smokeless tobacco manufacturers.

In its brief, WLF noted that the U.S. Supreme Court has held that *all* truthful commercial speech -- provided it does not propose an illegal transaction -- is entitled to substantial First Amendment protection. WLF argued that Massachusetts's attempt to single out one type of advertising for prohibition cannot withstand First Amendment scrutiny in the absence of any evidence that the ban is narrowly drawn to address a substantial government concern *and* that the ban is likely to alleviate that concern "to a material degree."

WLF argued that the Supreme Court's recent *44 Liquormart* decision makes plain

that courts may not accept at face value a city's claim that a ban on tobacco advertising would reduce underage smoking to a "material degree." WLF argued that if the State is seriously interested in reducing underage smoking, it should step up enforcement against merchants who violate the ban on sales to minors rather than attempting to suppress speech.

WLF also argued that the Federal Cigarette Labeling and Advertising Act (the "Act") prohibits any attempts by state and local governments to regulate cigarette advertising. The Act provides that state and local governments may neither regulate nor prohibit cigarette advertising to the extent that such regulation is "based on smoking and health." 15 U.S.C. § 1334(b). WLF's brief argued that the Regulations quite clearly *are* "based on smoking and health" and thus are preempted by federal law. The plaintiffs are appealing from a district court ruling upholding the Regulations; the district court rejected both the First Amendment argument and the preemption argument.

The Washington Legal Foundation is a nonprofit public interest law and policy center with supporters in all 50 states, including many in Massachusetts. It devotes a substantial portion of its resources to defending the rights of businesses who have become the targets of unwarranted government regulation.

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