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 *AMICI CURIAE* TOBACCO CONTROL LEGAL CONSORTIUM, *ET AL.,* IN SUPPORT OF APPELLANTS

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INTEREST OF THE AMICI CURIAE

Amici curiae Tobacco Control Legal Consortium, Action on Smoking and Health, American Cancer Society Eastern Division, American Lung Association in New York, American Thoracic Society, Americans for Nonsmokers' Rights, Campaign for Tobacco-Free Kids, Framework Convention Alliance, National Association of County and City Health Officials, and National Association of Local Boards of Health are non-profit public health organizations. *Amici* are unified by their commitment to support policies that educate the public about, and protect the public from, the devastating health consequences of tobacco use. *Amici* have a strong interest in this appeal because it involves a local regulation that promotes *amici*'s public health goals.[1]

SUMMARY OF ARGUMENT AND STATUTORY BACKGROUND

"[T]he purpose of Congress is the ultimate touchstone in every pre-emption case." *Altria Group, Inc. v. Good*, 555 U.S. 70, 129 S. Ct. 538, 543 (2008) (internal punctuation omitted); *see also Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). As

[1] Plaintiff-Appellees oppose this submission. A motion for leave is concurrently filed. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. A further description of each *amicus* and its interest in this litigation is included as an addendum to this brief.

detailed below, a close analysis of Congress' purpose in enacting and subsequently amending the Federal Cigarette Labeling and Advertising Act (FCLAA, or Act) demonstrates that Congress did *not* intend to preempt the New York City (City) regulation at issue here, New York City Health Code § 181.19. Indeed, this conclusion is bolstered by the well-established maxim that "the historic police powers of the States [are] not to be superseded by [federal law] unless that was the clear and manifest purpose of Congress." *Altria*, 129 S. Ct. at 543 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

The provision at issue in this case—§ 5 of FCLAA, 15 U.S.C. § 1334—has been amended twice since its enactment in 1965. Reviewing Congress' purpose in enacting and amending this provision demonstrates that the district court's interpretation of the provision is considerably broader than ever was contemplated by Congress.

When enacted, the preemption provision read in relevant part:

> (b) No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

Pub. L. No. 89-92, § 5 (1965). Congress' purpose in enacting this provision was to avoid "diverse, nonuniform, and confusing cigarette labeling and advertising regulations" that might otherwise result if every state and locality were permitted to enact its own, unique requirements regarding what health warnings had to be

included in cigarette advertising or on cigarette packages. *Id*. § 2. But aside from the provision's narrow restriction preventing states from requiring any particular "statement" in cigarette labeling or advertising, FCLAA does not evince any desire by Congress to more broadly interfere with states' traditional police powers to protect the health and welfare of their citizens.

In 1970, Congress enacted the Public Health Smoking Act, which prohibited cigarette advertisements on television and radio. As part of that act, Congress amended FCLAA's preemption provision to read:

> (b) 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.[2]

Pub. L. No. 91-222, § 5(b) (1970). As discussed in Part II, these changes reflected Congress' recognition that state or local laws might impose "diverse, nonuniform, and confusing" requirements on tobacco companies without requiring any particular "statement" in cigarette advertising. Even under the broader 1970 preemption provision, however, Congress did not intend to preempt regulations such as the City's that regulate only tobacco *retailers* and do not impose any requirements on cigarette advertisers or advertisements.

[2] The term "State" includes any political subdivision of a state. Pub. L. No. 91-222, § 3(3) (1970).

The second and most recent change to FCLAA's preemption provision came in 2009, when Congress expressly amended it as part of the Family Smoking Prevention and Tobacco Control Act (FSPTCA). The amended version, which governs the dispute in this case, left subpart (b) unchanged, but added subpart (c), which states:

> (c) Notwithstanding subsection (b), a State or locality may enact statutes and promulgate regulations, based on smoking and health, that take effect after the effective date of the Family Smoking Prevention and Tobacco Control Act, imposing specific bans or restrictions on the time, place, and manner, but not content, of the advertising or promotion of any cigarettes.

Pub. L. No. 111-31, § 203 (2009). As it has since 1965, Congress remains concerned about state and local laws that might impose conflicting obligations on tobacco companies with respect to the content *of cigarette advertisements or promotions themselves*. But the text of FSPTCA—as well as subsequent congressional actions supporting tobacco control—demonstrate that Congress did not intend to more broadly preempt state and local tobacco control efforts that do not impose any requirements on cigarette companies or advertisers.

Accordingly, the district court's conclusion that the City's regulation is preempted because "an acknowledged purpose of Article 181.19 is to *counter the effect* of cigarette promotion" is based on an overbroad reading of the statute that is not supported by the statute's history and is directly contradicted by Congress' more recent actions. District Court Opinion (D.C. Op.) 12 (emphasis added). The

district court based its holding upon the need to give full effect to the phrase "*with respect to* the advertising or promotion of cigarettes." But the broad meaning applied by the district court confounds rather than furthers the congressional purpose underlying the preemption provision. *See* D.C. Op. 7. By enacting FCLAA, Congress did not intend to preempt any state actions designed to "*counter the effect*" of tobacco advertising or promotion—an exceedingly broad category of activities that could conceivably encompass virtually all of the well-established (and federally-supported) functions of state and local tobacco control programs. Nor did it seek to preempt requirements tied to the sale of cigarettes that impose no obligations on tobacco companies or those advertising on their behalf.

I. CONGRESS' INTENT IN ENACTING FCLAA'S PREEMPTION PROVISION WAS TO PROTECT TOBACCO COMPANIES FROM "DIVERSE, NONUNIFORM, AND CONFUSING CIGARETTE LABELING AND ADVERTISING REGLATIONS," NOT TO BAR PUBLIC HEALTH MESSAGING THAT DOES NOT PLACE ANY REQUIREMENTS ON TOBACCO COMPANIES.

The regulatory context of FCLAA's enactment, the Act's statement of purpose, and the legislative history of its preemption provision, all indicate that Congress' primary purpose in enacting the preemption provision was to avoid "diverse, nonuniform, and confusing cigarette labeling and advertising regulations" that would impose conflicting and burdensome obligations on tobacco companies that advertise in numerous jurisdictions. Pub. L. No. 89-92, § 2 (1965) (codified as

amended at 15 U.S.C. § 1331 (2011)). The City's public health warnings at issue in this case place no burden at all on tobacco companies; the obligation to post the City's health warnings applies only to tobacco retailers "selling tobacco product face-to-face to consumers in New York City." Art. 181.19(a). Therefore, Congress' animating concern of preventing "a multiplicity of State and local regulations" that could create "chaotic marketing conditions" for tobacco companies is simply not relevant here. H.R. Rep. No. 449, 89th Cong., 1st Sess., 4 (1965); S. Rep. No. 195, 89th Cong., 1st Sess., 4 (1965).

As explained by the Supreme Court in *Cipollone* and *Lorillard*, Congress enacted FCLAA in response to moves by both state legislatures and federal agencies to regulate cigarette packaging and advertising following the Surgeon General's 1964 report emphasizing the adverse health consequences and dangers of cigarette smoking. *See Lorillard*, 533 U.S. at 543; *Cipollone*, 505 U.S. at 513-14. New York State, for example, adopted its own warning label requirement in June 1965, prior to the enactment of FCLAA. *Palmer v. Liggett Group, Inc.*, 825 F.2d 620, 622 n.1 (1st Cir. 1987). In hearings before Congress, the tobacco companies argued that such "conflicting regulations" would be "intolerable." Hearings before the House Committee on Interstate and Foreign Commerce, 88th Cong., 2d Sess., 140 (June 25, 1964) (statement of Bowman Gray, R.J. Reynolds Tobacco Co.). The legislative history of FCLAA makes it clear that the

preemption provision was Congress' direct response to this concern. H.R. Rep. No. 449, 89th Cong., 1st Sess., 4 (1965) ("There was general agreement among the witnesses . . . that if the Committee took any action in this field, such a requirement as to labeling should be uniform; otherwise, a multiplicity of State and local regulations pertaining to labeling of cigarette packages could create chaotic marketing conditions and consumer confusion."); S. Rep. No. 195, 89th Cong., 1st Sess., 4 (1965) (same); *see also Cipollone*, 505 U.S. at 519 ("[A] warning requirement promulgated by the FTC and other requirements under consideration by the States were the catalyst for passage of the 1965 Act.").

In the "Declaration of Policy" included in FCLAA, Congress made explicit its motivation for the preemption provision. The Declaration stated that "commerce and the national economy may be (A) protected to the maximum extent consistent with [the objective of adequately informing smokers of the risks of smoking] and (B) *not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations* with respect to any relationship between smoking and health." Pub. L. No. 89-21, § 2 (1965) (emphasis added). As this shows, Congress' primary goal was to avoid the proliferation of state and local laws that would impose varying obligations upon tobacco companies. For example, state and local laws mandating that tobacco advertisements include health warnings phrased in a particular manner would require tobacco companies to

reformat their advertisements for each different jurisdiction with such a requirement. This would make it extremely burdensome to market tobacco products on a national scale and would therefore "impede commerce." The City's regulation at issue here, by contrast, poses no risk of "impeding commerce" with "diverse, nonuniform, and confusing" regulations because tobacco companies and cigarette advertisers need to do *nothing at all* to comply.[3]

Accordingly, the history of the enactment of FCLAA's preemption provision, as well as the Act's "Declaration of Policy," demonstrate that Congress intended to "protect *the cigarette companies* from the burdens of confusing and contradictory state regulations of *their* labels and advertisement." *Lorillard*, 533 U.S. at 595 (Stevens, J., concurring in part and dissenting in part) (emphasis added). Congress did not intend to interfere with the traditional police power of state and local governments to conduct educational efforts concerning the dangers of smoking, so long as those efforts did not regulate the content used by cigarette companies in their labeling and advertising.

[3] Even if regulations similar to the City's were enacted elsewhere, this would not present the risk of "diverse, nonuniform, and confusing" regulations that concerned Congress. The requirement to post a health warning sign is not borne by tobacco companies or advertisers, and it is not conditioned upon or triggered by tobacco companies' decisions to advertise or promote their products. *Local* tobacco retailers, who are already responsible for compliance with relevant municipal and state laws relating to tobacco sales, are responsible for compliance with the regulations.

II. THE 1970 AMENDMENTS WERE INTENDED TO EXPAND AND CLARIFY, NOT "VASTLY BROADEN," THE SCOPE OF FEDERAL PREEMPTION.

The district court stated that "the [1970] amendments to the [FCLAA's preemption provision], by proscribing generally any state requirements 'with respect to' both 'advertising' and 'promotion' was plainly intended to vastly broaden the scope of the preemption."[4] D.C. Op. 7. Although the District Court is correct that the 1970 amendments expanded the Act's preemptive reach, *Cipollone*, 505 U.S. at 520, the legislative history and historical context indicate that Congress' primary intention was to "'clarif[y]' the existing precautions against confusing and nonuniform state laws and regulations," not to dramatically alter the scope of federal preemption. *Cipollone*, 505 U.S. at 539-40 (Blackmun, J., concurring in part and dissenting in part). The District Court erred in divorcing its analysis of the preemption provision's language from consideration of Congress' purpose in amending of the FCLAA, which the Supreme Court has specifically warned against. *Lorillard*, 533 U.S. at 595 ("Ripped from its context, this provision could theoretically be read as a breathtaking expansion of the limitations imposed by the 1965 Act. However, both our precedents and common sense require us to read statutory provisions—and, in particular, pre-emption clauses—in

[4] The district court's opinion refers to the "1969 Amendments." Congress approved the amendments to the FCLAA in 1970, with retroactive effect to July 1969. They are referred to herein as the "1970 Amendments."

the context of both their neighboring provisions and of the history and purpose of the statutory scheme.").

A. Congress Modified the Language of the FCLAA Preemption Provision to Clarify its Preemption of State and Local Laws that Could Impose "Diverse, Nonuniform, and Confusing" Requirements on Tobacco Companies.

FCLAA provided that its advertising-related provisions would expire on July 1, 1969, and as that date approached, both state governments and federal agencies again prepared their own, potentially conflicting, advertising regulations. *Cipollone*, 505 U.S. at 515. "It was in this context that Congress enacted the Public Health Cigarette Smoking Act of 1969," modifying the language of the preemption provision. *Id.* at 517. The legislative history of the Public Health Cigarette Smoking Act of 1969—which was not enacted until 1970—demonstrates that the goal of the revised preemption provision remained "to avoid the chaos created by a multiplicity of conflicting regulations." S. Rep. 91-566, 91st Cong., 2d Sess., 11 (1969). The Senate Report emphasized that the revised preemption provision was "narrowly phrased" to accomplish this goal. *Id.*

Whereas the 1965 version "merely prohibited state and federal rulemaking bodies from mandating particular cautionary statements . . . in cigarette advertisements," *Cipollone*, 505 U.S. at 518, the 1970 version prohibited any "requirement or prohibition . . . with respect to the advertising or promotion" of cigarettes. The legislative history explaining the reason for the change in language

is sparse, but the available evidence demonstrates that Congress replaced the phrase "[n]o statement" with "[n]o requirement or prohibition" in order "to ensure that a State could not do through negative mandate (banning all cigarette advertising) that which it already was forbidden to do through positive mandate (mandating particular cautionary statements)." *Lorillard*, 533 U.S. at 549 (quoting *Cipollone*, 505 U.S. at 539 (Blackmun, J., concurring in part and dissenting in part)). Of particular concern appears to have been the D.C. Circuit Court of Appeals' decision in *Banzhaf v. Federal Commc'n Comm'n*, 405 F.2d 1082 (D.C. Cir. 1968), the only federal court opinion that interpreted the reach of the 1965 preemption provision.[5] In *Banzhaf*, the court determined that the Federal Communication Commission's (FCC's) ruling "requiring radio and television stations which carry cigarette advertising to devote a significant amount of broadcast time to presenting the case against cigarette smoking" was not preempted by the FCLAA (which, in its 1965 incarnation, applied to both states and federal agencies). *Banzhaf*, 405 F.2d at 1085. The court reasoned that because the FCC's ruling did not require any particular "statement . . . in the advertising" of cigarettes, "it [did] not violate the letter of the Act." *Id*. at 1088. Congress may have been concerned that states might seek to impose similar counter-advertising

[5] Congress was clearly aware of the *Banzhaf* decision, which was discussed at length in the Senate's report on the Public Health Cigarette Smoking Act. S. Rep. 91-566, 91st Cong., 2d Sess., 6-7 (1969).

obligations on tobacco companies. Harold C. Reeder, Lindsey v. Tacoma-Pierce County Health Department: Cipollone *Revisited, Billboards, State Law Tort Damages Actions, Federal Preemption, and the Federal Cigarette Labeling and Advertising Act*, 24 Seattle U. L. Rev. 763, 828 (2001). "By replacing the word 'statement' with the broader phrase 'requirement or prohibition,' Congress simply sought to ensure that states could not circumvent the existing provision by enacting legislation that did not require any particular statement in the advertisement of cigarettes but that could nevertheless result in the imposition of diverse, nonuniform, and confusing regulations" on tobacco companies. *Id*.

The regulation later at issue in *Vango Media* is an example of a local law that would not have been preempted under the 1965 Act, but that Congress likely intended to prohibit with the 1970 revisions. *Vango Media v. City of New York*, 34 F.3d 68 (2d Cir. 1994). In *Vango Media*, New York City required tobacco advertisers to display one "public health message" for every four tobacco advertisements displayed on taxicabs. The City's law did not require any particular "statement relating to smoking and health in the advertising of any cigarette;" the tobacco companies were free to design the content of their own tobacco advertisements. Therefore, the City's law would not have been preempted under the narrow language of the 1965 Act. Nonetheless, it directly imposed significant requirements on tobacco advertisers: they were required to pay for and display the

public health messaging, and the more tobacco advertisements they ran, the more counter-advertising they were required to purchase. If numerous localities or states adopted similar laws imposing detailed counter-advertising obligations on tobacco advertisers—i.e., the responsibility to carry specifically-phrased public health messages through their own advertising channels—it would create a patchwork of "diverse, nonuniform, and confusing" regulations that would make large-scale tobacco advertising extremely burdensome. This is exactly what Congress had hoped to prevent with the 1965 preemption provision, and the 1970 revisions (driven by the sunset clause in the FCLAA) provided Congress with the opportunity to clarify its intent.

The district court here erred in analogizing the instant case to *Vango Media*. In *Vango Media*, the Second Circuit found that the City's law "impose[d] conditions" on tobacco advertising because it *required tobacco advertisers* to pay for and run public health messaging. *Id*. The regulation at issue here, by contrast, does not require tobacco advertisers to do or refrain from doing anything, and therefore it does not "impose conditions" on tobacco advertisers in any way that is relevant to FCLAA's purpose of "avoid[ing] the chaos created by a multiplicity of conflicting regulations." *Id.* at 75 (quoting the Senate report on FCLAA). Moreover, the requirements imposed in *Vango Media* were "with respect to" advertising because the tobacco companies' obligation to run public health

messaging was directly tied to the existence and quantity of tobacco advertising. In contrast, the regulation at issue here is not directly tied to advertising at all; a retailer must place a warning sign wherever tobacco products are sold—regardless of whether or how much they are advertised or displayed.[6] Interpreting the words "with respect to," as the district court did, to bar public health messaging in any location where tobacco products are sold, effectively adds another clause to the preemption provision that Congress did not intend.

Contrary to the district court's expansive reading of the phrase "with respect to," there is no evidence that Congress recognized the addition of this phrase as a substantive edit when it amended the preemption provision in 1970. Once the word "statement" was replaced with "requirement or prohibition," the rest of the sentence had to be modified in order to make grammatical sense. Whereas the 1965 version provided that "no statement . . . shall be required *in* the advertising of any cigarettes," it would have made no sense for Congress to state that "no requirement or prohibition. . . shall be required *in* the advertising of any

[6] Article 181.19 provides that a retailer may place the warning sign either at the cash register or where the tobacco products are displayed. The mere choice of location does not make this regulation "with respect to" advertising or promotion. The choice reflects the Health Department's attempt to ensure that someone *purchasing* tobacco products views the warning, regardless of where, how much, or whether tobacco products are advertised. Moreover, if the Court views the option of placing the warning sign near a tobacco display as preempted, that portion is severable from the regulation as a whole.

cigarettes." The addition of the word "prohibition" thus necessitated replacing "in" with "with respect to." Reeder, 24 Seattle U. L. Rev. at 828-29. As the Senate reported, the amendments to FCLAA's preemption provision were intended to "clarif[y]" the scope of the "narrowly phrased" preemption provision. S. Rep. 91-566, 91st Cong., 2d Sess. 11 (1969). Nothing in the legislative history of the 1970 Act suggests that Congress expected the addition of the term "with respect to" to "vastly broaden" the reach of the provision. D.C. Op. 7. To the contrary, Congress repeated the "Declaration of Policy" from the 1965 Act in 1970, reaffirming that its objective was unchanged: to avoid imposing "diverse, nonuniform, and confusing labeling and advertising regulations" on cigarette companies. Pub. L. No. 91-222, §2(2).[7]

B. The Supreme Court Has "Fairly and Narrowly" Interpreted the 1970 Preemption Provision in Light of Congress' Goal of Preventing "Diverse, Nonuniform, and Conflicting" State and Local Laws.

The Supreme Court has instructed that courts must "fairly but – in light of the strong presumption against pre-emption – narrowly construe the precise language of § 5(b)." *Cipollone*, 505 U.S. at 523. The two primary cases in which the Supreme Court interpreted 15 U.S.C. § 1334(b)—*Cipollone* and *Lorillard*—

[7] The legislative history is silent on why the term "promotion" was added to the FCLAA preemption provision. Congress' "Declaration of Policy" made no mention of "promotion," which suggests that Congress did not see the addition of that term as a significant modification to the preemption provision.

construed the reach of this preemption provision in light of Congress' purpose. These cases, as well as the relevant district and circuit court case law, confirm that the preemption provision was primarily intended to avoid burdening tobacco companies with conflicting or inconsistent requirements and that the 1970 revisions were meant to expand, but not to "vastly broaden," the scope of the preemption provision.

In *Cipollone*, the Court considered whether § 1334(b) barred common law tort claims against tobacco companies. Although there was no majority decision with respect to whether the 1970 version preempted common law tort claims, "seven of the nine Justices subscribed to opinions that explicitly tethered the scope of the pre-emption provision to Congress' concern with 'diverse, nonuniform, and confusing cigarette labeling and advertising regulations.'" *Lorillard*, 533 U.S. at 597 (Stevens, J., concurring in part and dissenting in part). The plurality decision, authored by Justice Stevens, concluded that state law fraud claims were not preempted because they "do not create 'diverse, nonuniform, and confusing' standards," and instead "rely only on a single, uniform standard: falsity."[8]

[8] This holding was reaffirmed by a majority of the Court in *Altria Group, Inc. v. Good*, 555 U.S. 70, 129 S. Ct. 538 (2008). Appellees make much of the dicta in *Altria* that "[t]ogether, the labeling requirement and pre-emption provisions express Congress' determination that the prescribed federal warnings are both necessary and sufficient to achieve its purpose of informing the public of the health consequences of smoking." 129 S. Ct. at 544. Read in context, this statement refers to Congress' intent to balance the need to inform consumers about the

Cipollone, 505 U.S. at 529. By contrast, failure to warn claims were preempted because liability would imply that the tobacco companies' "post-1969 advertising or promotions should have included additional, or more clearly stated, warnings," and such rulings could create through judicial decision the nonuniform standards that Congress explicitly sought to avoid. *Id.* at 524.

In addition to anchoring its reasoning in Congress' statement of purpose, the plurality in *Cipollone* recognized that the 1970 amendments had expanded the reach of the FCLAA preemption provision, writing that in comparison to the phrase "[n]o statement," the phrase "'[n]o requirement or prohibition' sweeps broadly and suggests no distinction between positive enactments and common law." *Cipollone*, 505 U.S. at 521. Thus, although state common law claims would not have been preempted by the 1965 Act—because such suits would not mandate any particular "statement" in advertising—the language of the 1970 Act was broad enough to encompass common law claims that sought to impose "requirements or prohibitions" on tobacco advertising. *Id*. at 521-22.

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dangers of smoking with the need to avoid "imped[ing] commerce" with inconsistent state and local regulations. Nothing in the decision is intended to address regulations such as New York City's that do not implicate such concerns. More significantly, even if this passage is given a broader reading, it must be read in light of Congress' subsequent enactment of the FSPTCA, where Congress clearly demonstrated its intent to allow and encourage local tobacco control efforts that would supplement federal regulations.

Relevant in this context, however, is that while the *Cipollone* plurality recognized that the phrase "requirement or prohibition" had expanded the scope of FCLAA's preemption, it continued to give a narrow reading to the phrase "with respect to the advertising or promotion." The tobacco companies broadly asserted that all common law tort claims that might have some potential impact on tobacco advertising were preempted. Rejecting this argument, Justice Stevens noted that § 1334(b) preempted only regulations "with respect to the advertising or promotion of cigarettes," and he therefore required a careful case-by-case analysis as to whether the plaintiff's claim, if successful, would require the tobacco companies to modify their advertising. *See id.* at 523-24 (discussing the required analysis); *id.* at 528-29 (concluding that plaintiff's claims that tobacco companies' failed to disclose material facts were not preempted).

In *Lorillard*, the Court struck down a Massachusetts regulation that limited the location of outdoor tobacco advertising. The Court rejected the argument that FCLAA preempted only content-based, and not location-based, advertising regulations, concluding that the 1970 version of the preemption provision made no such distinction. *Lorillard*, 533 U.S. at 551. A contrary result in *Lorillard* would have subjected tobacco companies to "diverse, nonuniform, and confusing" location-based advertising regulations that would have made compliance by tobacco companies difficult and conflicted with Congress' intent. Tobacco

advertisers would potentially have had to comply with different location-based regulations in innumerable local jurisdictions. Additionally, a contrary holding would have permitted states and localities to use location-based restrictions to essentially eliminate all tobacco advertising by very narrowly limiting the locations where tobacco advertising was permissible. According to the Court, this was a result that Congress had sought to avoid.[9] *Lorillard*, 533 U.S. at 549. Nothing in *Lorillard*, however, suggests an expansive interpretation of the phrase "with respect to." Rather, the Court concluded that the location-based restriction at issue in *Lorillard* was "with respect to" advertising because it "*expressly target[ed]* cigarette advertising" as the object of its regulation. *Lorillard*, 533 U.S. at 547 (emphasis added).

The concerns expressed by the Court in both *Cipollone* and *Lorillard* are absent in this case. Unlike the failure to warn claims in *Cipollone* and the location-based restrictions imposed upon tobacco advertisers in *Lorillard*, regulation of tobacco *retailers* does not present a risk of burdening tobacco advertisers with "diverse, nonuniform, and confusing regulations." Likewise, the City's regulation does not place any requirements or restrictions upon tobacco advertisements—it merely introduces the City's separate and distinct voice into the retail environment.

[9] Congress has essentially overturned the Supreme Court's decision in *Lorillard* by adding § 1334(c) to the preemption provision in 2009. States are now permitted to regulate the "time, place, and manner" of cigarette advertisements and promotions.

The Court in *Cipollone* and *Lorillard* was not concerned with broad-based public health messaging campaigns that might impact—even substantially—tobacco advertising and promotion, so long as such campaigns did not impose obligations or restrictions on the tobacco companies' advertisements.

Similarly, all other cases that have found state or local laws to be preempted by the FCLAA have involved laws that directly regulated or imposed requirements on tobacco companies or those conducting promotional campaigns on their behalf. *Vango Media*, 34 F.3d 68 (imposing counter-advertising obligation on tobacco advertisers); *Jones v. Vilsack*, 272 F.3d 1030 (8th Cir. 2001) (prohibiting product sampling); *R.J. Reynolds Tobacco Co. v. Seattle-King County Department of Health*, 473 F. Supp. 2d 1105 (W.D. Wash. 2007) (same); *R.J. Reynolds Tobacco Co. v. McKenna*, 445 F. Supp. 2d. 1252 (W.D. Wash. 2006) (same); *Rockwood v. City of Burlington*, 21 F. Supp. 2d 411 (D. Vt. 1998) (prohibiting sampling and barring tobacco advertisements in retail stores); *Chiglo v. City of Preston*, 909 F. Supp. 675 (D. Minn. 1995) (prohibiting tobacco advertisements in retail stores).[10] None of the cases have involved regulations that placed requirements only on

[10] *Amici* respectfully maintain that the cases holding regulations prohibiting "sampling" (i.e., the free distribution of tobacco products) to be preempted by the FCLAA were wrongly decided, because sampling is not a form of "promotion" as that term is used by FCLAA. *See Amicus Curiae* Brief of the League of California Cities, California State Association of Counties, and Tobacco Control Legal Consortium, *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 124 P.3d 408 (Cal. 2005). Our disagreement with those cases, however, is immaterial to the arguments advanced here.

tobacco retailers, *cf. Lorillard*, 533 U.S. at 567-70 (upholding state's prohibition on self-service displays of tobacco products against First Amendment challenge and noting that tobacco companies had declined to challenge the restriction on preemption grounds), or counter-advertising campaigns that did not require advertisers to carry the state's public health messaging. *See R.J. Reynolds Tobacco Co. v. Shewry*, 423 F.3d 906 (9th Cir. 2004) (rejecting tobacco company's argument that state anti-smoking campaign funded by a tax on tobacco products constituted unconstitutional compelled speech). Because the City's regulation does not prescribe or limit the way in which tobacco companies may advertise and promote their products, it is easily distinguishable from the regulations at issue in these prior cases; it does not constitute a "requirement . . . with respect to the advertising or promotion" of cigarettes.

III. THE 2009 AMENDMENT TO FCLAA'S PREEMPTION PROVISION UNMISTAKABLY DEMONSTRATES CONGRESS' INTENT TO NARROWLY LIMIT THE SCOPE OF FEDERAL PREEMPTION.

In 2009, Congress enacted the Family Smoking Prevention and Tobacco Control Act (FSPTCA), which provided the Food and Drug Administration (FDA) with authority to regulate tobacco products. Pub. L. No. 111-31 (2009). With FSPTCA, Congress also amended the preemption provision of FCLAA and considerably narrowed its scope. Whatever ambiguity may have existed before, Congress' enactment of FSPTCA further demonstrated its intention to permit—and

indeed to encourage—local tobacco control measures such as New York City's regulation.

FSPTCA left unchanged the language of 15 U.S.C. § 1334(b) (as amended in 1970), but added a new subsection (c) to § 1334 which reads as follows:

> Notwithstanding subsection (b), a State or locality may enact statutes and promulgate regulations, based on smoking and health, that take effect after the effective date of the [FSPTCA] *imposing specific bans or restrictions on the time, place, and manner, but not content, of the advertising or promotion of any cigarettes.*

(Emphasis added.) The plain language of this subsection establishes that Congress intends to preempt only a very narrow category of regulations—those that regulate the "content" of cigarette advertising and promotion—and to otherwise provide state and local governments with broad authority to pursue tobacco control measures.[11] Even though the avoidance of "diverse, nonuniform, and confusing" tobacco regulations has been an important congressional goal since 1965, Congress demonstrated in 2009 that its concern for uniformity is clearly secondary to its desire to support aggressive tobacco control efforts by states and localities. The only area remaining off-limits is regulation of the content of tobacco

[11] Appellees contended below that New York City's regulation was a "content"-based provision (because it prescribes the content to be placed on the point-of-sale signs), and was therefore preempted by this subsection. This is simply incorrect. What FCLAA's amended preemption provision prohibits are regulations directed at the content "*of the advertising or promotion* of any cigarettes." New York City's regulation does not require or prohibit the tobacco companies' use of any specific content in their advertisements or promotions.

advertisements; such content-based regulations would place the most burdensome obligations on national tobacco advertisers by requiring them to reformat their advertisements for each separate jurisdiction, and would make advertising in nationally-circulated periodicals impossible. Congress has in essence returned to the original position it adopted in 1965: states cannot impose onerous obligations on tobacco companies by regulating the content of tobacco advertising, but otherwise, states and local governments have broad authority to restrict tobacco marketing.

Pursuant to the 2009 amendment, New York City could, for example, prohibit all advertising or promotion of tobacco products at the point of sale; such a restriction would constitute a permissible "place" restriction. By authorizing state action that could effectively prohibit all advertising and promotion at the point of sale, Congress made clear its intention to give states broad discretion to fashion restrictions that had previously been barred. The regulation at issue in this case is substantially less sweeping than a general prohibition on all point-of-sale promotion. It is difficult to believe that Congress would have authorized States to prohibit all point of sale promotion but not permitted them to adopt the far more modest regulatory measure enacted by the City.

Moreover, the language and structure of § 1334(c) suggest that Congress never imagined that regulations such as the City's would be considered "with

respect to . . . advertising or promotion" and covered by the FCLAA preemption provision. The new subsection permits state and local governments to restrict the time, place, and manner—but not the content—of tobacco advertising and promotion, even though these restrictions might otherwise have been preempted under § 1334(b). It thus conceptualizes restrictions that could potentially have been preempted under § 1334(b) as only those that limit the time, place, manner, or content of cigarette advertising or promotion. The City's regulation requiring signs to be posted at retail locations where tobacco is sold does not fall within any of these four categories. The logical implication is that Congress does not consider—and never has considered—such regulations to be "requirement[s] or prohibition[s] . . . with respect to the advertising or promotion" of cigarettes. All court decisions prior to this case finding state or local laws to be preempted by FCLAA have involved regulations that imposed restrictions or conditions on the time, place, manner, or content of tobacco advertising or promotion. *See* cases cited page 15 *supra*. Prior to the district court's decision here, no court had ever found that a regulation seeking to reduce tobacco consumption *without* limiting the time, place, manner, or content of tobacco companies' advertisements or promotions to be preempted.

The 2009 amendment also makes the district court's overbroad reading of the phrase "with respect to the advertisement of or promotion of cigarettes"

untenable. The opinion of the district court ignores § 1334(c) and analyzes the regulation without reference to this important change in the law. In particular, the district court concluded that because the City's regulation is "specifically designed to counter the effect of plaintiffs' point of sale promotional displays," it must be a regulation "with respect to" the promotion of cigarettes. D.C. Op. 12-13. But with § 1334(c), Congress has now authorized "time, place, and manner" restrictions on tobacco advertising and promotion, and such restrictions would obviously be passed with the intent of countering the effect of tobacco advertising and promotion (i.e., the goal of such measures would be to reduce tobacco sales). Therefore, it is apparent that Congress no longer intends—if it ever did—to preempt regulations such as New York City's merely because they have an impact on counteracting tobacco advertisements or promotions. Rather, as stated in FSPTCA's preamble, Congress recognized that "State governments have lacked the legal and regulatory authority and resources they need to address comprehensively the public health and societal problems caused by the use of tobacco products," and the FSPTCA was intended to expand such authority. Pub. L. No. 111-31, § 2(7).

Congress' desire to permit state and local governments a wide range of authority to pursue tobacco control goals is also evidenced in another provision included in the FSPTCA:

> Except as provided in paragraph (2)(A) [relating to tobacco product regulation and labeling], nothing in this subchapter, or rules promulgated under this subchapter, shall be construed to limit the authority of . . . a State or political subdivision of a State . . . to enact, adopt, promulgate, and enforce any law, rule, regulation, or other measure with respect to tobacco products that is in addition to, or more stringent than, requirements established under this subchapter, including a law, rule, regulation, or other measure relating to or prohibiting the sale, distribution, possession, exposure to, access to, advertising and promotion of, or use of tobacco products . . . .

21 U.S.C. § 387p. This provision states that although the FDA has the sole authority to pursue certain types of regulations, state and local governments are not otherwise limited in their ability to pursue tobacco control measures that are "in addition to, or more stringent than" requirements established by FSPTCA or the FDA.

Viewed as a whole, FSPTCA establishes a broad regulatory structure at the federal level and still provides for preemption where federal action requires uniformity. However, in areas such as restrictions on the retail sales of cigarettes and regulations of advertising and promotion at the point of sale—areas where no comprehensive federal regulatory structure is imposed or contemplated—the legislation encourages states to impose public health regulations. Such regulations can now be as broad as a total prohibition on advertising and promotion at the point of sale, or they can be, as New York City's regulation is, far more narrowly tailored. The important changes made by this legislation in the scope of federal preemption should be decisive in this case. Whatever result might have been

reached under the prior statutory authority, under the law as amended, the City's regulation is not preempted.

IV. RECENT ENACTMENTS DEMONSTRATE CONGRESS' ACTIVE SUPPORT FOR STATE AND LOCAL EFFORTS SUCH AS NEW YORK CITY'S REGULATION.

Since 1965, informing the public "that cigarette smoking may be hazardous to health" has remained an express purpose of the FCLAA. Pub. L. No. 89-92, § 2 (1965). Congress' contribution to this effort was to mandate standardized warning labels on cigarette packages (and later on cigarette advertising). As long as complementary state and local educational efforts did not directly regulate or impose conditions on cigarette manufacturers or advertisers (which would interfere with Congress' other objective of avoiding "diverse, nonuniform, and confusing" regulations), Congress has welcomed—and often funded—such initiatives. *See, e.g.*, 15 U.S.C. § 1341(a) (requiring the Secretary of Health and Human Services to "establish and maintain a liaison with . . . State and local public agencies respecting activities relating to the effect of cigarette smoking on human health").

Two recent Congressional actions demonstrate Congress' support for local tobacco control efforts such as the City's regulation. First, as part of the American Reinvestment and Recovery Act of 2009 (ARRA), Congress created a $1 billion "Prevention and Wellness Fund," of which $650 billion was allocated to "carry out

evidence-based clinical and community-based prevention and wellness strategies authorized by the [Public Health Service] Act, as determined by the Secretary [of Health and Human Services], that deliver specific, measurable health outcomes that address chronic disease rates." Pub. L. No. 111-5 (2009). Pursuant to this provision, and subject to close congressional oversight, the Department of Health and Human Services (HHS) developed the Communities Putting Prevention to Work program, which awarded nearly all of the available prevention funding to state, territorial, tribal, and local governments to pursue one or more of five health promotion strategies. Among the activities funded were state and local efforts to "[u]se media to . . . employ counter-advertising for tobacco," "restrict the availability of tobacco," and, most relevant here, "*[u]se of point of decision labeling/signage/placement to discourage consumption of tobacco.*" U.S. Department of Health and Human Services, *Communities Putting Prevention to Work – Implementation Plan* (June 2010) (emphasis added).[12] In short, HHS has used ARRA funds—without any objection from Congress—to fund local communities to pursue *exactly the type of regulation at issue in this case.* Accordingly, the logical conclusion is that Congress is supportive of such state and local efforts and does not consider them to be preempted by FCLAA.

[12] *Available at* http://www.hhs.gov/recovery/reports/plans/pdf20100610/CDC_CPPW%20%20June%202010.pdf.

Second, after having been apprised of how HHS was utilizing the Prevention and Wellness Fund, Congress used nearly identical language in authorizing a $15 billion "Prevention and Public Health Fund" in 2010 as part of the Patient Protection and Affordable Care Act. Pub. L. No. 111-148, § 4002 (2010). Already, several million dollars from this fund have been distributed to state and local governments to "implement plans to reduce tobacco use through regulatory and educational arenas, as well as enhance and expand the national network of tobacco cessation quit lines to significantly increase the number of tobacco users who quit." U.S. Department of Health and Human Services, HHS Awards Nearly $100 Million in Grants for Public Health and Prevention Priorities (Sept. 24, 2010).[13] By investing substantial expenditures in local tobacco control efforts, Congress has clearly signaled that it has no desire to broadly preempt such initiatives.

CONCLUSION

The broad construction of § 1334(b) urged by Appellees is not mandated by the provision's text and is at odds with FCLAA's stated purposes and the legislative history of the Act and its amendments. Moreover, Congress' recent enactment of § 1334(c) and its active support of tobacco control efforts such as the City's should remove any doubt that Congress intends the scope of FCLAA

[13] http://www.hhs.gov/news/press/2010pres/09/20100924a.html (last visited Mar. 27, 2011).

preemption to be narrowly construed. Accordingly, *amici* respectfully request that this Court reverse the decision of the District Court.

Dated: April 15, 2011

Respectfully submitted,

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American Lung Association in New York
American Thoracic Society
Americans for Nonsmokers' Rights
Campaign for Tobacco-Free Kids
Framework Convention Alliance
National Association of County and City Health Officials
National Association of Local Boards of Health

*Application for Attorney Admission to the United States Court of Appeals for the Second Circuit pending.

CERTIFICATE OF COMPLIANCE PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)(c) AND SECOND CIRCUIT RULE 32.1

I certify that:

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(c) and Second Circuit Rule 32-1, the attached brief is proportionately spaced, has a typeface of 14 points or more, and contains 6,975 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

DATED: April 15, 2011

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ADDENDUM

Statements of Interest

The Tobacco Control Legal Consortium

The Tobacco Control Legal Consortium is a national network of legal centers providing technical assistance to public officials, health professionals, and advocates in addressing legal issues related to tobacco and health, and supporting public health policies that will reduce the harm caused by tobacco use in the United States. The Consortium grew out of collaboration among specialized legal resource and public health centers serving six states and is supported by national advocacy organizations, voluntary health organizations, and others. The Consortium prepares legal briefs as *amicus curiae* in cases in which its experience and expertise may assist courts in resolving tobacco-related legal issues of national significance. The Consortium has submitted *amicus* briefs in cases before the U.S. Supreme Court; the U.S. Courts of Appeals for the Second and Fifth Circuits; the U.S. District Court for the District of Columbia; and the appellate courts of California, Delaware, Florida, Kentucky, Minnesota, Montana, New Hampshire, South Carolina, and Washington. The Consortium's activities are coordinated by attorneys at the Public Health Law Center at William Mitchell College of Law in St. Paul, Minnesota.

Action on Smoking and Health

Action on Smoking and Health (ASH) is a national nonprofit public health and educational organization whose mission for more than 40 years has been to protect nonsmokers from the clearly-established dangers of secondhand tobacco smoke, reduce the deadly toll of smoking by banning the advertising and promotion of cigarettes and by keeping them out of the hands of children, end all government support of the tobacco industry and serve as a clearinghouse of information and ideas for all people concerned about smoking, both here and abroad.

The American Cancer Society

The American Cancer Society (ACS) is the nationwide community-based health organization dedicated to eliminating cancer as a major health problem by preventing cancer, saving lives and diminishing suffering from cancer, through research, education, advocacy and service. Research conducted by ACS was instrumental in establishing the original link between tobacco use and cancer, and nationwide our volunteers work to further tobacco control policies. ACS Eastern Division includes New York City, and the Division has a critical interest in preserving state and local ability to promote effective tobacco control. Smoking accounts for an

estimated 30% of all cancer deaths and 87% of lung cancer deaths. In New York City alone, an estimated 1,810 cancer deaths annually can be attributed to smoking, including 1,573 deaths from lung cancer. ACS Eastern Division has supported many cancer-related issues policies at the federal, state, and local levels, including Resolution § 181.19.

The American Lung Association in New York

The American Lung Association in New York is New York state's chartered association for the American Lung Association, the nation's oldest voluntary health organization. Because cigarette smoking is a major cause of lung cancer and chronic obstructive pulmonary disease, the American Lung Association has long been active in research, education and public policy advocacy on the adverse health effects of tobacco products. The American Lung Association believes that point of-sales education is an important tool to help prevent children from becoming smokers and to encourage adult smokers to quit.

The American Thoracic Society

Amicus Curiae the American Thoracic Society ("ATS"), founded in 1905, is an independently incorporated, non-profit, educational and scientific organization of physicians and scientists that focuses on respiratory and critical care medicine. ATS has approximately 13,500 dues-paying members

around the world, who help prevent and fight respiratory disease internationally through research, education, patient care, and advocacy. The long-range goal of ATS is to decrease morbidity and mortality from all respiratory disorders and life-threatening acute illnesses. Although ATS members work on diverse issues, all share an interest in tobacco use prevention, tobacco cessation and the treatment of tobacco-related disease.

Americans for Nonsmokers' Rights

Americans for Nonsmokers' Rights (ANR) is a national advocacy organization with more than 8,000 members consisting of individuals and organizations. ANR promotes the protection of everyone's right to breathe smokefree air, educates the public and policy-makers regarding the dangers of secondhand smoke, works to prevent youth tobacco addiction, and tracks and reports on the adversarial efforts of the tobacco industry. Founded in 1976 and based in Berkeley, California, ANR began by backing legislation to ban smoking in the workplace and other enclosed public spaces. Since the early 1980s, ANR has supported clean indoor air initiatives in more than 3,000 communities in the United States.

The Campaign for Tobacco-Free Kids

The Campaign for Tobacco-Free Kids works to raise awareness that cigarette smoking is a public health hazard by advocating public policies to limit the marketing and sales of tobacco to children, and altering the environment in which tobacco use and policy decisions are made. Tobacco-Free Kids has over 100 member organizations, including health, civic, corporate, youth, and religious groups dedicated to reducing children's use of tobacco products.

The Framework Convention Alliance

The Framework Convention Alliance (FCA) was founded in 1999 and is made up of over 350 organizations from more than 100 countries working on the development, ratification and implementation of the international treaty, the World Health Organization's (WHO) Framework Convention on Tobacco Control (FCTC). The WHO FCTC is the world's first global public health treaty, and requires parties to adopt a comprehensive range of measures designed to reduce the devastating health and economic impacts of tobacco. The FCA is a civil society alliance whose vision is a world free from the devastating health, social, economic and environmental consequences of tobacco and tobacco use.

The National Association of County and City Health Officials

The National Association of County and City Health Officials (NACCHO) is the national organization representing the nation's 2800 local health departments. Many local health departments are actively engaged in tobacco prevention and control programs to reduce the toll of tobacco use in their communities and have an interest in preserving their flexibility to devise and use point of sale messages. NACCHO's mission is to be a leader, partner, catalyst, and voice for local health departments in order to ensure the conditions that promote health and equity, combat disease, and improve the quality and length of all lives.

The National Association of Local Boards of Health

The National Association of Local Boards of Health (NALBOH) represents the interests of boards of health in the United States. There are over 3,200 boards of health across the United States with over 20,000 citizen volunteers working to improve the health of their communities. NALBOH's mission is to strengthen and improve public health governance, and NALBOH is dedicated to the development of effective public health policy at the community level.