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

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

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July 19, 2011

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FEDERAL STATUTE

STATE STATUTES

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PRELIMINARY STATEMENT

This brief is submitted in reply to the brief submitted on behalf 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") and in further support of the appeal of 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"), 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.

STATEMENT OF FACTS

For a full rendition of the facts, the Court is respectfully referred to the Statement of Facts appearing in Appellant's Brief, and to the Record on Appeal.[1]

[1] Unless otherwise indicated, numbers in parentheses refer to page numbers in the Record on Appeal.

ARGUMENT

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.

At the end of the day, Big Tobacco hopes to be the sole entity allowed to deliver a message at the point where their products are sold. Nevertheless, neither the doctrine of preemption nor the First Amendment unequivocally guarantees Big Tobacco that right.

Conspicuously absent from plaintiffs' brief is a direct response to the City's argument that the Regulation is not preempted by the Federal Cigarette Labeling and Advertising Act because the Regulation pertains to the retail sale of tobacco products and not the advertising or promotion of those products. The Act includes a preemption provision at 15 U.S.C. § 1331, which in Subsection (b) provides that

> "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."

The preemptive scope of the Act is governed entirely by the express language in § 1334(b) since Congress considered the issue of preemption and included in the enacted legislation a provision expressly

addressing that issue. The Supreme Court has noted that the "provision provides a 'reliable indicium of congressional intent with respect to state authority.'" Cipollone v. Liggett Group, Inc., 120 L.Ed.2d 407, 112 S.Ct. 2608, 2618 (1992). The plain language of Section 1334(b) of the Act does not reflect a clear and manifest purpose of Congress to prevent the regulation of the sale of tobacco products.

In a similar context, the Supreme Court expressed great reluctance to give a literal reading to imprecise language in a preemption clause. The Employee Retirement Income Security Act ("ERISA") preempts state laws that "relate to any employee benefit plan…." In attempting to determine the scope of this phrase, the Court reasoned as follows:

> If "relates to" were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for really, universally, relations stop nowhere. But that, of course, would be to read Congress's words of limitation as mere sham, and to read the presumption against pre-emption out of the law whenever Congress speaks to the matter with generality.

New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995) (internal quotation marks and citations omitted).

To provide guidance as to the meaning of "relates to," the Court stated that the proper inquiry is whether the law has a "connection with" or

"reference to" an employee benefit plan. See id. at 656. While the "reference to" language is relatively straightforward, the Court acknowledged that the phrase "connection with" suffers from the same infirmity as "relates to." See id. Thus, the courts should "look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." Id. Additionally, preemption is not appropriate where the state law has only a "tenuous, remote, or peripheral connection with covered plans . . . ." Hattem v. Schwarzenegger, 449 F.3d 423, 429 (2d Cir. 2006).

In Vango Media, Inc. v. City of New York, 34 F.3d 68 (2d Cir. 1994), this Court suggested that "with respect to" is analogous to the phrase "relates to." Vango Media, 34 F.3d at 74. Working under this assumption, the two-part inquiry set forth by the Supreme Court in Travelers proves helpful. Clearly, the Resolution in no way references advertising or promotion as did the Local Law invalidated in Vango Media or the other cases finding preemption under 15 U.S.C. § 1334(b). For example, the statutes invalidated in Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 550 (2001) and Rockwood v. City of Burlington, 21 F. Supp. 2d 411, 414-15 (D. Vt. 1998), on their face, expressly targeted cigarette advertising by prohibiting certain point-of-sale ads.

In the cases finding preemption, "the existence . . . of advertising [was] essential to the state law's operation." Philip Morris Inc.

v. Harshbarger, 122 F.3d 58, 74 (1st Cir. 1997). In other words, the ordinances were predicated on the existence of cigarette advertising. In contrast, the Resolution has force and effect regardless of whether there is cigarette advertising at the point-of-sale.

The question then is whether the Resolution has a "connection with" advertising. The only "connection with" advertising or promotion is the possibility that the required signage will counterbalance the persuasiveness of plaintiffs' promotional efforts. Such a connection is simply too tenuous and remote to necessitate preemption. Nor will preemption of the Resolution further the objectives of either the Federal Cigarette Labeling and Advertising Act or the Public Health Smoking Act of 1969. It is clear that the principal purpose of both laws was to adequately warn the public about the hazards of smoking through required warnings on cigarette packages and in cigarette advertisements.

Nevertheless, Congress was also concerned about the possibility of diverse, nonuniform regulations by municipalities. For example, if each state had different labeling requirements, tobacco manufacturers would have to vary their cigarette packaging or advertising depending upon the market that the product or ads were distributed to. The Resolution furthers the first objective, without the risk of creating multiple, inconsistent regulatory requirements. As in Harshbarger, the regulation challenged herein does not mandate the content of advertising or dictate

choices to advertisers. See id. Even if every municipality or state adopted a regulation similar in nature to the Resolution, advertisers would not have to tailor their conduct "to the peculiarities of the laws of each jurisdiction." Hattem, 449 F.3d at 429.

Plaintiffs argue that "[t]obacco 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" (Brief for Plaintiffs-Appellees at p. 24). As an initial matter, plaintiffs' tobacco product displays should not be considered "promotion." Tobacco product displays are nothing more than just cigarettes on a shelf. That the displays may be located at the front of the store does not convert them into promotional activity. Such displays are no different than the magazine racks or candy displays near the checkout area of a supermarket.

If plaintiffs' argument was accepted, the definition of "promotion" would mean anything that increases the visibility of a product. Defendants advance a more sensible understanding of promotion that finds support in Jones v. Vilseck, 272 F.3d 1030 (8th Cir. 2001). That is, promotion is that which adds extra value to a consumer's purchase. Thus, candy that simply sits on a rack next to the cash register would not be promotion; however, if Hershey's offers a buy-one-get-one-free deal for Almond Joy bars, such activity is promotion of that product. Plaintiffs

expanded definition of promotion essentially declares that all of the space at the front of the store or around cash registers is reserved to the tobacco industry, with the result that no one can regulate the point of sale.

Nevertheless, the Regulation does not relate to the content of cigarette advertisements, and does not limit the ability of cigarette manufacturers to advertise or promote their products. Instead, the Regulation directly relates to the sale of tobacco products and requires retailers of tobacco products to display signage bearing the City's message at the point of sale.

If the Resolution were indeed directed at countering Big Tobacco's advertising or promotional messages, the Resolution would require that the City's message be displayed wherever Big Tobacco's advertising or promotion appears. It does not do so, however. Tobacco product manufacturers may engage in advertising or promotion activities without having to display the challenged signage, since the Resolution is not a restriction on the promotion or advertising of tobacco products. The signage relates only to the sale of tobacco products, and it is only when those products are being sold that the signage requirement takes effect. Consequently, plaintiffs' reliance on Vango Media is misplaced because the Resolution neither imposes conditions on nor substantially impacts advertising or promotion.

The challenged ordinance in Vango Media required certain entities that displayed cigarette advertising to also display anti-smoking messages. The Resolution does no such thing, and the display of advertising simply does not trigger the display of the City's message. To the extent that this Court determined that the challenged ordinance in Vango Media was preempted under Section 1334(b) because it substantially impacted or imposed conditions on advertising or promotion, that determination has no applicability to the instant situation. Here, the Resolution has no impact "with respect to" tobacco advertising or promotion. Simply put, a manufacturer or retailer may display as many advertisements as they wish, or perform whatever promotions they desire, without triggering the Resolution's requirements.

The ability to advertise or promote is not conditioned on compliance with the requirements of the Resolution. It is only when the manufacturer or retailer sells tobacco products that the Resolution comes into play, and it does so whether there is advertising or promotion, or whether there is no advertising or promotion. Not once do plaintiffs explain how placing a sign, whether at the register or at the display, impacts, let alone substantially impacts on their ability to advertise or promote their products. Plaintiffs never squarely address this argument. Instead, plaintiffs discuss the alleged effects of the Resolution on tobacco product displays.

Nonetheless, plaintiffs are unable to explain how the Regulation "imposes conditions" "with respect to" the advertising or promotion of cigarettes. Plaintiffs are also unable to demonstrate how the Regulation "substantially impact[s]" the advertising or promotion of tobacco products. See Vango Media. Plaintiffs fail to explain how posting the City's message changes the appearance of their displays. At bottom, however, plaintiffs appear to argue that their advertising or promotional displays are directly effected merely because the Resolution requires posting of the City's signs if tobacco products are sold at retail.

Plaintiffs' argument that the City "uses the medium of advertising to achieve its ends" (Brief for Plaintiffs-Appellees at p. 30) is immaterial. Similarly, plaintiffs' arguments regarding the "acknowledged purposes of the Resolution" (Brief for Plaintiffs-Appellees at pp. 28-29) are unavailing because the City is not prohibited from doing so. It is no secret that the City is actively engaged in an anti-smoking campaign which employs advertising and, consequently, it should come as no surprise that among the purposes of the Resolution are to "[c]ounteract tobacco advertising" or "counter the effect[s] of cigarette promotion" as plaintiffs assert. Id.

It does not follow, however, that the "Resolution's explicit purpose to counteract advertising and promotion is itself enough for preemption" (Brief for Plaintiffs-Appellees at p. 29). In order for the

Resolution's requirements to be invalidated, those requirements must be preempted by the Federal statute. Plaintiffs have made no such demonstration.

POINT II

CONTRARY TO PLAINTIFFS' ASSERTION, THE COMPELLED SIGNS ARE CLEARLY GOVERNMENT SPEECH.

Because the City of New York is engaging in its own expressive conduct, the First Amendment's Free Speech Clause has no application. See Pleasant Grove City, Utah v. Summum, 129 S. Ct. 1125, 1131 (2009). Despite plaintiffs' acknowledgement that the signs were developed by, and convey the message of the City, plaintiffs nevertheless argue that the signage at issue, the posting of which is required by the Resolution, somehow does not constitute government speech. Plaintiffs' position is, of course, wholly inconsistent with their claim that "the Resolution forces stores that lawfully sell tobacco products to carry shocking images of diseased body parts" along with information for individuals who wish to stop smoking (Brief for Plaintiffs-Appellees at p. 16). It is beyond dispute, however, that the speaker here clearly is the government. The warning and cessation signs convey the City's message and do not compel any speech by the plaintiffs. Thus, as the First Amendment is not implicated, the inquiry should properly end.

In support of their erroneous position, however, plaintiffs argue that in order for speech to be government speech, it must occur on government property or through the expenditure of government funds (Brief for Plaintiffs-Appellees at p. 38). Plaintiffs are simply incorrect that any such limitation exists on the government speech doctrine. Perhaps out of a recognition that the government speech doctrine effectively disposes of their First Amendment claim, plaintiffs have fabricated a rule out of whole cloth. Plaintiffs' proposed public property/private property dichotomy is entirely without legal support, however.

In Johanns v. Livestock Marketing Association, 544 U.S. 550 (2005), the Supreme Court focuses on the identity of the speaker, and not on whether the speech occurs on or through government property. The question is whether the message expressed is effectively controlled by the government, and it is answered by considering whether the government established the message from "beginning to end" and exercised "final approval authority over every word used in every promotional campaign." Id. at 560-61.

Contrary to the position espoused by plaintiffs, the case law clearly establishes that government speech can occur on or through private property. See Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47, 61 n.4 (2006) (military recruitment at institutions of higher learning is without question government speech), and that private

entities can serve as the conduit for the government's message; Legal Services Corp. v. Velazquez, 531 U.S. 533, 541 (2001).

This remains so even if the private party does not voluntarily agree to propagate the information. See Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 884 (1992) (First Amendment not violated where physicians were required by statute to inform women seeking an abortion about the availability of materials published by the State of Pennsylvania).[2]

A number of the above-referenced cases are similar to the instant matter because they, too, require the dissemination of information to which the private party objected. In the same way, retailers here are required by the City to distribute information, and the fact that the distribution occurs via a poster affixed to a location within a private store is immaterial and inconsequential. Also common to these cases is that the objecting party can clarify, criticize or disavow the information.

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[2] See also Summit Med. Ctr. of Ala., Inc. v. Riley, 274 F. Supp. 2d 1262, 1271-72 (M.D. Ala. 2003) (relying on Casey to find no First Amendment violation in requiring physicians to purchase and distribute State sponsored material promoting childbirth over abortion); Environmental Defense Ctr., Inc. v. E.P.A., 344 F.3d 832, 848-51 (9th Cir. 2003), cert denied, 541 U.S. 1085 (2004) (upholding EPA rule requiring distribution of educational materials regarding stormwater runoff); Strickland v. City of Seattle, 2009 U.S. Dist. LEXIS 81787, *10-14 (W.D. Wa. Sept. 9, 2009), aff'd 2010 U.S. App. LEXIS 18573 (9th Cir. Sept. 2, 2010) (document prepared and distributed by plaintiff, a private party, constitutes government speech where the government had final approval authority over its contents); Beeman & Pharmacy Servs., Inc. v. Anthem Prescription Mgmt., Inc., 2007 U.S. Dist. LEXIS 39779, *16-29 (C.D. Ca. May 4, 2007).

In support of their flawed argument, plaintiffs cite to the Pleasant Grove decision, but such reliance is badly misplaced. While the Supreme Court stated that the placement of monuments on public property represents government speech, the Court did not create a rule that the identity of the speaker is determined based solely upon whether the speech occurs on or through government or private property. In fact, the Pleasant Grove Court found it equally important that "the City has 'effectively controlled' the messages sent by the monuments in the Park by exercising 'final approval authority' over their selection." Pleasant Grove, 129 S. Ct. at 1134 (quoting Johanns, 544 U.S. at 560-61). Thus, rather than establishing a new test, the Court in Pleasant Grove reaffirmed that the standard set forth in Johanns remains viable.

In any event, a public property/private property distinction is completely impracticable inasmuch as there is no workable formula to distinguish between the two. Inevitably, cases present a mixture of both public and private property. For example, in Pleasant Grove, even though the monuments were placed in a public park, they were not designed, built or paid for by Pleasant Grove City. See Pleasant Grove, 129 S. Ct. at 1134.

POINT III

IF THIS COURT DETERMINES THAT THE CONTESTED SPEECH IS NOT GOVERNMENT SPEECH, THE STANDARD SET FORTH IN ZAUDERER IS APPLICABLE.

Should this Court determine that the signage, which conveys the City's message and is required to be posted pursuant to the Resolution, is not government speech, the Court should still find that, as set forth below, the Resolution withstands scrutiny under the Zauderer/Sorrell rational basis test. Moreover, as the City previously indicated in its main brief, although strict scrutiny review is unwarranted, the Resolution satisfies such a demanding review.

In Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985), the Supreme Court held that disclosure requirements must be "rationally related to the State's interest in preventing deception of consumers." Zauderer, 471 U.S. at 651. In Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104 (2d Cir. 2001), this Court found that a disclosure requirement will withstand First Amendment scrutiny if there is merely a "rational connection between the purpose of [the] commercial disclosure requirement and the means employed to realize that purpose." Sorrell, 272 F.3d at 115. This Court also interpreted Zauderer as not strictly limited to the prevention of consumer deception.[3] Id. In Pharmaceutical Care Mgmt.

[3] The compelled disclosure at issue therein was intended to better inform consumers about the products that they purchase.

Ass'n v. Rowe, 429 F.3d 294, 310 n.8 (1st Cir. 2005), the United States Court of Appeals for the First Circuit similarly adopted a broad reading of Zauderer.

The Supreme Court's recent decision in Milavetz, Gallop & Milavetz, P.A. v. United States, 130 S. Ct. 1324 (2010), cited by plaintiffs, simply quotes Zauderer's "preventing deception of consumers" language, but does not hold that all other disclosure requirements are subject to a heightened level of scrutiny. Indeed, the Court did not have to go any further because the requirement at issue in Milavetz, like the one upheld in Zauderer, addressed deceptive advertising. Consequently, Sorrell and Rowe remain good law. Moreover, in Milavetz, the Supreme Court was choosing between the Zauderer standard and intermediate scrutiny, not strict scrutiny. See id. at 1339. The Milavetz Court never suggested that a commercial disclosure requirement should be analyzed under strict scrutiny. Nor have plaintiffs provided any other legal support for their contention that strict scrutiny is applicable if it is determined that the signs are not purely factual and uncontroversial.

The City needs only to show that the signage requirement is rationally related to the City's goal of reducing the prevalence of smoking in New York City. Plaintiffs contend that Zauderer requires a more rigorous level of review, but provide no legal basis (and little anecdotal basis) for this argument. In fact, the law is quite clear that under the rational relationship

test, no such empirical evidence is required. See Beatie v. City of New York, 123 F.3d 707, 712 (2d Cir. 1997) ("We will not strike down a law as irrational simply because it may not succeed in bring about the result it seeks to accomplish [or] because the problem could have been better addressed in some other way . . . Nor will a statute be overturned on the basis that no empirical evidence supports the assumptions underlying the legislative choice"). When conducting rational basis review, the courts will not second guess the governmental decision maker. The legislative choice will be upheld if some "reasonably conceivable state of facts could provide a rational basis" for the action, whether or not the legislature actually relied upon them. Id. Plaintiffs overstate what defendants are required to establish to withstand rational basis review. Defendants need not demonstrate conclusively that the signage requirement will be successful in reducing the prevalence of smoking in New York City. See New York State Restaurant Ass'n v. New York City Bd. of Health, 2008 U.S. Dist. LEXIS 31451, *47 (S.D.N.Y. Apr. 16, 2008) (calorie posting requirement upheld despite the lack of conclusive proof that the regulation will reduce obesity).

The Resolution easily satisfies rational basis review. With respect to the graphic images of which plaintiffs complain, it is a matter of common sense that such pictures are more likely than text-only warnings to motivate smokers to quit or convince nonsmokers not to start. Information or warnings provided to consumers at the time of decision-making is more

likely to influence behavior than those situated at a more remote place and time. See Cummings Declaration at ¶¶ 17, 18.

Strict scrutiny review is inapplicable here because the City's message is purely factual and uncontroversial. There is no controversy or factual dispute regarding whether smoking causes lung cancer, stroke or tooth decay because the medical risks associated with smoking are well proven (245, 252-56). Although the images may be unpleasant, since those images represent the true effects of smoking they are not nonfactual.

Plaintiffs' reliance on the decision of the United States Court of Appeals for the Seventh Circuit in Entertainment Software Ass'n. v. Blagojevich, 469 F.3d 641 (7th Cir. 2006), is misplaced. In that matter, the Seventh Circuit applied strict scrutiny because that Court found that the State employed its subjective judgment that a video game was sexually explicit. In the instant case, it is not merely the City's opinion that smoking causes cancer and a host of other illnesses; it is a medically established fact.

Finally, and particularly in light of plaintiffs' claim that the signage somehow does not constitute government speech, plaintiffs' assertion that "the text - 'QUIT SMOKING TODAY - CALL 311 OR 1-866-NYQUITS' - is a directive, not a statement of fact" (Brief for Plaintiffs-Appellees at p. 44) is completely illogical. Obviously, the City cannot direct anyone to quit smoking, much less to quit smoking today, and the City cannot order anyone to call 311 or any other telephone number.

Certainly, the only rational interpretation of that language is that if an individual wishes to attempt to quit smoking, assistance in doing so is available by calling the listed telephone numbers. The fact that smoking cessation assistance is available to any person electing to call makes the content of the signage factual.

For all of the above reasons, as well as the reasons set forth in the City's main brief, the order appealed from should be reversed.

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.

Respectfully submitted,

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July 19, 2011

CERTIFICATION OF WORD COUNT

I certify that this brief, exclusive of the Table of Contents and Table of Authorities, contains fewer than 7,000 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
July 19, 2011

_____
Drake A. Colley
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