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UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

23-34 94TH ST. GROCERY CORP., KISSENA BLVD. CONVENIENCE STORE, INC.,
NEW YORK ASSOCIATION OF CONVENIENCE STORES, NEW YORK STATE ASSOCIATION
OF SERVICE STATIONS AND REPAIRS SHOPS, INC., LORILLARD TOBACCO COMPANY,
PHILIP MORRIS USA INC., R.J. REYNOLDS TOBACCO CO., INC.,
Plaintiffs-Appellees,

v.

NEW YORK CITY BOARD OF HEALTH, NEW YORK CITY DEPARTMENT OF HEALTH AND
MENTAL HYGIENE, NEW YORK CITY DEPARTMENT OF CONSUMER AFFAIRS,
THOMAS FARLEY, DR., IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE
NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE,
JONATHAN MINTZ, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE
NEW YORK CITY DEPARTMENT OF CONSUMER AFFAIRS,
Defendants-Appellants.

On Appeal From the United States District Court for the Southern District of New
York, No. 10-cv-04392 Before the Honorable Jed. S. Rakoff

**BRIEF FOR AMERICAN LEGACY FOUNDATION, AMERICAN
ACADEMY OF PEDIATRICS, AMERICAN CANCER SOCIETY – CANCER
ACTION NETWORK, AMERICAN COLLEGE OF PREVENTIVE
MEDICINE, AMERICAN HEART ASSOCIATION, AMERICAN LUNG
ASSOCIATION, AMERICAN MEDICAL ASSOCIATION, AMERICAN
PUBLIC HEALTH ASSOCIATION, ASIAN PACIFIC PARTNERS FOR
EMPOWERMENT, ADVOCACY, AND LEADERSHIP, ASSOCIATION OF
SCHOOLS OF PUBLIC HEALTH, CITIZENS’ COMMISSION TO
PROTECT THE TRUTH, FAITH UNITED AGAINST TOBACCO, LUNG
CANCER ALLIANCE, MEDICAL SOCIETY OF THE STATE OF NEW
YORK, MASSACHUSETTS ASSOCIATION OF HEALTH BOARDS,
NATIONAL ASSOCIATION OF CHRONIC DISEASE DIRECTORS,
NATIONAL LBGT TOBACCO CONTROL NETWORK, AND
PARTNERSHIP FOR PREVENTION AS *AMICI CURIAE*
SUPPORTING DEFENDANTS-APPELLANTS**

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CORPORATE DISCLOSURE STATEMENT

No party to this filing has a parent corporation, and no publicly held corporation owns 10% or more of the stock of any of the parties to this filing.

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INTEREST OF *AMICI CURIAE*

Amici are non-profit public health organizations and advocacy groups that for decades have worked to prevent the devastating health and economic consequences of tobacco use.¹ *Amici* have broad experience in conducting tobacco-related public health research and public education efforts to alert people to the risks of smoking and to help them quit.²

Although the district court decided only the issue of federal preemption, Defendants on appeal have also addressed the First Amendment arguments advanced by the Plaintiffs below. *Amici* accordingly submit this brief to explain to the Court that, contrary to Plaintiffs' arguments, the measures adopted by the New York City Board of Health are consistent with the First Amendment because they

¹ No counsel for a party authored this brief in whole or part. No party or counsel for a party contributed money towards the preparation or submission of this brief. No person other than *amici curiae* and their counsel contributed money towards the preparation or submission of this brief. The parties have consented to the filing of this brief.

² *Amici curiae* are the following organizations: American Legacy Foundation, American Academy of Pediatrics, American Cancer Society – Cancer Action Network, American College of Preventive Medicine, American Heart Association, American Lung Association, American Medical Association, American Public Health Association, Asian Pacific Partners for Empowerment, Advocacy, and Leadership, Association of Schools of Public Health, Citizens' Commission to Protect the Truth, Faith United Against Tobacco, Lung Cancer Alliance, Medical Society of the State of New York, Massachusetts Association of Health Boards, National Association of Chronic Disease Directors, National LGBT Tobacco Control Network, and Partnership for Prevention. A description of each *amicus* and its interest in this litigation is included as an addendum to this brief.

are appropriately tailored to advance the City's compelling interests in helping smokers to quit, encouraging others to abstain, and thereby curbing tobacco use.

As this brief details, a substantial body of empirical public health research indicates that displaying, at the point of sale, prominent graphic warnings about the dangers of tobacco use and messages that encourage individuals to quit smoking or abstain from smoking is effective in reducing tobacco use.

INTRODUCTION AND SUMMARY OF ARGUMENT

Smoking is the leading cause of preventable death and disease in New York City and the United States and a major cause of disability. Each year, an estimated 443,000 people nationwide die prematurely from smoking-related causes—more than AIDS, alcohol, car accidents, fires, homicides, and suicides combined. *See* Adhikari et al., Centers for Disease Control & Prevention, *Smoking-Attributable Mortality, Years of Potential Life Lost, and Productivity Losses—United States, 2000-2004*, 57 *Morbidity & Mortality Wkly. Rep.* 1226, 1226 (2008); Xu et al., *Deaths: Final Data for 2007*, 58 *National Vital Statistics Reports* 19, 33-35, 95-96 (2010). Approximately 8.6 million Americans suffer from serious tobacco-related disease. *See* Hyland et al., Centers for Disease Control & Prevention, *Cigarette Smoking-Attributable Morbidity—United States, 2000*, 52 *Morbidity & Mortality Wkly. Rep.* 842, 842 (2003). Despite these grim figures—and despite the concerted efforts of public health authorities and organizations to prevent tobacco

use—an estimated 6,800 Americans, including more than 4,100 people under the age of 18, try cigarettes for the first time each day, and approximately 46 million adult Americans are current smokers. *See* Substance Abuse & Mental Health Servs. Admin., *Results from the 2009 National Survey on Drug Use and Health: Volume I, Summary of National Findings* 5 (2010); Dube et al., Centers for Disease Control & Prevention, *Vital Signs: Current Cigarette Smoking Among Adults Aged ≥ 18 Years—United States, 2009*, 59 *Morbidity & Mortality Wkly. Rep.* 1135, 1136 (2010).

It is now widely recognized that the standard textual health warnings used for so many years to warn consumers of the dangers of smoking are ineffective. *See* Institute of Medicine, *Ending the Tobacco Problem: A Blueprint for the Nation* 290-291 (2007). Policymakers in the United States and in dozens of other countries around the world have thus begun to adopt more evidence-based approaches to convey the risks of smoking to current and potential smokers and to help smokers to quit as well as to encourage others not to take up smoking. The health warnings required by Resolution § 181.19 are part of that effort, and are entirely consistent with the First Amendment.

In the district court, Plaintiffs argued that key elements of Resolution § 181.19 did not appropriately advance constitutionally legitimate or compelling interests of the City. But each of these contested elements—the graphic nature and

size of the signs, their placement at the point of sale, and their message to “Quit Smoking Today—Call 311 Or 1-866-NYQUITS”—is grounded in established empirical research regarding consumer behavior, and directly advances the City’s compelling interest in curbing smoking. First, a massive body of research—much of it occasioned by the adoption of similar graphic tobacco warnings in Canada, Australia, and other countries—indicates that prominent graphic health warnings are significantly more likely than purely textual messages to cause consumers to notice and read the warnings, to focus on and develop stronger beliefs about the serious health risks of smoking, and to take steps to quit. Smokers in those countries report that the warnings helped them reduce their smoking, increased their motivation to quit and the likelihood of their quitting, and kept them from relapsing. Second, research indicates that the use of displays at the point of sale is a particularly effective means of influencing consumer purchase decisions, including the decision not to purchase tobacco products. Third, the empirical literature strongly supports the use of messages such as “Quit Smoking Today” and the inclusion of quit-assistance phone numbers to encourage smokers to quit and to assist them in seeking treatment. Each of these elements of Resolution § 181.19 is integral to advancing the City’s interest in curbing smoking and helping its residents to quit.

ARGUMENT

RESOLUTION § 181.19 IS APPROPRIATELY TAILORED TO ADVANCE THE CITY'S COMPELLING INTERESTS IN HELPING SMOKERS TO QUIT AND ENCOURAGING OTHERS NOT TO TAKE UP SMOKING

For the reasons explained by the City (Br. 43-49), the point-of-sale displays required by Resolution § 181.19 are not subject to strict scrutiny review under the First Amendment and are not properly understood as compelled ideological speech, but rather should be reviewed according to the standards set forth in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) and *National Electrical Manufacturers Association v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001). Under those cases, the required displays satisfy the First Amendment as long as they are “reasonably related” to the State’s legitimate interest in curbing smoking. *See Sorrell*, 272 F.3d at 115. Resolution § 181.19 certainly satisfies that standard. But even if the Court were to apply a more stringent First Amendment analysis, the Resolution should be upheld because it directly advances, and is appropriately tailored to, the City’s compelling interests in curbing smoking among its residents by helping smokers quit and encouraging others not to take up smoking.

A. The Displays Required by Resolution § 181.19 Are Well Grounded in Fact

Although Plaintiffs have argued that the displays required by the City are equivalent to compelled ideological messages, the warnings at issue are solidly grounded in fact. The images required by the City are accurate depictions of

certain real-life health consequences of smoking: lung cancer, tooth decay, and brain damage caused by stroke. Not every person who smokes suffers these consequences, but many do, and the dangers of these consequences are sufficiently grave that the Board of Health is well justified in warning the public about them. Studies have shown a definitive causal relationship between smoking cigarettes and lung cancer, dental diseases, and stroke. *See* Centers for Disease Control & Prevention, Nat'l Center for Chronic Disease Prevention & Health Promotion, Office on Smoking & Health, *The Health Consequences of Smoking: A Report of the Surgeon General* 14, 25 (lung cancer), 27 (stroke), 29 (dental diseases) (2004). In 2000, there were 184,000 smoking-attributable lung cancer cases and 1,021,000 smoking-attributable stroke cases. *See* Hyland et al., 52 *Morbidity & Mortality Wkly. Rep.* at 843. From 2000 to 2004, on an annual basis, there were 125,522 smoking-attributable lung cancer deaths (and a few thousand more secondhand-smoke-attributable lung cancer deaths) and 15,922 smoking-attributable stroke deaths. *See* Adhikari et al., 57 *Morbidity & Mortality Wkly. Rep.* at 1227.

In this respect, the required warnings here are no different than the required warnings on cigarette packs, which have long included the warning that “Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy,” and which (under recent federal legislation) must in the future include warnings such as “Cigarettes cause fatal lung disease,” “Cigarettes cause cancer,”

and “Cigarettes cause stroke and heart disease.” 15 U.S.C. § 1333. Indeed, such factually based warnings, required and composed by the federal government, about the potential health consequences of commercial products are ubiquitous in our society. *See, e.g.*, 15 U.S.C. § 1278(a)(2) (requiring certain toys to be labeled “CHOKING HAZARD—Small parts. Not for children under 3 yrs.”); 21 C.F.R. § 101.17(g) (requiring warning on label of unpasteurized juice to state: “WARNING: This product has not been pasteurized and, therefore, may contain harmful bacteria that can cause serious illness in children, the elderly, and persons with weakened immune systems.”). Given the pervasive nature of such warnings, it is difficult to credit Plaintiffs’ suggestion that an objective observer would attribute the content of the Board of Health-designed posters (which include the label “NYC”) to the retailer, rather than understanding it as another government public health advisory in a commercial setting.

B. The City Has a Compelling Interest in Curbing Smoking Among Its Residents

In the district court, Plaintiffs correctly did not contest that the City has a compelling government interest in preventing tobacco use by minors. *See* Pltfs.’ Opp. 24 (Doc. #52); *see also Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 564 (2001) (“The State’s interest in preventing underage tobacco use is substantial, and even compelling[.]”). Plaintiffs argued, however, that the City “has no

constitutionally compelling interest in dissuading adults from purchasing a legal product.” Pltfs.’ Opp. 24.

There can be no serious doubt, however, that New York City has a compelling interest in reducing smoking among its entire population, given the devastating consequences of tobacco use for individuals and for the public at large, and that the City may accomplish that goal by helping smokers quit and by encouraging others not to take up smoking in ways that are likely to be effective rather than ineffective. The fact that tobacco use by adults is legal does not mean the City lacks a compelling interest in alerting its residents to the devastating health and economic consequences of smoking and helping them to quit. More than 950,000 adults and 20,000 public high school students in New York City smoke. *See* A104. Cigarette smoking resulted in an estimated 443,000 deaths nationwide and 5.1 million years of potential life lost annually from 2000 to 2004. *See* Adhikari et al., 57 *Morbidity & Mortality Wkly. Rep.* at 1226. These figures include more than 25,000 deaths and more than 340,000 years of potential life lost annually in the State of New York alone. *See* Centers for Disease Control & Prevention, *State-Specific Smoking-Attributable Mortality and Years of Potential Life Lost—United States, 2000-2004*, 58 *Morbidity & Mortality Wkly. Rep.* 29, 31 (2009).

The consequences of smoking are felt by the general public as well as by individuals who suffer from tobacco-related disease. From 2000 to 2004, productivity losses and direct health-care expenditures attributable to smoking amounted to nearly \$200 billion per year nationwide—or roughly 2% of annual U.S. gross domestic product during the period. *Id.*; Bureau of Economic Analysis, National Economic Accounts, *Current-dollar and “Real” Gross Domestic Product*, at <http://www.bea.gov/national/xls/gdplev.xls> (last accessed Apr. 12, 2011). The corresponding productivity losses and health-care expenditures for New York State alone totaled \$14.2 billion annually. *See* Centers for Disease Control & Prevention, *Best Practices for Comprehensive Tobacco Control Programs* 90 (Oct. 2007). Approximately eleven percent of all Medicaid expenditures are attributable to smoking, and in 2004, \$3.3 billion in Medicaid funds were spent on smoking-related health care costs in New York state alone. *See* Armour et al., *State-Level Medicaid Expenditures Attributable to Smoking*, 6 *Preventing Chronic Disease* 1 (2009). Households in New York state bear an average state and federal tax burden of \$889 per year from smoking-caused governmental expenditures. *See* Campaign for Tobacco Free Kids, *The Toll of Tobacco in New York*, at http://www.tobaccofreekids.org/facts_issues/toll_us/new_york (last accessed Apr. 12, 2011). By any reasonable measure, smoking

represents a leading public health and economic problem for New York City and for many localities in the United States.

Addressing the problem of tobacco use is particularly difficult because it is hard for smokers to quit. Nicotine, a psychoactive ingredient in cigarettes, is highly addictive. Most smokers begin in adolescence, and empirical studies indicate that symptoms of dependence can arise within two days of a youth first inhaling from a cigarette. *See* DiFranza et al., *Symptoms of Tobacco Dependence After Brief Intermittent Use*, 161 *Archives of Pediatric and Adolescent Medicine* 704, 708 (2007). Indeed, the vast majority of smokers *want* to quit smoking, but cannot do so easily. During 2007, nearly 70% of adult smokers in New York tried to quit at least once. *See* A59. But without cessation assistance, fewer than 10% of smokers who try succeed in quitting permanently. *Id.* However, with evidence-based cessation assistance, particularly by using appropriate nicotine replacement therapy or drug treatments, the odds of a person successfully quitting smoking can *double*. *See id.* Plaintiffs' suggestion in the district court (Pltfs.' Opp. 24) that the City can have no compelling interest in "dissuading" its residents from smoking therefore misses the mark. The displays required by Resolution § 181.19 are in large part intended to help smokers to accomplish what they themselves already want to do—stop. Given the serious health and economic consequences of tobacco use, the City has a compelling interest both in reinforcing, through public

information messages, the reasons for quitting smoking and in helping those many smokers who want to quit to succeed permanently.

C. Empirical Research Demonstrates that the Resolution § 181.19 Signs Are Likely To Be More Effective in Curbing Smoking

Plaintiffs contended in the district court that the displays required by Resolution § 181.19 are not tailored to “any constitutionally relevant interest in affecting the permitted use of a legal product by adults” because “there is no empirical evidence that an additional warning about health risks of smoking would be effective in affecting adult decisions on whether to smoke.” Pltfs.’ Opp 27. But the scientific evidence is in fact unmistakable that the use of graphic images, point-of-sale displays, and cessation-assistance messaging is likely to be particularly effective in prompting the City’s residents to quit or abstain from smoking.

1. Prominent graphic warnings are significantly more effective in curbing smoking than textual warnings

Resolution § 181.19 seeks to remedy a critical drawback of standard textual warnings regarding the health risks of tobacco use: such warnings often go unnoticed or fail to cause individuals to focus on the message being conveyed. For example, studies concerning textual tobacco warnings required by federal law show that young people in particular often fail to see or remember textual health warnings on tobacco packaging and advertisements. *See Robinson & Killen, Do Cigarette Warning Labels Reduce Smoking?: Paradoxical Effects Among*

Adolescents, 151 Archives of Pediatrics & Adolescent Medicine 267, 270 (1997) (as few as a third of surveyed regular adolescent smokers recalled seeing a particular required textual warning); Fischer et al., *Recall and Eye Tracking Study of Adolescents Viewing Tobacco Advertisements*, 261 J.A.M.A. 84, 88-89 (1989) (finding that almost two-thirds of adolescents in the study failed to look at the required textual warnings at all or to look long enough to read any words). In addition, studies show that viewers consistently fail to read or process textual tobacco warnings on billboards and other public advertising even while they are able to identify cigarette brand names and notable imagery associated with cigarette brands. See Davis & Kendrick, *The Surgeon General's Warnings in Outdoor Cigarette Advertising*, 261 J.A.M.A. 90, 93 (1989) (finding, for example, that viewers in New York City were unable to read *any* part of the required textual warnings on taxi advertisements for cigarettes).

In contrast, warnings that use prominent graphics, such as those required by Resolution § 181.19, are likely to be much more effective in conveying messages about the risks of smoking and in helping smokers to quit. Empirical studies demonstrate that the greater emotional response triggered by graphic warnings illustrating the effects of tobacco often leads to greater awareness of, and attention to, the health risks of smoking. See Hammond et al., *Text & Graphic Warnings on Cigarette Packages: Findings from the Int'l Tobacco Control Four Country Study*,

32 Am. J. Prev. Med. 210, 215 (2007) (“*Text & Graphic Warnings*”); *see also* Institute of Medicine of the National Academies, *Ending the Tobacco Problem: A Blueprint for the Nation* 294 (2007) (“*Blueprint*”) (“In general, the evidence shows that the salience of warnings is affected by their placement, sizes, and other design features, and that salient warnings affect the consumer’s awareness of risks.”).

A review of the relevant research on graphic tobacco warnings published by the World Health Organization concluded that such warnings are “(i) more likely to be noticed than text-only warning labels; (ii) more effective for educating smokers about the health risks of smoking and for increasing smokers’ thoughts about the health risks; and (iii) associated with increased motivation to quit smoking.” Fong et al., *The Impact of Pictures on the Effectiveness of Tobacco Warnings*, 87 Bull. World Health Org. 640, 640 (2009) (footnoted citations omitted); *see also* Hammond et al., *Showing Leads to Doing: Graphic Cigarette Warning Labels Are an Effective Public Health Policy*, 16 Eur. J. Pub. Health 223, 223-224 (2006) (“All evidence suggests that graphic warnings are ... more likely to be noticed and discussed than text warnings; ... [are] associated with increased cessation ... [; and] enjoy high credibility and support from smokers themselves.”).

In short, graphic warnings help many smokers to realize their intention of quitting: graphic anti-smoking advertisements “elicit strong emotional arousal” and are associated with an “increased intention not to smoke” among both adults and

teenagers. Wakefield et al., *Effects of Anti-Smoking Advertising on Youth Smoking: A Review*, 8 J. Health Commc'n 229, 240 (2003) (“*Effects of Anti-Smoking Advertising*”). In particular, negative emotional reactions to graphic warnings have been associated with cessation behavior, including quitting, attempting to quit, and reduced smoking. See Hammond et al., *Graphic Canadian Cigarette Warning Labels and Adverse Outcomes: Evidence from Canadian Smokers*, 94 Am. J. of Pub. Health 1442, 1442 (2004). Moreover, graphic warnings may be particularly effective in reaching low-income or low-literacy individuals and helping them to quit. See *Blueprint* at 295 (“preliminary evidence suggests that countries with pictorial warnings demonstrate fewer disparities in health knowledge across educational levels,” and “[p]ictorial warnings may also be particularly effective in educating people who are illiterate”).

In the last decade, prominent graphic tobacco warnings have been adopted by more than thirty countries, and studies of several of these policy initiatives demonstrate the effectiveness of graphic warnings. See *Required Warnings for Cigarette Packages and Advertisements*, 75 Fed. Reg. 69,524, 69,525 (Nov. 12, 2010) (noting that the Food and Drug Administration (FDA) “found evidence of a strong worldwide consensus that effective tobacco health warnings should be large and should include a graphic image component”). The leading empirical research concerns the impact of graphic warnings recently deployed in Canada and

Australia, and confirms that such warnings grab smokers' attention, inform them more effectively of the risks of smoking, and help motivate them to quit or help former smokers to abstain successfully.

For example, studies in Canada found that nearly all Canadian smokers noticed the recent change in labeling and were aware of the new graphic health warnings. See Canadian Cancer Society, *Evaluation of New Warnings on Cigarette Packages* 28 (2001) (“*Evaluation of New Warnings*”); Koval et al., *The Potential Effectiveness of Warning Labels on Cigarette Packages: The Perceptions of Young Adult Canadians*, 96 *Canadian J. Pub. Health* 353, 354 (2005). Studies have also found that Australian smokers were significantly more likely to notice the new graphic warnings on cigarette packs, and to consider their message about the risks of smoking, in comparison to predecessor textual warnings. See, e.g., Borland et al., *Impact of Graphic and Text Warnings on Cigarette Packs: Findings from Four Countries Over Five Years*, 18 *Tobacco Control* 358, 361 (2009). In addition, the new graphic warnings appear to be particularly effective in getting the attention of young people. See Shanahan & Elliott, Australia Department of Health and Ageing, *Evaluation of the Effectiveness of the Graphic Health Warnings on Tobacco Product Packaging 2008*, at 16, 100 (2009) (“Shanahan & Elliott”) (finding that young people generally were more likely than older people to consider the graphic warnings effective).

The new graphic warnings in Canada and Australia have also been found to significantly increase smokers' awareness of the risks of tobacco use. Studies from these countries consistently find that smokers considered the health risks of smoking more frequently after the introduction of graphic warnings. *See Evaluation of New Warnings* at 52 (58% of smokers surveyed who noticed the graphic warnings reported that they thought about the health risks more frequently); Hammond et al., 94 Am. J. Pub. Health at 1443 (51% of smokers surveyed reported that the new graphic warnings caused them to consider the health effects of smoking more often); Miller et al., *Response of Mass Media, Tobacco Industry and Smokers to the Introduction of Graphic Cigarette Pack Warnings in Australia*, 19 Eur. J. Pub. Health 644, 644 (2009) (51% of smokers surveyed perceived a greater risk of dying from smoking in light of Australia's new graphic warnings).

Most importantly, the new graphic warnings work. They motivate individuals to quit smoking and to abstain over the long term. Studies from Canada indicate that between one-third and one-half of smokers reported an increased motivation to quit because of the new graphic warnings. *See Evaluation of New Warnings* at 62 (44% of adult smokers surveyed stated that the new warnings increased their motivation to quit); Koval et al., 96 Can. J. Pub. Health at 354 (new labels led 37% of males and 48% of female smokers to think about trying

to quit). One study found that participants who quit smoking after introduction of graphic warnings were almost three times more likely to cite the warnings as a motivation to quit than smokers who quit before graphic warnings were introduced. See Hammond et al., *The Impact of Cigarette Warning Labels and Smoke-Free Bylaws on Smoking Cessation*, 95 Can. J. Pub. Health 201, 201 (2004) (“*Impact of Cigarette Warning Labels*”). In Australia, 62% of recent quitters reported that the graphic health warnings had helped them quit smoking. See Shanahan & Elliott 18. Research also shows that graphic warnings motivate former smokers to abstain from smoking over the long term. See *Impact of Cigarette Warning Labels*, 95 Can. J. Pub. Health at 201 (finding that 27% of surveyed former smokers reported that Canada’s new graphic warning labels had helped them remain smoke-free); see also Shanahan & Elliott 17-18 (finding that 35% of surveyed long-term ex-smokers and 55% of recent quitters said Australia’s graphic warnings helped them to abstain from smoking). Finally, graphic anti-smoking warnings are likely to be more effective than text-only warnings in preventing individuals, particularly young people, from taking up smoking in the first place. See *id.* at 17 (22% of Australian non-smokers surveyed stated that the graphic warnings on cigarette packs had helped prevent them from taking up smoking); Elliott & Shanahan Research, *Literature Review: Evaluation of the Effectiveness of the Graphic Health Warnings on Tobacco Product Packaging*

2008, at 20 (2009) (concluding that published research “suggests that graphic health warnings when compared with text-only warnings have a stronger impact on potential smokers, namely young non-smokers”).

The FDA has recognized the “substantial evidence” that prominent graphic warnings would yield significant public health benefits over and above those achieved through the current textual warnings used in the U.S. Graphic warnings grab smokers’ attention more effectively, get them to focus on the risks of tobacco use, and help them to quit. *See* 75 Fed. Reg. at 69,524-69,534. The agency has proposed rules specifying large graphic warning labels for cigarette packaging, as required by federal law. *See* Family Smoking Prevention & Tobacco Control Act of 2009, Pub. L. No. 111-31, § 201, 123 Stat. 1776, 1845 (to be codified at 15 U.S.C. § 1333(d)) (stating that FDA labeling rules shall “require color graphics depicting the negative health consequences of smoking to accompany the label statements specified” by the Act). Like the soon-to-be-required federal warning labels, the signs mandated by Resolution § 181.19 are based on solid scientific evidence that graphic warnings are effective in helping people to quit, or abstain from, smoking, and thus directly advance the City’s interest in curbing tobacco use.

2. Signs at the point of sale are particularly effective in curbing smoking

In the district court, Plaintiffs took issue with the City's determination to place Resolution § 181.19 signs at the point of sale. *See* Pltfs.' Opp. 30-31. But posting signs at the point of sale—where individuals may waver, critically, in their determination to quit smoking or abstain from smoking—directly advances the City's compelling interest in helping smokers quit and encouraging potential smokers to abstain from tobacco use. Resolution § 181.19 is supported by empirical research finding that point-of-sale displays are effective in influencing consumer behavior.

Empirical studies consistently demonstrate the effectiveness of point-of-sale advertising. Several prominent studies concern food and beverage sales. One such study found that placing information at the point of sale regarding healthy beverage options significantly increased purchases of healthier drinks and resulted in a decrease in purchases of high-sugar drinks. *See* Bergen et al., *Effects of Energy-Content Labels & Motivational Posters on Sales of Sugar-Sweetened Beverages: Stimulating Sales of Diet Drinks Among Adults Study*, 106 J. Am. Dietetic Ass'n 1866, 1868 (Nov. 2006). Another study demonstrated that point-of-sale displays can affect not only an individual's present purchase decisions, but also his or her future buying habits. *See* Sutherland et al., *Guiding Stars: The Effect of a Nutrition Navigation Program on Consumer Purchases at the*

Supermarket, 91 Am. J. Clinical Nutrition 1090S, 1092S (Supp. 2010) (point-of-sale display was “effective at bringing about changes in food purchasing immediately after implementation, but also continued to incrementally improve the purchasing of [healthier] foods 1 and 2 y[ears] later”).

Moreover, contrary to Plaintiffs’ contention in the district court that point-of-sale signs are irrelevant to youth smoking (Pltfs.’ Opp. 25-26), the Resolution § 181.19 signs are critically important for reaching the 20,000 New York City public high school students who smoke. *See* A104. City teenagers are frequent customers of convenience stores and other retail outlets where cigarettes are sold. *See* Wakefield et al., *Tobacco Industry Marketing at Point of Purchase After the 1998 MSA Billboard Advertising Ban*, 92 Am. J. Pub. Health 937, 938 (2002) (noting that because “3 of 4 teenagers visit a convenience store at least once per week, these research studies suggest that the point-of-purchase environment may have important influences on youths”).

The importance of point-of-sale messages rests on common sense as well. The tobacco companies themselves clearly understand the effectiveness of advertising at the point of sale, as they spent over \$240 million on point-of-sale promotion in 2006 alone. *See* Federal Trade Commission, *Cigarette Report for 2006*, at 4 (2009). Outside estimates of the effectiveness of such advertising suggest that it increases tobacco sales by as much as 28%. *See* Carter et al., *The*

Effect of Retail Cigarette Pack Displays on Unplanned Purchases: Results from Immediate Postpurchase Interviews, 18 Tobacco Control 218, 218 (2009); see also Henriksen et al., *A Longitudinal Study of Exposure to Retail Cigarette Advertising and Smoking Initiation*, 126 Pediatrics 232, 232 (2010) (finding that “adolescents’ exposure to widespread cigarette advertising at the point of sale is a risk factor for smoking initiation”). This research strongly indicates that, to prevent adolescents from smoking, it is critical to reach them at the moment when they are deciding whether to use tobacco—in retail establishments where cigarettes are sold.

3. The prominence of the signs is crucial to their effectiveness

Although Plaintiffs objected in the district court to the size of the required signs (Pltfs.’ Mem. 25-26 (Doc. #23)), studies illustrate that “anti-smoking ads must have adequate share of voice to break through ad clutter, attract attention and persuade.” *Effects of Anti-Smoking Advertising*, 8 J. Health Commc’n at 242 (citations and internal quotation marks omitted). Consumers’ ability to notice the signs is vital to the success of Resolution § 181.19 in advancing the City’s interest in curbing smoking. One study finds that “[s]mokers who reported noticing warnings were between 1.5-3.0 times more likely to believe” in the relevant health effects of smoking. Hammond et al., *Effectiveness of Cigarette Warning Labels in Informing Smokers About the Risks of Smoking: Findings from the Int’l Tobacco Control Four Country Survey*, 15 Tobacco Control iii19, iii23 (Supp. III 2006).

Further, “larger, more vivid warnings are more likely to retain their salience over time than less prominent warnings.” *Text & Graphic Warnings*, 32 Am. J. Prev. Med. at 215.

4. The signs’ message to “Quit Smoking Today—Call 311 Or 1-866-NYQUITS” reinforce smokers’ commitment to quitting

The signs required by Resolution § 181.19 encourage smokers to “Quit Smoking Today—Call 311 Or 1-866-NYQUITS,” which is the City’s hotline for quit assistance. This element of the signs directly advances the City’s compelling interest in curbing smoking by encouraging smokers to quit and to seek the City’s help in that effort.

Research indicates that the message to “Quit Smoking Today” is a critical element of the City’s effort in helping smokers to quit. *See Smith, Social Marketing: An Overview of Approach and Effects*, 12 Injury Prevention i38, i39 (Supp. I 2006) (“Social marketing is skeptical of the notion that information [alone] leads to behavior change[.]”). Such messaging is likely to be particularly important and effective because most smokers, at one time or another, *want* to quit smoking, but they need encouragement and assistance to do so. For those smokers, the signs’ message to “Quit Smoking Today” reinforces their motivation to quit. Even Plaintiffs do not appear to disagree that quitting smoking is often the best course of action: one of the tobacco companies states on its website that “[i]f you

are concerned about the health effects of smoking, you should quit.” Pltfs.’

Mem. 18. The inclusion of similar messages in the Resolution § 181.19 signs appropriately advances the City’s interest in helping smokers to quit.

The signs do not simply motivate smokers to quit, but also direct them to quit-assistance resources. Nicotine is extremely addictive, and it is exceedingly difficult to quit smoking, especially without cessation help. Of the 70% of smokers who try to shake the addiction each year, only 4% to 7% are successful. *See* U.S. Dep’t of Health & Human Services, *Treating Tobacco Use and Dependence: 2008 Update* 15 (2008). Smokers who use evidence-based treatments, however, are significantly more likely to succeed in quitting over the long term. *Id.* at vi.

Scientific studies consistently find that providing quitline information in anti-smoking warnings increases the number of smokers who use this telephone counseling treatment, and that quitlines are effective in helping smokers to quit. In an Australian study, quitline usage doubled in the year after quitline phone numbers were added to cigarette packages. *See* Miller et al., *Impact on the Australian Quitline of New Graphic Cigarette Pack Warnings Including the Quitline Number*, 18 *Tobacco Control* 235, 236 (2009); *see also* Willemsen et al., *Impact of the New EU Health Warnings on the Dutch Quit Line*, 11 *Tobacco Control* 381, 381 (2002) (noting 3.5-fold increase in Dutch quitline usage after

phone number was included on cigarette packaging). Moreover, studies indicate that use of quitlines can significantly increase smoking abstinence compared to attempting to quit with minimal or no counseling. *See* Stead et al., The Cochrane Collaboration, *Telephone Counseling for Smoking Cessation 2* (2009); *see also* U.S. Public Health Service, *A Clinical Practice Guideline for Treating Tobacco Use and Dependence: 2008 Update*, 35 Am J. Prev. Med. 158, 172 (2008); Wakefield & Borland, *Saved by the Bell: The Role of Telephone Helpline Services in the Context of Mass-Media Anti-Smoking Campaigns*, 9 Tobacco Control 117, 118 (2000) (observing that quitlines can use the “motivation generated by anti-smoking advertising, thus providing an opportunistic channel for smokers who are motivated to take some kind of action”). Inclusion of the quitline phone number on the Resolution § 181.19 signs is integral to the City’s goal of helping its residents to quit smoking.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court rule that the displays required by Resolution § 181.19 are consistent with the First Amendment.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B), the brief contains 5,495 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2003 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(a)(7)(B), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

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ADDENDUM

Statements of Interest

American Legacy Foundation

American Legacy Foundation, created as a result of the 1998 Master Settlement Agreement between 46 states and the tobacco industry, is dedicated to building a world where young people reject tobacco and anyone can quit.

Legacy's signature programs include truth®, the award-winning youth smoking prevention campaign, and EX®, an innovative program designed to help smokers quit.

American Academy of Pediatrics

The American Academy of Pediatrics (AAP) was founded in 1930 and is a national, not-for-profit organization dedicated to furthering the interests of children's health and the pediatric specialty. Since its inception, the membership of AAP has grown from the original group of 60 physicians specializing in children's health to over 60,000 primary care physicians, pediatric medical subspecialists, and pediatric surgical specialists. Over the past 80 years, AAP has become a powerful voice for children's health through education, research, advocacy, and expert advice and has demonstrated a continuing commitment to working with hospitals and clinics, as well as with state and federal governments to protect the well-being of America's children. The AAP has engaged in broad and

continuous efforts to prevent harm to the health of children and adolescents caused by the use of tobacco products and exposure to second-hand tobacco smoke.

American Cancer Society / ACS CAN

The American Cancer Society Cancer Action Network (ACS CAN) is the nonprofit, nonpartisan advocacy affiliate of the American Cancer Society. ACS CAN supports evidence-based policy and legislative solutions designed to eliminate cancer as a major health problem. ACS CAN works to encourage government officials to make cancer a top national priority, and has nearly 500,000 advocates nationwide. ACS CAN strongly supports tobacco control measures across the country, including working with the Society's local affiliates in support of regulations such as those at issue in this case. A local affiliate, the American Cancer Society Eastern Division, is participating in the public health brief addressing preemption issues.

American College of Preventive Medicine

The American College of Preventive Medicine (ACPM) is the national professional society for physicians committed to disease prevention and health promotion. ACPM was established in 1954. Its 2,400 members are engaged in preventive medicine practice, teaching and research.

American Heart Association

The American Heart Association (AHA) is a voluntary health organization that, since 1924, has helped protect people of all ages and ethnicities from the ravages of heart disease and stroke. AHA is one of the world's premier health organizations, with local chapters in all 50 states, as well as Washington D.C., and Puerto Rico. The association invests in research, professional and public education, and advocacy so people across America can live stronger and longer lives. AHA has long been active before Congress and regulatory agencies on tobacco and other health-related matters and has petitioned the Food and Drug Administration on several occasions seeking regulation of cigarettes and other tobacco products under the federal Food, Drug, and Cosmetic Act.

American Lung Association

The American Lung Association is the nation's oldest voluntary health organization, with 435,000 volunteers in all 50 states and the District of Columbia. Because cigarette smoking is a major cause of lung cancer and chronic obstructive pulmonary disease, the American Lung Association has long been active in research, education and public policy advocacy on the adverse health effects of tobacco products. The American Lung Association believes that point-of-sales education is an important tool to help prevent children from becoming smokers and to encourage adult smokers to quit.

American Medical Association

The American Medical Association (AMA), an Illinois non-profit corporation founded in 1847, is the largest association of physicians and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all US physicians, residents and medical students are represented in the AMA's policy making process. The objectives of the AMA are to promote the science and art of medicine and the betterment of public health. The AMA has developed expertise in the pharmacology of nicotine, the toxic effects of cigarette smoke, and the societal implications of tobacco usage. For many years, the AMA has been one of the leading anti-smoking organizations in the United States.

American Public Health Association

The American Public Health Association (APHA) is a national organization devoted to protecting Americans and their communities from preventable serious health threats. Founded in 1872, APHA is the world's oldest and most diverse public health organization. APHA represents a broad array of health providers, educators, environmentalists, policy makers, and health officials at all levels working both within and outside governmental organizations and educational institutions. APHA advocates for national tobacco control measures to protect the public's health from the adverse effects of tobacco products.

Asian Pacific Partners for Empowerment, Advocacy, and Leadership

Founded in 1994, Asian Pacific Partner for Empowerment, Advocacy and Leadership (APPEAL) is a national non-profit organization whose mission is to champion social justice and achieve parity and empowerment for Asian Americans, Native Hawaiians and other Pacific Islanders by supporting and mobilizing community-led movements through advocacy and leadership development on critical public health issues.

Association of Schools of Public Health

The Association of Schools of Public Health (ASPH) represents the Council on Education for Public Health-accredited schools of public health. ASPH promotes the efforts of schools of public health to improve the health of every person through education, research, and policy.

Citizens' Commission to Protect the Truth

The Citizens' Commission to Protect the Truth was formed to promote public education to discourage smoking by children and teens. The Commission has assembled all former U.S. Secretaries of Health, Education, and Welfare, former U.S. Secretaries of Health and Human Services, and all former U.S. Surgeons General and Directors of the Center for Disease Control and Prevention from every administration, Republican and Democrat, since Lyndon Johnson, to support this cause.

Faith United Against Tobacco

Faith United Against Tobacco is a coalition of thirty national faith groups and denominations that work together to reduce smoking, particularly among children, across the country.

Lung Cancer Alliance

The Lung Cancer Alliance is the only national non-profit organization dedicated solely to patient support and advocacy for people living with lung cancer and those at risk for the disease. The organization's mission is to reverse decades of stigma and neglect by empowering those with or at risk for the disease, elevating awareness and changing health policy.

Massachusetts Association of Health Boards

Massachusetts Association of Health Boards (MAHB) is a non-profit trade association that represents local boards of health in Massachusetts. MAHB's mission is to assist and support boards of health in meeting their statutory and service responsibilities, through programs of education, technical assistance, representation, and resource development. MAHB has had a grant to provide technical assistance on tobacco control to local boards of health since 1993.

Medical Society for the State of New York

The Medical Society of the State of New York (MSSNY) represents approximately 21,000 physicians, medical residents and medical students in New

York State. MSSNY's purposes include engaging in activities to contribute to the professional and personal development of physicians by representing the profession as a whole and advocating health-related rights, responsibilities and issues. These actions are designed to promote a favorable environment for the practice of medicine and improvement of health of the residents of New York State.

National Association of Chronic Disease Directors

The National Association of Chronic Disease Directors (NACDD) is a national public health association for chronic disease program directors of each state and U.S. territory. Founded in 1988, NACDD links together more than 1,500 members to advocate for preventive policies and programs, encourage knowledge sharing and develop partnerships for health promotion. Since its founding, NACDD has been a national leader in mobilizing efforts to reduce chronic diseases and their associated risk factors through state and community-based prevention strategies.

National LGBT Tobacco Control Network

The National LGBT Tobacco Control Network works to support the many local tobacco control advocates in supporting the elimination of tobacco health disparities for all Lesbian, Gay, Bisexual and Transgender people. The Network operates in response to the documented high rates of smoking within sexual and

gender minority populations and works to educate tobacco control efforts regarding the specific LGBT population.

Partnership for Prevention

Partnership for Prevention is a membership organization of business, nonprofit organizations and government leaders advancing evidence-based prevention in policies and practices. Partnership seeks to increase investment in preventing disease and promoting health, making prevention a national priority and America a healthier nation. Partnership seeks to create a “prevention culture” in America, where the prevention of disease and the promotion of health, based on the best scientific evidence, are the first priority for policy makers, decision-makers and practitioners who can make a difference in this area. Tobacco control is a major initiative of the Partnership.