No. 11-0091

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 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.

BRIEF FOR PLAINTIFFS-APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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CORPORATE DISCLOSURE STATEMENTS

Plaintiff-Appellee 23–34 94th St. Grocery Corp.:

Pursuant to Federal Rule of Appellate Procedure 26.1, undersigned counsel for Plaintiff-Appellee 23–34 94th St. Grocery Corp. state that Plaintiff-Appellee 23–34 94th St. Grocery Corp. is a privately held company. No publicly held company owns more than ten percent of 23–34 94th St. Grocery Corp.

Plaintiff-Appellee Kissena Blvd. Convenience Store, Inc.:

Pursuant to Federal Rule of Appellate Procedure 26.1, undersigned counsel for Plaintiff-Appellee Kissena Blvd. Convenience Store, Inc. state that Plaintiff-Appellee Kissena Blvd. Convenience Store, Inc. is a privately held company. No publicly held company owns more than ten percent of Kissena Blvd. Convenience Store, Inc.

Plaintiff-Appellee New York State Association of Service Stations and Repair Shops, Inc. ("NYSASSRS"):

Pursuant to Federal Rule of Appellate Procedure 26.1, undersigned counsel for Plaintiff-Appellee NYSASSRS state that Plaintiff-Appellee NYSASSRS is a privately held company. No publicly held company owns more than ten percent of NYSASSRS.

Plaintiff-Appellee New York Association of Convenience Stores ("NYACS"):

Pursuant to Federal Rule of Appellate Procedure 26.1, undersigned counsel for Plaintiff-Appellee NYACS state that Plaintiff-Appellee NYACS is a private,

not-for-profit trade association. No publicly held company owns more than ten percent of NYACS.

Plaintiff-Appellee Lorillard Tobacco Company:

Pursuant to Federal Rule of Appellate Procedure 26.1, undersigned counsel for Plaintiff-Appellee Lorillard Tobacco Company state that Plaintiff-Appellee Lorillard Tobacco Company is a wholly owned subsidiary of Lorillard, Inc. Shares of Lorillard, Inc. are publicly traded.

Plaintiff-Appellee Philip Morris USA Inc.:

Pursuant to Federal Rule of Appellate Procedure 26.1, undersigned counsel for Plaintiff-Appellee Philip Morris USA Inc. state that Plaintiff-Appellee Philip Morris USA Inc. is a wholly owned subsidiary of Altria Group, Inc. Altria Group, Inc. has no parent corporation. Shares of Altria Group, Inc. are publicly traded. No publicly held corporation owns more than ten percent of Altria Group, Inc.'s stock.

Plaintiff-Appellee R.J. Reynolds Tobacco Co., Inc.:

Pursuant to Federal Rule of Appellate Procedure 26.1, undersigned counsel for Plaintiff-Appellee R.J. Reynolds Tobacco Co., Inc. state that Plaintiff-Appellee R.J. Reynolds Tobacco Co., Inc. is a wholly owned, indirect subsidiary of Reynolds American Inc., a publicly held corporation. Brown & Williamson Holdings, Inc. holds more than ten percent of the stock of Reynolds American, Inc.

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PRELIMINARY STATEMENT

New York City appeals from a district court order invalidating New York City Health Code Article 181.19 ("Resolution § 181.19" or the "Resolution"). In September 2009, the New York City Board of Health (the "Board") enacted the Resolution, which requires retailers to display anti-tobacco signs containing graphic images of diseased organs and the directive "Quit Smoking Today—Call 311 Or 1-866-NYQUITS." *See* Resolution § 181.19(a)–(c). Retailers must place these signs "at each location where tobacco products are displayed" or "on or within 3 inches of each cash register or each place where payment may be made." *Id.* § 181.19(c).

The district court held the Resolution preempted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 *et seq.* (the "Labeling Act"). The Labeling Act establishes mandated cigarette health warnings and bars states and municipalities from imposing any "requirement or prohibition based on smoking and health . . . with respect to the advertising or promotion of . . . cigarettes." 15 U.S.C. § 1334(b). The City does not dispute that its additional cigarette health warnings are a "requirement based on smoking and health." The only contested issue is whether the Resolution is "with respect to the advertising or promotion" of cigarettes. The district court found that cigarette product displays in retail stores constitute "promotion," that the Resolution required additional cigarette health

warnings to be placed aside the displays, and that the Resolution therefore was "with respect to the . . . promotion" of cigarettes. The district court's order should be affirmed.

Because the preemption ruling is correct and dispositive, this Court—like the district court—need not reach the City's remaining arguments. But should this Court do so, it should reject them as well. The Resolution violates the First Amendment to the United States Constitution and the Free Speech Clause of the New York Constitution. The Resolution crosses the constitutional boundary by going beyond simply telling consumers facts about the health risks of a product. Rather, the City seeks to require all who sell cigarettes to post "warnings" that display shocking images designed to stimulate disgust and to affirmatively urge all consumers to "Quit Smoking Today." Nor are the First Amendment stakes here limited to cigarettes and health warnings. Although the City seeks to compel retailers to deliver its policy-driven messages only with respect to cigarettes, any number of legal products that the City disfavors could be next unless courts enforce the First Amendment.

When the government forces private citizens to carry its message on their own property, and the message is not purely factual and uncontroversial, the requirement must satisfy strict constitutional scrutiny. Although the City contests that strict scrutiny applies, it does not—and cannot—meaningfully defend the

Resolution under that standard. Strict scrutiny requires affirmance of the judgment for the Plaintiffs.

Finally, the Resolution also violates the separation of powers established by the New York Constitution. In New York, important constitutional and policy questions must be decided by democratically elected bodies, not the appointed members of the Board.

STATEMENT OF THE CASE

Plaintiffs are two proprietors who run small convenience stores in New York City, two trade associations collectively representing hundreds of shop owners and other retailers in New York City, and the three largest tobacco manufacturers in the United States. The Plaintiffs filed a complaint on June 2, 2010, in the Southern District of New York seeking relief from New York City Board of Health Resolution § 181.19. Plaintiffs alleged that the Labeling Act preempted the Resolution and that the Resolution violated the First Amendment to the United States Constitution (made applicable to the City by the Fourteenth Amendment), the New York Constitution's Free Speech Clause, and the New York Constitution's separation of powers provisions.

Plaintiffs moved for a preliminary injunction against enforcement of the Resolution on June 25, 2010, and the City agreed to a stay of enforcement of the Resolution while that motion was pending.

Following argument on October 20, 2010, the district court, the Honorable Jed S. Rakoff, granted summary judgment to Plaintiffs on December 29, 2010, holding that the Resolution is preempted by the Labeling Act. Because that ruling was dispositive, the court did not decide the remainder of Plaintiffs' claims. The City now appeals the court's final judgment that the Resolution is preempted by federal law and also asks this Court to rule on the First Amendment and New York constitutional claims that the district court did not decide.

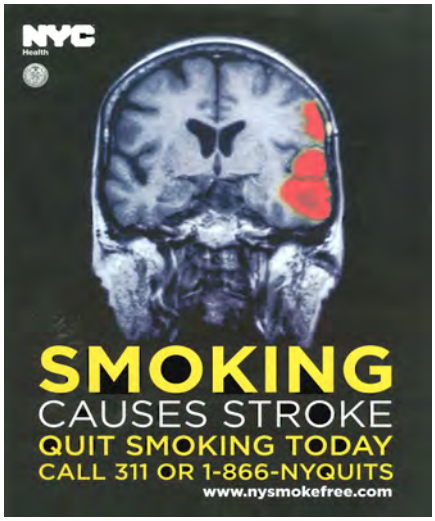
STATEMENT OF FACTS AND REGULATORY FRAMEWORK

A. The Board of Health's Resolution.

On September 22, 2009, the New York City Board of Health amended Article 181 of the City's Health Code to require that "[a]ny person in the business of selling tobacco products face-to-face to consumers in New York City shall prominently display tobacco health warning and smoking cessation signage produced by the Department [of Health and Mental Hygiene]." Resolution § 181.19(a). The Resolution was designed in part to "[c]ounteract tobacco advertising." *See* Joint Appendix ("JA") 111. According to the administrative record before the Board, the Resolution was proposed because the federal cigarette health warnings required by the Labeling Act were deemed not good enough and needed to be supplemented. *See, e.g.*, JA 58–59 (Resolution, Statement of Basis

and Purpose); JA 70 (Pearson Proposal). The Board's members are appointed by the Mayor; they are not elected by the City's citizens.

The Resolution grants the Commissioner of the Department of Health and Mental Hygiene (the "Department") discretion over "the text, images and content of [the] signage," which the Department exercised in producing three signs. Resolution § 181.19(b), (d); JA 64–66. The signs say "QUIT SMOKING TODAY—CALL 311 OR 1-866-NYQUITS." Each sign depicts one of three color images that the district court described as "graphic, even gruesome images." *23–34 94th St. Grocery Corp. v. N.Y. City Bd. of Health*, No. 10 Civ. 4392 (JSR), slip op. at 5 (Dec. 29, 2010), ECF No. 63 ("Order"), reported at 757 F. Supp. 2d 407 (S.D.N.Y. 2010). One version of the sign purports to show a diseased lung with the additional caption "SMOKING CAUSES LUNG CANCER"; another a decayed tooth with the caption "SMOKING CAUSES TOOTH DECAY"; and the third shows an MRI brain scan and the caption "SMOKING CAUSES STROKE."



The Department produced the signs in two sizes. Retailers must post signs measuring 432 square inches (three square feet) "at each location where tobacco products are displayed," or signs measuring 144 square inches (one square foot) "on or within 3 inches of each cash register or each place where payment may be made." Resolution § 181.19(b)(2), (c).

The district court record demonstrates that the area around the cash register is extremely valuable advertising space. In New York City, the "overwhelming

majority" of retailers place tobacco product displays next to the cash register because of commercial factors, space restrictions, and New York State law restricting the display of cigarettes. Order 12; *see also* N.Y. Pub. Health Law § 1399-cc(7) (retailers must store tobacco products either behind a counter in an area accessible only to employees or in a locked container). The Resolution thus commandeers the most valuable advertising and promotional space in retail stores—the area surrounding the register—and forces retailers to post signs urging their customers not to purchase their lawful products.

B. The Federal Regulatory Scheme.

The City enacted the Resolution against a backdrop of extensive and increasing federal regulation of smoking and health. Congress has directly addressed the issue of smoking and health no fewer than eight times over forty-five years. *See, e.g.*, Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282 (1965); Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87; Little Cigar Act of 1973, Pub. L. No. 93-109, 87 Stat. 352; Alcohol and Drug Abuse Amendments of 1983, Pub. L. No. 98-24, 97 Stat. 175; Comprehensive Smoking Education Act, Pub. L. No. 98-474, 98 Stat. 2200 (1984); Comprehensive Smokeless Tobacco Health Education Act of 1986, Pub. L. No. 99-252, 100 Stat. 30; Alcohol, Drug Abuse, and Mental Health Administration

Reorganization Act, Pub. L. No. 102-321, 106 Stat. 323 (1992); Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009).

Through the Labeling Act, Congress imposed "a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health." 15 U.S.C. § 1331. The Labeling Act specifies the content of the health warnings contained on cigarette packages and in cigarette advertisements, including advertising on product displays in retail stores, as well as the location, size, font, and color scheme of those warnings. *See id.* § 1333(a)(2), (b)(2). Congress's objective is to strike a delicate, nationwide balance between ensuring that the public is "adequately informed about any adverse health effects of cigarette smoking" and guaranteeing that "commerce and the national economy [is] protected to the maximum extent consistent with this declared policy." *Id.* § 1331.

To that end, the Labeling Act provides that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes." 15 U.S.C. § 1334(b). The Supreme Court has examined this provision on four occasions, from which one common theme emerges: States and municipalities may not require additional health warnings. Three years ago, the Court explained that:

> Together, the labeling requirement and pre-emption provisions express 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. 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 the federal warnings are inadequate.

Altria Grp., Inc. v. Good, 129 S. Ct. 538, 544 (2008).

In June 2009, Congress enacted the Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009) ("FSPTCA"), which amended the Labeling Act. The FSPTCA rewrites the required federal warnings, underscoring federal control over the content and extent of required cigarette health warnings. The new warnings include the phrases "Cigarettes cause fatal lung disease"; "Tobacco smoke can harm your children"; and "Smoking during pregnancy can harm your baby." FSPTCA § 201. The FSPTCA requires those warnings to occupy the top half of the front and rear panels of cigarette packages and the top twenty percent of press and poster advertisements. *See id.* § 201(a)(2), (b)(2). And the FSPTCA directs the Food and Drug Administration ("FDA") to promulgate regulations "that require color graphics depicting the negative health consequences of smoking to accompany the label statements." *Id.* § 201(d). The FDA issued a final rule specifying the content of those warnings, many of which contain graphic images of diseased body parts, on June 21, 2011. *See* Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628 (June 22, 2011) (to be codified at 21 C.F.R. pt. 1141).

The FSPTCA also required the FDA to reissue, in nearly identical form, the rule regulating tobacco advertising and promotion issued by the FDA in 1996 that the Supreme Court invalidated in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). *See* 21 U.S.C. § 387a–1(a). The FDA issued the final rule on March 19, 2010. *See* Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products To Protect Children and Adolescents, 75 Fed. Reg. 13,225, 13,232 (Mar. 19, 2010) (to be codified at 21 C.F.R. pt. 1140). The rule includes prohibitions and limitations on brand-name sponsorships and merchandise, non-tobacco gifts given in consideration of a purchase, and product sampling. *See id.* at 13,231–32. It bans or severely limits tobacco product advertising in certain media, such as in newspapers or magazines, on billboards, posters, and placards, in non-point-of-sale promotional materials, including direct mail, and in audio or video format at the point of sale. *See id.* at 13,232. It also seeks to prohibit color and imagery in most tobacco advertisements. *See id.* This last restriction was declared unconstitutional in a lawsuit brought by Plaintiffs Lorillard Tobacco Company and R.J. Reynolds Tobacco Co., Inc. challenging all of these additional restrictions, in a case currently on appeal to the United States Court of Appeals for the Sixth Circuit. *See Commonwealth Brands, Inc. v. United States*, 678 F. Supp. 2d 512 (W.D. Ky. 2010), *appeal docketed sub nom. Disc.*

Tobacco City & Lottery Inc. v. United States, Nos. 10-5234 & 10-5235 (6th Cir. Mar. 9, 2010).

There are still other legal restrictions on tobacco advertising and promotion. Since 1971, federal law has prohibited the advertising of cigarettes on television and radio. *See* 15 U.S.C. § 1335; *see also id.* § 4402(c) (ban on advertising of smokeless tobacco on television and radio). The 1998 Master Settlement Agreement ("MSA") is an agreement through which Lorillard Tobacco Company, Philip Morris USA Inc., R.J. Reynolds Tobacco Co., Inc., and other tobacco companies settled claims with the Attorneys General of forty-six states, five U.S. territories, and the District of Columbia. The MSA prohibits participating tobacco product manufacturers from advertising on billboards, signs, and placards at stadiums, arenas, malls, arcades, bus stops, and taxi stands; limits brand-name sponsorships to one per year; and imposes strict size and location restrictions on outside advertising at retail establishments where tobacco products are sold.

All of these restrictions leave the retail store as one of the few channels of communication between tobacco retailers and manufacturers, on the one hand, and adult tobacco consumers, on the other. There, retailers and manufacturers may and do post tobacco advertisements, so long as they include the mandated federal warning. And they may and do set up displays of cigarette packages, which show the established brand trademarks, communicate qualities of various brands, and

announce that certain brands of cigarettes are available for sale. *See* JA 195–196 (Lindsley Decl. ¶¶ 6–7); JA 221–222 (Dunham Decl. ¶¶ 7–8); JA 225–226 (Gifford Decl. ¶¶ 6–7).

THE DISTRICT COURT'S OPINION AND ORDER

After the City conceded that all other elements of preemption under Section 1334(b) are satisfied here, the district court held that the Resolution is "with respect to . . . the promotion of . . . cigarettes," and is thus preempted by Section 1334(b).

The district court focused on "the provision of [the Resolution] calling for tobacco retailers to post a large anti-smoking sign wherever 'tobacco products are displayed.'" Order 11 (quoting Resolution § 181.19(c)(2)). The court concluded that, "by any standard," tobacco product displays are "promotion" under Section 1334(b). *Id.* at 10. The court reached this conclusion by consulting the sources that the Eighth Circuit found dispositive in *Jones v. Vilsack*, 272 F.3d 1030 (8th Cir. 2001), including federal agency studies of tobacco industry promotional practices. When used in the "commercial sense," the court found, "'[p]romotion' . . . encompasses any act, including 'publicity or discounting,' that 'further[s] the . . . sale of merchandise.'" Order 8 (quoting *Jones*, 272 F.3d at 1036). Placing tobacco products in plain sight of consumers at a retail store clearly fell within this definition, the court held.

The City argued that "promotion" reached only activities "that add extra value" to the purchase, such as "discount[s]" or "free . . . samples." Order 8. The district court rejected the City's "narrow conception" of the word "promotion" as "contrary not only to its plain meaning, but also to its intended role in the wording of Section 1334(b)." *Id.* The City's argument "totally ignore[d] the extent to which tobacco manufacturers use the display of tobacco products at retail stores to promote the sale of merchandise" and that "retail displays at the point-of-sale are presently the 'dominant channel' by which tobacco manufacturers promote their products in the United States." *Id.* at 10.

The district court further held that the Resolution was "with respect to" that promotion in the form of tobacco product displays. The district court applied the test established by this Court in *Vango Media*: "Under *Vango Media,* a local regulation with even an indirect relationship to cigarette advertising (or here promotion) is nonetheless pre-empted by the Labeling Act if it 'imposes conditions' that 'substantially impact[]' such advertising (or, here again, promotion)." Order 11 (quoting *Vango Media, Inc. v. City of New York*, 34 F.3d 68, 74–75 (2d Cir. 1994)). The Resolution's requirement to post large signs wherever "tobacco products are displayed" "plainly imposes conditions on the promotion of cigarettes – indeed, in a far more direct way [than in *Vango Media*]." Order 11. The district court similarly found that the Resolution's alternate

requirement of "posting a sign near the cash register" was no less objectionable "since a confluence of regulatory and commercial factors lead tobacco retailers to display tobacco products near the cash registers at the point-of-sale." *Id.* Moreover, "since an acknowledged purpose of Article 181.19 is to counter the effect of cigarette promotion, the very purpose of the Article's requirement of posting an anti-smoking sign near the cash register is an implicit recognition that this is near where the cigarettes are displayed." *Id.* at 12 (citing Decl. of Kenneth Michael Cummings ¶ 16). Indeed, that the Resolution was "specifically designed to counter the effect of plaintiffs' point-of-sale promotional displays" further demonstrated that it was "with respect to . . . promotion" and thus preempted. *Id.* at 13.

The court entered summary judgment for the Plaintiffs on the preemption issue alone and did not reach the Plaintiffs' First Amendment and New York constitutional claims.

SUMMARY OF ARGUMENT

The Resolution intrudes on the long-standing exclusive federal regulation of mandated cigarette health warnings. The City has decided that the federally mandated warnings that appear on all cigarette packs and in all cigarette advertisements are not good enough and that additional health warnings must be posted where those packs are displayed or sold at retail stores. The Resolution is

precisely the type of local requirement Congress has prohibited. The Labeling Act bars states and municipalities from imposing any "requirement or prohibition based on smoking and health . . . with respect to the advertising or promotion of . . . cigarettes." 15 U.S.C. § 1334(b). The City concedes that the Resolution is a "requirement" that is "based on smoking and health." The only question raised in this appeal, then, is whether the Resolution is "with respect to" the advertising or promotion of cigarettes.

In holding that the Resolution is preempted, the district court correctly determined that cigarette product displays constitute "promotion" under the Labeling Act. Order 13. The district court then properly applied this Court's decision in *Vango Media* authoritatively interpreting the phrase "with respect to the advertising or promotion of" cigarettes. There, this Court explained that municipal regulations that "impose conditions" on or "substantially impact" the advertising or promotion of cigarettes are "with respect to" such advertising or promotion. *Vango Media*, 34 F.3d at 72. Here, the Resolution requires additional health warnings be placed side-by-side with cigarette product displays, and is designed to "counter the effect of plaintiffs' point-of-sale promotional displays," and thus clearly "imposes conditions" on and "substantially impacts" such promotion. Order 10–11.

The Resolution is "with respect to the advertising or promotion" of cigarettes for additional reasons. First, an acknowledged purpose of the Resolution is to "[c]ounteract tobacco advertising." JA 111. Second, the Resolution seeks to alter the message presented to consumers by, and the appearance of, cigarette *advertising* in retail stores. Third, the Resolution requires posters that are themselves indistinguishable from "advertising." Ultimately, the Resolution attacks the core of the Labeling Act—selecting the cigarette health warnings to be required of private parties.

The Resolution also violates the First Amendment to the United States Constitution and the Free Speech Clause of the New York Constitution. When the government seeks to require a private citizen to carry its message on private property, the First Amendment inquiry is binary: Either the compelled speech is *purely factual and uncontroversial* and directed at preventing consumer deception, in which case a less rigorous standard for compelled commercial disclosures applies, *see Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 650–51 (1985), or it is not and is subject to strict scrutiny.

Here, the Resolution forces stores that lawfully sell tobacco products to carry shocking images of diseased body parts and the directive to "QUIT SMOKING TODAY—CALL 311 OR 1-866-NYQUITS." Of course, telling everyone to "Quit Smoking Today" is not a factual and uncontroversial statement.

And the City's graphic images designed to shock and to appeal to emotion are neither purely factual nor uncontroversial.

The City disputes that strict scrutiny applies and makes no meaningful attempt to claim that the Resolution would satisfy that standard. Properly applying this standard would require that the Order be affirmed on this alternate ground, because the Resolution is not the least restrictive means of achieving a compelling government interest. Indeed, even under the *Central Hudson* standard generally applicable to restrictions on commercial speech, the Order must be affirmed. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980). With so many alternatives available for the City to accomplish its goals that do not *force* private parties to speak, including the City purchasing its own public health advertising time or space, the Resolution is not narrowly tailored to any substantial government interest.

The Resolution also violates the separation of powers established by the New York Constitution. This case began when an unelected administrative agency—the New York City Board of Health—overstepped its bounds and pressed on the constitutional rights of tobacco retailers and manufacturers. The New York Constitution, however, reserves those sensitive public policy decisions for the elected representatives of the People. The Order should be affirmed on this separate ground as well.

STANDARD OF REVIEW

This Court reviews an order granting summary judgment *de novo*. It will affirm the judgment if the evidence, viewed in the light most favorable to the party against which the judgment was entered, establishes that there are no genuine issues of material fact and that judgment is warranted as a matter of law. *See, e.g.*, *McGullam v. Cedar Graphics, Inc.*, 609 F.3d 70, 75 (2010). It reviews conclusions of law *de novo*. *See Freedom Holdings, Inc. v. Cuomo*, 624 F.3d 38, 49 (2d Cir. 2010).

This Court may affirm a judgment of the district court on any ground supported by the record, even if it was not the ground relied upon by the lower court. *See Freedom Holdings*, 624 F.3d at 49; *Shumway v. United Parcel Serv., Inc.*, 118 F.3d 60, 63 (2d Cir. 1997). Accordingly, this Court may affirm the district court's judgment declaring the Resolution "null and void," should it find the Resolution violates the First Amendment or the New York Constitution.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT THE LABELING ACT EXPRESSLY PREEMPTS THE RESOLUTION.

Through the Labeling Act, "Congress has crafted a comprehensive federal scheme governing the advertising and promotion of cigarettes." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001). The Labeling Act establishes detailed requirements for health warnings on cigarette packages and in cigarette

advertisements, including advertising and product displays where cigarettes are sold. *See* 15 U.S.C. § 1333(a)(1).

To preserve Congress's judgment about the extent and content of cigarette health warnings required of private parties, and about other requirements affecting cigarette advertising and promotion, the Labeling Act contains an express preemption provision:

> 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.

15 U.S.C. § 1334(b). As the Supreme Court has explained: "Together, the labeling requirement and pre-emption provisions express Congress' determination that prescribed federal warnings are both necessary and sufficient to achieve its purpose of informing the public of the health consequences of smoking." *Good*, 129 S. Ct. at 544. While keeping the public informed about the health risks of smoking, the Labeling Act "protect[s]" "commerce and the national economy . . . to the maximum degree consistent with [that] purpose." 15 U.S.C. § 1331(2).

The Supremacy Clause of the United States Constitution provides that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. State and municipal laws that conflict with federal law are thus "without effect." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); *see also*

PLIVA, Inc. v. Mensing, No. 09-993, slip op. at 11 (U.S. June 23, 2011) (holding that "state law must give way"). "[T]he purpose of Congress is the ultimate touchstone of pre-emption analysis," and "Congress' intent may be explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992).

Where, as here, "Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue," the Court's task is to "identify the domain expressly pre-empted." *Cipollone*, 505 U.S. at 517. A proper analysis of the scope of a preemption provision "[b]egins with the language of the statute," gives "meaning to each element of the pre-emption provision," and takes into account the "circumstances in which the current language was adopted." *Reilly*, 533 U.S. at 542.

The Resolution directly contravenes the Labeling Act by attempting to supplement the health warnings deemed necessary and sufficient by Congress. The City has conceded that the Resolution is a "requirement" and that it is "based on smoking and health." *See* Order 6; Br. of Defs.-Appellants at 26, No. 11-0091 (2d Cir. Apr. 8, 2011), ECF No. 51 ("City Br."). The only question, then, is whether the district court correctly held that the requirement imposed by the Resolution is "with respect to the advertising or promotion" of cigarettes.

The district court correctly concluded that the Resolution is preempted because it requires a sign "at each location where tobacco products are *displayed*." Resolution § 181.19(c)(2) (emphasis added). Product displays in retail stores are "promotion" under the Labeling Act, and requiring health warnings signs beside those displays is "with respect to" that promotion.

A. The District Court Correctly Held That Cigarette Product Displays in Retail Stores Are "Promotion" Under The Labeling Act.

Tobacco product displays are "promotion" under the Labeling Act. As the district court explained, "'[p]romotion,' when used in the commercial sense, encompasses any act, including 'publicity or discounting,' that 'further[s] the . . . sale of merchandise.'" Order 8 (quoting *Jones*, 272 F.3d at 1036). And promotion also includes the "'publicization of a product'" to "'increase sales.'" *Id.* at 8 (quoting Oxford College Dictionary 1092 (2002)). The district court found that "[i]n the context of cigarette distribution in particular, 'promotion' is commonly used to refer to point-of-purchase displays." *Id.* at 9. Displaying cigarette packages, in sight of adult consumers in retail stores, announces that particular brands of cigarettes are available and puts company trademark and trade dress in plain view. These displays clearly "further the sale" of that merchandise. Rejecting the City's argument that the displays are merely for sales, not promotion, the district court determined that the City's argument "totally ignores the extent to

which tobacco manufacturers use the display of tobacco products at retail stores to promote the sale of merchandise." *Id.* at 10.

The City would limit "promotion" to only those activities that "add[] extra value toward [a] purchase," such as coupons, free samples, or sale prices. City Br. 35. The district court properly rejected that argument. Order 8. Although that may be one "specific definition" of the term, *Jones*, 272 F.3d at 1036, there is no evidence that Congress chose to invoke only one aspect of the plain meaning of "promotion." To the contrary, the Supreme Court has characterized the addition of the term "promotion" as giving Section 1334(b) "sweeping" breadth, and has rejected efforts to give Section 1334(b), as amended, a "narrow reading." *Reilly*, 533 U.S. at 542; *Cipollone*, 505 U.S. at 521–22 (plurality op.).

Importantly, the Executive Branch also has recognized that cigarette "promotion" includes cigarette product displays in retail stores.[1] The Eighth

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[1] The City also shared this view in its briefing below, before the district court's reasoning crystallized. *See* Reply Brief of Defendants at 15–16, No. 10 Civ. 4392 (S.D.N.Y. Oct. 8, 2010), ECF No. 56 (noting the amount supposedly spent by tobacco manufacturers on point-of-sale promotional materials and claiming that studies show that "tobacco product displays stimulate impulse purchases"); Brief of Defendants at 7, *23–34 94th St. Grocery Corp. v. N.Y. City Bd. of Health*, No. 10 Civ. 4392 (S.D.N.Y. Aug. 13, 2010), ECF No. 47 ("City D. Ct. Opp. Mem.") (claiming that "it is clear from the pictures . . . that plaintiffs . . . continue to facilitate Big Tobacco's aggressive promotion and sale of tobacco products," including "multiple cigarette advertisements," "a large cigarette display stand," and "a similar cigarette display"). Before this Court, the City

[Footnote continued on next page]

Circuit looked to federal reports on tobacco marketing to define "promotion." *Jones*, 272 F.3d at 1035. In one of those reports, the Surgeon General described "point of sale displays" as a core form of "promotional" activity:

> Promotional activities can take many forms. Promotional expenditures can stimulate retailers to place and display products in ways that will maximize the opportunity for purchase (e.g., supplying retailers with point-of-purchase displays to locate products at checkout stands).

Id. at 1035 (quoting *Preventing Tobacco Use Among Young People: A Report of the Surgeon General* 159–60 (1994) ("Surgeon General Report")); *see also* Surgeon General Report at 8 ("Barred since 1971 from using broadcast media, the tobacco industry increasingly relies on promotional activities, including sponsorship of sports events and public entertainment, outdoor billboards, point-of-purchase displays, and the distribution of specialty items . . . ."); *id.* at 159 ("'[A]dvertising' refers to company-funded advertisements that appear in paid media (e.g., broadcasts, magazines, newspapers, outdoor advertising, and transit advertising), whereas 'promotion' includes all company-supported nonmedia activity (e.g., direct-mail promotions, allowances, coupons, premiums, point-of-purchase displays, and entertainment sponsorships).").

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> returned to form and complained that cigarette manufacturers "presume that they are entitled to promote their products on all of the wall and counter space in any retail location." City Br. 5 n.4.

The district court relied on this study in finding that retail cigarette displays are promotion. Order 9. The City asserts that the district court's conclusion that cigarette product displays are "promotion" is unsupported by case law. *See* City Br. 32. But the district court relied on the same sources as every other federal court that has interpreted the term "promotion" in Section 1334(b). *See Jones*, 272 F.3d at 1035; *see also R.J. Reynolds Tobacco Co. v. Seattle-King Cnty. Dep't of Health*, 473 F. Supp. 2d 1105, 1109–10 (W.D. Wash. 2007) (applying the same analysis); *R.J. Reynolds Tobacco Co. v. McKenna*, 445 F. Supp. 2d 1252, 1255 (W.D. Wash. 2006) (same).

B. The Resolution Is "With Respect To The Advertising Or Promotion" Of Cigarettes.

Tobacco product displays are one of two places where the Resolution requires retailers to place the mandated graphic signs. This requirement demonstrates that the Resolution is "with respect to" cigarette product displays and thus is preempted.

The meaning of "with respect to the advertising or promotion" of cigarettes is not a question of first impression for this Court. In *Vango Media*, this Court invalidated a New York City ordinance requiring taxicab companies that displayed advertisements for cigarettes on taxicab roofs also to display anti-tobacco public health advertisements. 34 F.3d at 70. The ordinance required that for every four tobacco advertisements carried atop a company's taxicabs, the company would be

required to run (separately) one public health advertisement approved by the City. *See id.* at 70–71. Only by coincidence would the mandated anti-tobacco advertisements and cigarette advertisements be seen together on the same street corner. *See id.*

This Court held that the ordinance was preempted under Section 1334(b). The Court "acknowledged that the actual cigarette advertisements would not look different were [the court] to permit the City to impose the mandated public health messages," and that the law at issue was "not aimed at advertising or promotion." *Vango Media*, 34 F.3d at 74. The Court held, however, that Section 1334(b) preemption reached even beyond those two categories, rejecting arguments that there is no preemption because the ordinance did not restrict the amount or content of advertising. The term "with respect to," the Court explained by reference to dictionaries, requires only a "relation to or concern with" advertising or promotion. *Id.* The Court rejected suggestions that the term should be given a more restrictive meaning. *Id.* If a state or local regulation "imposes conditions" on or "substantially impacts" advertising or promotion, it is "with respect to" advertising or promotion. *Id.* at 74–75; *see also* Order 11.

Vango Media makes this an easy case. The Resolution requires retailers to post a sign where cigarettes are displayed, changing the appearance of those displays. Resolution § 181.19(b)(2), (c). That direct relationship was enough for

the district court to determine that the Resolution "substantially impacts" promotional activity—in this case, cigarette package point-of-sale displays. And this Court strongly implied that changing the appearance of advertising (and presumably promotion) was itself enough for preemption. *Vango Media*, 34 F.3d at 74.

The City attempts to distance the Resolution from its obvious effect on cigarette product displays by stressing that retailers may place signs at each cash register. In New York City, that is a distinction without a difference. New York law requires retailers to place cigarettes behind a counter, where only store personnel have access to them, or in a locked container. *See* N.Y. Pub. Health Law § 1399-cc(7); Order 11–12. Federal law bans tobacco product displays where customers may serve themselves. *See* 75 Fed. Reg. at 13,231. Between applicable law and the customary configuration of retail establishments, tobacco product displays are almost always behind the retail counter with the cash registers in New York City. *See* Order 11–12. Thus, posting the City's graphic signs at the cash register is little different from attaching them to the tobacco product display and has a similar effect on changing the display's appearance.

The City's reliance on the cash register as an alternative location also ignores that the cigarette package itself serves an important promotional function. The package displays smaller versions of each manufacturer's distinctive

trademarks, colors, and trade dress, all of which help adult consumers identify brands in the marketplace and convey the goodwill and premium product quality associated with specific brands. Manufacturers often use cigarette packages to carry additional advertising and promotional messages, through imprinted cellophane wrappers surrounding the package and on "onserts" attached to the package. All of these additional promotional and advertising materials are designed not to obscure the mandated federal health warnings that are present on every cigarette package and that are the foundation of the Labeling Act. As a result, the Resolution's two alternative locations for signs will always affect promotion, whether it is the tobacco product display itself or at the cash register where packages are handed to the consumer for inspection and purchase.

Even if the requirement to place signs at the cash register did not itself constitute a requirement "with respect to advertising or promotion," the Resolution would still be preempted. The Resolution's requirement to place the mandated signs "where tobacco products are displayed" is clearly preempted; the City would not escape preemption of the Resolution as a whole by giving retailers the alternative "option" of placing the additional warnings at the cash register. The government cannot achieve a forbidden objective by making it a choice among undesirable alternatives.

By way of example, a regulation would be preempted if it gave retailers the "option" of altering their tobacco product displays to include additional warnings or else pay a fee of $20 per pack (or to take the even more drastic step of ceasing sale of tobacco products altogether). *See Speiser v. Randall*, 357 U.S. 513, 526–29 (1958) (government may not condition the amount of tax payments on conduct it is prohibited from requiring). In this case, the City offers to confiscate the most valuable promotional and advertising space in the store—right beside the cash register—in exchange for not posting the City's shocking additional health warning alongside the promotional product displays. *See* JA 201 (Cala Decl. ¶ 13); JA 214 (Infante Decl. ¶ 18). The requirement to change the appearance of promotional materials or to engage in other activity with significant commercial costs still "concerns" that promotion and is preempted.

While the district court focused on the Resolution's direct effect on tobacco product displays, there are yet other grounds for holding that the Resolution is a requirement "with respect to the advertising or promotion" of cigarettes.

First, two acknowledged purposes of the Resolution are to "[c]ounteract tobacco advertising" and to "counter the effect[s] of cigarette promotion." JA 111; Order 12; *see* JA 509–511 (Decl. of Dr. Kenneth Michael Cummings ¶ 16) (admitting on behalf of the City that the purpose of Article 181.19 was to neutralize the impact of cigarette promotional activity at the point of sale). The

administrative record reinforces these apparent purposes. The Department of Health and Mental Hygiene staff proposing the Resolution made a presentation to the Board of Health documenting cigarette advertising in retail stores. *See* JA 105. The Board should counterbalance that advertising, the staff explained, by mandating that retailers post in their stores vivid anti-smoking messages of the Board's own choosing. *See id.* at 106–12. Indeed, the staff stated that "[t]obacco advertising [is] prominent in most stores," but that "[c]urrently [there is] no point of sale health information." *See* JA 105.

This Court strongly suggested seventeen years ago that local requirements for private parties "aimed at advertising or promotion" were preempted. *Vango Media*, 34 F.3d at 74. The City's stated purpose for the Resolution demonstrates the "concern with" advertising that is the plain meaning of the statutory term "with respect to advertising." *Id.* The Supreme Court has looked to the purpose of state law, especially one to "supplement[] the federally prescribed warnings" for cigarettes, to determine whether Section 1334(b) preempts it. *Good*, 129 S. Ct. at 544; *see id.* ("States may not impede commerce in cigarettes by enforcing rules *that are based on an assumption that the federal warnings are inadequate*." (emphasis added)). The Resolution's explicit purpose to counteract advertising and promotion is itself enough for preemption.

Second, the Resolution alters the appearance of the message adult cigarette consumers receive in a retail store. That too is enough for preemption. In *Vango Media*, this Court assumed that a requirement altering the appearance of advertising would be preempted, while recognizing that the preemptive reach of the statute was far broader than that. *See* 34 F.3d at 74. As discussed above, at issue in that case was an ordinance that required advertising companies to display anti-tobacco public health advertisements on taxicab roofs if those companies displayed advertisements for cigarettes on *other* taxicabs. The taxicab cigarette advertisements and the mandated public health messages at issue in *Vango Media* could have been separated by blocks or miles. Here, the City's graphic health warnings and point of sale advertising are separated by inches or feet. This more direct relationship to cigarette advertising conclusively demonstrates that the Resolution is preempted. The federally mandated package and advertising warnings similarly alter the message presented by advertising and promotion in a retail store, but Section 1334(b) reserves that power exclusively to the federal government.

Third, the City not only targets advertising, but also uses the medium of advertising to achieve its ends. The City's required signs—similar to advertisements the City has run elsewhere—expose viewers to vibrant images and attention-grabbing words as any advertisement would. *See, e.g.*, JA 404

(describing the City's "advertising" plan to urge New Yorkers not to smoke). When a regulation seeks to counteract advertising, requires signs to accompany cigarette promotion and advertising, and itself uses the medium of advertising, the conclusion that the regulation is "with respect to advertising or promotion" inevitably follows.

C. The City's Narrow Reading Of Section 1334(b) Contradicts The Text And Amendment History Of The Labeling Act.

In the face of the Resolution's clear purpose and effects, the City contends that the district court erred by construing too broadly the preemptive scope of the Labeling Act. City Br. 23. The City makes three arguments, all of which fail.

First, according to the City, Section 1334(b) preempts only those regulations that "limit the ability of cigarette manufacturers to advertise or promote their products." City Br. 24. The Resolution is not preempted, the City argues, because "retailers and tobacco companies remain free to advertise and promote tobacco products notwithstanding the Resolution." *Id.* at 30.

But this is not the test. The City cites no authority for these propositions and mischaracterizes the preemptive reach of Section 1334(b). Indeed, the Resolution is not a local legislative effort along the edges of the Labeling Act; rather, it targets the Act's core and historical purpose. The Labeling Act reflects Congress's considered judgment that cigarette health warnings imposed on private parties should convey a uniform, carefully crafted message regarding smoking and health.

To carry out this purpose, Congress required specified health warnings on cigarette packages and in cigarette advertisements, including advertisements on tobacco product displays.

The City now wants to alter that judgment because it believes that Congress's warnings are not good enough. The City admitted in the district court that the signs are intended to "address" what it judged to be "deficiencies" in the federal warnings scheme, asserting that "[t]he basic problem[]" with the existing federal regulations is "that they are unnoticed and stale, and they fail to convey information in an effective way." City D. Ct. Opp. Mem. 20–21. The Supreme Court already has explained, however, that municipalities are "prohibit[ed] from supplementing the federally prescribed warning" and may not "enforc[e] rules that are based on an assumption that the federal warnings are inadequate." *Good*, 129 S. Ct. at 544.

Second, the City claims the Resolution is not preempted because it does not require additional warnings on cigarette packages or in cigarette advertising. *See* City Br. 25–26. This argument ignores the 1969 amendments to Section 1334(b). In its original form, Section 1334(b) provided that "[n]o *statement* relating to smoking and health shall be required *in the advertising of* any cigarettes the packages of which are labeled in conformity with the provisions of this Act." *See* Labeling Act § 5(b) (emphases added). In 1969, Congress amended the statute to

preempt requirements or prohibitions based on smoking and health "with respect to the advertising or promotion" of cigarettes. The Supreme Court has held that this change in language—from "in the advertising" to "with respect to the advertising or promotion" of cigarettes—made the preemptive scope of the statute "'much broader.'" *Reilly*, 533 U.S. at 545 (quoting *Cipollone*, 505 U.S. at 520 (plurality op.)); *see also Vango Media*, 34 F.3d at 74 (explaining that "with respect to" is similar to "relate to," a phrase the Supreme Court has given "broad effect").[2] Prior to its amendment in 1969, Section 1334(b) preempted state or local requirements

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[2] Some *amici* argue that the Resolution is saved from preemption by Section 1334(c), added by 2009 amendments to the Labeling Act. *See* Brief of Tobacco Control Legal Consortium as *Amicus Curiae* Supporting Defs.-Appellants at 22–25, No. 11-0091 (2d Cir. Apr. 19, 2011), ECF No. 82 ("Tobacco Control Legal Consortium *Amicus* Br."); Brief of L.A. Cnty. Dep't of Pub. Health as *Amicus Curiae* Supporting Defs.-Appellants at 6–9, No. 11-0091 (2d Cir. Apr. 25, 2011), ECF No. 95 ("L.A. Cnty. Dep't of Pub. Health *Amicus* Br."). Section 1334(c) states that "a State or locality may enact statutes and promote regulations . . . imposing specific bans or restrictions on the time, place, and manner, *but not content*, of the advertising or promotion of any cigarettes." 15 U.S.C. § 1334(c) (emphasis added).

As the City did not present this argument below, it is waived. *See, e.g.*, *In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 132 (2d Cir. 2008) (per curiam). In any event, this argument fails on the merits. The Resolution unambiguously seeks to specify "content," and is not just a "time, place, and manner" restriction. Indeed, the Resolution requires the City's message promoting abstinence directly adjacent to cigarette product displays and amidst cigarette advertising. *Cf. Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988) ("Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech.").

that placed additional warnings "*in*" the four corners of the cigarette advertising. Substituting the term "with respect to the advertising or promotion" for the term "in the advertising" reached required health warnings around advertising and promotion.

Third, the City turns to the Supreme Court's statement in *Reilly* that "states remain free . . . to regulate conduct with respect to cigarette use and sales." City Br. 25 (citing *Reilly*, 533 U.S. at 552). The Resolution, the City explains, only requires any establishment that "sells tobacco products" to post the signs. *Id.* at 24–25.[3]

Reilly makes clear, however, that restrictions on the sale of tobacco products are preempted if they relate to "advertising and promotion." *Reilly*, 533 U.S. at 552. The *Reilly* Court's examples of permissible "sales" restrictions include cigarette taxation or the prohibition of sales to minors. *See id.* And courts applying *Reilly* have distinguished bans on self-service tobacco displays, the sale

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[3] *Amici* claim that courts have held preempted by the Labeling Act only those laws directly regulating tobacco companies or those conducting promotional campaigns on their behalf. No cases, they claim, reached regulations of tobacco retailers. Tobacco Control Legal Consortium *Amicus* Br. at 20–21. The cases cited by those *amici*, however, were preemption challenges brought and won *solely by tobacco retailers*. *See, e.g.*, *Rockwood v. City of Burlington*, 21 F. Supp. 2d 411, 413–14 (D. Vt. 1998) (action by tobacco retailers challenging a ban on certain advertising in retail stores); *Chiglo v. City of Preston*, 909 F. Supp. 675, 676 (D. Minn. 1995).

of tobacco products to minors, or smoking in public places, as addressing access to or availability of tobacco products, from "measures which attempt to affect the desire for cigarettes by regulating tobacco advertising." *Rockwood v. City of Burlington*, 21 F. Supp. 2d 411, 420 (D. Vt. 1998). The Resolution is in the latter category: It seeks to affect the consumer's desire to buy tobacco products by exposing them to graphic anti-smoking signs.

* * *

The ties that bind the Resolution to cigarette advertising and promotion are many and close. The Resolution requires that new health warnings be placed aside tobacco product displays, which are clearly promotion. The administrative record demonstrates that the Resolution expressly targets advertising and promotion. The Resolution changes the appearance of, and the message conveyed by, cigarette advertising and promotion in retail stores. And the Resolution requires the display of posters that are themselves indistinguishable from advertising. The Resolution explicitly challenges Congress's conclusive judgment that the federal cigarette warnings are necessary and sufficient and that no further health warnings may be required. The Resolution is within the heartland of Section 1334(b), and the district court correctly ruled that it is preempted.

II. THE RESOLUTION VIOLATES THE FIRST AMENDMENT.

The Resolution is preempted and thus violates the Supremacy Clause of the United States Constitution. The district court ruled only on that ground. The City, however, asks this Court to address Plaintiffs' independent claim that the Resolution violates the First Amendment. This provides an alternative ground for affirmance.

The Resolution violates the First Amendment's guarantee of "both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Without satisfying strict constitutional scrutiny, the government may not force citizens, including businesses, to use their private property to post a message that is not wholly factual and uncontroversial. *See id.* at 715; *see also 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).

The Resolution requires Plaintiffs to post in their stores signs containing shocking and controversial images and the unambiguously non-factual call to action: "QUIT SMOKING TODAY—CALL 311 OR 1-866-NYQUITS." This requirement is subject to strict scrutiny. It must be *narrowly tailored* to advance a *compelling* state interest. The Resolution manifestly fails that test. Nor would the Resolution satisfy the *Central Hudson* test customarily applicable to commercial

speech restrictions, because it is not narrowly tailored to any substantial state interest.

The City presses this Court to apply a relaxed standard of First Amendment review—the *Zauderer* standard applicable to the most antiseptic and routine of compelled commercial disclosures—or, alternatively, to characterize the mandated signs as government speech and therefore exempt from the First Amendment. *See* City Br. 36–48; *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). Because it is seeking to protect public health, the City claims that it is entitled to greater latitude to affect the free speech interests of those who make or sell a disfavored product. *See* City Br. 45–46. In June 2011, however, the Supreme Court rejected two similar pleas for less demanding inspection under the First Amendment. *Brown v. Entm't Merchs. Ass'n*, No. 08-1448 (U.S. June 27, 2011) (preventing youth violence not enough to exempt sales restrictions on violent video games from strict scrutiny); *Sorrell v. IMS Health Inc.*, No. 10-779 (U.S. June 23, 2011) (improving physician decisions does not protect restrictions on commercial speech from heightened scrutiny). Even the best intentions do not allow the government to regulate what businesses must or may say, without satisfying the rigorous review required under the First Amendment. As these recent Supreme Court decisions confirm, the Court should reject the City's arguments to the contrary and hold the City to strict scrutiny.

And that result should end the case. The City makes no real effort to argue that the Resolution can survive more demanding standards of constitutional review, nor does it seek remand to the district court. If this Court decides that strict scrutiny (or the *Central Hudson* test) applies to the Resolution as a matter of law, it should affirm the judgment. But even if the Court determines that *Zauderer* applies, the result would be the same.

A. The Compelled Signs Are Not Government Speech.

A compelled commercial disclosure is either purely factual and uncontroversial and directed at preventing consumer deception, in which case the standard for compelled commercial disclosures articulated in *Zauderer* applies, or it is not, in which case strict scrutiny applies. *See Wooley*, 430 U.S. at 714; *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006). It is *never* government speech, contrary to the City's primary argument. City Br. 36–43.

It is true that the First Amendment "does not regulate government speech." *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1131 (2009). Thus, the City is free to post graphic anti-smoking signs on its own property, and it may even purchase advertising space for expressing its own views, as it has done.

The Resolution, however, requires the posting of a prescribed message on *private property*. For speech to be government speech, it must occur on *government* property or through the expenditure of *government* funds—as the

cases cited by the City demonstrate. *See Summum*, 129 S. Ct. at 1129 ("[T]he placement of a permanent monument in a *public park* is best viewed as a form of government speech . . . ." (emphasis added)); *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 562–65 (2005) (holding that the First Amendment does not apply to tax assessments—government property—that are used to fund government speech so long as the speech is not reasonably attributable to any particular taxpayers); *R.J. Reynolds Tobacco Co. v. Shewry*, 423 F.3d 906, 911 (9th Cir. 2005) (treating as government speech "advertisements that criticize the tobacco industry" funded by a tobacco tax); *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1011 (9th Cir. 2000) (treating as government speech statements on bulletin boards that "were the property and responsibility" of a public high school).[4]

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[4] Based on decisions establishing the "unconstitutional conditions" doctrine, *amici* led by the Los Angeles County Department of Public Health suggest that speech by private individuals on private property has been found to be government speech. L.A. Cnty. Dep't of Pub. Health *Amicus* Br. 14 n.4 (citing *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995); *Rust v. Sullivan*, 500 U.S. 173 (1991)). In both *Velazquez* and *Rust*, however, the government entered into an agreement to *pay* private individuals to state the government's message. These were never compelled speech cases, but rather challenges to the strings the government may attach when granting funds to a private party. This specialized category of cases has no application here. *Velazquez*, 531 U.S. at 541–43; *Rosenberger*, 515 U.S. at 833; *Rust*, 500 U.S. at 192–201. In any event, this Court recently recognized what narrow latitude the government has in forcing even recipients of government funds "to voice the

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The Supreme Court's decision in *Wooley* drives home this point. The State of New Hampshire enacted a law that required all license plates to bear the state motto "Live Free or Die." New Hampshire argued that the First Amendment did not apply because the motto would be attributed to the State, not to private citizens. Br. of Appellants at 18, *Wooley v. Maynard*, No. 75-1453, 430 U.S. 705 (1977). The Supreme Court recognized the widespread knowledge that vehicle license plates set forth a message attributable to the State, not to any particular driver. Nevertheless, the Court rejected any notion that the requirement constituted the State's speech. As the Court explained, "New Hampshire's statute in effect requires that appellees use their private property as a 'mobile billboard' for the State's ideological message—or suffer a penalty." *Wooley*, 430 U.S. at 715.

The City's argument here that a mandated sign with the government's logo is likely to be attributed to the government and is therefore constitutional was set forth by Justices Rehnquist and Blackmun *in dissent* in *Wooley*. 430 U.S. at 719–22 (Rehnquist, J., dissenting); *cf. Caruso v. Yamhill Cnty.*, 422 F.3d 848, 858 (9th Cir. 2005) (holding a voter ballot is government speech because "unlike . . . [in] *Wooley*, [the statute did] not require that owners use their private property to

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government's viewpoint." *Alliance for Open Soc'y Int'l*, No. 08-4917, slip op. at 28.

transmit the State's message"). But here, just as in *Wooley*, the Resolution forces Plaintiffs to use their private property as a "billboard" for the City's message.

The City tries to distinguish *Wooley* by arguing that it addresses only compelled confessions of ideology. City Br. 36 n.14. Courts have rejected that interpretation. "In general, First Amendment protection does not hinge on the ideological nature of the speech involved," and "the First Amendment's proscription of compelled speech does not turn on the ideological content of the message that the speaker is being forced to carry." *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1284 n.4 (10th Cir. 2004); *see also Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573–74 (1995) ("[T]his general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid.").

The City and its *amici* reach to every corner of First Amendment case law in an effort to neutralize *Wooley* and its progeny. But all of their cited authority is irrelevant. The City's leading case is *Johanns*, where the government used tax assessments on cattlemen to buy advertisements. The Court drew a sharp distinction between compelled *subsidies* and compelled *speech*—which the Court expressly stated that it was not addressing. *See Johanns*, 544 U.S. at 556, 564–565 & n.8. Compelling private parties to pay money subsidizing the government's own

speech is not a "true compelled-speech case[] in which an individual is obliged personally to express a message he disagrees with, imposed by the government." *Id.* at 557.

The City contends that courts have applied *Johanns* outside the context of compelled subsidies, City Br. 39 n.15, but courts have not done so in any sense relevant to this case. The decisions to which the City refers address whether the government is creating a "limited public forum," invalidly marginalizing some individual speakers because of the content of their expression. *See, e.g.*, *Ariz. Life Coal. Inc. v. Stanton*, 515 F.3d 956 (9th Cir. 2008) (whether Arizona's vanity plate program created a limited public forum); *Grosjean v. Bommarito*, 302 F. App'x 430 (6th Cir. 2008) (unpublished) (whether biographies published by the Michigan government created a limited public forum).[5] The point remains: The government

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[5] *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), is even less relevant. *See* L.A. Cnty. Dep't of Pub. Health *Amicus* Br. 15. The question in *PruneYard* was whether California state constitutional clauses permitting *private* individuals to speak and petition at privately owned shopping centers violate the First Amendment. The Court specifically noted that the case was not like *Wooley*, in which "the government itself prescribed the message." *PruneYard*, 447 U.S. at 87–88. Concurring in the judgment, Justice Powell stated that he did "not believe that the result in *Wooley v. Maynard* . . . would have changed had the State of New Hampshire directed its citizens to place the slogan 'Live Free or Die' in their shop windows rather than on their automobiles." *Id.* at 97.

speech doctrine does not protect mandates to post government messages on private property.

B. Strict Scrutiny Applies To The Resolution.

Compelled disclosures are excepted from strict scrutiny only if they are "purely factual and uncontroversial" and "reasonably related to the State's interest in preventing deception of consumers." *Zauderer*, 471 U.S. at 651; *see also Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1339–41 (2010). Even then, compelled disclosures will be struck down if they are "unjustified or unduly burdensome." *Zauderer*, 471 U.S. at 651. Where "the government seeks to affirmatively require government-preferred speech, its efforts raise serious First Amendment concerns." *Alliance for Open Soc'y Int'l*, No. 08-4917, slip op. at 24.

The Resolution mandates posting of the Board's directive to "Quit Smoking Today," along with what the district court described as "graphic, even gruesome" images of decayed teeth, cancerous lungs, and diseased brains. Order 5. The textual and pictorial content of the signs is hardly factual or uncontroversial. Rather, the signs are designed to shock and to persuade the public not to buy a legal product. As the City acknowledged, the "images are designed to shock," and the Department "intended these signs to produce a strong visceral reaction." City D. Ct. Opp. Mem. at 22; *accord* City Br. 5 (signs intended to leave "indelible

impact upon the viewer"); Brief of Am. Legacy Found. as *Amicus Curiae* Supporting Defendants at 6, *23–34 94th St. Grocery Corp. v. N.Y. City Bd. of Health*, No. 10 Civ. 4392 (S.D.N.Y. Aug. 20, 2010), ECF No. 51 ("Am. Legacy Found. Dist. Ct. *Amicus* Br.") (graphic anti-smoking signs "'elicit strong emotional arousal'"); *id.* at 1 (conceding that the signs "call[] on potential [smokers] to quit smoking immediately"); *id.* at 14 (signs "exhort[] consumers to 'take action'"); JA 249 (Farley Decl. ¶ 12) ("Smokers report negative emotional responses to graphic warnings . . . .").

And the text—"QUIT SMOKING TODAY—CALL 311 OR 1-866-NYQUITS"—is a directive, not a statement of fact. This makes the phrase required here categorically different from the phrase "Assistance in quitting smoking is available by calling 1-866-NYQUITS."

Contrary to the City's conclusory assertion, it is not true that "the signs at issue are typical" of routine warning signs. City Br. 6. The signs stand in stark contrast to factual warnings that have been upheld under cases applying *Zauderer*. In *Zauderer* itself, the Supreme Court upheld a mandate that advertising attorneys disclose that losing clients may be responsible for certain fees and costs. 471 U.S. at 652–53. In *Milavetz*, the Court upheld a mandate to advertising attorneys to disclose whether they functioned as a debt relief agency, because the words "entail[ed] *only* an accurate statement identifying the advertiser's legal status and

the character of the assistance provided." 130 S. Ct. at 1339–40 (emphasis added). In *New York Restaurant Ass'n v. New York City Board of Health*, 556 F.3d 114, 121 (2d Cir. 2009), this Court upheld a New York City law requiring restaurants to publish calorie information (i.e., "the taco salad contains 840 calories"). Both *National Electric Manufacturers Ass'n v. Sorrell*, 272 F.3d 104, 113–14 (2d Cir. 2001), and *Environmental Defense Center, Inc. v. EPA*, 344 F.3d 832, 850 (9th Cir. 2003), involved purely factual descriptions about how to dispose of toxic products.

The City's compelled signs lack any precedent. The best the City can do is to contend that the graphic images—only one part of the signs—are purely factual and satisfy half of the *Zauderer* standard. The City argues that the graphic images contain "photographs of a real tooth, lung and MRI brain scan," and that "[t]here is no issue of truth with respect to an unaltered photograph." City Br. 47. Even if the images were "unaltered,"[6] however, the City's position ignores the numerous examples of images that, though "factual" renditions of events in one sense, seek to play on emotions or fears to convey a highly subjective message. One need only consider the "factual" pictures of aborted fetuses utilized by anti-abortion groups or the controversy over whether to release the graphic death photographs of Osama bin Laden to understand this point.

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[6] The district court observed, however, that the MRI photograph *was* altered. 10/20/2010 Tr. at 39:25–40:13.

By the City's reasoning, there is no limit to the shocking, unaltered renditions it could require private speakers to post. Under its logic, the City could force fast food restaurants to post disgusting images of diseased hearts and arteries emblazoned with the call to action "Quit Eating Fast Food Today—Call 1-866-NYSLIMS." Similarly, the City could require all gas stations to post graphic images of a pelican covered in oil bearing the message "Stop Killing Animals—Go Electric Today." The City is free to pursue such hard-hitting tactics on its own—and indeed, it apparently does so.[7] JA 306–308 (Reynolds Decl. ¶¶ 36–40). But it cannot compel Plaintiffs and thousands of retailers to do so against their wishes.

The Seventh Circuit's decision in *Entertainment Software* is instructive of the Resolution's constitutional error. There, the court invalidated under strict scrutiny an Illinois requirement that "sexually explicit" games bear an "18 or over" sticker. The *Entertainment Software* court applied strict scrutiny because the compelled message conveyed not fact, but the State's subjective judgment that the game was "sexually explicit" and should not be used by those under 18. *Entm't Software*, 469 F.3d at 652–53. Here, the signs' graphic images and call to action express the City's subjective judgment that the citizens of New York should "Quit

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[7] *See infra* Section II(C)(2) for a discussion of the City's tobacco control program, including the use of advertising space purchased by the City.

Smoking Today." The government may express that viewpoint, but compelling private parties to do so on their own property is subject to strict scrutiny.

The Supreme Court's recent decision on video games supports the application of strict scrutiny. The State of California took a strong position that children should not use violent video games without parental consent. *See Brown*, No. 08-1448, slip op. at 1, 15. But that policy viewpoint could not be carried out through restricting speech. *See id.* at 17–18. Compelled speech is no different. The City's view that no one should smoke cigarettes cannot be forced on private parties.

Smoking carries with it certain health risks, a fact that Plaintiffs underscore in a variety of settings. The compelled signs do not, however, confine themselves to describing those health risks; instead, they urge consumers not to purchase lawful products through the emotional appeal of grotesque images and through the City's command to "Quit Smoking Today." The First Amendment requires that such efforts satisfy strict scrutiny or fail.

C. The Resolution Compelling This Speech Fails Strict Scrutiny.

The City makes no meaningful attempt to argue that the Resolution satisfies strict scrutiny.

Under strict scrutiny review, the Resolution must be "justified by a compelling government interest" and "narrowly drawn to serve that interest." *See*

Brown, No. 08-1448, slip op. at 11. If the City could achieve its interest through an alternative that is non-restrictive or less restrictive of speech, then it *must* do so. *See United States v. Playboy Entm't Grp.*, 529 U.S. 803, 813 (2000). Strict scrutiny is the "most rigorous and exacting standard of constitutional review." *Miller v. Johnson*, 515 U.S. 900, 920 (1995); *see also Bernal v. Fainter*, 467 U.S. 216, 219 n.6 (1984) ("[S]trict-scrutiny review is 'strict' in theory but usually 'fatal' in fact.").

1. The Resolution does not serve a constitutionally compelling interest.

The City asserts that the Resolution serves the interests of "[c]ounteract[ing] tobacco advertising," JA 111, thereby preventing underage tobacco use *and reducing smoking by adults*. City Br. 48; JA 244 (Farley Decl. ¶ 3). First, the Supreme Court in *Sorrell* rejected such broad appeals to the interests of public health as justifications for burdening of speech. No. 10-779, slip op. at 21–22. In *Sorrell*, Vermont sought to burden a particular type of speech between pharmacies and pharmaceutical companies in order to improve the functioning of the medical system. But the Court explained that "[w]hile Vermont's stated policy goals may be proper, [the state] does not advance them in a permissible way . . . [because t]he State seeks to achieve its policy objectives through the indirect means of restraining certain speech." *Id.* The government may not burden speech that it finds "too persuasive," nor may it "burden the speech of others in order to tilt

public debate in a preferred direction." *Id.* at 22, 23. In this case, the City unambiguously wishes to "tilt [the] public debate" regarding smoking and health in a particular direction to achieve public health benefits. *Id.* at 23; *see, e.g.*, JA 111. *Sorrell* makes clear that the City may not do so through burdening the rights of tobacco manufacturers and retailers not to speak.

Second, whatever interest the City may have in preventing underage tobacco use, it has no interest relevant under the First Amendment in reducing adult use of a legal product. As the Supreme Court explained in *Reilly*, "so long as the sale and use of tobacco is lawful for adults, the tobacco industry has a protected interest in communicating information about its products and adult customers have an interest in receiving that information." 533 U.S. at 571. Because the City has no legitimate purpose in deterring adult use of tobacco products, the Resolution fails under *any* standard of First Amendment scrutiny. *Sorrell*, No. 10-779, slip op. at 24–25.

The Supreme Court has rejected time and again the notion that the government may compel or restrict speech in order to prevent adults from engaging in what it may consider to be disfavored—though perfectly legal—behavior. *See, e.g.*, *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501, 510–14 (1996) (opinion of Stevens, J., joined by Kennedy & Ginsburg, JJ.); *id.* at 517 (Scalia, J., concurring

in the judgment); *id.* at 518 (Thomas, J., concurring in the judgment); *Edenfield v. Fane*, 507 U.S. 761, 766–67 (1993); *see also Brown*, No. 08-1448, slip. op. at 17–18 (rejecting restrictions on speech intended to protect youth from engaging in disfavored behavior). The government may use its own channels of communication to attempt to dissuade adults from engaging in such conduct, but it may not restrict or compel private speech to achieve the same purpose. *See, e.g.*, *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 498 (1995) (Stevens, J., concurring in judgment); *Linmark Assocs., Inc. v. Twp. of Willingboro*, 431 U.S. 85, 97 (1977); *Entm't Software*, 469 F.3d at 653.

2. The Resolution is not narrowly tailored.

The City has not sought to demonstrate—nor can it demonstrate—that forcing private retailers to post graphic smoking signs is narrowly tailored to the prevention of underage smoking.

First, the City's argument with respect to youth smoking falls of its own weight. The Resolution's supporters contend that the City must require the mandated signs at the point of sale—as opposed to on billboards, bus and taxi ads, print media, or in schools—to stop "impulse" purchases and to reach consumers at the moment they "may waver . . . in their determination to quit smoking or abstain from smoking." Am. Legacy Found. Dist. Ct. *Amicus* Br. 19. But this is, at best, an argument for *adults*. *See* J.A. 249, 256 (Farley Decl. ¶¶ 13, 25). It is illegal for

anyone under the age of 18 to purchase tobacco in the City. JA 323–324 (Reynolds Decl. ¶ 65).

Second, the City has presented no legally relevant evidence that the mandated signs will reduce smoking by anyone, much less by youth. The City summed up its evidence before this Court: "It is believed that requiring the display of signage at the point-of-purchase increases the likelihood that consumers will receive, process, and act upon this information." City Br. 5. The City is guessing. The Supreme Court could not have been more clear in *Brown* that such speculation is not enough for strict scrutiny. There, the government presented studies showing a "correlation" between children playing video games and committing violence. But the Court demanded studies showing "causation." *Brown*, No. 08-1448, slip op. at 12–13. The City presents neither type of study.

Third, the City could have furthered its interest in curbing youth smoking (or its professed interest in curbing adult smoking as well) through numerous alternatives that do not trample on Plaintiffs' free speech rights. The testimony of Plaintiffs' experts Dr. Reynolds and Dr. Viscusi in this regard is uncontradicted in the record. JA 323–324, 329–333 (Reynolds Decl. ¶¶ 65, 77); JA 423–430 (Viscusi Decl. ¶¶ 33–43). The City's Five Point Tobacco Control Program further demonstrates this point. The City already publishes some anti-tobacco advertisements—similar to the Resolution's posters—on its own property. Of

course, purchasing advertising space on private property is more expensive than confiscating private property, but no court applying strict scrutiny ever has sacrificed constitutional values to put a government's balance sheet in better standing. *See Mem'l Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 263 (1974). The City has imposed new taxes on tobacco, increased penalties for sales to minors, and imposed unprecedented restrictions on the public use of tobacco products. It is considering expanding this campaign. JA 404 (Tobacco Control Plan).

Smoking rates among the City's residents consistently have declined since 2002 without resort to the infringements on free speech imposed by the Resolution. *See* JA 246 (Farley Decl. ¶ 7). Faced with this reality, the City argues that existing tobacco interventions have reached the point of diminishing returns. City Br. 4. This argument is without any citation to the record and ignores numerous possible alternatives that the City has not yet implemented.

Even if the City could prove that the only remaining option to further reduce youth smoking rates is to impinge on Plaintiffs' First Amendment rights, the City has no "compelling interest in each marginal percentage point by which its goals are advanced." *See Brown*, No. 08-1448, slip op. at 15. On the record before the Court, the City cannot demonstrate—and, indeed, has not attempted to demonstrate—that it has any such compelling interest that can be served only through the violation of Plaintiffs' First Amendment rights. Here, the marginal

benefit, if any, of another warning does not justify the Resolution's attack on First Amendment interests. *See id.* at 16 & n.9.

Fourth, the mandated signs "literally fail[]" narrow tailoring review due to their size and format. *See Entm't Software*, 469 F.3d at 652. They are visible throughout the store and are so big that they will often be seen even before a customer enters a retail establishment. *See, e.g.*, JA 203 (sign clearly visible from exterior of store owned by Plaintiff Kissena Blvd. Convenience Store, Inc.). The signs occupy some of Plaintiffs' most valuable retail space, restricting advertising and promotion of both tobacco and non-tobacco products. They impose a substantial burden on Plaintiffs' ability to configure and use their store space in ways they find most effective. *See, e.g.*, JA 200 (Cala Aff. ¶ 9); JA 211 (Infante Aff. ¶ 9). The Seventh Circuit invalidated the characters "18" in the corner of a package because they were too big. *Entm't Software*, 469 F.3d at 652–53. The Resolution's signs are much more intrusive.

The City has chosen to compel non-factual and controversial speech, without any legally relevant evidence to show it will make a difference and despite numerous alternatives to forcing speech. That is not the care strict scrutiny requires.

3. *Central Hudson* would not save the Resolution.

The City and its *amici* erroneously suggest that strict scrutiny would never apply in this context because commercial entities are being forced to speak. *See, e.g.*, L.A. Cnty. Dep't of Pub. Health *Amicus* Br. 25–26. The *Zauderer* standard reflects the Supreme Court's approach to compelled speech in the commercial context. If *Zauderer*'s gatekeeping qualifications are not satisfied, then strict scrutiny applies. *Entm't Software*, 469 F.3d at 652–53.

But even the *Central Hudson* test applicable to restrictions on commercial speech would require the same result here: An affirmance of the judgment for the Plaintiffs. *Central Hudson* requires only a "substantial" state interest, not a compelling one. *See Cent. Hudson*, 447 U.S. at 557. But that distinction is not relevant to this case. In *Sorrell*, the Supreme Court rejected in *Sorrell* broad public health objectives as a "substantial state interest" that would justify restrictions on commercial speech under *Central Hudson*. No. 10-779, slip op. at 16–18. Moreover, the Supreme Court also has rejected affecting adult use of a lawful product as a substantial state interest under *Central Hudson*. *See, e.g.*, *Thompson*, 535 U.S. at 374; *Edenfield*, 507 U.S. at 766–67.

When it comes to narrow tailoring, *Central Hudson* is no less forgiving. 447 U.S. at 569–70 (restrictions on commercial speech must be "no more extensive than necessary to further the State's interest in energy conservation").

As the Supreme Court recently explained in *Sorrell*, it is often unnecessary to decide between strict scrutiny and *Central Hudson* review, as speech restrictions frequently fail either standard. No. 10-779, slip op. at 16. Indeed, in *Sorrell*, the Court made clear that the First Amendment required "heightened scrutiny whenever the government creates 'a regulation of speech because of disagreement with the message it conveys.'" *Id.* at 10. "Commercial speech is no exception." *Id.* at 10–11. The *Central Hudson* standard is designed to "ensure not only that the State's interests are proportional to the resulting burdens placed on speech, but also that the law does not seek to suppress a disfavored message." *Id.* at 16. And that, of course, is precisely what the City is attempting to do here.

D. The Resolution Is Unjustified And Unduly Burdensome.

If this Court determines that the *Zauderer* standard applies, the record before this Court also requires judgment for the Plaintiffs. Even compelled disclosures that are purely factual and uncontroversial violate the First Amendment if they are unjustified and unduly burdensome. *See Zauderer*, 471 U.S. at 651; *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 146–47 (1994). While not as demanding as strict scrutiny or the *Central Hudson* test, this standard is not deferential. The *government* bears the burden to prove that the compelled disclosure is justified and not unduly burdensome. *See Ibanez*, 512 U.S. at 146; *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 71 n.20 (1983).

Recognizing the weakness of its case, the City said it need only "rationally speculat[e]" that the signs will reduce smoking rates significantly enough to justify their intrusions into stores and gas stations. City Br. 49. But courts applying *Zauderer* have required evidence from the government. *See Pub. Citizen, Inc. v. La. Attorney Disciplinary Bd.*, 632 F.3d 212, 229 (5th Cir. 2011). And this is especially so in the face of the evidence put forth by Plaintiffs' experts. Undisputed statistical studies show that the public is well aware of, and indeed overestimates, the health risks of smoking. JA 414 (Viscusi Decl. ¶ 19). With no consumer misperception to correct, another warning on top of those required by the federal government cannot be justified.

In addition, the Resolution is unduly burdensome. The City's mandated signs are far more burdensome than the compelled disclosure in *Ibanez.* There, a Florida regulatory board required accountants using a "specialist" designation to explain that the accrediting body was not governmental and to describe its accreditation requirements. 512 U.S. at 146. The Supreme Court struck down the compelled disclosure because it was too big, "effectively rul[ing] out notation of the 'specialist' designation on a business card or letterhead, or in a yellow pages listing." *Id.* at 146–47. Needless to say, the signs are well beyond the antiseptic disclaimers in *Ibanez*—broadcasting in vivid color, and occupying the most

valuable space in retail stores. The City's attempt at "rational speculation" cannot support signs so intrusive.

III. THE RESOLUTION VIOLATES THE NEW YORK CONSTITUTION.

The New York Constitution guarantees that "[e]very citizen may freely speak, write and publish his or her sentiments on all subjects." N.Y. Const. art. I, § 8. This guarantee of free speech is broader than the First Amendment. *See Immuno AG v. Moor Jankowski*, 567 N.E.2d 1270, 1277–78 (1991). For the reasons set forth above explaining that the Resolution violates the First Amendment to the United States Constitution, the Resolution also violates the New York Constitution.

IV. THE RESOLUTION VIOLATES THE SEPARATION OF POWERS ESTABLISHED BY THE NEW YORK CONSTITUTION.

All of these constitutional problems—federal preemption and the First Amendment—point to an additional defect under New York constitutional law. Through the Resolution, the unelected members of the Board of Health have pressed against First Amendment rights and sought to overturn the judgment of Congress on the sufficiency of the federal cigarette warnings. They have done all of this on the basis of a general mandate from the City Council regarding matters of public health. N.Y.C. Charter § 558. The separation of powers under the New York Constitution, however, requires decisions of this importance to be made by the elected legislative bodies, such as the New York City Council.

The decision of the New York Court of Appeals in *Boreali v. Axelrod*, 517 N.E.2d 1350, 1353 (1987), supports Plaintiffs' position. The New York Board of Public Health prohibited smoking in some areas, but not others. That decision exercised inherently legislative authority because it: (1) weighed "economic and social concerns," not just health concerns; (2) did not fill in the details of an existing statutory scheme, but instead wrote on a blank slate; (3) regulated where the New York Legislature had repeatedly tried—and failed—to reach agreement in the face of substantial public debate; and (4) did not exercise any relevant health expertise. *Boreali*, 517 N.E.2d at 1353–57.

Federal courts in New York have applied *Boreali* to strike down a number of smoking ordinances adopted by county boards of health. *See Dutchess/Putnam Rest. & Tavern Ass'n v. Putnam Cnty. Dep't of Health*, 178 F. Supp. 2d 396, 402 (S.D.N.Y. 2001) (applying *Boreali* to strike down a county health regulation of public smoking); *Leonard v. Dutchess Cnty. Dep't of Health*, 105 F. Supp. 2d 258, 264–66 (S.D.N.Y. 2000) (same); *Justiana v. Niagra Cnty. Dep't of Health*, 45 F. Supp. 2d 236, 243 (W.D.N.Y. 1999) (same); *Nassau Bowling Proprietors Ass'n v. Cnty. of Nassau*, 965 F. Supp. 376, 379–80 (E.D.N.Y. 1997) (same). Failing only one of the *Boreali* factors—deciding issues unrelated to public health—can invalidate a regulation. *See Nassau Bowling*, 965 F. Supp. at 380.

The same result should obtain here. The New York City Board of Health did not confine itself to public health considerations, but rather reached to decide serious constitutional and economic issues. *See Boreali*, 517 N.E.2d at 1352–57. Specifically, the Board received numerous comments on the potential economic impact of, and First Amendment problems with, the Board's sign requirements. *See* JA 121–150; *see also Leonard*, 105 F. Supp. 2d at 266 (faulting the Dutchess County Board of Health for considering "non-health factors presented to it during the public hearing").

The Board sought to address every one of these comments. *See* Resolution § 181.19, Statement of Basis and Purpose; JA 103–115 (Pearson Proposal). In so doing, the Board engaged in an impermissible "weighing and balancing of other significant [non-health-related] concerns not within the ambit of authority delegated to the Board." *Nassau Bowling*, 965 F. Supp. at 380.

Equally important, the Board was not carrying out a charge by the City Council to adjust mandated health warnings, but instead wrote on a "clean slate." *See Boreali*, 517 N.E.2d at 1356. As the New York Court of Appeals explained, "smoking regulation[], [is] an area . . . especially suited for legislative determination as it involves 'difficult social problems' which must be resolved 'by making choices among competing ends.'" *Justiana*, 45 F. Supp. 2d at 244 (quoting *Boreali*, 517 N.E.2d at 1356). The City champions the Resolution as taking a

"pioneering approach" to point-of-sale warnings. *See* City D. Ct. Opp. Mem. 2. In New York, policy frontiers are for democratically elected officials, not administrative agencies.

Boreali makes clear that the Board, absent a more specific authorization from the City Council, may not press against delicate congressional judgments and constitutional rights. The Resolution violates the New York Constitution.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

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Respectfully submitted,

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