No. 11-91

United States Court of Appeals for the Second Circuit

23-34 94TH ST. GROCERY CORP., KISSENA BLVD. CONVENIENCE STORES, INC., NEW YORK ASSOCIATION OF CONVENIENCE STORES, NEW YORK STATE ASSOCIATION OF SERVICE STATIONS AND REPAIR SHOPS, INC., LORILLARD TOBACCO COMPANY, PHILIP MORRIS USA INC., AND 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, DR. THOMAS FARLEY, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE, AND JONATHAN MINTZ, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE NEW YORK CITY DEPARTMENT OF CONSUMER AFFAIRS,

DEFENDANTS-APPELLANTS

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK, NO. 10-cv-04392
HON. JED S. RAKOFF, PRESIDING

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PLAINTIFFS-APPELLEES IN SUPPORT OF AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, undersigned counsel states that the Chamber of Commerce of the United States of America is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent company and has issued no stock.

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INTRODUCTION, INTEREST OF AMICUS CURIAE, & SOURCE OF AUTHORITY TO FILE[1]

This is a case of enormous potential importance, not just to those who make and sell tobacco products, but to every regional or national corporation that does business within this Circuit. It is potentially important because of the threat the appellants' position poses—not just to the express preemption clause of the Federal Cigarette Labeling and Advertising Act and its benefits to those who deal in cigarettes, but to the express preemption clauses in *hundreds* of federal statutes, which were designed by Congress to ensure regulatory uniformity to companies making or selling everything from apples to zinc. And that threat arises largely from the interpretive methodology the appellants urge on this Court, a methodology that, at every turn, would eliminate as much meaning as possible from *any* express preemption clause, in a manner that would be considered unacceptable in any other statutory-interpretation setting.

As the world's largest business federation, the Chamber of Commerce of the United States of America is uniquely situated to address this important issue. The Chamber represents three hundred thousand direct members and indirectly

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), we state that no party's counsel authored this brief in whole or in part; that no party or party's counsel contributed money intended to fund preparing or submitting the brief; and that no person—other than the amicus curiae, its members, or its counsel—contributed money intended to fund preparing or submitting the brief.

represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every sector and geographic region of the country. And one of the Chamber's important functions is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in courts throughout the nation, including this Court, on issues of national concern to the business community.

This is such a case. The Chamber—which has filed amicus briefs in prior preemption cases, including *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068 (2011), *Wyeth v. Levine*, 555 U.S. 555 (2009), *Altria Group, Inc. v. Good*, 129 S. Ct. 538 (2008), *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008), *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000), and *United States v. Locke*, 529 U.S. 89 (2000)—is well-situated to address the issue of preemption raised here. Its members, which include retailers that must comply with regulations like those embodied in N.Y. City Health Code Article 181.19, are engaged in commerce in each of the 50 states. The Chamber's membership also includes millions of businesses that are subject in varying degrees to a wide range of federal regulatory schemes that expressly preempt state and local laws. As a result, the Chamber has a powerful interest in ensuring that this case is decided in a way that allows its members to operate in a consistent, reasonably uniform regulatory environment, free from the regulatory balkanization

that would flow from the appellants' approach to the interpretation of express preemption clauses.

The Chamber has authority to file pursuant to written consents from counsel for all of the parties on both sides. Fed. R. App. P. 29(a).

BRIEF FACTUAL BACKGROUND

This case involves a New York City ordinance, N.Y. City Health Code Article 181.19 (the "Resolution"), which requires retailers who sell tobacco face-to-face to consumers to display "smoking cessation signs" in their stores. The signs must present City-prescribed warnings about smoking, including: "information about tobacco products and the adverse health effects of tobacco use," "a pictorial image illustrating the effects of tobacco use," and "information about how to get help to quit using tobacco." Art. 181.19(b)(1). Implementing the Resolution, the City designed three signs for display—each containing "graphic, even gruesome images of a brain damaged by a stroke, a decaying tooth and gums, and a diseased lung, accompanied by corresponding information about the dangers of smoking." Op. 5. The signs must be displayed "prominently." Art. 181.19(a)-(b).

The Resolution did not write on a blank slate, however. The Federal Cigarette Labeling and Advertising Act ("Labeling Act"), 15 U.S.C. §§ 1331-1341, "establish[es] a comprehensive Federal program to deal with cigarette labeling and advertising" (§ 1331) and expressly preempts state law to the contrary. In relevant

part, the preemption provision states: "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." § 1334(b).

Invoking the Labeling Act, tobacco manufacturers, retailers, and trade associations sued the City to have the Resolution declared invalid. The City conceded that the Resolution's mandated warnings were "requirement[s] . . . based on smoking and health," but disputed that the warnings were "with respect to the advertising or promotion" of cigarettes. The district court disagreed, holding that "the display of cigarettes at the point-of-sale constitutes cigarette 'promotion' as that term is used in the Labeling Act." Op. 9. Accordingly, the Court granted the plaintiffs' motion for summary judgment and invalidated the Resolution. Op. 13. This appeal followed.

ARGUMENT

I. As applied to express preemption clauses, the presumption against preemption articulated in some Supreme Court decisions has effectively been abandoned, and therefore need not and should not be applied here.

As a threshold matter, the City builds its argument on a foundation of sand by relying on a "presumption against preemption." City Br. 16-18. According to the City, not only is it "presumed that [state] police powers are not to be superseded unless that was the clear and manifest purpose of Congress" (City Br. 16);

but once it is clear that Congress has purposed to preempt state law, "where the text of a preemption clause is ambiguous or open to more than one plausible reading, courts have a duty to accept the reading that disfavors preemption" (City Br. 18) (purporting to quote *Desiano v. Warner-Lambert & Co.*, 467 F.3d 85, 94 (2d Cir. 2007)). But the case the City cites for the latter proposition says no such thing. And, in any event, and although this Court need not decide the issue to affirm, Supreme Court decisions since *Altria* (2008) show that the Court has effectively abandoned any presumption against preemption where, as here, a statute expressly preempts state law.

1. The Supreme Court decides preemption cases with some frequency, and thus it is striking that since 2008, not a single express preemption decision has applied a presumption against preemption. For example, just this spring, the Court decided a case brought by the Chamber of Commerce of the United States of America and various business and civil rights organizations challenging the validity of Arizona's undocumented workers employment law as preempted under the federal Immigration Reform and Control Act. *Chamber of Commerce of the United States of Am. v. Whiting*, 131 S. Ct. 1968 (2011). The federal statute contains an express preemption provision, which the majority construed without invoking a presumption against preemption. *Id*. at 1977-81. Indeed, though *Whiting* produced three opinions, none of the Justices so much as mentioned the presumption.

Similarly, still earlier this year in *Bruesewitz v. Wyeth*, the Court considered the preemptive effect of the express preemption provision in the National Childhood Vaccine Injury Act. 131 S. Ct. 1068 (2011). But though two dissenters invoked the presumption in a footnote (*id.* at 1096 n.16), the majority did not reference it—even though, according to the appellants here, the presumption is "strongest when the state regulation concerns matters of health and safety." City Br. 18.[2]

So too in *Cuomo v. Clearing House Ass'n, L.L.C.*, 129 S. Ct. 2710 (2009), the Court refused to enforce an express preemption clause, but again, not on the basis of a presumption against preemption. Rather, the Court read the statute at issue (the National Banking Act) as preempting some activities of the state but not others—*by its own terms*. The dissent at least mentioned a presumption against preemption, but only to explain that "[t]here should be no presumption against preemption because Congress has expressly pre-empted state law in this case." *Id.* at 2732. Similarly, the majority expressly declared that invoking the presumption

[2] In fact, the Court has *often* decided express preemption cases involving health and safety without relying on any presumption. *See, e.g., Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008) (Medical Device Amendments of 1976); *Engine Mfrs. Ass'n. v. South Coast Air Quality Mgt. Dist.*, 541 U.S. 246 (2004) (Clean Air Act); *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002) (Federal Boat Safety Act of 1971); *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001) (Federal Food Drug & Cosmetic Act); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) (Federal Motor Vehicle Safety Standard 208; National Traffic and Motor Vehicle Safety Act of 1966); *cf. United States v. Locke*, 529 U.S. 89 (2000) (non-health-and-safety case involving express preemption provision, but not mentioning presumption).

was unnecessary: "We have not invoked the presumption against pre-emption, and think it unnecessary to do so in giving force to the plain terms of the National Bank Act." *Id.* at 2720.

Indeed, the Court has disclaimed a presumption against preemption in recent cases involving implied preemption—where the argument for a presumption is arguably stronger. The Court's recent decision in *PLIVA, Inc. v. Mensing*, ___ S. Ct. ___, No. 09-993, 2011 WL 2472790 (2011), for example, dealt with implied preemption—yet the five-member majority did not invoke the presumption. Moreover, four members of the Court expressly criticized the presumption, stating that in light of the Supremacy Clause "courts should not strain to find ways to reconcile federal law with seemingly conflicting state law." *Id.* at *10. Thus, even in the context of implied preemption, it now appears the presumption may no longer command a majority of the Court. That is *a fortiori* true here, where the provision includes an express preemption provision.

2. The City, moreover, has not cited any Second Circuit decisions that would require applying the presumption here in construing the scope of an express preemption clause. Nor have we found any such cases.

True, a few of this Court's decisions cite the presumption in the context of statutes that contain express preemption provisions. *See Goodspeed Airport LLC v. E. Haddam Inland Wetlands & Watercourses Comm'n*, 634 F.3d 206 (2d Cir.

2011); *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114 (2d Cir. 2009). However, these cases merely "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." 556 F.3d at 123 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

That does not mean the assumption applies in construing the *scope* of an express preemption provision. To the contrary, these cases merely show that, if a statute contains an express preemption provision, it is necessarily "clear and manifest" that the purpose of Congress was to "supersede" state power. That is, an express preemption provision automatically satisfies the "clear and manifest purpose" condition.

3. Nor would it be appropriate to apply such a presumption in conducting that analysis. To do so would be to deliberately hold a thumb on the interpretive scale, pushing the analysis in favor of state power and against federal power. In other words, the court deliberately would be attempting, at every turn, to divest as much meaning as possible from a statutory provision enacted by the people's elected representatives in Congress and signed by their elected executive, the President. Assuming the underlying provision is a valid exercise of federal authority under the Constitution, such a minimalist, anti-democratic approach to interpretation would be unacceptable—indeed, roundly derided on all sides—in any other

setting. *See, e.g.*, *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 558 (2005) (when "[o]rdinary principles of statutory construction apply," it is "important not to adopt an artificial construction that is narrower than what the text provides"); *Black v. Magnolia Liquor Co.*, 355 U.S. 24, 26 (1957) ("The will of Congress would be thwarted if we gave the language in question the strictest construction possible. The fair meaning of the Act is our guide.").

Such an approach would also seriously intrude upon Congress's express constitutional authority to determine the extent to which it will displace state authority over commercial matters. *See* Art. I, § 8, cl. 3 (authority to regulate interstate commerce). And that is no doubt one reason—perhaps the main reason—why since 2008 the Supreme Court has studiously avoided invoking the "presumption against preemption," especially in cases involving an express preemption provision.

In sum, because the Supreme Court has effectively abandoned application of a presumption against preemption in express preemption cases, especially when determining the scope of an express preemption clause, there is no need for this Court to apply one here. The City has cited no precedents of this Court to require that, and we have found none. Accordingly, "[o]rdinary principles of statutory construction apply." *Exxon Mobil Corp.*, 545 U.S. at 558. As ably demonstrated by the District Court and the appellees, those principles require affirmance.

II. Even if a presumption against preemption applied, the Labeling Act easily rebuts it, using preemptive language that the Supreme Court instructs is "comprehensive," "expansive," and "sweeps broadly."

Indeed, even if a presumption against preemption applied here, the City's ordinance still must fall. *See* Appellees' Br. 18-35. That is because the City's construction of the word "promotion" in the Labeling Act's express preemption clause is not only narrow, it is absurdly narrow. The City asserts that "here there is absolutely no nexus to advertising or promotion and instead, it is the *sale* of tobacco products that triggers the Resolution's posting requirement" (City Br. at 29) (emphasis added). As the district court found, however, a point-of-purchase display is nothing if not a promotion; indeed, the undisputed evidence shows that "displays at the point-of-sale are presently the 'dominant channel' by which tobacco manufacturers promote their products." Op. 10. And as we now show, the City's crabbed reading of "promotion" contradicts the Supreme Court's repeated instruction that the Labeling Act's preemption clause sweeps "broadly."

1. Most recently in *Altria*, although the Court refused to "limit[] the States' authority to prohibit deceptive *statements* in cigarette advertising," the Court explained that, as to the warnings themselves, the Act "expres[ses] Congress' determination that the prescribed federal warnings are both necessary and sufficient to achieve its purpose of informing the public of the health consequences of smoking." 129 S. Ct. at 544. Indeed, "[b]ecause Congress has decided that no

additional warning statement is needed to attain that goal, States may not impede commerce in cigarettes by enforcing rules that are based on an assumption that federal warnings are inadequate." *Id*. (emphasis added). This makes sense, the Court held, because the Act's purposes of adequately informing the public and promoting commerce "are furthered by prohibiting States from supplementing the federally prescribed warning." *Id*.

Unlike the state law in *Altria* prohibiting fraud, the Labeling Act easily captures the City's Resolution governing point-of-sale displays, which requires nothing if not "additional warning statement[s]." *Id.* Indeed, the City's *amici* tout the City's desire to require a new warning statement as a reason to *uphold* the Resolution: "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." Am. Br. For American Legacy Foundation, *et al*. 3. But fortunately, say the *amici*, "[p]olicymakers in the United States and in dozens of other countries around the world" have "more evidence based approaches to convey the risk of smoking." *Id*. In other words, "We think Congress and the FDA are behind the curve, so we have taken matters into our own hands."

But this is exactly what Congress determined to prevent, declaring, in the Supreme Court's words, that "the prescribed federal warnings are both necessary and sufficient to . . . inform[] the public of the health consequences of smoking."

129 S. Ct. at 544. And "because Congress has decided that no additional warning statement is needed to attain that goal, States may not impede commerce in cigarettes by enforcing rules that are based on an assumption that federal warnings are inadequate." *Id*. Thus, even though it invoked a presumption against preemption, *Altria* read the Labeling Act to command "no additional warning statements"—period. Accordingly, even if this Court were to invoke the presumption, *Altria* compels affirmance.

2. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), is to the same effect, noting that, "without question," the clause at issue here, involving advertising and promotion, employs "*sweeping language* to describe the state action that is pre-empted"—namely, that "[n]o requirement or prohibition based on smoking and health shall be imposed . . . with respect to the advertising or promotion of any cigarettes." *Id*. at 542 (citing 15 U.S.C. § 1334(b)) (emphasis added). With this categorical phrasing, the Court explained, "Congress has created a comprehensive federal scheme." *Id*. at 541 (emphasis added).

Although *Lorillard* likewise invoked the principle that state police powers should not be superseded by federal law unless that is the "clear and manifest purpose of Congress," *id*. at 543 (citations omitted), the Court concluded that the Labeling Act showed just such a purpose—and therefore it invalidated state regulations barring point-of-sale advertising near schools and playgrounds. As the Court

explained, "Congress prohibited state cigarette advertising regulations" that were merely "*motivated by* concerns about smoking and health." *Id*. at 548 (emphasis added). And "[a]t bottom, the concern about youth exposure to cigarette advertising is intertwined with the concern about cigarette smoking and health." *Id*. Such regulations, the Court held, "cannot be squared with the language of the preemption provision, which reaches *all* 'requirements' and 'prohibitions' 'under state law.'" *Id*. (emphasis in original).

If, as *Lorillard* held, the Labeling Act's express preemption clause is broad enough to prevent State or local regulation of the promotion of cigarettes near a school or playground, it is surely broad enough to reach the local regulation at issue here. Here too, by preventing localities from placing "requirement[s] or prohibitions" "based on smoking" "with respect to . . . the promotion" of cigarettes, Congress has prohibited localities from requiring warning signs located at point-of-purchase displays, which the undisputed evidence shows are the dominant channel by which tobacco manufacturers promote their products. Op. 10. Any presumption against preemption is thus rebutted, as in *Lorillard*, by the Act's "comprehensive scheme," which "reaches *all* requirements and prohibitions" "imposed under state law." *Lorillard*, 533 U.S. at 548, 571 (emphasis added).

3. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), further confirms the point. There, as in *Altria* and *Lorillard*, the Court recited the presump-

tion against preemption. But the Court concluded that the phrase "'[n]o requirement or prohibition' *sweeps broadly*," and ruled that this phrase can preempt common-law damages actions against cigarette manufacturers. 505 U.S. at 521 (plurality opinion). Indeed, the Court held that this language "plainly reaches beyond" "positive enactments by States and localities," even though "portions of the legislative history of the [Act] suggest that" these were Congress' "primar[y] concern." *Id*.

Despite this plain instruction, the City here seizes on a snippet of legislative history asserting that, "[t]he state preemption of regulation or prohibition with respect to cigarette *advertising* is narrowly phrased[.] . . . It is limited entirely to State or local requirements or prohibitions in the advertising of cigarettes." City Br. 21 (quoting Senate Committee report) (citation omitted) (emphasis added). But assuming a presumption against preemption applied, *Cipollone* shows that, despite a passing contrary suggestion in the legislative history, any such presumption is "plainly" satisfied by the text of the statute, which, as the Court held, "sweeps broadly." 505 U.S. at 522.[3]

[3] To be sure, as Justice Scalia noted separately, *Cipollone* spoke inconsistently—calling for a narrowing construction of the statute, but failing to apply that construction. *See* 505 U.S. at 555 ("Must express pre-emption provisions really be given their narrowest reasonable construction (as the Court says in Part III), or need they not (as the plurality does in Part V)?") (Scalia, J., concurring in part and dissenting in part) (emphasis added); *see also Altria*, 129 S. Ct. at 553 (Thomas, J., dissenting) ("Relying heavily on a presumption against . . . preemption . . . [the

In short, *Altria*, *Lorillard*, and *Cipollone* all invoked the "presumption against preemption," but all powerfully compel affirmance. Given these decisions, the City errs in saying that "[i]t could not have been the intention of Congress to preempt local laws requiring local retailers to post signs warning the public about the health risks of smoking." City Br. at 21. In fact, whether or not Congress focused on this exact warning requirement, there is no doubt that Congress fully intended to prevent states and localities from adding *any* warnings "with respect to" cigarette promotions, because Congress deemed the federal warnings "necessary and sufficient." *Altria*, 129 S. Ct. at 544. Accordingly, even if a presumption against preemption applied, the decision below must be affirmed.

III. Allowing localities to second-guess Congress's comprehensive scheme would thwart the sound policies underlying both the Supremacy Clause and the Commerce Clause, needlessly subjecting regional and national retailers to a costly patchwork quilt of regulations.

Affirmance will also serve the interests of businesses and consumers, which face confusion and higher prices when nationally uniform standards, set by Congress or expert agencies acting under its direction, are thrown aside in favor of a grab-bag of local rules. By contrast, adoption of the City's arguments would allow States and localities to second-guess a wide variety of comprehensive, uniform

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plurality in *Cipollone*] settled on a 'narrow' reading of the Labeling Act."). Nevertheless, the holding of *Cipollone* is plain: Because the Labeling Act "sweeps broadly," it is capable of preempting common law claims. 505 U.S. at 522.

regulatory regimes governing numerous industries, thereby seriously subverting the economic benefits that the Commerce and Supremacy Clauses were designed to provide.

1. The Supremacy and Commerce Clauses were adopted, in part, to remove obstacles to a national market. Indeed, one of the chief purposes of the Constitution was to create a national government with the power to regulate interstate commerce in a uniform manner. As James Madison explained, "[t]he defect of power in the existing [Articles of Confederation] to regulate the commerce between its several members [has] been clearly pointed out by experience." THE FEDERALIST, No. 42, at 267 (James Madison).[4] And before the Constitution, the "multiplicity of laws in [the] several states" was one of the chief "evils . . . of our situation." James Madison, *Vices of the Political System of the United States* (1787).[5] As Hamilton noted, absent a national government with authority to prescribe uniform commercial regulations, "[e]ach State, or separate confederacy,

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[4] *Available at*: http://v1.consource.org/index.asp?bid=582&fid=600&documentid=720.

[5] *Available at*: http://press-pubs.uchicago.edu/founders/documents/v1ch5s16.html. The problem, Madison continued, was that states were acting as "little republics," encroaching on the rights of outsiders. *Id*. And creating an authoritative government over the states would likely dampen this impulse, because, in a larger federal system, the nation "becomes broken into a greater variety of interests, of pursuits, of passions, which check each other, whilst those who may feel a common sentiment have less opportunity of communication and concert." *Id*. Thus, in Madison's view, "an extensive Republic [a]meliorates the administration of a small Republic." *Id*.

would pursue a system [of] commercial polity peculiar to itself [that would create] distinctions, preferences and exclusions, which would beget discontent." THE FEDERALIST, No. 7 (Alexander Hamilton).[6] And accordingly, as Hamilton elsewhere remarked, "[t]he importance of the Union, in a commercial light, is one of those points, about which there is least room to entertain a difference of opinion, and which has in fact commanded the most general assent of men, who have any acquaintance with the subject." THE FEDERALIST, No. 11 (Alexander Hamilton).[7]

Such a union required both that the national government have authority to pass uniform laws governing interstate commerce, and that those laws supersede contrary laws enacted under the authority of the States. As Hamilton put it, "[t]he government of the Union must be empowered to pass all laws, and to make all regulations . . . in respect to commerce." THE FEDERALIST, No. 23 (Alexander Hamilton).[8] And that was one main reason the Framers determined that "[t]he character of such a governme[nt] ought . . . to be paramount to the state constitutions." James Madison, *Notes of the Constitutional Convention* (May 29, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 17-23 (Max Farrand ed., 1911). Thus, the Constitution's combination of the Commerce Clause and the Su-

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[6] *Available at*: http://v1.consource.org/index.asp?bid=582&fid=600&documentid=749.
[7] *Available at*: http://v1.consource.org/index.asp?bid=582&fid=600&documentid=687.
[8] *Available at*: http://v1.consource.org/index.asp?bid=582&fid=600&documentid=700.

premacy Clause created the framework for a truly national market, one that would substantially improve the new Nation's prosperity and, with that prosperity, its strength and standing in the world.

And that is why, when George Washington, then the President of the Constitutional Convention, transmitted the Constitution to the Continental Congress, he was able to tout as one of the three critical reasons for its adoption the fact that it vested the power of "regulating Commerce" in "the general Government of the Union." Letter from Federal Convention President George Washington to the president of Congress, Transmitting the Constitution (Sept. 17, 1787).[9] But in so doing, he expressly recognized that the price of that arrangement would be States ceding a substantial portion of their sovereignty to the national government: "It is obviously impracticable in the federal Government Of these States to secure all Rights of independent Sovereignty to each and yet provide for the Interest and Safety of all—Individuals entering into Society must give up a Share of Liberty to preserve the Rest." But for Washington—and as confirmed by the subsequent ratification votes in the several States—the benefits of uniform commercial regula-

[9] *Available at:* http://www.utulsa.edu/law/classes/rice/Constitutional/Letter_Transmitting_Constitution.htm. "We have now the Honor to submit to the Consideration of the United States in Congress assembled that Constitution which has appeared to us the most advisable. . . . The Friends of our Country have long seen and desired that the Power of making War Peace and Treaties, that of levying Money & regulating Commerce and the correspondent executive and judicial Authorities should be fully and effectually vested in the general Government of the Union." *Id.*

tions were well worth the necessary sacrifice of the States' "independent Sovereignty." It was considered a price worth paying for the benefits of an efficient, national market, one that would benefit businessmen, laborers, farmers, and consumers alike.

2. Uniformity of commercial regulations is especially important today because, more than any other period in history, the Nation's economy is interconnected. Products purchased in one state or region, for example, are increasingly likely to originate in another: According to the U.S. Census Bureau, in 2007, U.S. businesses shipped almost $12 trillion in goods, most of it across state lines. *See* U.S. Census Bureau, *Commodity Flow Survey Shows U.S. Businesses Ship Nearly $12 Trillion in Goods in 2007*, Dec. 9, 2008.[10] . Internet sales in the U.S. totaled over $160 billion in 2010. *See* U.S. Census Bureau, *Quarterly Retail E-Commerce Sales*, at 2, May 16, 2011, (*available at*: http://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf (e-commerce statistics).

[10] *Available at:* http://www.census.gov/newsroom/releases/archives/economic_census/cb08-179.html*See also* Bureau of Transportation Statistics, *The Commodity Flow Survey: 2007*, at 1 (*available at:* http://www.bts.gov/publications/commodity_flow_survey/final_tables_december_2009/pdf/entire.pdf (The total value of goods shipped was $11,684,872,000,000); Thomas L. Gallagher, *Shipping Value Surged 2002-07*, Traffic World, Dec. 9, 2008 ("Shipping via all modes in the United States grew 11 percent by tonnage and 43 percent by value in the five years between 2002 and 2007. American industry shipped 13 billion tons of goods valued at almost $12 trillion in 2007.").

But while the economy grows ever more national, the number of states and localities remains fixed and massive. Besides the fifty state governments, each with its own executive branch, judiciary, and legislature, there are in the United States more than 89,000 local governmental units, including counties, cities, and other municipalities. U.S. Census Bureau, Statistical Abstract of the United States: 2007, at 267 (2007).[11] And this abundance of governmental actors means that, without federal preemption, businesses attempting to serve national or even regional markets will be subjected to complicating and overlapping—and hence costly—legal and regulatory systems.

Consider the implications of this reality in this case. Without uniformity, different rules and regulations governing cigarette warning signs may be placed on retailers in every town, borough, city, municipality, and precinct in New York—or any other state for that matter. Thus, reversing the decision below would affect even relatively small retail chains. The same would be true for larger regional chains throughout the Second Circuit, which would face an even more diverse panoply of rules than their smaller competitors.

Take, for example, a regional grocery chain with locations throughout the Northeast. Without the uniformity required by the Labeling Act, in marketing cigarettes, that grocer would be required to create new store policies to comply with

[11] *Available at*: http://www.census.gov/prod/2011pubs/11statab/stlocgov.pdf.

the rules in every jurisdiction in which it operates. If, as in this case, the regulations come from cities, the grocer could be subject to literally hundreds of different regulations on how it can display cigarettes. If states and counties got into the act, the burden would further multiply.[12]

Moreover, if this Court reverses the decision below, the burden on the economy is likely to become national. Consider the diversity of the City's *amici*, which include the following:

- the County of Los Angeles, California;
- the City of Philadelphia, Pennsylvania;
- the Boston Public Health Commission;
- Public Health—Seattle and King County, Washington;
- the County of Santa Clara, California; and
- the City and County of San Francisco, California

Br. of Amici Curiae Los Angeles County Dep't of Public Health 1. No doubt the City considers having nationwide *amici* a feather in its cap, but for this Court it should be a warning sign. The nation is watching this case. If New York City can

[12] Grocery retailers have a significant impact on local economies. According to a government study, grocery stores provide approximately 2.5 million wage and salary jobs in this country, with eighty percent of the stores classified as small businesses. *See* Bureau of Labor Statistics, U.S. Dep't of Labor, *Career Guide to Industries: Grocery Stores* (*available at*: http://www.bls.gov/oco/cg/cgs024.htm) (2010-11 ed.).

set its own standards for warning signs at point-of-purchase displays, smaller locales will say, "so can we." And the burden on regional or national businesses could become massive.

3. The costs of complying with local, regional, and national regulations, moreover, are inevitably passed on to the consumers. This is common sense. As one business executive noted at a recent hearing of the U.S. House Oversight and Government Reform Committee, "[t]he cost of regulation incurred by all businesses is eventually passed on to the consumer and our workforce. Regulatory costs require business owners like me to devote more time and resources to government compliance, which means less capital devoted to investment and job creation." *Hearing on the Regulatory Impediments to Job Creation Before the H. Comm. on Oversight and Government Reform*, 112th Cong. (2011) (statement of Michael J. Fredrich, President of MCM Composites); *see also, Hearing on The Views of the Administration on Regulatory Reform Before the H. Comm. on Energy and Commerce*, 112th Cong. (2011) (statement of The Honorable Cass R. Sunstein, Administrator, Office of Information & Regulatory Affairs) ("Executive Order 13563 directs agencies to take steps to harmonize, simplify, and coordinate rules. It emphasizes that some sectors and industries face redundant, inconsistent, or overlapping requirements. In order to reduce costs and to promote simplicity, it calls for greater coordination."). This notion has been recently empirically confirmed by a study by

the state of California. Researchers found that the cost of state regulations were likely to be passed on to consumers, and even more troubling, resulted in an employment loss of 3.8 million jobs in that state. *See* Sanjay B. Varshney & Dennis H. Tootelian, *Cost of State Regulations on California Small Business Study*, The State of California Governor's Office, at 5, 15 (*available at:* http://www.sba.ca.gov/Cost%20of%20Regulation%20Study%20-%20Final.pdf).

But consumers would not merely pay a price in dollars; they would pay a price in sheer confusion. As noted, Congress delegated to the FDA the complex task of determining the right amount of information to give consumers in cigarette warnings, so that Americans receive a single, authoritative message. *See* The Family Smoking Prevention and Tobacco Control Act, Pub. L. 111-31 (2009) (codified at 21 U.S.C. § 387k). But as the City itself concedes, its warnings seek to strike a different balance, undermining the balance struck by Congress and the FDA. City Br. 24-25. This is particularly troubling in a city the size of New York, through which millions of *non*-New Yorkers travel every year. Whereas Congress charged an expert federal agency (the FDA) with providing clear guidance to consumers on the health risks associated with cigarette smoking, the City effectively asks this Court to open the floodgates to State and local authorities that wish to second-guess Congress and the FDA.

Here again, the City's desire to second-guess Congress is confirmed by the city's own *amici*. As noted, the Labeling Act "express[es] Congress' determination that the prescribed federal [cigarette] warnings are both necessary and sufficient to achieve its purposes of informing the public of the health consequences of smoking." *Altria*, 129 S.Ct. at 544. Yet the City's *amici* openly criticize that standard, stating that "[i]t 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." Am. Br. for Am. Legacy Found. 3. Moreover, the *amici* offer what, in their view, constitute sound empirical grounds for the policies they have chosen: "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." *Id*. at 3; *see also id*. at 12-18 (citing numerous studies).

The more the City and its *amici* try to argue the merits of the City's prescribed warnings, the clearer it becomes that the City wants to override the FDA's policy judgment. Yet courts are not constitutionally equipped to adjudicate such questions on the merits, but instead are commanded by the Supremacy Clause to hold them preempted. As a matter of constitutional law and congressional command, the only "policy makers" this Court may heed are Congress itself and the FDA—and they have made their judgment. But by requiring New York City re-

tailers to supplement those warnings with different ones, the City arrogates to itself a role that Congress sensibly delegated to the FDA.[13]

4. Finally, reversal of the district court's sound interpretation of the straightforward, express preemption clause here would jeopardize numerous statutes and thus undermine the policies behind the Commerce and Supremacy Clauses.[14] Recognizing this critical nexus between commerce and national uniformity, Congress preempts often. According to one survey, between 1789 and 1992 Congress enacted "approximately 439 significant preemption statutes"—"more than 53 percent" of which were enacted between 1969 and 1992. U.S. Advisory Comm'n on Intergovernmental Relations, *Federal Statutory Preemption of State and Local Authority: History, Inventory, and Issues*, at iii (1992). And there is no reason to think Congress' preemption of state laws has slowed. *E.g.*, Joseph F. Zimmerman,

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[13] Remarkably, the City's *amici* concede that FDA is *already* at work creating new policies in this area. Br. of Amer. Legacy Found. 14. The FDA has examined the current scientific evidence and surveyed other countries in assessing its own policy on cigarette warnings. *Id*. And in response, it has promulgated new rules that were published in final form on June 21, 2011. *See* Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628 (June 22, 2011). Ironically, the City's warning requirement thus attempted to preempt the FDA's efforts to carry out its own statutory obligations. Any changes in warnings that consumers receive may only come from the FDA.

[14] As a sister circuit has noted, "although the Commerce Clause differs from the Supremacy Clause in that the Commerce Clause is a specific grant of legislative power to Congress, the two clauses are analogous in the sense that both clauses limit the power of a state to interfere with areas of national concern." *Consolidated Freightways Corp. of Del. v. Kassel*, 730 F.2d 1139, 1144 (8th Cir. 1984).

Congressional Preemption During the George W. Bush Administration, 37. 3 PUBLIUS, 432-452 (Apr. 25, 2007) ("President Bush approved sixty-four preemption acts during 2001–2005"). Thus, it is critical that the Court uphold a straightforward reading of a preemption clause as clear as the one at issue here, lest multiple such clauses be effectively invalidated—to the detriment of myriad other industries.

CONCLUSION

By invoking an effectively defunct "presumption against preemption," the City is attempting to evade Congress' direction in the Labeling Act delegating the formulation of warnings about smoking to the FDA. The City's proposed reading would not only ignore the plain language of the statute, but also its repeated interpretation by the Supreme Court, which has held it to be "sweeping," "expansive," and "comprehensive." To adopt that reading would not only flout the will of Congress, it would place a heavy burden on businesses. It would also create confusion for consumers, who would face a cacophony of voices in an area where Congress intended the FDA to speak with one, authoritative voice.

In refusing to side with the City, the district simply read the Act by its terms, and thus promoted the uniformity that the Supremacy Clause and the Commerce Clause sensibly require. The judgment should be affirmed.

Respectfully submitted,

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32

Pursuant to Fed. R. App. P. Rule 32, the undersigned counsel for Appellant certifies that the foregoing amicus brief complies with the type-volume and type-face requirements of Fed. R. App. P. 32(a)(7)(B) and 32(a)(5-6).

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,301 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using 14-point Times New Roman font on Microsoft Word 2007.

Date: July 15, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2011, I electronically filed the Brief for the Chamber of Commerce of the United States of America as *amicus curiae* in Support of Plaintiffs-Appellees in Support of Affirmance, with the Clerk of the Court for the U.S. Court of Appeals for the Second Circuit using the CM/ECF system. I certify that all parties in the case are registered CM/ECF user and that service will be accomplished by the CM/ECF system.

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Date: July 15, 2011