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COURT URGED TO STRIKE DOWN OUTDOOR ADVERTISING BAN

(Greater New York v. Giuliani)

The Washington Legal Foundation (WLF) this week urged the U.S. Court of Appeals for the Second Circuit to strike down a New York City ordinance that bans outdoor advertising of tobacco products while imposing virtually no restrictions on other products' advertising.

In a brief filed in the case, *The Greater New York Metropolitan Food Council v. Giuliani*, WLF argued that the First Amendment prohibits a city 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 messages needs to be suppressed," WLF Chief Counsel Richard Samp said after filing WLF's brief. "New York City has failed to produce any such evidence in this case," Samp said.

The ordinance in question, the Youth Protection Against Tobacco Advertising and Promotion Act, 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 City businesses that display tobacco advertising on the front of their stores, as well as a coalition of advertisers. For many small businesses, the income they receive from displaying tobacco signs can make the difference between operating at a profit or a loss.

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 New York City'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 City 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 New York City ordinance quite clearly *is* "based on smoking and health" and thus is preempted by federal law. Indeed, that was the basis of a district court opinion striking down the ordinance. The City is appealing from the district court ruling.

The Washington Legal Foundation is a nonprofit public interest law and policy center with supporters in all 50 states, including many in New York City. 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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