

January 11, 2001

COURT AGREES TO REVIEW OUTDOOR ADVERTISING BAN

(Lorillard Tobacco Co. v. Reilly)

The U.S. Supreme Court agreed this week to hear a challenge to Massachusetts regulations that ban outdoor advertising of tobacco products while imposing virtually no restrictions on other products' advertising. The decision to review the case, *Lorillard Tobacco Co. v. Reilly*, was a victory for the Washington Legal Foundation (WLF), which in November had filed a brief urging the High Court to hear the case. 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.

WLF plans to file an additional brief in February in support of the challenge. The Court is expected to hear oral argument in the case in April and to issue a decision no later than June.

WLF urged the High Court to hear the case for the purpose of reconsidering its current test for examining restrictions on commercial speech, known as the *Central Hudson* test. WLF argued that the *Central Hudson* test provides municipalities too much leeway to ban truthful speech simply because they do not like the message being conveyed.

"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 learning that the Supreme Court had agreed to hear the case. "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 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 Supreme Court will be reviewing a court of appeals ruling upholding the Regulations; that court rejected both the First Amendment argument and the preemption argument. WLF argued that the High Court should review the court of appeals's decision that the Massachusetts regulations are not preempted by the Act, because it conflicts with another court of appeals decision that reached the exact opposite conclusion.

In its one-sentence order this week, the Supreme Court agreed to review both the federal preemption issue and the First Amendment issue.

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. WLF also filed a brief in this case when it was before the U.S. Court of Appeals for the First Circuit in Boston.

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