11-0091-cv

United States Court of Appeals
FOR THE SECOND CIRCUIT

23-34 94TH ST. GROCERY, CORP., KISSENA BLVD. CONVENIENCE STORE, INC., NEW YORK ASSOCIATION OF SERVICE STATIONS & 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 & 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 & Mental Hygiene, and 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

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF APPELLEES, URGING AFFIRMANCE

Daniel J. Popeo
Cory L. Andrews
Richard A. Samp
(Counsel of Record)
WASHINGTON LEGAL FOUNDATION
2009 Mass. Ave., N.W.
Washington, DC 20036
(202) 588-0302

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici curiae* Washington Legal Foundation and the Allied Educational Foundation state that they are non-profit corporations organized under § 501(c)(3) of the Internal Revenue Code; they have no parent corporations, and no publicly held company has a 10% or greater ownership interest.

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INTERESTS OF *AMICI CURIAE*[1]

The Washington Legal Foundation (WLF) is a public interest, law and policy center with supporters in all 50 states. WLF regularly appears as an *amicus* to promote economic liberty, free enterprise, and a limited and accountable government. In particular, WLF has devoted substantial resources over the years to defending free speech rights, both of individuals and of the business community. To that end, WLF has regularly appeared before this and other federal and state courts in cases raising important First Amendment issues, especially those involving compelled speech. *See, e.g., Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005); *United States v. United Foods, Inc.*, 533 U.S. 405 (2001); *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997).

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this court on a number of occasions.

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[1] Pursuant to Federal Rule of Appellate Procedure 29(c), *amici* state that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties to this dispute have consented to the filing of this brief.

Amici strongly object to government efforts to compel individuals or corporations to speak against their will. *Amici* agree with the district court below that Article 181.19 of the New York City Health Code is preempted by federal law. *Amici* write separately to express concern over what they view as the City's overly broad interpretation of the "government speech" defense to compelled speech claims. If that defense is really as broad as the City claims it to be, then governments everywhere have been given an easily followed roadmap to defeat any and all compelled speech claims. Given the importance that the Supreme Court has placed on the First Amendment right to speak *and* to refrain from speaking, *amici* do not believe that the entire compelled speech doctrine should so lightly be cast away.

Amici are also troubled by the City's contention that *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), supplies the appropriate level of First Amendment scrutiny in this case. The signs the City seeks to impose on retailers in this case are not ordinary disclosure requirements of the kind upheld in *Zauderer*. Rather, they are the sort of controversial, nonfactual disclosures that *Zauderer* very clearly did not allow. Such ideological messages have *nothing* to do with protecting consumers from being misled—a requirement of *Zauderer*. If anything, *Zauderer* actually highlights the

constitutional defect in the City's reasoning.

STATEMENT OF THE CASE

Appellees—two New York City retailers, two associations representing New York City retailers, and three tobacco manufacturers—successfully challenged a provision of the New York City Health Code that requires retailers to use their own private property to convey the City's anti-smoking message, which they find objectionable.

Although federal law has long required warnings regarding the health risks of smoking to appear on every pack of cigarettes and in every cigarette advertisement, the City goes much further. Article 181.19 of the New York City Health Code ("the Resolution") requires anyone engaged in "face-to-face" sales of tobacco products to consumers to prominently display either a small sign within three inches of each cash register or a large sign at each location where tobacco products are displayed. *See* N.Y.C. Health Code § 181.19; SPA 7-8. The signs are designed by the City's Department of Health. Each sign includes warnings about the adverse effects of tobacco use (*e.g.*, "Smoking Causes Lung Cancer") and the directive "Quit Smoking Today—For Help, Call 311 Or 1-866-NYQUITS." *Id.* Each sign further contains one of three graphic, color images depicting the potential effects of tobacco use: a brain damaged by a stroke, decaying teeth and gums, or a diseased lung. *Id.* Finally, each sign

includes the seal of the City of New York and the phrase "NYC Health." *Id.*

Seeking to invalidate the Resolution, Appellees filed suit in the U.S. District Court for the Southern District of New York. They sought a preliminary injunction on the grounds that the City's sign requirement (1) is preempted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§1331-1341 (the Labeling Act), (2) violates the free speech protections of the U.S. and New York Constitutions, and (3) exceeds the authority of the City's Board of Health under the New York Constitution. *See* SPA 8. The City answered the complaint and cross-moved for summary judgment. *Id.*

The district court entered summary judgment against the City, concluding that the Resolution is preempted by the Labeling Act, which prohibits any "requirement or prohibition based on smoking and health" imposed under state or local law "with respect to the advertising or promotion of cigarettes." *Id.* at 8-16. Emphasizing the breadth of the Labeling Act's preemption provision, the district court concluded that "promotion" under the Act encompasses point-of-purchase displays of cigarettes. *Id.* As a result, the Resolution constitutes an impermissible "requirement . . . based on smoking or health" with respect to the "promotion of cigarettes." *Id.*

The City now appeals from the district court's entry of judgment in favor of Appellees. Because it overturned the Resolution on preemption grounds

under the Supremacy Clause, the district court did not need to reach the First Amendment issues raised below. But this court "may affirm on any basis for which there is sufficient support in the record, including grounds not relied on by the District Court." *Ferran v. Town of Nassau*, 471 F.3d 363, 365 (2d Cir. 2006) (per curiam) (citing *Shumway v. United Parcel Serv., Inc.*, 118 F.3d 60, 63 (2d Cir. 1997)).

SUMMARY OF ARGUMENT

The First Amendment guarantees "both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). As a result, the Supreme Court has repeatedly struck down laws that compel a speaker to convey a message dictated by the government. The City claims that this case does not implicate the First Amendment because the speech at issue here—mandatory signs containing an anti-smoking message accompanied by graphic images—is "government speech" akin to that recognized in *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005). But, as demonstrated below, the City's overly broad interpretation of the government speech defense is impossible to square with the Supreme Court's compelled speech jurisprudence.

Having authored the message contained on the anti-smoking signs from beginning to end, and having exercised final approval over every word used, the

City argues that so long as government officials have controlled the message in its entirety, compelled speech can never be deemed to violate First Amendment rights. This extraordinary reading of the government speech defense finds no support in the case law. Indeed, if merely placing the government's imprimatur on speech is all that is required to invoke the "government speech" defense, then virtually all of the Supreme Court's compelled speech cases would have been decided the other way. When the Court invoked the First Amendment to bar compelled speech in each of those instances, it is highly unlikely that the Court contemplated that governments could so easily avoid First Amendment scrutiny.

The City's position is also undermined by its failure to appreciate the rationale underlying the government speech defense—ensuring that dissenting citizens cannot invoke the compelled speech doctrine to silence the government itself. No one contends that the First Amendment bars the City from continuing with its anti-smoking crusade. Even without the Resolution, the City can continue its anti-smoking campaign so long as it does not force others to convey a message with which they disagree. In the absence of any threat to the City's ability to speak out as it chooses on smoking-related issues, there is no reason to abandon otherwise-applicable constitutional restraints on compelled speech.

Finally, even assuming the government speech defense does not apply,

the City contends that *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), supplies the appropriate First Amendment test in this case. But the signs the City seeks to force retailers to display in this case are *not* ordinary disclosure requirements of the kind upheld in *Zauderer*. Rather, they are the sort of controversial, nonfactual disclosures of which *Zauderer* very clearly did not approve. Such ideological messages have *nothing* to do with protecting consumers from being misled—a requirement of *Zauderer*. If anything, *Zauderer* actually highlights the constitutional defect in the City's reasoning.

ARGUMENT

I. THE CITY CANNOT AVAIL ITSELF OF THE GOVERNMENT SPEECH DEFENSE IN THIS CASE.

Beginning with its decision in *W. Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943), which struck down a law requiring school children to recite the Pledge of Allegiance over their objections to doing so, the Supreme Court has recognized that the First Amendment protects not only the freedom of speech, but also the freedom not to speak. The Court reiterated this view over thirty years later in *Wooley v. Maynard*, by holding that New Hampshire may not require objecting motorists to display the state motto, "Live Free or Die," on automobile license plates. 430 U.S. 705, 713-15 (1977). Such constitutional restrictions on compelled speech extend to corporations as well as to

individuals. *See, e.g., Pacific Gas & Elec. Co. v. Public Utils. Comm'n of Cal.*, 475 U.S. 1, 12 (1986) ("For corporations as for individuals, the choice to speak includes the choice of what not to say."). These well-established restrictions on the government's ability to compel speech bar the City's efforts in this case to force retailers to convey the government's anti-smoking message, with which they disagree.

In *Johanns v. Livestock Mktg. Ass'n*, the Supreme Court for the first time recognized, under certain narrowly defined circumstances, a "government speech" defense to compelled *subsidy* claims. *See* 544 U.S. at 550 . In response, the City now seeks to take the "government speech" defense and apply it with a vengeance to all compelled *speech* claims. In doing so, the City has construed "government speech" so broadly that, unless reined in by the courts, future plaintiffs will find it virtually impossible to demonstrate that government-directed use of private property to convey a message with which the property owner disagrees violates the First Amendment. As shown here, the City's overly broad interpretation of the government speech defense is impossible to square with the Supreme Court's compelled speech jurisprudence.

A. The City's Interpretation of the Government Speech Defense Threatens to Emasculate the Compelled Speech Doctrine.

The City claims in its brief that the Resolution does not implicate the First Amendment because the speech at issue here—mandatory signs containing

an anti-smoking message accompanied by graphic images—is "government speech" akin to that recognized in *Johanns*. The City's reliance on *Johanns* for its sweeping interpretation of the government speech defense is far from self-evident. Under the federal law at issue in *Johanns*, beef producers were charged one dollar per head of cattle to fund the Beef Council, which used the money to buy, among other things, advertisements promoting beef, such as the "Beef, It's What's For Dinner" campaign. Reiterating the continued viability of its long-standing compelled speech cases, the Court acknowledged that "[w]e have not heretofore considered the First Amendment consequences of government-compelled *subsidy* of the government's own speech." *Id.* at 557. The Court then went on to vacate a judgment that had overturned the federal subsidy law, explaining that "compelled *funding* of government speech does not alone raise First Amendment concerns." *Id.* at 559 (emphasis added).

The contrast between the factual and legal postures of this case and *Johanns* could not be more striking. There is a difference not just of degree, but of material kind, between the compelled speech at issue here—compelling tobacco retailers to display signs in their retail shops urging their customers to "Quit Smoking Today"—and compelling beef producers to fund advertisements promoting their products with the message "Beef, It's What's For Dinner." For this reason, the Supreme Court has recognized that constitutional objections to

compelled generic advertising are largely "trivial" and in any event are not "comparable to those [cases] in which an objection rested on political or ideological disagreement with the content of the message." *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 471-72 (1997). By reflexively relying on *Johanns*'s government speech defense in a radically different setting, the City seriously erodes retailers' First Amendment rights.

Applied to this case, *Johanns* might conceivably allow the City to compel tobacco retailers and manufacturers to subsidize a "Tobacco Council," which would then produce and purchase advertisements *promoting* tobacco products to the public. But nothing in *Johanns* supports the City's extraordinary view that virtually no First Amendment limitations exist on the government's ability to compel private property owners to convey and associate themselves with a message with which they disagree. Indeed, no value is more central to the First Amendment doctrine—one could fairly describe it as the reason we have the First Amendment in the first place—than the freedom of private speakers to disassociate themselves from the government. If anything, *Johanns* suggests that a law commanding private speakers to convey and associate themselves with a government message with which they disagree should be subject to *stricter* constitutional scrutiny than one that merely compels them to fund or subsidize such speech.

Little remains of the compelled speech doctrine if the City's understanding of the government speech defense is correct. According to the City, *any* message crafted entirely by the government may be thrust on private citizens, who are powerless to resist the government's demand to convey and associate themselves with a message with which they disagree. If that were true, any government could avoid all those pesky compelled speech cases by merely maintaining complete control over the message it wishes to impose.

Nevertheless, having authored the message contained on the signs from beginning to end, and having exercised final approval over every word used, the City argues that so long as government officials have controlled the message in its entirety, compelled speech can never be deemed to violate First Amendment rights—no matter how closely individuals objecting to the speech are forced to convey and associate with its message:

> In the instant case, the speaker is clearly the government.
>
> . . . .
>
> [The City] controlled every aspect of the design process, including choosing the pictorial images, selecting the types of warnings that would be used and determining the layout. Indeed, [the City] controlled every font, color, and word found on the sign. Neither plaintiffs nor any non-governmental or private entity had any input of control over the design process.

Appellant's Br. at 37, 39. That extravagant reading of the government speech defense finds no support in the case law.

If merely placing the government's imprimatur on speech is all that is

required to invoke the "government speech" defense, then little remains of *Wooley*'s prohibition against requiring citizens to "use their private property as a 'mobile billboard' for the State's ideological message." *Wooley*, 430 U.S. at 715. Indeed, under the City's contention, *Wooley* would have been decided the other way.[2] After all, New Hampshire controlled every aspect of the design process of its license plates, including choosing the font, color, and wording contained in the layout, which included the state seal. Neither George Maynard, the plaintiff, nor any other private entity had control over the design process. Yet under the City's approach to the government speech defense, States everywhere can require their citizens to display a wide-variety of State-sponsored messages with which they disagree.

Under the City's overly expansive view of "government speech," the government would be free to compel school children to recite the Pledge of Allegiance in classrooms, so long as that Pledge was crafted entirely by the government. *See Barnette*, 319 U.S. at 642. States could require utility companies to include ideological messages in their billing envelopes, so long as the views expressed belonged solely to the government. *Pacific Gas & Elec.*

[2] Indeed, the City's very position in this case—that a mandated sign bearing the government's logo will likely be attributed to the government and thus fails to implicate the First Amendment—was argued by the dissent in *Wooley* and squarely rejected by the Court. *See* 430 U.S. at 719-22 (Rehnquist, J. dissenting).

Co., 475 U.S. at 15-16. When the Supreme Court invoked the First Amendment to bar compelled speech in each of those instances, it is highly unlikely that the Court contemplated that governments could so easily avoid First Amendment scrutiny merely by ensuring complete control of the message. Nor is the tyrannical nature of being compelled to espouse opinions in which one disbelieves somehow dissipated because the government has slapped its imprimatur on the speech. "[T]he correct focus is not on whether the ads' audience realizes the Government is speaking, but on the compelled assessment's purported interference with respondents' First Amendment rights." *Johanns*, 544 U.S. at 564 n.7.

B. The Underlying Purpose of the Government Speech Defense—Ensuring That Dissident Taxpayers Cannot Silence the Government—Is Wholly Inapplicable Here.

The City's position is further undermined by a serious misunderstanding of the policy underlying the government speech defense. The Supreme Court first had occasion to discuss "government speech" (as it relates to compelled speech claims) in *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990), where the plaintiffs objected to being forced to subsidize the State Bar of California's expressive activities. The Court explained that a "government speech" defense to the compelled speech doctrine may be necessary to help ensure that dissenting citizens cannot invoke the compelled speech doctrine to silence the

government altogether:

> Government officials are expected as a part of the democratic process to represent and to espouse the views of a majority of their constituents. With countless advocates outside of the government seeking to influence its policy, it would be ironic if those charged with making government decisions were not free to speak for themselves in the process. If every citizen were to have a right to insist that no one paid with public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed.

Keller, 496 U.S. at 12-13.[3] In other words, no taxpayer's veto exists over what the government is permitted to say in its own right.

Keller's rationale for exempting "government speech" from the compelled speech doctrine strongly suggests that the government speech defense is inapplicable to this case. Appellees do not contend that the First Amendment bars the City from continuing with its anti-smoking crusade; rather they contend merely that the City should not be able to implement its campaign in a way that commandeers the private property of retailers who are then forced to convey a message with which they disagree. Thus, this suit does not threaten the City's ability to speak out at all. If this suit is successful, the City could nonetheless continue its

[3] Despite California's determination as a matter of State law that the State Bar was a "governmental agency," the Supreme Court ultimately concluded that the State Bar was not an entity qualified to invoke the "government speech" defense. *Id.* at 12-13.

anti-smoking campaign so long as it did not force private property owners to convey a message with which they disagree. In the absence of any threat to the City's ability to speak out as it chooses on smoking-related issues, there is no reason to abandon otherwise-applicable constitutional restraints on compelled speech simply because the message is crafted in its entirety by the government itself.

Far from suggesting that *Keller* is no longer good law, *Johanns* cites repeatedly to *Keller* in support of its understanding of the scope of the government speech defense. Accordingly, *Johanns* cannot be understood as granting the City unlimited authority, so long as the City controls messaging at every stage in the process, to compel private property owners to convey a message with which they disagree. What the City is doing in this case is the First Amendment equivalent of the executioner who requires a condemned man to dig his own grave and to load the bullet before being shot. *Johanns*—which allowed the government to require the beef industry to subsidize advertisements *promoting* their products—should not be read to condone such conduct.

As noted above, *Keller*'s rejection of California's government speech defense (to a compelled speech challenge) was not based on a finding that the State Bar was in any sense a private entity. Indeed, the

State Bar's status as an arm of the government was not open to serious dispute—after all, the plaintiffs could not have invoked the jurisdiction of the court under the First Amendment in the absence of an allegation that the State Bar was acting under color of state law. Nevertheless, *Keller* recognized that even though the State Bar was created and controlled entirely by the State government, the government speech defense was inapplicable and inappropriate.

Of course, the City is perfectly entitled to express its "don't smoke" viewpoint on its own property. But the First Amendment does not permit the government to regulate *others*' speech based on a desire to "balance" which viewpoints reach the general public and which do not, solely for the purpose of preventing consumers from "making bad decisions." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002) (rejecting a "highly paternalistic approach" because "people will perceive their own best interests"). The right *not* to speak "applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995).

The government has an interest in ensuring that consumers are well informed, but it does not have an interest in commandeering others'

speech for the purpose of browbeating their own consumers into behaving in a government-approved manner. The City may at some point in the future determine that tobacco use is sufficiently harmful to warrant banning the distribution, sale, and use of tobacco products. But so long as the sale of tobacco products remains lawful, the First Amendment does not permit the government to compel speech about tobacco products as an alternative form of regulation. As *Western States Medical Ctr.* explains, the First Amendment requires that "regulating speech must be a last—not a first—resort." 535 U.S. at 374.

II. THE CITY'S PURPORTED RELIANCE ON *ZAUDERER* AND ITS PROGENY IS ENTIRELY MISPLACED

Appellee's responsive brief convincingly demonstrates that the City cannot satisfy *any* version of First Amendment scrutiny. The Resolution fails both the strict scrutiny required in cases where "the government seeks to affirmatively require government-preferred speech," *Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, No. 08-4917, slip op. at 23-25 (2d Cir. July 6, 2011), and the intermediate *Central Hudson* test customarily applied to commercial speech restrictions, *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557 (1980). *Amici* will not repeat those arguments here.

We write separately to refute the City's suggestion that *Zauderer v.*

Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626 (1985), controls this case. The signs imposed by the City's Resolution are not ordinary disclosure requirements of the kind upheld in *Zauderer*. Rather, they are the sort of controversial, nonfactual disclosures of which *Zauderer* very clearly did not approve. In fact, the admonition to "Quit Smoking Today" does not "disclose" anything; rather, it is an ideological message that has *nothing* to do with protecting consumers from being misled.

A. Because the Resolution is Not Aimed at Preventing Consumer Deception, *Zauderer* Does Not Apply.

The City seeks to invoke the dramatically reduced standard of review associated with *Zauderer* on the basis of nothing more than bald assertions. Contrary to the City's opening brief, *Zauderer* offers no support for the City's First Amendment position in this case. In *Zauderer*, the Supreme Court *overturned* a state court's reprimand of an attorney for an advertisement that was neither false nor deceptive but sustained the reprimand to the extent that the advertisement omitted a disclosure that a client would be liable for costs in the event a contingent-fee lawsuit was unsuccessful. Upholding the disclosure requirement for the sole purpose of correcting misleading commercial speech, *Zauderer* cautioned:

> We recognize that unjustified or unduly burdensome disclosure

> requirements might offend the First Amendment by chilling protected commercial speech. But we hold that an advertiser's rights are adequately protected ***as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers.***

471 U.S. at 651 (emphasis added). Thus, *Zauderer* squarely held that disclosure requirements are permissible only if necessary "to dissipate the possibility of consumer confusion or deception." *Id*. Indeed, the Court upheld the state's imposition of a disclaimer only after finding that the possibility of deception was "self-evident" and that "substantial numbers of potential clients would be so misled" without the state's disclosure rule. *Id*. at 652. By its own terms, *Zauderer* applies only to mandated disclosures that serve the government's interest in preventing deception of consumers.

If anything, *Zauderer* actually highlights the constitutional defect in the City's sign requirement. Subsequent Supreme Court cases have only reaffirmed that the "reasonably related" test of *Zauderer* has real teeth. In *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), the Court invalidated under the First Amendment a federal requirement that mushroom producers pay an assessment for generic advertising, to which they objected. In its short opinion, the Court distinguished *Zauderer*:

> Noting that substantial numbers of potential clients might be misled by omission of the explanation, the [*Zauderer*] Court sustained the requirement as consistent with the State's interest in "preventing deception of consumers." There is no suggestion in

> the case now before us that the mandatory assessments imposed to require one group of private persons to pay for speech by others are somehow ***necessary to make voluntary advertisements non-misleading for consumers***.

533 U.S. at 416 (emphasis added). Time after time, the Court has cautioned that *Zauderer* does not apply unless the state demonstrates an actual likelihood that consumers will be misled absent the disclosure.[4]

Here, the compelled speech required by the Resolution is not necessary to make the sale of cigarettes non-misleading. Consumers are well aware of the health risks posed by tobacco; federal law has long required warnings regarding the health risks of smoking to appear on every pack of cigarettes and in every cigarette advertisement. Nor can the City seriously suggest that it requires retailers to convey the message "Quit Smoking Today" in order to prevent consumer deception rather than merely to discourage consumers from smoking.

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[4] *See e.g. Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1339-40 (2010) (upholding a disclosure requirement directed at "misleading commercial speech" but emphasizing that *Zauderer* is limited "to combat[ing] the problem of inherently misleading commercial advertisements"); *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 490 (1997) (Souter, J., dissenting) ("[H]owever long the pedigree of such mandates may be, and however broad the government's authority to impose them, *Zauderer* carries no authority for a mandate unrelated to the interest in avoiding misleading or incomplete commercial messages."); *Pacific Gas & Elec.*, 475 U.S. at 15 n.12 ("Nothing in *Zauderer* suggests . . . that the State is equally free to require [entities] to carry the message of third parties, where the messages themselves are biased against or are expressly contrary to the [entity's] views.").

Indeed, the City does not even claim that preventing consumers from being deceived or misled is a motivation behind the Resolution. Unlike unwittingly purchasing a product containing mercury, *National Electrical Manufacturer's Ass'n v. Sorrell*, 272 F.3d 104 (2d Cir. 2001), or retaining an attorney with the expectation of not incurring any expense only to be saddled with legal costs as in *Zauderer*, there is nothing inherently deceptive or misleading to consumers about buying cigarettes.

The theory underlying the City's Resolution appears to be that no rational person would choose to use tobacco products, and that those who do are obviously misinformed about the health risks. But that theory is belied by human experience, which demonstrates that individuals routinely choose to engage in a wide range of activities that others would consider overly risky—from mountain climbing and bungee jumping to eating red meat and sunbathing. As a good friend of Chief Justice William Rehnquist recently recounted:

> I often speculated as to why a man who was smart, disciplined, intellectually focused and strong-willed could not break the tobacco habit. Whenever I brought up the subject, he explained that he knew he could quit. As a matter of fact, he said that he had gone cold turkey for extended periods several times in his life. But he greatly enjoyed cigarettes. And he knowingly accepted the trade-offs. Several times he explained his [smoking habit] in an idiom he particularly liked: "Let's just say that I am an informed bettor."

Herman Obermayer, *The William Rehnquist You Didn't Know*, ABA JOURNAL (Mar. 2010). As this court has already held, satisfying "consumer curiosity alone is not a strong enough state interest to sustain compulsion of even an accurate, factual statement . . . in a commercial context." *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 74 (2d Cir. 1996).

B. Because the Resolution Does Not Involve the Disclosure of Purely Factual, Uncontroversial Information, *Zauderer* Does Not Apply.

Zauderer endorsed compelled disclaimer requirements *solely* for the purpose of counteracting potentially misleading messages included in an advertisement. But the Supreme Court has never suggested that "companies can be made into involuntary solicitors for their ideological opponents." *Cent. Ill. Light Co. v. Citizens Utility Bd.*, 827 F.2d 1169 (7th Cir. 1987). Rather, *Zauderer* allowed the state to require that advertisers "include in [their] advertising *purely factual* and *uncontroversial* information about the terms under which [their] services will be available." 471 U.S. at 651.

The Resolution mandates signs that do not even purport to convey purely factual or noncontroversial information. Rather, they ultimately communicate "a subjective and highly controversial message." *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006). "Such forced association with potentially hostile views burdens" free expression and "risks forcing [retailers] to speak where [they] would prefer to remain silent." *Pacific Gas & Elec.*, 475

U.S. at 18.

Nor can any potential health hazards posed by tobacco justify the City's invocation of *Zauderer*. The Supreme Court has repeatedly rejected assertions that there is a "vice" exception to the First Amendment. *Rubin v. Coors Brewing*, 514 U.S. 476, 482 n.2 (1995); *44 Liquormart v. Rhode Island*, 517 U.S. 484, 513-14 (1996). As Justice Stevens explained:

> [T]he scope of any "vice exception" to the protection afforded by the First Amendment would be difficult, if not impossible, to define. Almost any product that poses some threat to public health or public morals might reasonably be characterized by a state legislature as relating to "vice activity." Such characterization, however, is anomalous when applied to products such as alcoholic beverages, lottery tickets, or playing cards, that may be lawfully purchased on the open market.

44 Liquormart , 517 U.S. at 514. So long as the purchase and sale of cigarettes continue to be lawful, there can be no basis for asserting that the health hazards posed by tobacco use justify a relaxation of normal First Amendment constraints on government action. *See United Foods, Inc.*, 533 U.S. at 410-11 ("[T]hose whose business and livelihood depend in some way upon the product involved no doubt deem First Amendment protection to be just as important for them as it is for other discrete, little noticed groups.").

For this and other reasons, the City's suggestion that the Resolution's sign requirement is a valid regulation of commercial speech under *Zauderer* and its progeny is meritless. Rather than being "factual and uncontroversial," the

question of whether or not to smoke cigarettes is far more opinion-based and controversial than a simple disclosure requirement.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court affirm the judgment below.

Respectfully submitted,

/s/ Richard A. Samp
Daniel J. Popeo
Cory L. Andrews
Richard A. Samp
(Counsel of Record)
WASHINGTON LEGAL FOUNDATION
2009 Mass. Ave., N.W.
Washington, DC 20036
(202) 588-0302

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

I certify pursuant to Federal Rule of Appellate Procedure 32(a)(7)(c) that the foregoing brief is in 14-point, proportionately spaced Times New Roman font. According to the word processing software used to prepare this brief (Microsoft Word), the word count of the brief is exactly 5,438 words, excluding the cover, corporate disclosure statement, table of contents, table of authorities, certificate of service, and this certificate of compliance.

/s/ Richard A. Samp
Richard A. Samp

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I hereby certify that on July 15, 2011, I electronically filed the brief of *amici curiae* Washington Legal Foundation and Allied Educational Foundation with the Clerk of 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 users and that service will be accomplished by the CM/ECF system.

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Richard A. Samp