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WLF Asks Federal Court to Overturn NYC Restrictions on Truthful Product Promotion

(National Assoc. of Tobacco Outlets, Inc. v. City of New York)

“The City’s marketing ban all but ignores First Amendment restrictions on suppressing truthful speech to ‘protect’ consumers from actions they might take in response. Such measures are particularly unwarranted when, as here, the government can attain its objectives by taking steps that do not suppress speech.”
—Rich Samp, WLF Chief Counsel

WASHINGTON, DC—The Washington Legal Foundation (WLF) yesterday urged the U.S. District Court for the Southern District of New York to strike down a New York City ordinance prohibiting many common promotional practices for tobacco products, including discount coupons, offering discounts for purchasing more than one tobacco product, and advertising a “sale” price. In a brief supporting a challenge to the ordinance, WLF argues that the First Amendment protects the banned practices as commercial free speech and that the ordinance does not adhere to constitutional limitations that apply when restricting truthful commercial speech.

WLF’s brief explains that the banned promotional activities are protected by the First Amendment because they have an expressive element, noting that American businesses have used discount coupons for 150 years to convey a “try me” message to consumers. Businesses issued 315 billion discount coupons in 2013 alone. WLF asserts that the City is trying to ban discount tobacco coupons not because they mislead but because they often succeed in persuading consumers to purchase the advertised brand.

Under Supreme Court commercial speech case law, WLF argues that a government may not use speech restrictions to achieve an objective that can be achieved without restricting speech. WLF observes that if the City wants to raise cigarette prices, it can do so directly, by raising the “price floor” on cigarettes (currently \$10.50 per pack) or increasing excise taxes (nearly \$7.00 per pack). The City justifies its bans on the premise that they will lead to higher overall prices, thereby reducing demand for tobacco products. It asserts that the First Amendment has no relevance because the ordinance only regulates economic activity, not speech.

After filing its brief, WLF issued the following statement by Chief Counsel Richard Samp: “The City’s marketing ban all but ignores First Amendment restrictions on suppressing truthful speech to ‘protect’ consumers from actions they might take in response. Such measures are particularly unwarranted when, as here, the government can attain its objectives by taking steps that do not suppress speech. Regulating speech as a first resort sets a dangerous precedent.”

WLF is a public interest law firm and policy center that regularly litigates in support of the commercial free speech rights of the business community.

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