11-0091-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

23-34 94th ST. GROCERY, CORP., KISSENA BLVD. CONVENIENCE STORE, INC., NEW YORK ASSOCIATION OF 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,

- against -

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.

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

BRIEF FOR DEFENDANTS-APPELLANTS

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April 7, 2011

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PRELIMINARY STATEMENT

Defendants-appellants the New York City Board of Health ("Board"), the New York City Department of Health and Mental Hygiene ("DOHMH"), the New York City Department of Consumer Affairs

("DCA"), 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 (collectively, "defendants" or "City"), appeal from the opinion and order ("order") of the United States District Court for the Southern District of New York (Rakoff, U.S.D.J.), dated December 29, 2010, which granted the motion for summary judgment of plaintiffs-appellees 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. (collectively, "plaintiffs") .

Plaintiffs, comprised of the nation's three largest tobacco manufacturers, two trade associations and two New York City retailers who sell tobacco products, brought the instant action to challenge Article 181.19 of the New York City Health Code, which requires the display of smoking cessation signs at all places licensed by the City to sell tobacco products.

JURISDICTIONAL STATEMENT

Defendants seek review of a decision and order of the District Court that disposed of all claims with respect to all parties. This Court thus has jurisdiction of the appeal under 28 U.S.C. § 1291.

QUESTION PRESENTED

Whether the District Court improperly granted plaintiffs' summary judgment motion pursuant to Rule 56 of the Federal Rules of Civil Procedure?

STATEMENT OF FACTS

In 1964, the Surgeon General's Advisory Committee exposed the tobacco industry's deadly secret, and concluded that cigarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action.[1] This report prompted Congress the following year to require warning labels on all packages of cigarettes.

Smoking remains the leading cause of preventable death in the United States and New York City, despite decades of warnings and other efforts to educate the public about the dangers of tobacco use (244).[2] In

[1] Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 542 (2001).

[2] Unless otherwise indicated, numbers in parentheses refer to pages in the Joint Appendix and numbers in parentheses preceded by the letter "S" refer to pages in the Special Appendix.

large part, this is due to the persistent efforts of the tobacco industry to counter these messages and peddle their products to successive generations of smokers. While the tobacco industry claims that they strongly support warning tobacco product consumers about the dangers of smoking, their actions in having spent 13 billion dollars to promote their injurious products in 2005, speak louder than their words.[3]

Against this background, the City of New York has taken a leading role to address what the Supreme Court called "the single most important threat to public health in the United States." FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 146 (2000). DOHMH began a program in 2002 to reduce and prevent smoking in New York City (244). This campaign has achieved significant results; nevertheless, nearly one million New Yorkers continue to smoke (246). DOHMH has recognized that the point of diminishing returns has been reached on all initiatives including taxation, media campaigns and cessation services, and that an initiative should be undertaken to provide smokers with cessation information and warnings where they will be seen, i.e., where smokers make purchases.

On September 22, 2009, the Board of Health adopted New York City Health Code ("Health Code") § 181.19 (the "Resolution") to

[3] See Commonwealth Brands, Inc. v. United States, 678 F. Supp. 2d 512, 525 (W.D. Ky. 2010).

address these concerns. The Resolution requires tobacco retailers to prominently display signs designed and distributed by DOHMH that include information about available smoking cessation resources, the adverse health effects of tobacco use, and a pictorial image demonstrating these effects. The information contained on these signs is designed to enable consumers to make informed decisions about tobacco use and to support and aid those who want to quit.

Graphic images are more likely to effectively communicate health risks than traditional text-only warnings, since they leave an indelible impact upon the viewer. The signs deliver DOHMH's factual message that smokers should quit or risk becoming seriously ill. 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.

In recognition of the potential effectiveness of the City's approach, the tobacco industry[4] launched a multi-pronged attack on the constitutionality of the Resolution. While the tobacco industry may not like the City's message, Congress did not intend to silence local governments on the issue of smoking or to prevent them from encouraging and aiding

[4] Although the Resolution applies to local retailers, the challenges to it are largely based on the asserted rights of the manufacturers, who presume that they are entitled to promote their products on all of the wall and counter space in any retail location.

smokers to quit. Moreover, the signs at issue are typical of those encountered by the public on a daily basis, warning them of potential health dangers. Accordingly, the Resolution was well within the Board's quasi-legislative power.

PROCEDURAL HISTORY

Plaintiffs commenced this action in May 2010 by the filing of a complaint (28) and moved for a preliminary injunction on June 25, 2010 (83). Defendants answered the complaint on July 21, 2010 (227) and, thereafter, cross-moved for summary judgment on August 13, 2010 (238). The District Court rendered its decision on December 29, 2010.

ORDER APPEALED FROM

The United States District Court for the Southern District of New York (Rakoff, U.S.D.J.), granted summary judgment to plaintiffs, denied defendants' cross-motion, and declared Article 181.19 null and void, noting, among other things, that:

> Here . . . an otherwise laudable New York City health regulation designed to alert cigarette purchasers, at the very point of purchase, to the grave dangers of tobacco use must be declared invalid because it imposes burdens on the promotion of cigarettes that only the federal government may prescribe (S4-5).
>
> * * *

> [P]laintiffs seek summary judgment invalidating Article 181.19 on the grounds that it (1) is preempted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-1341 (the "Labeling Act"); (2) violates the free speech provisions of the Federal and New York State Constitutions; and (3) exceeds the authority of the Board of Health under the New York State Constitution's separation of powers doctrine. Concluding that Article 181.19 is preempted by the Labeling Act, the Court does not reach the other grounds (S8) . . .
>
> [T]he Labeling Act includes a preemption provision, 15 U.S.C. § 1331, that in Subsection (b) provides that "No requirement or prohibition based on smoking and heath 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."
>
> The City concedes that Article 181.19 is a "requirement . . . based on smoking and health." It disputes, however, that it imposes requirements "with respect to the advertising or promotion" of cigarettes." It notes that both the Supreme Court and the Second Circuit have cautioned that reading the words "with respect to" too broadly could lead to absurd results, such as preempting state laws designed to curb fraud in the advertising or promotion of cigarettes.
>
> But this does not mean that the words "with respect to" may be read out of the statute altogether, thereby rendering nugatory the entire preemptive policy of Section 1334 of the Labeling Act. Indeed, whereas the original preemption section of the Labeling Act was quite narrow and only forbade states from requiring the addition of other words to cigarette packaging where the packaging clearly conformed to the federal requirements, the 1969 amendments to the Act, by proscribing generally any state requirements "with respect to" both "advertising" and "promotion" of cigarettes, was plainly intended to vastly broaden

the scope of the preemption. Here, plaintiffs contend that Article 181.19, by imposing substantial conditions on the advertising and promotion of cigarettes at the very point of sale, strikes at the heart of that proscription (S9-10) . . .

[T]he Court . . . concludes that Article 181.19 imposes requirements "with respect to . . . the promotion of . . . cigarettes" and is therefore preempted (S10-11).

"Promotion" when used in the commercial sense, encompasses any act, including "publicity or discounting," that "further[s] the … sale of merchandise." While the line between promotion and advertising is not always clear, this does not mean that "promotion" as used in Section 1334(b) should be limited, as the City contends, to only those activities "that add extra value to the consumers' underlying purchase," such as "a discount . . . [or] free . . . samples" . . . Such a narrow conception of the word "promotion" is contrary not only to its plain meaning, but also to its intended role in the wording of Section 1334(b). For, as the Supreme Court has repeatedly noted, "promotion" was added to Section 1334 (b) of the Labeling Act in 1069 (along with" respect to") in order to materially broaden its preemptive scope.

In the context of cigarette distribution in particular, "promotion" is commonly used to refer to point-of-purchase displays. Thus, for example, a 1994 Report by the Surgeon General entitled "Preventing Tobacco Use Amongst Young People" distinguishes cigarette advertising from cigarette promotion as follows: "'advertising' refers to company funded advertisements that appear in paid media . . . whereas 'promotion' includes all company supported nonmedia activity (e.g., . . . point of purchase displays)." Surgeon General Report at 159. Similarly, the Federal Trade Commission, in its Cigarette Report for 1999, refers on its very first page to "point-of-sale promotions." FTC Cigarettes Report at 1.

The Court concludes that, at least in the circumstances of this case, the display of cigarettes at the point-of-sale constitutes cigarette "promotion" is that term is used in the Labeling Act. Although the City seeks to characterize tobacco displays at the point-of-sale as akin to merely placing "a product for sale on shelving," Def. Suppl. Mem. At 3. this totally ignores the extent to which tobacco manufacturers use the display of tobacco products at retail stores to promote the sale of merchandise. As noted in the Surgeon General Report, supra, at 8, since tobacco companies have been '[b]arred since 1971 from using broadcast media, the tobacco industry increasingly relies on promotional activities, including . . . point-of-purchase displays". Indeed, retail displays at the point-of-sale are presently the "dominant channel" by which tobacco manufacturers promote their products in the United States. The Court concludes that, by any standard, point-of-sale displays constitute cigarette "promotion" under the Labeling Act.

The question here thus reduces to whether the requirement of Article 181.19 that tobacco retailers post anti-smoking signs either "where tobacco products are displayed" or at the adjoining cash registers, are requirements "with respect to" the promotion of cigarettes and therefore preempted. The Court finds useful here the test developed by the Second Circuit in Vango Media, 34 F. 3d. 63 at 71-75, which, although dealing with the issue of preemption as applied to advertising, seems to this Court to have equal applicability to promotion. 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).

Here, the provision of Article 181.19 calling for tobacco retailers to post a large anti-smoking sign wherever "tobacco products are displayed," plainly imposes conditions on the promotion of cigarettes

-- indeed, in a far more direct way than the New York City regulation (requiring taxis to display one public health message for every four tobacco advertisements) that was found to be preempted in Vango Media. Although the Article's alternate mechanism for compliance -- posting a sign near the cash register -- does not quite so directly impose a condition on the promotion of cigarettes, a clear nexus still exists, since a confluence of regulatory and commercial factors lead tobacco retailers to display tobacco products near the cash registers at the point of sale . . . [T]obacco retailers, in the overwhelming majority of instances, display their cigarettes in close proximity to the cash register . . . Indeed, 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. The Court therefore concludes that the Article's requirements that anti-smoking signs be posted either where tobacco products are displayed or at the (adjoining) cash register in either case imposes conditions on plaintiffs' promotion of tobacco products.

As for the requirement under Vango Media that such conditions "substantially impact[]" the plaintiffs' promotional efforts at the point-of-sale, it is obvious that this is the very point of Article 131.19, which, is specifically designed to counter the effect of plaintiffs' point-of-sale promotional displays (citations omitted) (S11-16).

The instant appeal ensued.

SUMMARY OF ARGUMENT

The United States District Court for the Southern District of New York (Rakoff, U.S.D.J.), incorrectly concluded that New York City Health Code § 181.19 is precluded by the Federal Cigarette Labelling and Advertising Act ("FCLAA"). The District Court focused on the breadth of the preemption provision that was added to FCLAA in 1969 proscribing any "requirement or prohibition based on smoking and health . . . imposed under State law with respect to the advertising or promotion" of cigarettes. The District Court noted that, in the context of cigarette distribution, promotion commonly means point-of-purchase displays, and found that FCLAA preempted NYC's ordinance. The court below found that the Resolution imposes "substantial conditions" at the "very point of sale" and thus incorrectly concluded that the Resolution's posting requirement was "with respect to the promotion of cigarettes."

The District Court's determination is plainly wrong because the Resolution's requirements are triggered by the sale of tobacco products, and not the promotion or advertising of those products. Moreover, the District Court's overbroad definition of promotion, i.e. that promotion encompasses any act that furthers the sale of merchandise, eviscerates any distinction between promotion and advertising because, quite obviously, advertising also furthers the sale of merchandise.

The District Court's definition of promotion is untenable and finds no support in case law. The United States Court of Appeals for the Eighth Circuit addressed the question of defining promotion in Jones v. Vilsack, 272 F.3d 1030, 1034 (8th Cir. 2001), and, relying upon two federal reports on tobacco use and marketing, reached a very different conclusion than the District Court did here. The District Court's definitions of promotion do not comport with the definitions that the Eighth Circuit found to be probative.

Unlike plaintiffs, the District Court did not distinguish between the part of the sign with the warning and the part of the sign with cessation information. The District Court also overturned the entire ordinance, which related to tobacco products generally, on the basis of FCLAA, which applies only to cigarettes. The District Court further did not distinguish the ordinance from the Health Department's implementation of the ordinance.

Having incorrectly determined that FCLAA preempts the Resolution, the District Court did not reach the questions (1) whether the Resolution violates the free speech provisions of the Federal and New York State Constitutions; and (2) whether the Resolution exceeds the authority of the Board of Health under the New York State Constitution's separation of powers doctrine.

Nevertheless, as set forth below, the Resolution does not violate plaintiffs' First Amendment rights because the health warning and smoking

cessation signage is governmental speech and, accordingly, is not regulated by the First Amendment's free speech clause. Moreover, the signage discloses purely factual information that is rationally related to the City's legitimate goal of reducing smoking amongst its citizenry, and the Resolution satisfies the rational basis test, as well as strict scrutiny, since it is reasonably related to the City's interest in reducing the prevalence of smoking.

Furthermore, the Resolution does not violate the New York State Constitution and plaintiffs cannot demonstrate that the New York State Constitution would provide greater protection than the First Amendment in this context. Finally, the Board of Health did not exceed its statutory authority in adopting the resolution.

ARGUMENT

This Court reviews orders granting summary judgment de novo and focuses on whether the District Court properly concluded that there was no genuine issue as to any material fact and the moving party was entitled to judgment as a matter of law. Cronin v. Aetna Life Ins. Co., 46 F.3d 196, 202-03 (2d Cir. 1995).

The standard for summary judgment is well settled. Under Rule 56(c)(2) of the Federal Rules of Civil Procedure, summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file … show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2); see Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). The moving party bears the burden of proving that there is no genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986).

In ruling on a motion for summary judgment, the court must resolve any ambiguity in favor of the nonmoving party. Amnesty Am. v. Town of W. Hartford, 361 F.3d 113, 122 (2d Cir. 2004). The court "is not to weigh the evidence but is instead required to view the evidence in the light most favorable to the party opposing summary judgment, to draw all reasonable inferences in favor of that party, and to eschew credibility assessments." Weyant v. Okst, 101 F.3d 845, 852 (2d Cir. 1996). As a result, summary judgment will not issue where "the evidence is such that a

reasonable jury could return a verdict for the nonmoving party." Anderson, supra, 477 U.S. at 248. However, "a complete failure of proof concerning an essential element of the nonmoving party's case" renders summary judgment proper. Celotex, supra, 477 U.S. at 323.

POINT I

THE JUDGMENT SHOULD BE REVERSED BECAUSE THE CHALLENGED LOCAL LAW, NEW YORK CITY HEALTH CODE §181.19, IS NOT PREEMPTED BY THE FEDERAL CIGARETTE LABELING AND ADVERTISING ACT.

A. The Scope Of Federal Preemption.

Under the Supremacy Clause of the United States Constitution, state laws that conflict with federal law are without effect. [5] New York State Restaurant Association v. New York City Board of Health et al., 556 F.3d 114 (2d Cir. 2009). Operational force to the Supremacy Clause is provided through the doctrine of preemption, and Congress may preempt state

[5] Article 6, Clause 2 of the United States Constitution, generally referred to as the Supremacy Clause, provides that the

> "Constitution and the Laws of the United States which shall be made in Pursuance thereof . . . 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.

authority by so stating in express terms, assuming it acts within its constitutionally-delegated authority. Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission, 461 U.S. 190, 203 (1983).

It is well-settled that the scope of any such prohibition must be analyzed in terms of the purpose or intent of Congress in enacting the preemption provision. Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 8 (1987). Federal law may preempt a state law either expressly or impliedly. Express preemption concerns an express statement by Congress that prohibits state and local governments from enacting laws in a specific area. See, e.g., U.S. Smokeless Tobacco v. City of New York, 703 F. Supp.2d 329 (S.D.N.Y. 2010). Implied preemption occurs if the federal law fully occupies the field of regulation, when the state law frustrates congressional intent, or where a private party cannot comply with both the federal and state law. Id.

As the Supreme Court notes, while preemption analysis must begin with the statutory text, that interpretation is informed by two presumptions. First, because the States are independent sovereigns, where the exercise of historic state or local police powers is involved, it is presumed that such police powers are not to be superseded "unless that was the clear and manifest purpose of Congress." Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996). That approach is consistent with both federalism

concerns and the historic primacy of state police power regulation. Medtronic, 518 U.S. at 485; California Div. of Labor Stds. Enforcement v. Dillingham Constr., 519 U.S. 316 (1997).

Next, the analysis of the scope of a preemption provision is guided by the fact that the purpose of Congress is the ultimate touchstone in every preemption case. Altria Group, Inc. v. Good, 129 S.Ct. 538, 542 (2008). Such review includes not only the language but the statutory framework, with the court's reasonable understanding of the way Congress intended the statutory scheme to affect business and consumers, Medtronic, 518 U.S. at 485, as well as localities. See New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995) (cautioning against broad constructions that would "read the presumption against preemption out of the law whenever Congress speaks to the matter with generality").

Despite the breadth of the Supremacy Clause, the power of the federal government is not boundless and, through the Tenth Amendment, the Constitution reserves numerous powers to the states. Accordingly, the Supreme Court has held that an analysis of whether a state statute or regulation is preempted by federal law begins with the assumption that the historic powers of the States were not to be superseded by federal law unless that was the clear and manifest purpose of Congress. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

The presumption against preemption is heightened where federal law is said to bar state action in areas of traditional state regulation. N.Y. State Conference of Blue Cross & Blue Shield Plans, 514 U.S. at 655. Paramount among those areas are the states' historic police powers, and the presumption against preemption is strongest when the state regulation concerns matters of health and safety. New York State Rest. Ass'n, 556 F.3d at 123; see also Desiano v. Warner-Lambert & Co., 467 F.3d 85, 94 (2d Cir. 2007).

Given the traditional primacy of state and local regulation related to matters of health and safety, courts assume that state and local regulation related to those matters may normally coexist with federal regulations. See Medtronic, 518 U.S. at 485; Hillsborough County v. Automated Med. Labs., Inc., 471 U.S. 707, 718 (1985). As a result, "where the text of a preemption clause is ambiguous or open to more than one plausible reading, courts 'have a duty to accept the reading that disfavors pre-emption.'" Desiano, supra, 467 F.3d at 94 (quoting Bates v. Dow Agrosciences LLC, 544 U.S. 431, 449 (2005)). It is beyond cavil that the City regulation at issue here addresses concerns about the health impact of smoking on its residents. Consequently, the presumption is applicable here. Applying the principles set forth above to the instant case, the challenged Regulation is a proper exercise of the City's historic police powers to

provide for the general welfare of its citizens and is not preempted by federal law.

B. The Federal Cigarette Labeling And Advertising Act.

In 1965, Congress enacted the Federal Cigarette Labeling and Advertising Act ("FCLAA").[6] Congress set forth FCLAA's two purposes in its Declaration of Policy: (1) inform the public about the hazards of cigarette smoking through the inclusion of a warning on each package, and (2) protect commerce and the national economy from diverse, nonuniform and confusing cigarette labeling and advertising regulations.[7] To further the first purpose, § 4 of the FCLAA required that a warning label be placed in a conspicuous location on every cigarette package bearing the following statement: "Caution: Cigarette Smoking May Be Hazardous to Your Health."

In furtherance of the second purpose, Congress included a preemption clause, which stated, in relevant part:

> (a) No statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package.
>
> (b) No statement relating to smoking and health shall be required in the advertising of any

[6] Codified at 15 U.S.C. § 1331 et seq.

[7] See Pub. L. 89-92, § 2.

> cigarettes the package of which are labeled in conformity with the provisions of this Act.

Pub. L. 89-92, § 5.[8] The pre-emption provision was precise and narrow, and only "prohibited state[s] from mandating particular cautionary statements on cigarette labels (§ 5(a)) or in a cigarette advertisements (§ 5(b))." Cipollone v. Liggett Group, Inc., 505 U.S. 504, 518 (1992).

The Public Health Smoking Act of 1969 ("1969 Act") amended § 5(b) of the FCLAA to read:

> 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 Act.

Although the 1969 Act broadened the scope of the original preemption clause, see id. at 520,[9] neither the express language, nor its reasonable interpretation, preempts the contested Regulation in light of the Congressional purpose in enacting the FCLAA, i.e. to prevent the burden imposed by "diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health." 15 U.S.C. § 1331(2). FCLAA and the 1969 Act sought to

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[8] The preemption provision is now codified at 15 U.S.C. § 1334.

[9] The Family Smoking Prevention and Tobacco Control Act ("FSPTCA") once again amended the preemption clause in 2009. The language in subsection (a) was altered, though not in any material respect, and subsection (c) was added to permit state regulations imposing 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).

avoid the imposition of multiple regulatory schemes on cigarette companies that would require different labels and advertisements in each of the fifty states. Cipollone, 505 U.S. at 513-515, 529 (state law prohibitions on false statements not preempted because they do not create "diverse, nonuniform and confusing standards"). Thus, the focus was on prohibiting state regulation of the content of required warnings on cigarette packages or cigarette advertisements.

The accompanying Senate Report to the FCLAA emphasizes that it is not intended to preempt local police power matters. S. Rep. No. 91-566, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. & Ad. News, 2652, 2663. The Senate Committee on Commerce stated (id.) "The state preemption of regulation or prohibition with respect to cigarette advertising is narrowly phrased . . . It is limited entirely to State or local requirements or prohibitions in the advertising of cigarettes."

In view of that statement, and in the absence of any clear indication that it was Congress' purpose to preempt an ordinance such as the challenged Regulation, it could not have been the intention of Congress to preempt local laws requiring local retailers to post signs warning the public about the health risks of smoking, and informing them of available cessation services.

In Cipollone, the Supreme Court examined the scope of section 1334(b) in its plurality decision, and determined that the preemption

provision is governed entirely by its express language, and that any matters beyond that express language are not preempted. 505 U.S. at 513-15. The Court cited the Senate Report above with approval. Id. at 529. See Thornburg v. Gingles, 478 U.S. 30, 43 n.7 (1986).

Following Cipollone, the Fourth Circuit, in Penn Advertising of Baltimore, Inc. v. Mayor and City Council of Baltimore, 63 F.3d 1318 (4th Cir. 1995), aptly distinguished Vango Media in holding that the FCLAA did not preempt the challenged statute which involved restrictions on outdoor tobacco advertising located with 1000 feet of schools or playgrounds. The Fourth Circuit noted, among other things, that

> "the ordinance does not limit the ability of cigarette manufacturers to advertise generally in the media. The regulation simply restricts the location of cigarette-advertising signs, irrespective of the nature of the message communicated. A regulation with such a general relationship to cigarette smoking -- in contrast to a specific advertising 'prohibition based on smoking and health' -- is not preempted by the [FCLAA]. Were the preemption provision to be interpreted so broadly, the Supreme Court in [Cipollone] could not have allowed the continued prosecution of common law claims for breach of express warranty, misrepresentation, intentional fraud, and conspiracy -- all of which relate generally to the effects on health of promoting the sale of cigarettes. 63 F.3d at 1324.

Also employing a narrow construction, the First Circuit rejected a preemption challenge to a Massachusetts disclosure law requiring tobacco product manufacturers to provide reports listing the ingredients of their

products and providing public access to that information, noting that the disclosure law did not mandate the structure and content of advertising. Philip Morris, Inc. v. Harshbarger, 122 F.3d 58, 74 (1st Cir. 1997). The First Circuit found "the explicit preemption language and legislative history insufficient to 'clearly and manifestly' overcome the presumption against preemption of a state's traditional powers to legislate for the health and safety of its citizens." Id. at 77.

This Court recognized in Vango Media that, as in Cipollone, Congress "never planned that the traditional exercise of state police power in those areas be displaced; state power to regulate on those topics is left intact." 34 F.3d at 74. At stake here is the City's police power to take appropriate steps to inform the public, at the point of sale, about the health hazards presented by tobacco usage and to provide information that could help citizens quit a dangerous habit.

In the instant case, the District Court failed to follow the narrow construction mandate in Cipollone, which also emphasized that any construction should favor local governments. Id. at 533 (Blackmun, J., concurring); Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767, 780 (1947) (Frankfurter, J.) ("[a]ny indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity when it chooses to assume full federal authority.").

C. The Resolution Regulates Sales Of Tobacco Products And Does Not Restrict Advertising Or Promotion.

Here, the Regulation does not relate to the content of cigarette advertisements. Instead, it relates directly to the sale of tobacco products and does not limit the ability of cigarette manufacturers to advertise or promote their products. The Resolution does not mandate that tobacco product producers or retailers take or refrain from any action, or limit any activity, related to smoking and health in their advertisements or promotions. Accordingly, the Resolution is not preempted by the FCLAA.

The Resolution requires retailers of tobacco products to display, at the point of sale, signage bearing the City's message. The Resolution is not a restriction on promotion or advertising of tobacco products, because one may engage in advertising or promotion activities without having to display the signage. It is only when the products are being retailed that the signage requirements take effect.

On the other hand, if a retailer sells tobacco products, that retailer must display the signage irrespective of whether the retailer engages in promotion or advertising. For example, a small tobacconist shop or cigar store that does not utilize advertising or promotion is still required to display signs carrying the City's message.

Consequently, regardless of whether one considers a sign touting tobacco products to be promotion or advertising, where the City

confers a license to sell tobacco products, the retailer must display the City's smoking cessation signs. Thus it is clear that the Resolution places a requirement on the sale of tobacco products but places no restriction whatsoever on either promotion or advertising of tobacco in violation of FCLAA.

As the Supreme Court has held, FCLAA does not displace the City's authority "to regulate conduct with respect to cigarette use and sales" and, thus, restrictions on the sale of cigarettes are not preempted. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 550 (2001) ("States remain free . . . to regulate conduct with respect to cigarette use and sales"). The challenged Resolution's requirements do not target cigarette advertising or promotion. Instead, the Resolution imposes a requirement on the sale of cigarettes in New York City. Regardless of whether they choose to promote or advertise cigarettes, retailers who choose to sell tobacco products must post DOHMH's signs.

D. The Resolution Is Not Preempted By FCLAA Because It Does Not Restrict Advertising Or Promotion.

The scope of the preemption clause at issue here is governed entirely by its express language. As the Supreme Court has determined, "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not preempted."

Cipollone, supra, at 517.[10] Here, the Board of Health did not pass a regulation that requires a particular message concerning smoking and health to be included in advertising, nor has the Board placed any burden on interstate commerce or the national economy. Rather, pursuant to its police powers, the Board of Health created a measure to help convey to the public the health risks associated with smoking, as well as the resources available to help those who want to quit.

FCLAA only preempts state and local laws "with respect to the advertising or promotion of" cigarettes. 15 U.S.C. § 1334(b). Consequently, the dispositive question here is whether the Resolution imposes a "requirement or prohibition based on smoking and health . . . with respect to the advertising or promotion of any cigarettes." 15 U.S.C. § 1334(b). The analysis becomes simpler by breaking down the clause into its three component elements: (1) requirement or prohibition; (2) based on smoking and health; and (3) with respect to advertising or promotion. While it is clear that the Resolution is a requirement based on smoking and health, contrary to the District Court's determination here, it is also not one "with respect to advertising or promotion" and, consequently, the Resolution is not preempted.

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[10] See also English v. General Electric Co., 496 U.S. 72, 79 (1990) ("Pre-emption fundamentally is a question of congressional intent, and when Congress has made its intent known through explicit statutory language, the courts' task is an easy one").

DOHMH's tobacco control initiatives are designed to increase public awareness of the health consequences of smoking, and of available cessation resources, at the point of sale. If successful, those efforts will decrease the number of smokers in New York City. While FCLAA preempts defendants from regulating the tobacco industry's advertisements and promotions, it does not preempt the City from delivering a different message, even at the point of sale.

Plaintiffs, in support of their argument, rely on the Supreme Court's decision in Lorillard and this Circuit's decision in Vango Media, Inc. v. City of New York, 34 F.3d 68, 70 (2d Cir. 1994). For the reasons below, plaintiffs' reliance upon these cases is badly misplaced. Although the Supreme Court held that the preemptive scope of 15 U.S.C. § 1334(b) should be determined by the provision's express language, the text itself provides little guidance as to Congress' intent. See Greater N.Y. Metro. Food Council, Inc. v. Giuliani, 195 F.3d 100, 105 (2d Cir. 1999). It is, therefore, useful to consider how other courts have analyzed regulations challenged as preempted by 15 U.S.C. § 1334(b).

In a typical case, the invalidated statute imposes an outright ban on advertising/promotion or strictly limited the type or content of advertising/promotion. For example, in Rockwood v. City of Burlington, 21 F. Supp. 2d 411, 414-15 (D. Vt. 1998), the District Court struck down provisions of the Youth Access to Tobacco Ordinance which prohibited

point of sale advertising (with the exception of so-called tombstone signs) and the use or distribution of promotional items, among other things. The District Court reasoned that the "measures impose conditions on the display of tobacco advertisement, they directly affect the advertisement and promotion of cigarettes, and consequently, however well-advised the measures are, they are preempted by the FCLAA." Id. at 420.[11]

In such cases, the preempted regulation directly restricted the ability of retailers and tobacco companies to advertise or promote their products to some degree. In contrast, the Resolution contains no such restrictions and retailers and tobacco manufacturers remain free to advertise or promote their products wherever and however they desire.

Plaintiffs rely on Vango Media, which went further than the above decisions, in finding the Local Law at issue in that case[12] to be

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[11] See also Lindsey v. Tacoma-Pierce County Health Dep't, 195 F.3d 1065, 1070 (9th Cir. 1999) (court invalidated a resolution banning outdoor tobacco advertising); Chiglo v. City of Preston, 909 F. Supp. 675, 678 (D. Minn. 1995) (ordinance prohibiting point-of-sale advertising, with the exception of generic signs containing availability and factual product information, preempted); Jones v. Vilsack, 272 F.3d 1030, 1036 (8th Cir. 2001) (court held that Iowa act prohibiting the distribution of free tobacco products and promotional items was preempted); R.J. Reynolds Tobacco Co. v. Seattle-King County Dep't of Health, 473 F.Supp. 2d 1105, 1109 (W.D. Wash. 2007) (FCLAA preempts law banning tobacco sampling).

[12] The portion of the Local Law challenged in Vango Media required the display of one public health message (describing the health dangers of smoking or the health benefits of not smoking) for every four tobacco advertisements placed on privately-owned property licensed by the City of New York, and additionally required the advertising company to pay for the health messages. See Vango Media, 34 F.3d at 70, 71.

preempted, even though it only peripherally touched upon the area of tobacco advertising. Vango Media, 34 F.3d at 74. Significantly, this Court recognized that "actual cigarette advertisements would not look different" if the Local Law was upheld. Id. The Local Law also did not ban or limit the locations where tobacco advertisements could be placed. Nevertheless, this Court held that the Local Law impacted advertisers and promoters "with respect to the advertising or promotion" of cigarettes because the application of the law was triggered by the placement of tobacco advertisements. Put differently, the Local Law directly imposed a condition on the display of cigarette advertisements by advertisers and promoters.

The differences between the Local Law in Vango Media and the challenged Resolution here are readily apparent. In the instant case, application of the signage requirement is triggered neither by the display of advertisements nor by the promotion of tobacco products. Unlike Vango Media, here there is absolutely no nexus to advertising or promotion and, instead, it is the sale of tobacco products that triggers the Resolution's posting requirement. Accordingly, the Resolution is not preempted by FCLAA because the Resolution does not restrict cigarette advertising or promotion. See Philip Morris USA v. City and County of San Francisco, 2008 U.S. Dist. LEXIS 101933, at *9 (N.D. Ca. Dec. 5, 2008), aff'd Philip Morris USA, Inc. v. City and County of San Francisco, 345 Fed. Appx. 276 (9th Cir. 2009) ([T]he Ordinance does not regulate advertising, it only

regulates sales. Because the FCLAA does not regulate tobacco sales, Philip Morris's preemption claim is not likely to succeed on the merits.").[13]

In Vango Media, an advertiser or promoter could not display cigarette advertisements without also displaying the anti-smoking messages. Here, in contrast, retailers and tobacco companies remain free to advertise and promote tobacco products notwithstanding the Resolution. Unlike the Local Law in Vango Media, the Resolution's signage requirement does not even approach the periphery of regulating cigarette advertising or promotion. To expand the holding of Vango Media to this case would stretch the preemption provision to the breaking point, unduly interfere with the historic police powers reserved to the States, and distort congressional intent. Signs restricting cigarette sales to minors, for instance, would be

[13] This reasoning applies with full force to defeat plaintiffs' apparent attempt to assert a second type of free speech claim. Plaintiffs argue that the Resolution "undermines [their] ability to communicate effectively with consumers at the point of sale" (50-51). Such a claim is without any basis in fact or law. As discussed, the Resolution in no way restricts or prevents plaintiffs from displaying products or advertising at the point-of-sale. Retailers may place tobacco products – or any other products that they sell – and advertisements for such products, at any location in their stores. Nor are the advertisements themselves limited in any way; the Resolution contains no restrictions as to their size, layout, or content.

In upholding a San Francisco ordinance banning the sale of tobacco products in most stores containing pharmacies, the Ninth Circuit rejected a similar First Amendment argument, holding that the ordinance prohibited conduct, tobacco sales, not speech about tobacco products, and that Philip Morris could still advertise their products in pharmacies. See Philip Morris USA, Inc., supra, 345 Fed. Appx. at 277. The Resolution is even more benign as it prohibits neither sales nor speech. Moreover, even if the Resolution had an incidental effect on plaintiffs' advertising, which it does not, such effect would not amount to a constitutional violation.

jeopardized if this Court were to hold that a requirement imposed at the point of sale is de facto "with respect to" advertising or promotion.

Defendants respectfully suggest that this Court may be guided by Philip Morris Inc. v. Harshbarger, 122 F.3d 58, 61 (1st Cir. 1997), which upheld a statute requiring tobacco manufacturers to disclose the additives and nicotine-yield ratings of their products to the Department of Public Health. In its decision, the Court of Appeals for the First Circuit distinguished Vango Media and noted that

> "[i]n Vango Media, the very display of tobacco advertisements invoked the city ordinance requirements, thus evincing a direct and substantial connection between the ordinance and industry advertising. The Disclosure Act, on the other hand, does not impose conditions upon tobacco advertising or promotional decisions, which are irrelevant to the Disclosure Act's obligations." Id. at 74.

The District Court offers no basis for its conclusion that the Resolution substantially impacts promotion. Similarly, the Court does not explain how the Resolution imposes conditions on promotion. There is no link here between the Resolution and tobacco advertising or promotion, as the obligations imposed by the Resolution are unrelated to any decision by retailers or manufacturers to advertise or promote tobacco products. The Harshbarger Court also considered the seemingly indefinite scope of the "with respect to" language. "The Disclosure Act does not have a 'connection with' advertising and promotion because it does not mandate the

structure and content of advertising, and while it may somehow alter the incentives in advertising decision-making, it does not dictate the choices." Id. Likewise, the Resolution leaves plaintiffs' options as to the structure and content of advertising and promotional efforts unaffected.

E. The District Court's Definition Of Promotion Finds No Support In Case Law And Is Untenable.

In granting summary judgment, the District Court correctly observed that most of the case law on preemption under the Labeling Act relates to cigarette advertising. Nevertheless, the District Court found that it need not reach the issue of cigarette advertising because it concluded that "Article 181.19 imposes requirements 'with respect to . . . the promotion of . . . cigarettes' and is therefore preempted" (S14).

FCLAA does not offer a definition of "promotion," Jones v. Vilsack, 272 F.3d 1030, 1034 (8th Cir. 2001), and the District Court admittedly found that "the line between promotion and advertising is not always clear" (S11). Nevertheless, the District Court essentially found that the act of displaying cigarettes at the point of sale constitutes promotion, concluding that promotion encompasses any act that furthers the sale of merchandise (S11) and holding that "the display of cigarettes at the point-of-sale constitutes cigarette 'promotion' as that term is used in the Labeling Act" (S12). The District Court's overbroad definition of promotion would

render the City's police powers ineffective. In any event, the point-of-sale signs are a requirement based on the sale of product, and not whether a retailer promotes, advertises or displays a product. Accordingly, the Resolution is not a restriction on promotion or advertising.

The District Court's definition of promotion finds no support in the case law. In Jones v. Vilsack, 272 F.3d 1030, 1034 (8th Cir. 2001), the United States Court of Appeals for the Eighth Circuit addressed the question of defining promotion and, relying upon two federal reports on tobacco use and marketing, reached a very different conclusion than the District Court did here. The Eighth Circuit observed that the Federal Trade Commission's 1998 Report to Congress describes the "distribution of cigarette samples and specialty gift items" as "sales promotion activities." 272 F.3d at 1035.

The Eighth Circuit also noted that the Surgeon General's 1994 Report, "Preventing Tobacco Use Amongst Young People," offers a detailed list of a variety of promotions conducted by the tobacco industry:

> 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). Coupons reduce the price a consumer pays for products and thereby reduce the consumer's cost-sensitivity, which may be a substantial barrier to making a purchase. Premiums (e.g., including a cigarette lighter in the purchase price or even within the actual packaging of a box or carton of cigarettes) reduce cost-sensitivity by increasing (or appearing to increase) the value of a purchase. Free samples

> do away with cost-sensitivity altogether and actually give consumers an opportunity to try something new. Promotional devices such as these are more likely than advertising alone to lead consumers to purchase a product more than once -- a pattern sought by all manufacturers (internal citations omitted). 272 F.3d at 1035.

While noting that while the FTC and Surgeon General's Reports did not announce formal agency definitions of "promotion" to which the Court owed deference, nevertheless the Eighth Circuit found the Reports' use of "promotion" to be "probative of the term's plain and ordinary meaning in the context of cigarette marketing." Id.

The Eighth Circuit further noted that:

> [t]o be sure, the FTC and the Surgeon General are experts on the topic. The FCLAA charges the FTC with a duty to report to Congress on the "current practices and methods of cigarette advertising and promotion," 15 U.S.C. § 1337(b)(1), and the Surgeon General's Reports historically have provided the political and scientific impetus to enact and amend the FCLAA. Thus we consider the Reports' use of the term "promotion" indicative of the term's plain and ordinary meaning.

The Eighth Circuit also pointed out that it was guided by two Supreme Court opinions in ascertaining the plain meaning of "promotion," 272 F.3d at 1036, observing that in FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 128 (2000), "the Court emphasized that the federal Food and Drug Administration's regulation of tobacco company promotions 'prohibit the distribution of any promotional items, such as T-shirts or hats,

bearing the manufacturer's brand name.'" Id. The other Supreme Court opinion relied upon by the Eighth Circuit was Lorillard, supra, 533 U.S. 525. The Eighth Circuit noted that in discussing the FTC's role in monitoring advertising and promotional campaigns, "[t]he Court described retailer give-aways and the receipt of free merchandise in exchange for buying cigarettes as 'promotions.'" Id.

The opinion of the Eighth Circuit in Jones v. Vilsack, and the decisions and reports it relied upon, clearly supports the City's position that promotion is, as the Eighth Circuit noted, "all forms of communication other than advertising that call attention to products and services by adding extra values toward the purchase" (citations omitted). 272 F.3d at 1036. The definitions of promotion that the Eighth Circuit found to be probative are squarely at odds with those of the District Court.

Nevertheless, whether or not the District Court correctly defined promotion is not determinative of whether the Resolution is preempted by FCLAA. The Resolution is not preempted by FCLAA because the Resolution regulates sales and not promotion or advertising.

POINT II

THE RESOLUTION DOES NOT VIOLATE PLAINTIFFS' RIGHTS UNDER THE FIRST AMENDMENT.

A. The Health Warning And Smoking Cessation Signage Is Government Speech And, Therefore, Is Not Regulated By The First Amendment's Free Speech Clause.

The First Amendment includes "both the right to speak freely and the right to refrain from speaking at all." Wooley v. Maynard, 430 U.S. 705, 714 (1977). Plaintiffs argued below that their right to refrain from speaking is violated by the Resolution, and that the Resolution compels them to display "controversial images and non-factual directive" in violation of the First Amendment. Plaintiffs therefore assert that the Resolution is thus subject to strict scrutiny review.

At the same time, plaintiffs acknowledge that the signs were developed by, and convey the message of DOHMH. Nevertheless, plaintiffs ignore the notion of government speech and, instead, argue that the instant case is controlled by the line of cases identified by the Supreme Court as true compelled-speech cases – such as Wooley and West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).[14] In those cases, "an individual is

[14] The Wooley Court ruled that New Hampshire could not require motorists to display the motto "Live Free or Die" on their automobile license plates. The decision rested largely upon the fact that the license plate disseminated an ideological message; the Court referred to New Hampshire's motto as an ideological statement no less than four times. Wooley, 430 U.S. at 713-17. In Barnette, the Court held that the compulsory flag salute and pledge

obliged personally to express a message he disagrees with, imposed by the government . . . ." Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 557 (2005).

In the instant case, the speaker clearly is the government. Thus, it follows logically that no individual's speech is compelled. There is no question that the signage is the government's own speech and, consequently, private individuals are not required to personally express any message. Accordingly, the Free Speech Clause has no application and the Resolution is not subject to First Amendment scrutiny.

The government is not prohibited from engaging in its own expressive conduct by the First Amendment, inasmuch as "[t]he Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." See Pleasant Grove City, Utah v. Summum, 129 S. Ct. 1125, 1131 (2009). By merely expressing its own point of view or conveying its own message, the government is not abridging freedom of speech. Id.; see also Johanns v. Livestock Mktg. Ass'n, 544 U.S. at 553 (government speech is exempt from First Amendment scrutiny). Since the warning and cessation signs here convey the City's message, and do not compel any speech by any of the plaintiffs, the First Amendment is not implicated and the inquiry ends.

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violated the First Amendment. The invalidated regulation required students to utter and affirm acceptance of the political ideas represented by the flag. See id. at 633.

The government speech doctrine applies whether the government's message is delivered through private entities or directly by the government itself. Pleasant Grove City, 129 S. Ct. at 1131-32. When the government speaks, it may choose what to say and what not to say; it need not be neutral. Choose Life Illinois, Inc. v. White, 547 F.3d 853, 859 (7th Cir. 2008). As aptly put by the Ninth Circuit, "[s]imply because the government opens its mouth to speak does not give every outside individual or group a First Amendment right to play ventriloquist." Downs v. Los Angeles Unified School Dist., 228 F.3d 1003, 1013 (9th Cir. 2000). Because government remains accountable to its citizens through the electoral process, governmental advocacy is accorded constitutional latitude. See Pleasant Grove City, 129 S. Ct. at 1132; see also R.J. Reynolds Tobacco Co. v. Shewry, 423 F.3d 906, 918 (9th Cir. 2005); Choose Life Illinois, 547 F.3d at 859.

The dispositive question in Johanns v. Livestock Mktg. Ass'n, supra, 544 U.S. at 553, was whether certain advertising was, in fact, the government's own speech. The Supreme Court concluded that the advertising campaign for beef products was governmental speech because the government established the message from beginning to end and exercised final approval authority over every word used in every campaign.

Id. at 560-61. The Court noted an additional consideration: whether the message requires attribution to a private actor. Id. at 564-65.[15]

In light of Johanns, it is clear that the Resolution's message, as conveyed by the signs, is entirely government speech. DOHMH is directed pursuant to the Resolution to design, produce and distribute the signage and, in accordance with the Resolution, DOHMH designed the three signs at issue in this appeal. Moreover, each sign is clearly branded with the City's seal.

DOHMH controlled every aspect of the design process, including choosing the pictorial images, selecting the types of warnings that would be used and determining the layout. Indeed, DOHMH controlled every font, color, and word found on the sign. Neither plaintiffs nor any non-governmental or private entity had input or control over the design process. That the images and statements were exclusively chosen by DOHMH was acknowledged below by plaintiffs themselves.[16]

In Strickland v. City of Seattle, 2009 U.S. Dist. LEXIS 81787 (W.D. Wa. Sept. 9, 2009), the degree of control exercised by the government

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[15] While Johanns may be factually distinguishable inasmuch as private entities were compelled in that matter to subsidize government speech, courts have relied on the decision in determining whether a message constitutes government or private speech. See, e.g., Arizona Life Coalition, Inc. v. Stanton, 515 F.3d 956, 965 (9th Cir. 2008); Grosjean v. Bommarito, 2008 U.S. App. LEXIS 24608, at *12-13 (6th Cir. Dec. 4, 2008).

[16] The Affidavits of Manny Infante and Frank Cala also concede that the signs convey a "government message" (199, 200, 210).

similarly led the Court to reject the plaintiff's First Amendment claim that he was compelled to disseminate Seattle's message. In that case, the city required the owner of a marine works to develop a best management practices plan for marina tenants, and after disagreeing with the city over the contents of the plan, the owner sued.

The District Court rejected plaintiff's reliance on the Supreme Court's line of compelled speech cases and, although the case did not involve a government-compelled subsidy, applied the Johanns factors. The District Court held that the best management practices plan constituted government speech and was not subject to the First Amendment, even though the plan was initially drafted by plaintiff, because "every word of the . . . plan had to be approved by the City . . . [and] the government had complete control over its contents." Id. at *11-12.

Regarding attribution, nothing in the Resolution requires plaintiffs to adopt the signs as their own speech. The Resolution merely requires that tobacco retailers prominently display the signs and the simple posting of a sign does not imply association with its contents. The attribution issue is clearer here than in Johanns where the promotional materials credited "America's Beef Producers" and where the Supreme Court held that such a tagline was insufficient, standing alone, to attribute

the beef advertisements to a particular beef producer. 544 U.S. at 566. Here, in contrast, the signs don't reference any plaintiff in any way.[17]

Plaintiffs' argument that some few customers may be confused is insufficient to establish attribution. The relevant inquiry is whether a reasonable factfinder would attribute the signs to the plaintiffs, Johanns, 544 U.S. at 566, and the content and text of the City's signs leaves no doubt that they communicate a government message. The upper left-hand corner of the signs clearly shows the phrase "NYC Health" and below that, the seal of the City of New York (64-66, 253). In addition, the bottom of the sign directs smokers to "311" – the City of New York's phone number for government information and non-emergency service – for assistance with quitting. Under similar circumstances, the Ninth Circuit found that a reasonable viewer would not believe that anti-smoking advertisements were created, produced or approved by R.J. Reynolds or Lorillard, since the ads said "Sponsored by the California Department of Health Services." See Shewry, 423 F.3d at 925.

At issue in Shewry was the use of a California surtax on cigarettes to fund advertisements criticizing the tobacco industry, attacking the moral character of the tobacco industry and portraying it as "deceptive

[17] See, e.g., Avocados Plus, Inc. v. Johanns, 2007 U.S. Dist. LEXIS 4572, at *9 (D. D.C. Jan. 23, 2007) ("the advertisements … never mention any avocado importer by name….This alone is probably a sufficient basis for the court to find that no reasonable trier of fact could find that the advertisement is attributable to these individual plaintiffs….").

and as an enemy of public health." Shewry, 423 F.3d at 912. The Ninth Circuit, relying on the government speech doctrine, held that the program was immune from a First Amendment challenge despite the harsh tone of the ads. Here, the challenged signs are less objectionable than the ads in Shewry because they only convey the health dangers of smoking to the public.

Plaintiffs argued below that the signs contain images and words that plaintiffs would not post on their own. Nevertheless, a constitutional violation is not established by plaintiffs' lack of voluntariness; otherwise, every case brought by a plaintiff alleging a First Amendment violation on the basis of compelled speech would be successful. In any event, retail establishments throughout the City of New York are required to display a variety of signs as a condition of their licensure. Those signs provide information to the public in language that is entirely selected by the government, and the requirement of posting the signs are part of doing business as a regulated industry in New York City.

In sum, the Resolution establishes a statutory scheme employing signs designed wholly by the government. Nothing in the Resolution requires plaintiffs to affirm the government's statement, and plaintiffs may disavow the message, which they do by continuing to manufacture, sell, or advertise tobacco products. It is clear that the City is the speaker from the face of the signs themselves, and a reasonable person would not believe that plaintiffs endorse the City's message. The Resolution

requires tobacco retailers to post the signs, just as they must display other signs because they engage in a business requiring a license from the City.

B. The Signage Requirement Discloses Purely Factual Information That Is Rationally Related To The Legitimate Governmental Goal of Reducing The Prevalence Of Smoking In New York City.

(1) The Applicable Law

Assuming for sake of argument that the government speech doctrine is inapplicable under the circumstances of this case, this Court must determine the appropriate level of judicial scrutiny to apply to the Resolution. The Resolution clearly involves commercial speech because it requires the display of signage in connection with a proposed commercial transaction, i.e. the sale of tobacco products. See New York State Rest. Ass'n v. New York City Bd. of Health, 556 F.3d 114, 131 (2d Cir. 2009).

Commercial speech is speech that proposes a commercial transaction. United States v. United Foods, Inc., 533 U.S. 405, 409 (2001). Of course, as the Supreme Court has held, commercial speech is entitled to less extensive protection than other constitutionally guaranteed expression. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 562 (1980).

The exact nature of the speech at issue determines the extent of judicial review of commercial speech. The Supreme Court, in Zauderer v.

Office of Disciplinary Counsel, 471 U.S. 626, 650 (1985), upheld an attorney disciplinary rule that required an attorney advertising on a contingency basis to fully disclose whether the contingency fee rate was calculated before or after the deduction of costs.

The Court distinguished between prohibitions on speech and disclosure requirements, noting that "because disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, warnings or disclaimers might be appropriately required to dissipate the possibility of consumer confusion or deception." Id. at 651. The Court also compared the speech compelled in Wooley and Barnette which involved matters like politics, nationalism or religion, to an attorney's minimal interest in not providing purely factual information, and rejected the argument that the disclosure requirement must satisfy heightened scrutiny,[18] holding instead that it must be "reasonably related to the State's interest in preventing deception of consumers." Id.

In Sorrell, this Court applied Zauderer to uphold a statute requiring manufacturers to warn consumers that certain products contain mercury, by means of a label. This Court held that:

> the disclosure of accurate, factual commercial information does not offend the core First

[18] This Court has noted that the four-part Central Hudson test is inapplicable in compelled commercial disclosure cases, because it applies to statutes that restrict truthful, non-misleading commercial speech and not statutes that require commercial speech. See National Elec. Mfrs.' Ass'n v. Sorrell, 272 F.3d 104, 115 (2d Cir. 2001)

> Amendment values of promoting efficient exchange of information or protecting individual liberty interests. Such disclosure furthers, rather than hinders the First Amendment goal of the discovery of truth and contributes to the efficiency of the 'marketplace of ideas.' Protection of the robust and free flow of accurate information is the principal First Amendment justification for protecting commercial speech, and requiring disclosure of truthful information promotes that goal.

Sorrell, 272 F.3d at 114. This Court also distinguished between the compulsion of personal or political speech and compelled commercial disclosures:

> Required disclosure of accurate, factual commercial information presents little risk that the state is forcing speakers to adopt disagreeable state-sanctioned positions, suppressing dissent, confounding the speaker's attempts to participate in self-governance, or interfering with an individual's right to define and express his or her own personality.

Id. This Court concluded that a factual disclosure requirement withstands First Amendment review if there is a "rational connection between the purpose of a commercial disclosure requirement and the means employed to realize that purpose." Id. at 115.

(2) The Resolution Is A Purely Factual Disclosure Requirement That Triggers Only Rational Basis Review.

Because the Resolution requires only purely factual, non-controversial disclosures, the proper standard to review the constitutionality

of the Resolution is set forth in Zauderer and Sorrell. The Resolution indicates the information to be included on the required signage: "information about tobacco products and the adverse health effects of tobacco use; a pictorial image illustrating the effects of tobacco use; and information about how to get help to quit using tobacco" (96).

Pursuant to Health Code § 181.19(b)(1), DOHMH created three signs conveying tobacco health warnings and smoking cessation information. Each contains a large graphic color image followed by yellow and white text, all set against a black background. One sign displays an image of a decayed tooth with the phrase "Smoking Causes Tooth Decay" directly under it (100). Another displays an image of a cancerous lung with the words "Smoking Causes Lung Cancer" beneath it (99), while the third depicts a brain damaged by stroke, followed by the text "Smoking Causes Stroke" (101). Each sign contains the following text below the above-described health warnings: "Quit Smoking Today. Call 311 or 1-866-NYQUITS. www.nysmokefree.com" (99-101).

Unable to dispute that smoking causes lung cancer, tooth decay and stroke, since these are proven medical risks associated with smoking (245, 252-56), plaintiffs instead attack the City's use of graphic images and the phrase "Quit Smoking Today" as improper advocacy. That the images are unpleasant does not mean that they are controversial or nonfactual, since these truly are among the effects of smoking.

There is no issue of truth with respect to an unaltered photograph. Of course, plaintiffs don't try to explain how these photographs either express an opinion or are untruthful. These are photographs of a real tooth, lung, and MRI brain scan and plaintiffs do not argue otherwise. If there is no dispute as to the causal link between smoking and lung cancer, tooth decay, and stroke, it follows that an actual photograph and accompanying text depicting such health conditions cannot be considered controversial.

The phrase "Quit Smoking Today" contains factual components that further the dual goals of the signage requirement, despite being misconstrued by plaintiffs who read it in isolation from the rest of the sign. The phrase neither constitutes advocacy nor expresses an opinion. Rather, as noted in the Resolution's Statement of Basis and Purpose (273-77), since continued tobacco use by smokers "may reflect a lack of awareness and comprehension of the negative health outcomes associated with tobacco use, as well as a lack of knowledge about the availability of smoking cessation assistance," DOHMH designed the signage to provide both pieces of information to smokers, with the reasonable expectation that such knowledge would lead to a decrease in the prevalence of smoking within the City of New York.

When considered in this context, the phrase "Quit Smoking Today" reflects the fact that quitting smoking is the most effective way to

avoid the health risks described in the signs. Tobacco manufacturers don't dispute that quitting is the best way to reduce the health dangers caused by smoking.[19] Moreover, when read in conjunction with the last two lines of the sign, it is clear that the "Quit Smoking Today" language simply informs smokers of available resources to enable them to quit: 311, 1-866-NYQUITS, and www.nysmokefree.com.

(3) The Resolution Satisfies The Rational Basis Test Because It Is Reasonably Related To The City's Interest In Reducing The Prevalence Of Smoking In New York City.

It is beyond cavil that smoking is one of the leading preventable health concerns facing the City and the nation. The Resolution addresses this health issue, at the point of sale, where the City's message may be most effectively conveyed, especially to those young people who may be considering joining the ranks of smokers.

As there is a reasonable relationship between the intended purpose of the Resolution and the means employed to achieve that purpose, the Resolution satisfies the rational basis test. The Board adopted the Resolution to "promote further reductions in smoking prevalence in New York City" by encouraging smokers to quit and deterring prospective

[19] See www.rjrt.com/health.aspx ("No tobacco product has been shown to be safe and without risks, and quitting tobacco use significantly reduces the risk for serious diseases").

smokers from starting (93). The means employed to achieve the purpose are, obviously, the signs that DOHMH designed which contain health warnings and smoking cessation information.

It is worth noting what is not required to pass muster under rational basis review. First, the government can rely upon "rational speculation" and does not have to produce evidence or empirical data to sustain rationality. See Lewis v. Thompson, 252 F.3d 567, 582 (2d Cir. 2001); see also Lorillard, 533 U.S. at 555 (empirical data not required in applying the third prong of the Central Hudson test; history, consensus, and simple common sense is sufficient under strict scrutiny). Next, the statute or regulation does not have to eliminate all of the evils it was designed to address. Sorrell, 272 F.3d at 115-16 (statute upheld on the basis that the labeling requirement would likely contribute to the reduction of mercury pollution).[20]

POINT III

THE RESOLUTION DOES NOT VIOLATE THE NEW YORK STATE CONSTITUTION.

Article I, Section 8 of the New York State Constitution provides, in relevant part, that "[e]very citizen may freely speak, write and

[20] Although strict scrutiny review is unwarranted, the Resolution satisfies such a demanding review. A regulation survives strict scrutiny only if it is sufficiently narrowly tailored to serve a compelling government interest. See Pleasant Grove City, 129 S. Ct. at 1132.

publish his or her sentiments on all subjects…; and no law shall be passed to restrain or abridge the liberty of speech or of the press." N.Y. Const. Art. 1, § 8. Plaintiffs argued below that "[t]his guarantee of free speech is broader than the First Amendment" and, consequently, the Resolution violates the New York State Constitution.

Although the language of New York's Free Speech Clause is, on its face, more expansive than that contained in the First Amendment, it does not automatically follow that it will be interpreted more broadly than its federal equivalent. In Courtroom Television Network LLC v. State, 5 NY3d 222, 228 (2005), the New York State Court of Appeals held that there was no right under either the First Amendment or Article I, Section 8 to televise a trial, noting that "[w]hile we have in certain circumstances interpreted Article I, § 8 more broadly than its federal counterpart, we decline to do so here." Id. at 231.[21]

Plaintiffs cannot demonstrate that the New York Constitution provides greater protection than the First Amendment in this context. Indeed, New York State Courts frequently adopt a standard of review that

[21] See also Johnson Newspaper Corp. v. Melino, 77 NY2d 1, 8 (1990) (no public right of access to attend a professional disciplinary hearing under either the Federal or State Constitution); Festa v. New York City Dep't of Consumer Affairs, 13 Misc. 3d 466, 475 (N.Y. Sup. Ct. N.Y. Co., Apr. 3, 2006) (declining to interpret Article I, § 8 more broadly than the First Amendment); SHAD Alliance v. Smith Haven Mall, 66 NY2d 496 (1985) (rejecting plaintiffs' argument that no State action requirement exists under the New York State Constitution).

mirrors the standard applied by the federal courts, or arrive at the same conclusion as that reached under the federal law analysis. See, e.g., Rogers v. New York City Transit Auth., 89 NY2d 692, 701-02 (1997); Clear Channel Outdoor, Inc. v. City of New York, 608 F. Supp. 2d 477, 508 (S.D.N.Y. 2009) (no indication in the case law that New York State courts impose a stricter test for commercial speech regulation than that discussed in Central Hudson); Children of Bedford, Inc. v. Petromelis, 77 NY2d 713, 731 (1991) (New York Executive Law § 632-a did not violate free speech rights under either the Federal or State Constitution).[22]

POINT IV

THE BOARD OF HEALTH DID NOT EXCEED ITS STATUTORY AUTHORITY IN ADOPTING THE RESOLUTION.

Plaintiffs' argued below that by adopting the Resolution, the Board exceeded its authority as an administrative agency and violated the separation of powers doctrine, relying upon the principles set forth in Boreali v. Axelrod, 71 NY2d 1 (1987). In Boreali, the New York State Court of Appeals held that the Public Health Council ("PHC") engaged in

[22] See also O'Neill v. Oakgrove Constr., Inc., 71 NY2d 521, 529 (1988) (adopting tripartite test articulated in the federal courts for discovery of a reporter's sources or materials); Uhlfelder v. Weinshall, 10 Misc. 3d 151, 157 n.4 (N.Y. Sup. Ct. N.Y. Co. Aug. 24, 2005), aff'd 47 AD3d 169 (1st Dept. 2007) (free speech claims under the First Amendment and the New York State Constitution subject to the same standards.);

policy-making activity when it promulgated rules prohibiting smoking in certain indoor public areas. Reaching this conclusion, the Court stated:

> [a] number of coalescing circumstances that are present in this case persuade us that the difficult-to-define line between administrative rule-making and legislative policy-making has been transgressed. While none of these circumstances, standing alone, is sufficient to warrant the conclusion that the PHC has usurped the Legislature's prerogative, all of the circumstances, when viewed in combination, paint a portrait of an agency that has improperly assumed for itself the open-ended discretion to choose ends, which characterizes the elected Legislature's role in our system of government.

Id. at 11. The Court found: (1) the PHC carved out numerous exemptions based upon economic and social considerations; (2) the PHC "wrote on a clean slate, creating its own comprehensive set of rules without the benefit of legislative guidance"; (3) the State Legislature repeatedly tried and failed to reach an agreement for additional restrictions on smoking in public places; and (4) no special expertise in the field of health was necessary to develop the regulations. Id. at 12-14. Since none of these factors are present in this case, plaintiffs' reliance upon Boreali is sadly misplaced.

New York City Charter ("Charter") § 553 established a Board of Health within DOHMH. The functions, powers and duties of DOHMH are set forth in Charter § 556. Charter § 558(b) empowers the Board to "add to and alter, amend or repeal any part of the health code, and … publish additional provisions for the security of life and health in the city…."

Charter § 558(b). Charter § 558(c) provides that "[t]he board of health may embrace in the health code all matters and subjects to which the power and authority of the department extends." Charter § 558(c). The Resolution was promulgated pursuant to the authority granted by Charter § 558. See NOA at 1. The actions of the Board in adopting the Resolution did not exceed this broad authority.

While the Boreali Court did not state whether all four of the "coalescing circumstances" must be present for there to be a violation of the separation of powers doctrine, the decision was explicit that one circumstance, standing alone, was insufficient. Moreover, with the exception of Nassau Bowling Proprietors Ass'n v. County of Nassau, 965 F. Supp. 376 (E.D.N.Y. 1997), plaintiffs have not identified, and defendants are not aware of, any case in which a court granted a Boreali claim without finding the existence of all four factors.

Finally, all but one of the cases cited by the plaintiffs in support of their argument were in essence Boreali revisited, as they concerned nearly identical regulations on smoking in public places. These cases are factually inapposite since the Resolution does not regulate smoking and, instead, simply informs the public about particular risks of smoking. In any event, none of the factors identified by the Boreali Court are present in the instant matter.

Accordingly, for all of the above reasons, this Court should reverse the order appealed from in its entirety, and should grant the City's motion for summary judgment or, alternatively, remand the matter to the District Court for trial.

CONCLUSION

THE ORDER APPEALED FROM SHOULD BE REVERSED IN ITS ENTIRETY, AND THIS COURT SHOULD GRANT THE CITY'S MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, REMAND THE MATTER TO THE DISTRICT COURT FOR TRIAL.

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April 7, 2011

CERTIFICATION OF WORD COUNT

I certify that this brief, exclusive of the Table of Contents and Table of Authorities, contains fewer than 14,000 words.

_____
Drake A. Colley

ANTI-VIRUS CERTIFICATION

I, Drake A. Colley, hereby certify that I scanned this brief with VirusScan Enterprise Version 8.5i anti-virus software and no virus was detected.

Dated: New York, New York
April 7, 2011

_____
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