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## **COURT STRIKES DOWN OUTDOOR ADVERTISING BAN** *(Lindsey v. Tacoma-Pierce County Health Dep't)*

The U.S. Court of Appeals for the Ninth Circuit in San Francisco this week struck down a Tacoma, Washington ordinance that bans outdoor advertising of tobacco products while imposing virtually no restrictions on other products' advertising.

The decision was a victory for the Washington Legal Foundation (WLF), which had filed a brief in the case, *Lindsey v. Tacoma-Pierce County Health Dep't*, urging that the ordinance be struck down. The appeals court accepted WLF's argument that the federal law regulating tobacco advertising prohibits state and local governments from imposing their own additional regulations. In light of that ruling, the court found it unnecessary to reach WLF's additional argument that the Tacoma ordinance violates the First Amendment rights of advertisers.

The ordinance in question, Resolution No. 96-1997 (the "Resolution") of the Tacoma-Pierce County Board of Health (the "Board"), banned virtually all outdoor tobacco signs within Tacoma-Pierce County, Washington, as well as indoor signs that are visible from the street. The Resolution was challenged by a group of convenience store owners who wished to display tobacco advertising on the front of their stores. For many small businesses, the income they receive from displaying tobacco signs can make the difference between operating at a profit or a loss.

The appeals court accepted WLF's argument 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 successfully argued that the Tacoma ordinance quite clearly *is* "based on smoking and health" and thus is preempted by federal law.

In striking down the Tacoma ordinance, the Ninth Circuit acknowledged that its interpretation of the Act differs from that of the U.S. Courts of Appeals for the Second, Fourth, and Seventh Circuits. Those appeals courts upheld municipal tobacco ad bans in

New York City, Baltimore, and Chicago, respectively. In light of the conflicting decisions from the appeals courts, it is highly likely that the Supreme Court will agree to decide this issue in the coming year. WLF has pledged to support any challenge to a tobacco advertising ban that reaches the Supreme Court on the federal preemption issue.

WLF has also pledged to continue the fight to have such advertising bans struck down on First Amendment grounds. WLF believes that such bans 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 argues that a city or state'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 the State of Washington. 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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For further information, contact WLF Chief Counsel Richard Samp at (202) 588-0302.