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## FEDERAL APPEALS COURT REJECTS NYC'S EFFORT TO COMPEL COMMERCIAL SPEECH

*(23-34 94th St. Grocery, Corp. v. New York City Board of Health)*

U.S. Court of Appeals for the Second Circuit

The U.S. Court of Appeals for the Second Circuit today affirmed a federal district court's earlier order invalidating a New York City regulation that sought to force shopkeepers and retailers to display signs conveying the City's anti-smoking message, with which they disagree.

The decision was a victory for the Washington Legal Foundation (WLF), which filed a brief in *23-34 94th St. Grocery, Corp. v. New York City Board of Health* arguing that the First Amendment protects not only the right to speak but also the right not to speak, and that forcing someone to convey and associate with speech with which he disagrees violates the free speech protections of the U.S. Constitution.

"Today's ruling is a major victory in the unending battle against bad ideas," said WLF Senior Litigation Counsel Cory Andrews after reading the court's opinion. "If the government wishes to convey a message, it should do so on its own property, not by commandeering the private property of others who disagree with that message," Andrews said.

The case arose from a challenge to a new provision of the New York City Health Code that requires all tobacco retailers within the City to display gory, anti-smoking signs in their stores. Many tobacco retailers object to the signs, which urge their customers not to use tobacco products. Each sign includes warnings about the adverse effects of tobacco use (*e.g.*, "Smoking Causes Lung Cancer") and the directive "Quit Smoking Today—For Help, Call 311 Or 1-866-NYQUITS," as well as one of three graphic, color images depicting the potential effects of tobacco use: a brain damaged by a stroke, decaying teeth and gums, or a diseased lung. The U.S. district court for the Southern District of New York struck down the requirement under the Supremacy Clause as preempted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§1331-1341. The U.S. Court of Appeals affirmed that decision.

In its brief urging the Court to affirm the district court, WLF argued that the First Amendment fully protects the right to refuse to speak, and that forcing someone to convey the government's message on their own private property is constitutionally

suspect. WLF cited Supreme Court precedents prohibiting schools from requiring school children to recite the Pledge of Allegiance, and prohibiting the State of New Hampshire from requiring objecting motorists to display the State's motto, "Live Free Or Die," on their license plates.

WLF also urged the Court to reject the City's claim that the anti-smoking signs are exempt from First Amendment scrutiny because the speech at issue is really the government's own speech. In support of that claim, the City notes that it exercises complete control over the message contained on the mandatory signs. WLF argued that the "government speech" doctrine only exempts the government from First Amendment review when the speech at issue is funded by general tax revenues and is conveyed using the government property, not private property. WLF argued that if the "government speech" doctrine is really as broad as the City claims it to be, then governments everywhere have been given an easily followed roadmap to defeat any and all compelled speech claims.

WLF filed its brief on behalf of itself and the Allied Educational Foundation. WLF is a public interest law and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending free speech rights, both of individuals and of the business community.

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For further information, contact WLF Senior Litigation Counsel Cory Andrews, (202) 588-0302. A copy of WLF's brief is posted on its web site, [www.wlf.org](http://www.wlf.org).