

October 26, 1999

COURT REVERSES ORDER STRIKING DOWN OUTDOOR ADVERTISING BAN

(Greater New York Metropolitan Food Council v. Giuliani)

The U.S. Court of Appeals for the Second Circuit yesterday reversed a lower-court order that had struck down a New York City ordinance that bans outdoor advertising of tobacco products while imposing virtually no restrictions on other products' advertising.

The decision was a setback for the Washington Legal Foundation (WLF), which had filed a brief in the case, *Greater New York Metropolitan Food Council, Inc. v. Giuliani*, urging that the lower-court decision be upheld. While rejecting the rationale that had led the lower court to strike down the law, the appeals court remanded the case to the lower court for consideration of the plaintiffs' other challenges to the ordinance.

The appeals court rejected WLF's argument that the federal law regulating tobacco advertising prohibits state and local governments from imposing their own additional regulations. WLF also argued that the New York City ordinance violates the First Amendment rights of advertisers; it is that First Amendment argument that the appeals court has directed the lower court to consider on remand.

WLF attorneys expressed disappointment with the appeals court's ruling. "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. "New York City has failed to produce any such evidence in this case," Samp said.

The ordinance in question bans virtually all outdoor tobacco signs within New York City, as well as indoor signs that are visible from the street. The ordinance is being challenged by a coalition of New York 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 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 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 New York ordinance quite clearly *is* "based on smoking and health" and thus is preempted by federal law. The appeals court responded 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 court said that no such clear intent is manifest in the language of the Act and thus that local controls on the location of outdoor advertising (which the court held to be a part of local governments' traditional police powers) are not preempted. The court conceded that the ordinance is "based on smoking and health" but asserted (without explanation) that the ordinance does not impose a prohibition "with respect to" cigarette advertising.

WLF has pledged to continue the fight to have the New York ordinance struck down on First Amendment grounds. WLF believes that the ordinance 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 New York'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."

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.

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