No. 11-91

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

23-34 94th ST. GROCERY CORP., KISSENA BLVD. CONVENIENCE STORE, INC., NEW YORK ASSOCIATION OF CONVENIENCE STORES, NEW YORK STATE ASSOCIATION OF SERVICE STATIONS AND REPAIR SHOPS, INC., LORILLARD TOBACCO COMPANY, PHILIP MORRIS USA INC., and R. J. REYNOLDS TOBACCO CO., INC.,
Plaintiffs-Appellees,

v.

NEW YORK CITY BOARD OF HEALTH, NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE, NEW YORK CITY DEPARTMENT OF CONSUMER AFFAIRS, DR. THOMAS FARLEY, in his official capacity as Commissioner of the New York City Department of Health and Mental Hygiene, and JONATHAN MINTZ, in his official capacity as Commissioner of the New York City Department of Consumer Affairs,
Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of New York
The Honorable Jed S. Rakoff

BRIEF OF *AMICI CURIAE* LOS ANGELES COUNTY DEPARTMENT OF PUBLIC HEALTH, PUBLIC HEALTH – SEATTLE & KING COUNTY, CITY OF PHILADELPHIA, BOSTON PUBLIC HEALTH COMMISSION, COUNTY OF SANTA CLARA, CALIFORNIA; CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA; PUBLIC HEALTH LAW & POLICY IN SUPPORT OF DEFENDANTS-APPELLANTS NEW YORK CITY BOARD OF HEALTH, *ET AL*.

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INTEREST OF *AMICI*

Amici are local governments and health departments, which have a mandate to promote the health and well-being of their citizens, and Public Health Law & Policy, a non-profit organization dedicated to improving public health.[1] Government *amici* include the following: County of Los Angeles, California, Department of Public Health; the City of Philadelphia, Pennsylvania; the Boston Public Health Commission; Public Health – Seattle & King County, Washington; the County of Santa Clara, California; and the City and County of San Francisco, California. The government *amici* have been working to adopt a local law requiring warning signs similar to those at issue in this case, or wish to preserve their ability to engage in other public health education programs about tobacco or other public health topics using signs to inform and educate the public. As such, government *amici* share a common interest with New York City in its efforts to inform the citizenry about threats to health; and therefore, these *amici* have a compelling interest in the legal issues before this court.

[1] Pursuant to Fed. R. App. P. 29, *amici* have received the parties' consent to file this brief. No counsel of any party to this proceeding authored any part of this brief. No party or party's counsel, or any other person – other than *amici* and their members – contributed any money to fund the preparation or submission of this brief.

Amicus Public Health Law & Policy (PHLP) works to advance policy initiatives such as the regulation at issue in this case. PHLP has a strong interest in maintaining government's ability to require the posting of warning signs on the retail environment to inform and educate the public about the negative health consequences of tobacco use, as well as other dangers.

INTRODUCTION AND SUMMARY OF ARGUMENT

Local government in this country is "vested with the responsibility of protecting the health, safety, and welfare of its citizens." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342 (2007). Recognizing the vital role for local government in tobacco control contemplated in the Family Smoking Prevention and Tobacco Control Act (FSPTCA), Pub. L. 111-31 (2009), the New York City Board of Health acted to fulfill that responsibility by requiring that New Yorkers who visit tobacco retailers be provided with meaningful information about the dangers of smoking and the availability of support for the 70% of smokers who try to quit each year. Notice of Adoption of Health Code § 181.19 ("the Resolution"), at 3 n.17.

Because the City acted entirely within its authority to regulate *sales* of tobacco products, the Resolution is not preempted by that part of the Federal Cigarette Labeling and Advertising Act (FCLAA) that nullifies local efforts

"with respect to the advertising or promotion of . . . cigarettes." 15 U.S.C. § 1334(b). But even if the district court's implausible conclusion that the warning sign requirement regulated "promotion" were correct, the Resolution still would not be preempted. The newly-enacted FSPTCA explicitly exempts from preemption any local law that "imposes specific bans or restrictions on the time, place and manner, but not the content," of cigarette advertising or promotion. 15 U.S.C. § 1334(c). The only aspects of "promotion" that the Resolution could conceivably restrict have to do with the place of the promotion (requiring the signs to be located at the point of sale or display), or the manner of the promotion (prohibiting "promotion" of tobacco products without posting the signs). A measure that does not address retailers' and tobacco companies' own signage, and that applies to "any person engaged in the sale of tobacco products," § 181.19(a), regardless of whether they engage in any advertising or promotion at all, cannot be considered a regulation of "content."

Because the Resolution is not preempted, this Court may reach the question that the district court did not: whether the First Amendment stands in the way of the City's attempt to safeguard its populace.

The signs constitute the speech not of the retailers or tobacco companies but of the government itself. The City designed the signs, printed and distributed them at no cost to retailers, and stamped each one with the seal of both the City and the Department of Health and Mental Hygiene

("the Department") along with the City's 311 and NY-QUITS phone numbers.

As the City observes, the First Amendment does not directly regulate government speech. Appellants' Opening Brief (AOB) at 36; *Johanns v Livestock Mktg. Ass'n*, 544 U.S. 550, 553 (2005). But the Free Speech Clause does not permit government "to burden[] speech [of private speakers] disproportionately in light of the action's tendency to further a legitimate government objective." *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1140 (2009) (Breyer, J., concurring). Assessment of whether the burden on private speakers is undue requires consideration of the context in which their speech is inhibited. Since the signs appear on private property, the government faces stricter constraints than it would otherwise. *See Johanns*, 544 U.S. at 565. On the other hand, the facts that the signs appear in commercial establishments, which are traditionally subject to government regulation, *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 n.24 (1976), and that their focus is a subject of such urgent government concern, *see Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 564 (2001), markedly increase the burden that the government may impose. In the end, the burden placed on retailers of this deadly product cannot be considered disproportionate.

Alternatively, the Court need not rely on a government speech doctrine that is "recently minted," *Summum*, 129 S. Ct. at 1139 (Stevens, J., concurring), and whose contours are not yet well defined. Even analyzed

under the traditional test for compelled commercial disclosures by private parties, established in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985), the Resolution withstands First Amendment review. The signs are directly related to the government's objective of informing consumers about the dangers of tobacco use and the availability of assistance in quitting. The challenged images provide only factually uncontroversial information – no one contends that they are inaccurate, and they will be joined by similar images on packages of cigarettes once the new federal requirement for those images goes into effect. FSPTCA. § 201(a) (amending 15 U.S.C. § 1333 to add subsections (a)(2) and (d), requiring "color graphics depicting the negative health consequences of smoking" on the top 50% of packages); *Commonwealth Brands, Inc. v. U.S.*, 678 F.Supp.2d 512 (W.D. Ky. 2010) (upholding the requirement). Nor are the words "Quit Smoking Today" in any way controversial. The tobacco company defendants themselves say the same on their websites. *See* http://www.rjrt.com/prinbeliefs.aspx ("The best course of action for tobacco users concerned about their health is to quit"); http://www.philipmorrisusa.com/en/cms/Products/Cigarettes/Health_Issues/default.aspx?src=home ("To reduce the health effects of cigarette smoking, the best thing to do is to quit").

Finally, if for any reason the Court nevertheless finds that some aspect of the signs requires heightened review, the appropriate standard to apply is not strict scrutiny, but the intermediate scrutiny of *Central Hudson Gas &*

Electric. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980) – a standard that the Resolution readily meets.

In adopting the Resolution, the City acted well within its constitutional authority, and directly pursuant to its charge to safeguard its citizens' health and welfare, by taking realistic measures to address "the single leading cause of preventable death in the United States." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 127 (2000) (quoting FDA rulemaking).

ARGUMENT

I. THE RESOLUTION IS PRESERVED FROM ANY POSSIBLE PREEMPTION BY THE SAVINGS CLAUSE OF THE FSPTCA.

As explained in the briefs of the City and of *amicus curiae* Tobacco Control Legal Consortium, section 181.19 of the New York City Health Code does not regulate "with respect to the advertising or promotion of . . . cigarettes." 15 U.S.C. § 1334(b). It applies to all cigarette sales, regardless of how or whether they are promoted, and does not require that anything about tobacco advertising or promotion be changed.

Yet even if section 181.19 were somehow determined to fall within the scope of the preemption provision of section 1334(b), it would still avoid preemption – because it would come within the savings clause of section 1334(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,[2] imposing specific bans or restrictions on the time, place, and manner, but not content, of the advertising or promotion of any cigarettes.

Family Smoking Prevention and Tobacco Control Act (FSPTCA), Pub. L. 111-31, Div. A, section 203 (2009) (codified at 15 U.S.C. § 1334(c)). The district court failed to consider the impact of section 1334(c).

The purpose underlying the introduction of section 1334(c) – the "touchstone" of any preemption inquiry, *Cipollone v. Liggett Group*, 505 U.S. 504, 516 (1992) – was to reinstate and enhance the ability of states and localities to regulate the sale and marketing of cigarettes. *Commonwealth Brands, Inc.*, 678 F.Supp.2d at 520, 528. This intent is underscored by 21 U.S.C. § 387p, which provides that the new provisions of the FSPTCA not "be construed to limit the authority" of states or localities to adopt "more stringent" "measure[s] with respect to tobacco products," including restrictions on "promotion and advertising." FSPTCA, § 916(a)(1) (codified at 21 U.S.C. § 387p). Congress thus has twice recently expressed its encouragement of local regulation of cigarette promotion and advertising.

To conclude that the Resolution operates "with respect to" the promotion of cigarettes stretches the scope of section 1334(b) to the point that – contrary to Congress' intent – very little state or local regulation would *not* be preempted. *See Greater N.Y. Metro. Food Council, Inc. v. Giuliani*, 195 F.3d 100, 105-06 (2d Cir.1999) ("especially . . . in the

[2] The FSPTCA went into effect June 22, 2009; the Resolution was adopted September 22, 2009.

preemption context, . . . the purpose of Congress is the ultimate touchstone, and an overly-expansive . . . interpretation could subvert the presumption against preemption"). If section 1334(b) is interpreted so broadly, then the congressional purpose underlying the FSPTCA requires a correspondingly broad reading of the savings clause of section 1334(c).

If the display of cigarettes is a promotional activity, as the district court concluded, slip op. at 13, then a requirement aimed at the "location" of a display must be a restriction on the "place" of that activity, and must therefore fall within the scope of the savings clause. The requirement would also be excepted from preemption as a restriction on the "manner" of promoting cigarettes: retailers may not offer them for sale without posting warning signs.

What the Resolution plainly does *not* regulate is the "content" of tobacco advertising or promotion. See Pls.' Opp. to MSJ at 8. The Resolution says nothing at all about the content of the advertising and promotion engaged in by tobacco manufacturers, distributors and retailers. It regulates, instead, the content of signs that are designed, manufactured and distributed by the City itself. Congress was not concerned, in section 1334(c), with restricting what state and local governments say in their own communications with the public. The measure aims, instead, to (1) avoid nonuniform regulation of the content of advertising that would interfere with commerce by making it impossible to print or broadcast advertisements in media that reach more than one jurisdiction; and (2) to encourage states and

localities to exercise their authority to address a salient public health concern.

II. THE WARNING SIGNS ARE GOVERNMENT SPEECH THAT DOES NOT UNCONSTITUTIONALLY CONSTRAIN PLAINTIFFS' SPEECH.

As the City accurately notes, AOB at 36-43, the warning signs are the Government's own speech, and "[t]he Free Speech Clause . . . does not regulate government speech." *Summum*, 129 S. Ct. at 1131. It is true that the inquiry does not end here. While the Free Speech Clause does not apply directly to government speech, it does constrain that speech when it threatens to impose undue burdens on the speech of private parties. *See R.J. Reynolds Tobacco Co. v. Shewry*, 423 F.3d 906, 923 (9th Cir. 2005).[3]

Where the government speaks on private property, the burden on individual speakers is potentially much greater than in the generally public contexts where the government speech doctrine has recently been developed, e.g., parks, *Summum*, 129 S. Ct. at 1125; paid media, *Johanns*, 544 U.S. 550; schools, *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003 (9th Cir. 2000). The government could not, for example – even if it were clearly the speaker – commandeer the walls of people's homes to express its own

[3] Other constitutional provisions constrain government speech as well, including the Establishment Clause, *Summum*, 129 S. Ct. at 1139 (Stevens, J., concurring); the Equal Protection Clause, *id.*; the Due Process Clause, *R.J. Reynolds Tobacco Co. v. Bonta*, 272 F.Supp.2d 1085, 1108-09 (E.D. Cal. 2003); and others. *See Shewry*, 423 F.3d at 923-24 (surveying constraints); *Bonta*, 272 F. Supp. 2d at 1106-10 (same).

political advocacy, *cf. City of Ladue v. Gilleo*, 512 U.S. 43, 58 (1994), or require drivers to display government-issued bumper stickers with an ideological message, *cf. Wooley v. Maynard*, 430 U.S. 705 (1977). Nevertheless, among other considerations, the long tradition of government posting warning signs on private property to promote health and safety in the commercial sphere – from the fire marshal's announcing occupancy limits to the surgeon general advising about the health effects of smoking – compels the conclusion that whatever the burden on retailers and tobacco companies in this case, it is far outweighed by the government's interest.

A. The Mandated Warnings Are Government Speech.

Although "[t]he government-speech doctrine is relatively new, and correspondingly imprecise," *Johanns*, 544 U.S. at 574, (Souter, J., dissenting), the warning signs at issue here qualify as government speech under any of three principal analyses employed by the courts.

By the standard set out in *Johanns*, 544 U.S. 550, the Supreme Court's formative treatment of the government speech doctrine, the signs are government speech because (1) the government established the overall message to be communicated, and (2) the government approved "every word" of the message as ultimately disseminated. *Id.* at 562. Indeed, government responsibility is even greater here than in *Johanns*, where the government did not write the actual text of the promotional ads funded by involuntary assessments on beef producers. In this case, the Department itself determines the specific text of the signs, Resolution at § 181.19 (a),

(d), as well as designing, *id*. at § 181.19(b)(1), producing, *id*. at 181.19(a), and distributing, *id*. at § 181.19(b)(3), the signs.

The warning signs also clearly qualify as government speech under a four-factor test formulated by the Courts of Appeals prior to *Johanns* that continues to be utilized by some courts. *See, e.g., Ariz. Life Coalition, Inc. v. Stanton*, 515 F.3d 956, 965 (9th Cir. 2008) (finding four-factor test to be "supported by the Supreme Court's decision in *Johanns*"). This inquiry explores (1) the purpose of the program in which the speech occurs; (2) the degree of editorial control exercised by the government or private entities over the content of the speech; (3) the identity of the literal speaker; and (4) whether the government or the private entity bears ultimate responsibility for the content of the speech. *See Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles*, 288 F.3d 610, 618 (4th Cir. 2002) (summarizing factors relied on by the Eighth, Ninth, and Tenth Circuits).

Applying this test to the warning signs, the second and fourth factors are essentially identical to the *Johanns* factors and so weigh in favor of a finding of government speech. The first factor points to the same conclusion. The purpose of the sign mandate is to "promote further reductions in smoking prevalence in New York City," Resolution, § I – a purpose much more likely endorsed by the City than by a cigarette retailer or manufacturer.

With respect to the third factor, it is not clear that in the case of a posted sign there is a literal speaker. However, courts have regularly

analyzed this factor as closely linked to the fourth – whether government or a private party bears ultimate responsibility for the content of the speech. *See Stanton*, 515 F.3d at 967. And, as discussed, there can be no doubt that the city government bears ultimate (indeed, complete) responsibility for the warning signs in this case; it is therefore likely that the government is the 'literal speaker' as well.

All four factors thus confirm that the signs are government speech.

The third potential standard points to the same conclusion. Several courts following *Johanns* have held that the determinative question is whether a reasonable observer would attribute the speech to the government or to a private speaker. *Roach v. Stouffer*, 560 F.3d 860, 867 (8th Cir. 2009); *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 863 (7th Cir. 2008). *See also Summum*, 129 S. Ct. at 1133 (finding privately donated permanent monuments on public property to be government speech in large part because "there is little chance that observers will fail to appreciate" that government is the speaker).

Here, a reasonable observer would attribute the anti-smoking signs to the city government, rather than to the retailers or cigarette marketers. *Cf. Shewry*, 423 F.3d at 925 (noting that reasonable observer could not believe that anti-tobacco industry ads were speech of tobacco industry). In this case a similar inference is further corroborated by the appearance on the signs of city phone numbers and the prominently displayed seals of New York City and the Department.

In sum, the mandated warnings in this case are unambiguously government speech on any applicable standard.

B. The Warning Signs Do Not Impose An Undue Burden On Private Speakers.

A Free Speech Clause challenge to government speech should be reviewed by examining the burdens imposed on the expression of private speakers. *See Shewry*, 423 F.3d at 923. The First Amendment may be implicated, for example, when government speech appears to be the expression of nongovernmental speakers. *See Johanns*, 544 U.S. at 564 n.7; *Caruso v. Yamhill County*, 422 F.3d 848, 855 (9th Cir. 2005) ("the First Amendment may limit government speech . . . that attributes a government message to a private speaker"). It may likewise be implicated when government speech is so pervasive or dominant in a medium that it interferes with the speech of others. *See Shewry*, 423 F.3d at 923 ("there may be instances in which the government speaks in such a way as to make private speech difficult or impossible, . . . which could raise First Amendment concerns"); *Warner Cable Communications, Inc. v. City of Niceville*, 911 F.2d 634, 638 (11th Cir. 1990) ("The government may not speak so loudly as to make it impossible for other speakers to be heard by their audience. The government would then be preventing the speakers' access to that audience, and first amendment concerns would arise").

The foregoing concerns do not loom large in the present case. As discussed *supra*, there is no reasonable danger that the warning messages

will be misattributed to Plaintiffs-Appellees. And with tobacco companies spending some $13 billion annually on marketing, *see Commonwealth Brands*, 678 F. Supp. 2d at 525, there is little chance that the voice of the industry will be "drowned out." *Cf. Bonta*, 272 F. Supp. 2d at 1107 n.26 (noting inapplicability of "drowning out" concern to assessing taxes on tobacco to fund an anti-smoking campaign, given the vastly greater amounts spent on industry promotional campaigns than on government anti-smoking efforts). Nor is the speech of retailers drowned out. The warning signs leave the vast majority of wall and counter area within the retail space available for the retailers' own expression.

An additional consideration is the fact that the government speech in this case occurs on private property. While there is no merit to Plaintiffs-Appellees' contention that speech on private property is "*never* government speech," Plaintiffs' Reply, at 12 (emphasis in original),[4] the use of private

[4] Plaintiffs-Appellees offer no authority for this claim. Ownership of the location of the speech is not a factor in any of the tests used by courts to distinguish government speech. And speech on private property – indeed, involving private speakers – has in fact been found to be government speech. *See, e.g., Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) (describing compelled speech and speech restrictions imposed on private family planning clinic receiving government funding, upheld in *Rust v. Sullivan*, 500 U.S. 173 (1991), as instances of government speech); *accord Summum*, 129 S. Ct. at 1331. *See also Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995) ("we have permitted the government to regulate the content of what is or is not expressed when . . . it enlists private entities to convey its own message"); *accord Summum*, 129 S. Ct. at 1131.

property to convey speech against the owner's wishes is certainly relevant to the question of whether and how much private speech is burdened.

In the particular context of this case, however, the burden is not improper. First, as already noted, there is little danger of the misattribution that might often arise when government speech is located on private property.

Next, for First Amendment purposes, the walls of a commercial establishment that is voluntarily opened to the public are less inviolably private than other private property. *See Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980) (finding that a shopping mall owner's free speech rights were not infringed by a state requirement that the mall be open to others' expressive activities, and noting that the "[m]ost important" ground for distinguishing from *Wooley*, 430 U.S. 705, was that "the shopping center by choice of its owner is not limited to the personal use of appellants. It is instead a business establishment that is open to the public to come and go as they please)"[5] *Cf. City of Ladue*, 512 U.S. at 58 ("A special respect for

[5] Requiring that private property be made available to convey government expression, as in the present case, presumably imposes a *lesser* First Amendment burden than that upheld in *Pruneyard*, where the property was required to be made available to convey the expression of other private parties. *Cf. Johanns*, 544 U.S. at 565 n.8 ("being forced to fund someone else's private speech unconnected to any legitimate government purposes violates personal autonomy [citation omitted]. Such a violation does not occur when the exaction funds government speech"); *Kidwell v. City of Union*, 462 F.3d 620, 624 (6th Cir. 2006) ("All of the cases in which the Supreme Court has held a compelled subsidy to be a First Amendment

individual liberty in the home has long been part of our culture and our law; that principle has special resonance when the government seeks to constrain a person's ability to speak there") (citation omitted). This is not to say that the government could require the posting of political or ideological signs inside commercial establishments. But the distinction between core speech and commercial speech – so relevant in other contexts, *see Bd. of Trustees v. Fox*, 492 U.S. 469, 477 (1989); *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 796 (1988); *Zauderer*, 471 U.S. 626 – is relevant to assessing the burden in this context as well. In particular, the posting of signs to convey information to the public in a commercial space has extensive precedent, especially where public health and safety are concerned. The government requires, *inter alia*, postings on private property announcing maximum capacity, the location of emergency exits, the presence of hazardous materials, and the illegality of selling certain items – including tobacco – to minors.

Finally, the government here is regulating to protect the public from an intrinsically deadly product. When government is "protecting the health of its citizens" and thus regulating at the "core of its police power," *Sporhase v. Neb. ex rel. Douglas*, 458 U.S. 941, 956 (1982), its ability to impose burdens on private individuals is correspondingly greater.

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violation have involved subsidies of speech by private organizations rather than by the government itself").

In sum, the warning signs do not constitute an improper burden on the retailers' or tobacco companies' speech.

This case does not require the Court to determine the outer boundaries of the government speech doctrine. "Because the government speech doctrine . . . is recently minted, it would do well for us to go slow in setting its bounds, which will affect existing doctrine in ways not yet explored." *Summum*, 129 S. Ct. at 1141 (Souter, J., conc. in judgment) (internal quotation marks and citation omitted). It is enough in this case to note that the signs required by section 181.19 do not drown out or prevent the speech of tobacco retailers or the vast advertising and promotional efforts of the tobacco company defendants. The interest of the City in providing effective messages to promote the health and safety of its citizens could not be higher. And the affected merchants have chosen to sell tobacco products, a voluntary decision that carries with it the implicit acknowledgment of bringing into one's place of business a highly dangerous, and highly regulated, product. The burden placed on the retailers and tobacco companies in this case is not undue.

III. THE WARNING SIGNS WITHSTAND CONSTITUTIONAL REVIEW EVEN IF ANALYZED AS COMPELLED PRIVATE SPEECH.

An alternative approach yields the same conclusion. New York City's sign mandate easily passes constitutional muster if analyzed under the test for compelled commercial speech.

The proper standard for judicial review of mandatory factual disclosures in commercial contexts has been settled for a quarter of a century: the requirements are constitutional "as long as [the] disclosure requirements are reasonably related to the state's interest" and are not "unjustified or unduly burdensome." *Zauderer*, 471 U.S. at 651; *accord Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1339-1340 (2010). "Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides," an advertiser's "constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal." *Zauderer*, 471 U.S. at 650 (emphasis added); *accord Milavetz*, 130 S. Ct. at 1339. For this reason, regulations compelling factual, uncontroversial commercial speech are "subject to more lenient review" than the intermediate scrutiny appropriate for restrictions on accurate commercial speech. *New York State Rest. Ass'n v. New York City Bd. of Health* (*NYSRA*), 556 F.3d 114, 132 (2d Cir. 2009); *accord Nat'l Elec. Mfrs. Ass'n v. Sorrell (NEMA)*, 272 F.3d 104 (2d Cir. 2001).

Plaintiffs argued in the district court that these bedrock precedents do not apply to the mandated warnings in this case, either because the required signage is purportedly unrelated to a government interest in preventing deception, or because it supposedly goes beyond uncontroversial factual disclosures. Neither argument has merit.

A. Government May Compel Commercial Factual Disclosures In Order To Insure That Consumers Are Better Informed.

The principle that disclosure requirements in connection with commercial transactions are subject to deferential First Amendment review, because they tend to serve rather than hinder First Amendment interests in the free flow of information, is not confined to cases of potential deception. "*Zauderer's* holding was broad enough to encompass . . . disclosure requirements" not concerned with preventing consumers from being misled. *NYSRA*, 556 F.3d at 133; *see also NEMA*, 272 F.3d at 115 (*Zauderer* standard applied even though the "compelled disclosure at issue . . . was not intended to prevent 'consumer confusion or deception' per se, but rather to better inform consumers"). *Zauderer* itself explicitly rejected the suggestion that in order to avoid intermediate scrutiny, the State needed to "establish … that the advertisement, absent the required disclosure, would be false or deceptive." 471 U.S. at 650. Indeed, the First Circuit "found *no* cases limiting *Zauderer*" to "potentially deceptive advertising." *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 310 n.8 (1st Cir. 2005) (emphasis added).[6]

[6] There is no basis for Plaintiffs' suggestion below that the Supreme Court's recent decision in *Milavetz*, 130 S. Ct. 1324, somehow calls these precedents into question. Plaintiffs' Opp. to MSJ at 18 n.6. The Court's language in *Milavetz*, like that of *Zauderer*, simply reflected the fact that the particular government interest at stake in those cases involved preventing consumer deception. *Milavetz*, 130 S. Ct. at 1340; *Zauderer*, 471 U.S. at 651. In neither case did the Court indicate that its holding was limited solely to disclosures aimed at preventing consumer deception.

B. That The Mandated Warning Signs Include Disturbing Images And An Admonition To Quit Smoking Does Not Remove Them From "Reasonable Relationship" Scrutiny.

Equally unavailing is Plaintiffs-Appellees' argument that the warning signs are subject to heightened scrutiny because they include (1) pictorial images of the medical impact of tobacco use and (2) statements using the language "Quit Smoking Today" to refer smokers to resources that can assist them in ending their deadly habit. Pls.' Opp. to MSJ at 18. These features do not take the signs outside the realm of compelled "purely factual and uncontroversial information" which is governed by the *Zauderer* "reasonable relationship" standard. 471 U.S. at 651.

1. The photographs are factually uncontroversial.

Plaintiffs-Appellees have offered no authority for their claim that accurate photographs of typical health effects "do not present uncontroversial facts," Pls.' Opp. to MSJ at 19, or that the images are any more factually controversial than more familiar warnings. The law does not distinguish between written and pictorial warnings. *See*, *e.g.*, 29 C.F.R. § 1910.1200(c) (defining mandated hazard warnings as "words, pictures, symbols, or combination thereof"). *See also* 7 U.S.C. § 136(q)(2)(D) (requiring certain pesticides to be labeled with skull and crossbones). The trial court reviewing new federal requirements of similar graphic images on cigarette packages concluded that "the addition of a graphic image" would not "alter the substance of [mandated health warnings], at least as a general

rule," or change the applicable level of scrutiny. *Commonwealth Brands,* 678 F. Supp. 2d at 532.

Plaintiffs-Appellees simply aver that that the graphic images "shock and play on the emotions rather than inform." Pls.' Opp. to MSJ at 19. In reality, the images are far *more* informative than a bland warning that smoking is harmful to health – they make clear just what sorts of effects are to be expected, and they do so in a way that is more likely to attract a smoker's attention. *See Zauderer*, 471 U.S. at 647 ("The use of illustrations or pictures . . . serves important communicative functions"). The informational value of the mandated vivid pictures of the impact of smoking is particularly high, given that "most youth, at a time when they are deciding whether to start smoking, have a very inadequate understanding of the medical consequences, physical pain, and emotional suffering which results from smoking . . . ." *United States v. Philip Morris USA, Inc*. 449 F.Supp.2d 1, 579-80 (D.D.C. 2006) (summarizing extensive research). The imminent addition of similar images to cigarette packages, FSPTCA, § 201(a), also severely undermines Plaintiffs-Appellees' claim of "shock."

2. The Quitline referral is not a statement of controversial opinion triggering heightened scrutiny.

If the mandated signs read "Assistance in quitting smoking is available by calling 1-866-NYQUITS," no one would contest that that was a disclosure of uncontroversial information. It is implausible that a sign

conveying the same message but phrased as "Quit smoking today. Call 1-866-NYQUITS" requires a different level of scrutiny. It is very unlikely that the new federal warning "Quitting smoking today greatly reduces serious risks to your health," which has been found to pass First Amendment scrutiny, *Commonwealth Brands*, 678 F. Supp. 2d at 532, would have been subject to heightened scrutiny if the wording were instead "Quit smoking today to reduce serious health risks."

Uncontroversial warnings are often phrased in the imperative. *See*, *e.g.*, 15 U.S.C. § 1261(p)(1)(J)(i) ("Keep out of the reach of children" for hazardous substances); 16 C.F.R. § 1500.133(b) ("Keep away from heat, sparks, and open flame" for flammable liquids). Such "advocacy" has never been required to meet a heightened level of First Amendment review.

C. The Mandated Warning Signs Easily Meet The *Zauderer* Standard Because They Are Reasonably Related To The State's Interest And Are Not Unduly Burdensome.

Given that they are factually uncontroversial disclosures, the mandated warning signs easily pass First Amendment scrutiny, even considered as compelled private speech, because they are "reasonably related to the state's interest" and are not "unjustified or unduly burdensome." *Zauderer*, 471 U.S. at 651.

Whether New York City's interest is described as "promot[ing] further reductions in smoking prevalence," Resolution at 2, increasing understanding of the dangers of smoking, *id.* at 2-3, increasing utilization of cessation services, *id.* at 3-4, or preventing youth smoking initiation, *id.* at 4, the mandated warnings are certainly reasonably related.

The warnings are amply justified. There is considerable evidence that Americans, especially younger and less educated ones, significantly underestimate the risks of smoking. *See* Inst. of Medicine, *Ending the Tobacco Problem: A Blueprint for the Nation*, at 89-90 (2007). More than half of smokers surveyed in Canada, which now requires large graphic warnings on cigarette packages, "reported that the pictorial warnings have made them more likely to think about the health risks of smoking." IOM Report, at 294 (quoted in *Commonweath Brands*, 678 F. Supp. 2d at 531).

Given the extreme dangers of smoking,[7] mandating tobacco vendors to display a sign at the cash register or product display can hardly be considered unduly burdensome. Contrary to Plaintiffs-Appellees' contentions, MSJ Reply at 30, the warning sign requirement is significantly less onerous than the required disclosures struck down in *Ibanez v. Fla.*

[7] Smoking is the leading cause of preventable death in New York City. Nearly one in seven deaths in New York City is smoking-related; smoking kills about 7400 New Yorkers a year. Resolution at 2.

Dept. of Bus. & Prof'l Regulation, 512 U.S. 136 (1994), particularly in proportion to the interests at stake. The *Ibanez* Court noted that "on a different record, the . . . insistence on a disclaimer might serve as an appropriately tailored check," but in the actual case regulators "fail[ed] . . . to point to any harm that is potentially real, not purely hypothetical." *Id*. at 146. The harms at issue in this case are far from hypothetical. Moreover, the burdensomeness of the statute struck down in *Ibanez* stemmed from the fact that the disclosures required to accompany a "specialist" designation for lawyers were so lengthy that they "effectively rule[d] out notation of the 'specialist' designation on a business card or letterhead, or in a yellow pages listing." *Id*. at 146-47. Here there is no allegation that the required sign or signs makes it infeasible to sell tobacco products, or even that it rules out other signs. Indeed, in terms of leaving ample space for the vendor's own message, the requirement in this case is markedly less burdensome than the requirement, upheld in *Commonwealth Brands*,[8] that warnings occupy the top *half* of the front *and* rear of cigarette packages. 678 F. Supp. 2d at 528-32.

[8] The district court in *Commonwealth Brands* erroneously (and without explanation) applied the more stringent *Central Hudson* test to the FSPTCA package warnings. The warnings survived even this more rigorous review.

IV. EVEN IF ANALYZED AS MORE THAN COMPELLED DISCLOSURES, THE WARNING SIGNS WITHSTAND REVIEW.

A. Regulations Of Commercial Speech Are Not Subject To Strict Scrutiny.

There is no basis in law for Plaintiffs-Appellees' repeated assertions that strict scrutiny applies to any aspect of the Resolution where the *Zauderer* standard does not. *E.g.*, Pls.' Reply to MSJ at 12. Any speech implicated by section 181.19 is commercial speech. Consequently, in the unlikely event that the Resolution were found to compel factually controversial speech, the regulation would be subject at most to the intermediate scrutiny standard of *Central Hudson*, 447 U.S. 557.[9] That is the standard applied by this Court to compelled commercial speech that does not fall within the ambit of *Zauderer*. *See Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 73 (2d Cir. 1996).

Commercial speech warrants "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values." *Fox*, 492 U.S. at 477. Consequently, government restrictions on truthful, non-misleading commercial speech are subject to analysis under *Central Hudson* rather than strict scrutiny. Compelled commercial speech

[9] Plaintiffs-Appellees' position is belied by the fact that the alternative considered in *Zauderer* itself was applying the same level of scrutiny applied to commercial speech restrictions. 471 U.S. at 650. *See also Milavetz*, 130 S. Ct. at 1339 (same); *NEMA*, 272 F.3d at 113-14 (same).

that goes beyond factually uncontroversial disclosures must be analyzed similarly. *See Riley*, 487 U.S. at 796; *see also Fox*, 492 U.S. at 474 (assuming compelled commercial speech subject to less stringent scrutiny).

B. The Warning Sign Requirements Withstand *Central Hudson* Review.

There is no reason to doubt that the Resolution would pass even *Central Hudson* review. The steps of the *Central Hudson* analysis here are straightforward. The City would need to establish that a sign stating "Quit smoking today" (1) furthers a substantial government interest, (2) directly and materially advances that interest, and (3) offers a "reasonable fit" between the government's ends and the means it has chosen to effect those ends. *Lorillard Tobacco Co.*, 533 U.S. at 555-56.[10]

There is no question about the importance of the City's stated interests. Because of the health risks associated with smoking "[r]educing the burden of tobacco use," Resolution at 1-2, is an incontrovertibly important goal. *See IMS Health Inc. v. Sorrell*, 630 F.3d 263, 275 (2d Cir. 2010) ("state has a substantial interest in protecting public health"). For the same reason, the city's interest in "prevent[ing] youth smoking initiation," Resolution at 4, is substantial. *See Lorillard*, 533 U.S. at 564 ("State's

[10] The threshold "first prong" of the *Central Hudson* test requires that the speech in question (generally speech the government seeks to restrict) "must concern lawful activity and not be misleading." *Lorillard*, 533 U.S. at 555. This step is difficult to apply in the context of compelled speech.

interest in preventing underage tobacco use is substantial, and even compelling").

The Resolution also establishes that the sign requirement directly and materially advances that goal, adducing studies that show (1) that health warnings which communicate the adverse health effects of tobacco use are among the most effective at prompting smokers to quit, (2) that smokers, especially youth, find pictorial warnings more effective and engaging than text-only warnings, and (3) that smokers can double their chances of quitting smoking successfully by getting counseling and using nicotine replacement therapy or other appropriate drug treatments.

Finally, the required signs exhibit a "reasonable fit" between the government's means and ends. The Resolution cites various studies establishing that pictorial warnings are more effective than text-only warnings, especially among youth, and that utilization of cessation services increases when smokers are made aware of their availability. Resolution at 3. The signs are concise, effective, and precisely in line with the evidence developed by the Department.

Therefore, even if the court were to apply *Central Hudson* to the Resolution, the mandated signs would pass constitutional muster. This conclusion is strengthened by the fact that the speech in question is government speech. *See W. Va. Ass'n of Club Owners & Fraternal Servs. v. Musgrave*, 553 F.3d 292, 301 (4th Cir. 2009) ("We continue to use Central Hudson as a guide, but . . . the government speech aspects of the commercial

speech at issue provide additional weight in favor of upholding the state's regulations that is simply not present in other commercial speech cases").

CONCLUSION

For the reasons set forth above, *amici curiae* respectfully request that the Court reverse the judgment of the district court.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and 32(a)(7)(B) because this brief contains 6636 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced 14-point typeface including serifs. The typeface is Times New Roman, prepared using Microsoft Word.

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April 21, 2011

s/ Seth E. Mermin
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