



April 17, 2000

COURT DECLINES TO REVIEW DECISIONS UPHOLDING OUTDOOR ADVERTISING BAN

(*Greater New York Metropolitan Food Council v. Giuliani*, No. 99-1171)
(*FAIR v. City of Chicago*, No. 99-1172)

The U.S. Supreme Court today declined to review two federal appeals court decisions that had upheld ordinances in New York City and Chicago that ban outdoor advertising of tobacco products. The High Court's ruling was a setback for the Washington Legal Foundation (WLF), which had filed briefs in the two cases -- *Greater New York Metropolitan Food Council, Inc. v. Giuliani* and *Federation of Advertising Industry Representatives [FAIR] v. City of Chicago* -- urging that the lower-court decisions be reviewed.

The Supreme Court's decision does not bring to an end challenges to tobacco advertising bans. To the contrary, the appeals court decisions left undisturbed by today's action did not even address First Amendment challenges to the ordinances in question. Rather, the appeals courts merely rejected an alternative argument raised by the plaintiffs: that the Federal Cigarette Labeling and Advertising Act ("FCLAA") prohibits states from imposing their own regulations on tobacco advertising. The appeals courts sent the cases back to federal district courts for initial consideration of First Amendment challenges.

Moreover, the claim that the FCLAA preempts state and local regulation of tobacco advertising has been accepted by numerous other courts. For example, the U.S. Court of Appeals for the Ninth Circuit in San Francisco recently invoked the FCLAA to strike down Tacoma, Washington's ban on outdoor tobacco advertising. The conflict between the Ninth Circuit's decision and the decisions involving the Chicago and New York City ordinances means that sooner or later the Supreme Court -- in an effort to resolve the conflict -- is likely to agree to hear one of the numerous pending cases that challenge tobacco advertising bans on FCLAA grounds.

WLF attorneys expressed disappointment with the Supreme Court's decision not to review the appeals courts' rulings. "While cities should be permitted to impose reasonable restrictions on advertising based on aesthetic and traffic-safety concerns, federal law and the First Amendment demand that any such restrictions be imposed in a content-neutral fashion -- unless the government can produce strong evidence demonstrating why advertising conveying certain messages needs to be suppressed," WLF Chief Counsel Richard Samp said after the ruling.

The ordinances in question ban virtually all outdoor tobacco signs within Chicago and New York City, as well as indoor signs visible from the street. In each of the two cases, the ordinance is being challenged by a coalition of advertisers and businesses that display tobacco advertising on the front of their stores. For many small businesses, the income they receive from displaying such signs can make the difference between operating at a profit or a loss.

In its brief, WLF argued that the FCLAA prohibits any attempts by state and local governments to regulate cigarette advertising. The Act provides that state and local governments may impose no requirement or prohibition "with respect to" 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 Chicago and New York City ordinances quite clearly *are* "based on smoking and health" and thus are preempted by federal law. The appeals courts ruled that it should be presumed that federal law does not displace local governments' exercise of their traditional police powers unless that is Congress's clear intent. The courts said that no such clear intent is manifest in the language of the FCLAA and thus that local controls on the location of outdoor advertising (which the courts held to be a part of local governments' traditional police powers) are not preempted.

WLF has pledged to continue the fight to have the Chicago and New York City ordinances struck down on First Amendment grounds. WLF believes that the ordinances almost surely will not pass First Amendment scrutiny. 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 will argue that the cities' attempts 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." Indeed, the district court hearing the challenge to the New York ordinance recently held that the plaintiffs are likely to prevail on the First Amendment claims and issued a preliminary injunction against enforcement of the ordinance.

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

* * *

For further information contact WLF Chief Counsel Richard Samp at (202) 588-0302.