



Federal Preemption of Municipal Tobacco Ordinances: New York City and the Federal Cigarette Advertising and Labeling Act

Citation

Jennifer Michele Klein, Federal Preemption of Municipal Tobacco Ordinances: New York City and the Federal Cigarette Advertising and Labeling Act (April 2011).

Permanent link

<http://nrs.harvard.edu/urn-3:HUL.InstRepos:8592148>

Terms of Use

This article was downloaded from Harvard University's DASH repository, and is made available under the terms and conditions applicable to Other Posted Material, as set forth at <http://nrs.harvard.edu/urn-3:HUL.InstRepos:dash.current.terms-of-use#LAA>

Share Your Story

The Harvard community has made this article openly available.
Please share how this access benefits you. [Submit a story](#).

[Accessibility](#)

**FEDERAL PREEMPTION OF MUNICIPAL TOBACCO ORDINANCES:
NEW YORK CITY *and the*
FEDERAL CIGARETTE ADVERTISING AND LABELING ACT**

Jennifer Klein
Harvard Law School, Class of 2012
Food and Drug Law, Winter 2011
April 4th, 2011

Submitted in satisfaction of the course paper requirement

Federal Preemption of Municipal Tobacco Ordinances: New York City and the Federal Cigarette Advertising and Labeling Act

Jennifer Klein | Harvard Law School Class of 2012 | Food and Drug Law Winter 2011

ABSTRACT

In contrast to the Family Smoking Prevention and Tobacco Act of 2009, which appears to preserve a strong role for states and cities to participate in and strengthen tobacco regulation, the Federal Cigarette Labeling and Advertising Act (FCLAA) has placed significant limitations on the anti-tobacco policies that local governments can enforce. This paper argues that cities may have unique needs not adequately addressed by federal regulations and that, as a normative matter, they should be able to pass laws that better reflect the needs and desires of their residents.

Using New York City as an example, I will illustrate three cases in which city ordinances have been invalidated by federal preemption under FCLAA. I will explain the type of analysis in which judges have typically engaged in order to find preemption in these cases. These judges have tended to place a strong emphasis on the values codified by the Supremacy Clause of the United States Constitution while de-emphasizing the presumption against preemption for regulations that implicate states' traditional police powers.

I. Introduction

When Congress granted the Food and Drug Administration (FDA) authority to regulate tobacco products in 2009,¹ many people may have been surprised that the agency did not already possess this authority. Perhaps this is because a comprehensive regulatory regime for tobacco already existed on the federal level. In fact, it was the existence of this “comprehensive federal program” that Justice O’Conner stated as evidence of Congress’s intent to “preclude [the FDA] from exercising significant policymaking authority on the subject of smoking and health” in FDA v. Brown & Williamson.² Other federal entities have exercised, or attempted to exercise, authority over aspects of tobacco production and

¹ Family Smoking Prevention and Tobacco Control Act, 21 U.S.C. 387 (2009).

² FDA v. Brown and Williamson Tobacco Co., 529 U.S. 120 (2000).

sales for decades. For example, the Federal Trade Commission (FTC) has regulated labeling on cigarette packages since 1965,³ Congress banned tobacco advertising on television and radio in 1971⁴ and on domestic commercial airline flights in 1989,⁵ and the Occupational Safety and Health Administration proposed (and later withdrew) indoor air quality regulations with the goal of curtailing smoking in public areas and in workplaces in 1994.⁶

The political process that sometimes culminates with the passage of a significant statute like the Family Smoking Prevention and Tobacco Control Act of 2009 (FSPTCA) tends to involve debates and compromises that take into account the interests and the potential role of many federal agencies, courts, politicians, and the regulated industry. Too often missing from the conversation is the question of what role cities can and should play in determining an appropriate regulatory scheme for tobacco. In the case of the 2009 Act, the scope of that role is being worked out through court adjudication.⁷ In a recent case, U.S. Smokeless Tobacco Mfg. Co., LLC v. City of New York, a federal court read FSPTCA as preserving a role for cities to enact and enforce laws that create more stringent regulations.⁸ FSPTCA contains a “preservation clause” that explicitly states that its provisions should not be construed to limit this role of municipalities.⁹ Additionally,

³ Federal Cigarette Labeling and Advertising Act, 15 U.S.C. 1331 et seq. (1965)

⁴ Public Health Cigarette Smoking Act, 15 U.S.C. 1335 (1969)

⁵ Martin Tolchin, *House Would Extend Smoking Ban on U.S. Flights*, N.Y. TIMES, Nov. 1, 1989.

⁶ Indoor Air Quality, Proposed Rules, Department of Labor, Occupational Safety and Health Administration, 66 F.R. 64946-01 (2001)

⁷ Daniel A. Klein, Validity, Construction, and Application of Family Smoking Prevention and Tobacco Control Act (FSPTCA), 53 A.L.R. Fed. 2d 465, § 13 (2011)

⁸ U.S. Smokeless Tobacco Mfg. Co., LLC v. City of New York, 703 F. Supp. 2d 329, 343 (S.D.N.Y. 2010)

⁹ Family Smoking Prevention and Tobacco Control Act, 21 U.S.C. 387(p)(a)(1)

FSPTCA contains a “savings clause” that limits the applicability of the statute’s preemption provision so that it does not apply to city rules that regulate tobacco sales and distribution.¹⁰ The court in U.S. Smokeless Tobacco observed that “Congress expressed a clear and unmistakable preference for limiting the federal government's role to setting a floor below which no local sales regulations could go, while remaining sensitive to differing sensibilities about the use of tobacco products in different parts of the country.”¹¹

By contrast, the Federal Cigarette Labeling and Advertising Act of 1965 (FCLAA) includes an explicit preemption provision¹² that courts have cited to overturn local ordinances on several occasions. Using New York City as an example, this paper will explore the limitations that the preemption provision of FCLAA has placed on cities’ ability to pursue local strategies to discourage smoking. I will argue that cities have a special need to supplement federal tobacco regulations with ordinances tailored to local “sensibilities,” as the court in U.S. Smokeless Tobacco recognized, and I will explore the history of the relationship between cities and other government entities that defines the scope of municipal autonomy today. Lastly, I will illustrate three instances in which New York City (City) policies have been preempted by FCLAA in order to illustrate the very real limitations that federal preemption can place on a city’s flexibility and authority to pursue local goals.

¹⁰ Family Smoking Prevention and Tobacco Control Act, 21 U.S.C. 387(p)(a)(2)(b)

¹¹ U.S. Smokeless Tobacco, 703 F. Supp., 344-45

¹² Federal Cigarette Labeling and Advertising Act, 15 USC § 1334

II. Background

A. *The Need for Local Cigarette Regulation*

There is no doubt that New York City has actively tried to discourage cigarette use within its borders. The City, with varying degrees of success, has attempted to ban cigarette use in bars and restaurants¹³ and beaches and parks,¹⁴ impose and increase taxes on sales of cigarettes,¹⁵ and require cigarette vendors to display posters with grotesque images discouraging smoking at locations where cigarettes are sold.¹⁶ Yet, one might ask whether it is necessary for this type of regulation to occur at the municipal level while state and federal governments have created a comprehensive regulatory regime addressing many of the same issues New York City has sought to address, and while these higher level of governments may have greater access to resources and ability to create uniform requirements throughout the country.

The implications of cigarette use in New York City, and other cities like it, are simply different from the country as a whole and from those of New York State (the State). First, the impact of second-hand smoking may be more severe in New York City than elsewhere. Second, the City's smoking rates are lower than that of the State and the Country, so fewer smokers are causing a disproportionate amount of harm from the impact of second-hand smoke exposure. Third, as a normative matter, cities should be allowed to enact and enforce laws that are more protective of public health than State and

¹³ Jennifer Steinhauer, *Bloomberg Seeks to Ban Smoking in Every City Restaurant and Bar*, N.Y. TIMES, Aug. 9, 2002.

¹⁴ Javier C. Hernandez, *Smoking Ban for Beaches and Parks Is Approved*, N.Y. TIMES, Feb. 2, 2011.

¹⁵ Michael Cooper, *Cigarettes Up To \$7 a Pack With New Tax*, N.Y. TIMES, July 1, 2002.

¹⁶ Anahad O'Connor, *Judge Rejects City Law on Antismoking Posters*, N.Y. TIMES, Dec. 29, 2010.

Federal laws, especially when these local laws are representative of the unique needs and preferences of their residents or are enacted in response to heightened danger or special circumstances.

Many New Yorkers who do not use tobacco products are chronically exposed to cigarette smoke.¹⁷ Second-hand smoke inhalation is a bigger problem in New York City than in much of the rest of the country. While in the United States an average of 44.9% of non-smokers have elevated levels of a nicotine metabolite used to detect second-hand smoke exposure, in New York City the prevalence of this metabolite in non-smokers is 56.7%.¹⁸ Exposure to toxins in second-hand smoke can cause asthma, cancer, and cardiovascular disease.¹⁹ Particles in second-hand smoke can linger in the air for hours, and cling to hair, clothing, and furniture.²⁰ Surprisingly, exposure is a problem even for those who do not live or work with smokers. New York City health officials have reported that, “people seated within three feet of a smoker are exposed to roughly the same levels of secondhand smoke, regardless of whether they are indoors or outdoors.”²¹ Anyone who has walked through midtown Manhattan knows that it would be quite a challenge to remain more than three feet of a smoker for even one block.

The statistics about the prevalence of second-hand smoke exposure in New York City become even more striking when one considers that the proportion of people who

¹⁷ Roni Caryn Rabin, *New Yorkers Often Exposed to Cigarette Smoke, Study Finds*, N.Y. TIMES, Apr. 08, 2009.

¹⁸ Jennifer A. Ellis, Charon Gwynn, Renu K. Garg, Robyn Philburn, Kenneth M. Aldous, Sarah B. Perl, Lorna Thorpe and Thomas R. Frieden, *Secondhand smoke exposure among nonsmokers nationally and in New York City*, Nicotine and Tobacco Research (2009)

¹⁹ Mayo Clinic Staff, *Secondhand smoke: Avoid dangers in the air*, available at, <http://www.mayoclinic.com/health/secondhand-smoke/CC00023> (accessed Mar. 22, 2011)

²⁰ Id.

²¹ Hernandez, *Smoking Ban for Beaches and Parks Is Approved*.

are smokers in New York City is much lower than in the nation as a whole, meaning that fewer smokers are responsible for more second-hand smoke exposure in the City. Most likely as a result of both years of regulation discouraging cigarette use and evolving social norms that increasingly disapprove of smoking, cigarette use in New York City has reached its lowest rate on record.²² As of 2009, the rate was 15.8% in the city,²³ as compared with 20.6% in the nation²⁴ and 18.0% in New York State.²⁵ At first one might think the relatively low smoking rate in New York City indicates that the City does not need greater freedom to supplement State and Federal regulations with its own ordinances. However, the City's uniquely low smoking rate may mean that the City actually faces special challenges in reducing its smoking rate further. Strategies for lowering a population's smoking rate may need to change as the rate continues to decrease, as the "hold-outs" who do not quit after the first regulations are in place may require a different impetus to do so. Additionally, the population of smokers might differ in urban areas like New York City. For example, the age, gender, education level, or income distribution could be dissimilar, and different cessation promotion strategies may not be equally effective among these different groups.

²² Press Release, New York City Department of Health and Mental Hygiene, New York City Smoking Rates Fall to Lowest Rate on Record, (May 5, 2009), *available at*, <http://www.nyc.gov/html/doh/html/pr2009/pr023-09.shtml> (accessed Mar. 22, 2011)

²³ Id.

²⁴ Centers for Disease Control and Prevention. Vital Signs: Current Cigarette Smoking Among Adults Aged ≥ 18 Years—United States, 2009. *Morbidity and Mortality Weekly Report* 2010;59(35):1135–40.

²⁵ Centers for Disease Control and Prevention, Behavioral Risk Factor Surveillance System, Prevalence and Trends Data, New York – 2009 Tobacco Use, *available at* <http://apps.nccd.cdc.gov/BRFSS/display.asp?cat=TU&yr=2009&qkey=4396&state=NY> (accessed Mar. 22, 2011).

Federal Laws to regulate tobacco products must try to create one-size fit all rules for the country in order to promote uniformity for regulated parties. With large and powerful cigarette companies holding a strong stake in minimizing regulation of their products, there may be a thumb on the scale against more stringent regulations. The tobacco industry would, reasonably, oppose inconsistent obligations from state to state or from city to city, yet some localities may have a heightened need and desire to regulate tobacco products and purchasing. Allowing cities to do so, as courts have interpreted FSPTCA to do, will create a legal regime that is more closely tailored to the needs of the American people without necessarily undermining the purpose of federal law or creating inconsistent obligations. For example, cities often pass ordinances that do not regulate the tobacco product or advertisement itself, such as laws that affect the location of cigarette sales or advertising. If the consensus of the people and, by extension, the administration in New York City is that smoking should be more aggressively discouraged than federal law mandates, that decision should receive deference unless it clearly undermines federal law. As a public health matter, we should support local efforts to promulgate rules that are more protective of public health without interfering with the preferences and decisions of other localities.

New York City, at least during the so far nine-year Bloomberg Administration, has been uniquely committed to promoting the public health of its citizens.²⁶ City initiatives include a “smoking ban in indoor workplaces, increased cigarette taxes,

²⁶ *NYC death rates at all-time low*, United Press International, Dec. 30, 2010, *available at*, http://www.upi.com/Health_News/2010/12/30/NYC-death-rates-at-all-time-low/UPI-83441293756209/ (accessed Mar. 22, 2011).

educational campaigns, and promotion of smoking cessation programs.”²⁷ Perhaps this focus is at least partially due to the relatively large share of deaths in the City that smoking causes. In fact “within New York City, roughly 7,500 people die from smoking annually – more than from AIDS, homicide, and suicide combined.”²⁸ To discourage the City from continuing to pursue these types of policies would be to effectively limit the City’s ability to provide necessary and desired protections for its people unless these protections are the same as those needed by the rest of the state or the nation.

B. A Brief History of City Autonomy

An understanding of the historical and legal framework that defines the relationship between cities and other government entities is useful to provide context for this paper’s discussion of the preemption issues New York City has faced with respect to tobacco regulation. As a starting point, it is helpful to consider the influential views of Alexander Hamilton and James Madison, who expressed concern about the prospect of decentralization of power in states and localities.²⁹ Their series of essays, collectively called the Federalist Papers,³⁰ expressed a vision of a Republic in which power was centralized in order to avoid the tyranny of the majority – a state in which a slight minority of people would be constantly oppressed. Madison feared that decentralization would cause a splintering of the people into factions that would create the existence of

²⁷ 23-34 94th St. Grocery Corp. v. New York City Bd. of Health, 10 CIV 4392 JSR, 2010 WL 5392876 (S.D.N.Y. Dec. 29, 2010), Declaration of Thomas A. Farley, Commissioner of the Department of Health and Mental Hygiene.

²⁸ Id.

²⁹ See Alexander Hamilton, James Madison, John Jay, *The Federalist Papers*, Yale University Press (2009).

³⁰ John Jay also contributed 5 articles to the series of 85 articles.

numerous lawless classes that would ultimately deprive the wealthy minority of their property. His view of democracies was of “spectacles of turbulence and contention... incompatible with personal security or the rights of property,”³¹ and his solution was to “extend the sphere” of influence by centralizing power in one large republic.³²

Madison and Hamilton expressed their views about the importance of the Supremacy Clause,³³ under which federal law may preempt state or city law in the case of a conflict. Hamilton characterized the principle of the Clause as inherent in the political structure of the nation: “A clause which declares the supremacy of the laws of the Union...only declares a truth, which flows immediately and necessarily from the institution of a federal government.”³⁴ Madison defended the Supremacy Clause as vital to the functioning of the nation,

“without which [the Constitution] would have been evidently and radically defective...The world would have seen, for the first time, a system of government founded on an inversion of the fundamental principles of all government; it would have seen the authority of the whole society every where subordinate to the authority of the parts; it would have seen a monster, in which the head was under the direction of the members.”³⁵

This potential “inversion” was viewed as something the drafters of the Constitution had wisely chosen to avoid by their inclusion of the Supremacy Clause.

Yet cities in America have been envisioned as “experimental communities,” where ideas are tested as communities “[try] out different patterns.”³⁶ Economist Charles Tibout described a model of decentralized power in which “consumer-voters” move to

³¹ James Madison, Federalist No. 10 (1787).

³² Id.

³³ Constitution of the United States, U.S.C.A. Const. Art. 6, cl. 2.

³⁴ Alexander Hamilton, Federalist No. 33 (1788).

³⁵ James Madison, Federalist No. 44 (1788).

³⁶ Robert Nozick, *Anarchy, State and Utopia* (1974).

the communities that best satisfy their set of preferences.³⁷ Tiebout's idea assumes a large variance in the patterns of public goods cities offer, implying an underlying assumption that cities can shape their own identity to reflect the needs and desires of their residents. Similarly, Robert Nozick, a political philosopher and Harvard professor, discussed a libertarian system in which communities compete for residents thereby creating multiple co-existing utopias reflecting a range of individual choices.³⁸

If Nozick and Tiebout envisioned an idea of cities that is at all descriptive rather than idealistic, it may have more applicability in America's early history than it does today. In colonial New England, the locus of power was found in individual towns.³⁹ In Massachusetts, the state was viewed as a collection of localities and state power an aggregation of local power. From the time of settlement until the American Revolution, it became increasingly clear to the government of Massachusetts that "the public peace...would have to be separately secured in each town in the province." Further, "local institutions...became the prime political institutions of the new provincial society."⁴⁰ When representatives of local governments in colonial Massachusetts felt the need to shift municipal law and policy to conform to local desires, they simply did so without interference from the state. Not only was "the Court's acquiescence in those local desires...quite regular," but "towns quite commonly set the law aside...when the law proved inconvenient for local purposes."⁴¹

³⁷ Charles Tiebout, A Pure Theory of Local Expenditures, J. Pol. Econ. 416 (1956).

³⁸ Nozick, *supra*.

³⁹ Michael Zuckerman, *Peaceable Kingdoms* (1970).

⁴⁰ Id.

⁴¹ Id.

The manifestation of such flexible and overriding city power in colonial Massachusetts did not persist into the twentieth century. The modern conception of cities in the American governmental system was defined in the Supreme Court’s 1907 decision in Hunter v. City of Pittsburgh.⁴² In Hunter, the plaintiffs opposed a decree entered by the State of Pennsylvania authorizing consolidation of the cities of Pittsburgh and Allegheny. Despite the fact that the majority of voters in Allegheny voted against the consolidation, the court held that a state’s action to unite two municipalities without approval by the majority of voters in each municipality did not violate due process of law. The implication of this decision, which has never been overruled, has been enormously significant: it means that a city is merely “the creature of the state.”⁴³ As a matter of federal constitutional law, states have “absolute discretion” over “the number, nature, and duration of the powers conferred upon” cities.⁴⁴

The consequence of this inherent constraint in the structure of local government law places doubt on the classic vision of cities as a level of government that fosters experimentation and variety. The Supreme Court’s holding in Hunter did not imply that cities have no power whatsoever – clearly cities are authorized to act with respect to some local matters – so the question of just how restricted city power actually was remained unsettled. Written in 1872 in a local government law treatise, “Dillon’s Rule” was one of the earliest attempts to answer this question.⁴⁵ According to this rule, city power must be traced to specific state legislative delegation. Further, the rule creates a presumption against the validity of city action. When a court finds “any fair, reasonable,

⁴² Hunter v. City of Pittsburgh, 207 US 161 (1907).

⁴³ City of Trenton v. State of New York, 262 US 182, 187 (1932)

⁴⁴ Hunter, at 178

⁴⁵ John Dillon, Municipal Corporations (5th ed. 1911)

substantial doubt concerning the existence of power...[it shall be] resolved...against the [municipal] corporation.”⁴⁶ This doctrine has been applied to severely limit city initiatives. For example, the town of Hurley, South Dakota was prevented from expanding food service at a city-owned bar,⁴⁷ and a rule promulgated in Arlington County, Virginia that would have extended employee health benefits to domestic partners of employees was invalidated.⁴⁸

Although Dillon’s Rule is still applicable to some local governments, a movement towards greater city autonomy prompted many states to expressly reject the doctrine in favor of “Home Rule.” The home rule movement began in the late nineteenth century with the goal of ensuring that cities had power over local affairs and carving out an area of city autonomy free of state control.⁴⁹ Since Missouri became the first state to adopt home rule in 1875, most states have come to recognize some form of home rule.⁵⁰ However, because home rule seeks to identify “a distinct sphere of *local* authority,”⁵¹ the benefits of a home rule charter depend largely on judicial determinations about what issues should be considered of local concern.

In practice, home rule provisions in state constitutions can be just as limiting as a regime based on Dillon’s Rule. The idea, established in Hunter, of the city as a creature of the state underlies and informs courts’ application of the home rule doctrine, and it has continued to support a “regime [that]...often encourages local governments to be cautious

⁴⁶ Id.

⁴⁷ Olesen v. Town of Hurley, 619 N.W.2d 324 (S.D. 2004).

⁴⁸ Arlington County v. White, 528 S.E.2d 706 (Va. 2000).

⁴⁹ Gerald E. Frug, Richard T. Ford, and David J. Barron, *Local Government Law* (5th Ed. 2010) 167.

⁵⁰ Id., at 168.

⁵¹ Id. (emphasis added).

and unimaginative.⁵² This cautiousness may be well founded; municipalities acting under Home Rule have been prevented from acting in a wide range of situations: Montgomery County, Maryland was barred from creating a private cause of action that would have increased protection against employment discrimination;⁵³ New Orleans was prohibited from enforcing an ordinance establishing a minimum wage higher than the federal rate;⁵⁴ and an ordinance passed in Telluride, Colorado requiring construction of affordable housing to mitigate new development was forced to yield to conflicting state law.⁵⁵ All of these attempts were struck down because, in the interest of uniformity across the state or the nation, the relevant law was not considered of purely local import. These cases might lead one to ask, what issues could be described as “purely” local? Would anything non-trivial be left within a city’s sphere of autonomy? The combination of the Supremacy Clause with either a Dillon’s Rule or Home Rule regime may plausibly create a legal structure that discourages the pursuit of the kind of variety that Tiebout and Nozick envisioned.

C. The Federal Cigarette Labeling and Advertising Act

The Federal Cigarette Labeling and Advertising Act, administered by the FTC, was enacted in 1965 with two announced purposes. The first was to inform the public about adverse health effects of cigarette smoking through warning notices on cigarette packages and advertisements.⁵⁶ The second, and more relevant to the preemption issue,

⁵² Barron, Reclaiming Home Rule, 116 Harv. L. Rev. 2255 (2003).

⁵³ McCrory Corp. v. Fowler, 570 A.2d 834 (Md. 1990).

⁵⁴ New Orleans Campaign for a Living Wage v. City of New Orleans, 825 So.2d 1098 (La. 2002).

⁵⁵ Town of Telluride v. Lot Thirty-Four Venture, L.L.C., 3 P.3d 30 (Colo. 2000).

⁵⁶ Federal Cigarette Labeling and Advertising Act, 15 USC § 1331(1)

was the purpose of protecting commerce and the national economy such that they are “not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.”⁵⁷ FCLAA sets out specific labeling requirements, mandating that all cigarette packages, advertisements, and outdoor billboards in the United States bare one of four “Surgeon General’s Warning” labels⁵⁸ on a rotating basis,⁵⁹ and specifying precise requirements for size, font, and placement of these labels.⁶⁰

FCLAA contains an express preemption provision, which disallows additional requirements for any “statement relating to smoking health...on any cigarette package,” except pursuant to other federal acts.⁶¹ The same section was amended by the Public Health Cigarette Smoking Act of 1969 to explicitly preempt state laws that would impose requirements “with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act,”⁶² unless the regulation deals only with the “time, place, and manner, but not content of the advertising or promotion of any cigarettes.”⁶³ Other provisions of FCLAA prohibit advertisements of cigarettes on electronic forms of communication under the jurisdiction of the FCC,⁶⁴ allow for criminal penalties⁶⁵ and injunctive proceedings⁶⁶ to be imposed on violators of the Act, exempts cigarettes for export (unless for distribution to members of the armed

⁵⁷ FCLAA, § 1331(2)(A)-(B)

⁵⁸ FCLAA, § 1333(a)(1)-(3)

⁵⁹ FCLAA, § 1333(c)

⁶⁰ FCLAA, § 1333(b)

⁶¹ FCLAA, § 1334(a)

⁶² FCLAA, § 1334(b)

⁶³ FCLAA, § 1334(c)

⁶⁴ FCLAA, § 1335

⁶⁵ FCLAA, § 1338

⁶⁶ FCLAA, § 1339

forces),⁶⁷ and establishes a smoking research, education, and information program and interagency committee reporting to Congress.⁶⁸

III. Preemption examples

In recent years, Courts have found three New York City tobacco ordinances to be preempted, at least in part, by FCLAA. The first involved the City's attempt in 1992 to require taxicabs to display one anti-smoking public health message for every four tobacco advertisements. The second, in 1998, restricted tobacco advertising near schools, playgrounds, and other places frequented by children. The third and most recent was an attempt by the city in 2009 to require cigarette vendors to display "gruesome" pictures of the negative health effects of smoking where cigarettes are sold. Although Congress' purpose to preempt such local regulation must be "clear and manifest" to "overcome the presumption that state and local regulation of health and safety matters can constitutionally coexist with federal regulation,"⁶⁹ this presumption has been insufficient to insulate these ordinances from FCLAA's relatively explicit preemption provision.

*A. Taxicab Health Messages*⁷⁰

In the early 1990's, an anti-tobacco counter-advertising campaign was found preempted by FCLAA as it applied to a private company that sued the City. When New York passed the Tobacco Product Regulation Act (Local Law)⁷¹ in October of 1992, the

⁶⁷ FCLAA, § 1340

⁶⁸ FCLAA, § 1341

⁶⁹ Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 715-16 (1985) (quoting Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)).

⁷⁰ Vango Media, Inc. v. City of New York, 829 F. Supp. 572, 573 (S.D.N.Y. 1993) aff'd, 34 F.3d 68 (2d Cir. 1994)

⁷¹ New York City Administrative Code §§ 17-701 et seq.

Acting Commissioner of the New York City Department of Consumer Affairs called this law “the toughest and most sweeping anti-tobacco legislation in the country.”⁷² The relevant, and most controversial, section of this ordinance requires that there be at least one public health anti-smoking message for every four advertisements promoting a tobacco product on any unit of advertising space.⁷³ Other sections of the same act prohibit sale of tobacco products on school property,⁷⁴ out-of-package,⁷⁵ by those less than 18 years of age,⁷⁶ to those less than 18 years of age,⁷⁷ and required merchants to display a sign stating that it is illegal to sell tobacco to minors.⁷⁸

As details of the public health message requirement were developed during hearings towards the end of 1992,⁷⁹ a heated debate was spurred. Even before it had been implemented, the Local Law pitted Mayor David Dinkins, City Council Speaker and Act sponsor Peter F. Vallone, and anti-smoking groups against tobacco companies and advertising companies,⁸⁰ including a company called Vango Media, Inc. (Vango) that sold advertising space on the roofs of taxicabs. Even the City acknowledged that the ordinance might be vulnerable to legal challenge; for example, lawyers for the Dinkins

⁷² Richard Schrader, Acting Commissioner, N.Y.C. Dept. of Consumer Affairs, *Letter to the Editor: Let Tobacco Companies Bear the Burden*, N.Y. TIMES, May 31, 1993

⁷³ Administrative Code, § 17-707.

⁷⁴ Administrative Code, § 17-708.

⁷⁵ Administrative Code, § 17-704.

⁷⁶ Administrative Code, § 17-705.

⁷⁷ Administrative Code, § 17-706.

⁷⁸ Id.

⁷⁹ James C. McKinley Jr., *Panel Weighs Requirement For Free Anti-Smoking Ads*, N.Y. TIMES, Dec. 18, 1991.

⁸⁰ Id.

administration acknowledged that the City might lack legal authority to apply the rule to baseball stadiums and to the Metropolitan Transportation Authority.^{*81}

Vango Media, a New York based company that was in the business of displaying advertisements on the roofs of taxicabs, challenged the ordinance as applied in the District Court for the Southern District of New York. The Company was at risk of suffering great losses if it were forced to display the City's public health messages. Vango's CEO, J. Rembrandt George, had been "instrumental in introducing the elongated, pyramid-like plasticized billboards that sit on top of many of New York City's taxicabs."⁸² The City contracted with Vango in 1975 to allow the rooftop taxicab ads, and both parties benefited financially from the deal – Vango received profits from ad sales and passed on some of that profit to the City in the form of a fifty dollars per taxicab fee for a one-year permit to carry exterior advertisements.⁸³ By the 1990's, about one third of the City's approximately thirteen-thousand car taxi fleet⁸⁴ of taxicabs carried advertising signs,⁸⁵ and Vango alone placed advertisements on sixteen-hundred of these taxis.⁸⁶

The public health message requirement of the Tobacco Product Regulation Act would have required Vango to provide space for these messages free of charge, reducing income for the company both by tying up ad space for the city and by potentially driving

* The MTA is the New York State public benefit corporation that runs the subway and bus transit system in the New York Metropolitan area.

⁸¹ Id.

⁸² Kenneth N. Gilpin, *J. Rembrandt George, Creator Of Idea of Taxi Ads, Dies at 73*, N.Y. TIMES, May 31, 1997.

⁸³ Ad Code, § 19-525

⁸⁴ New York City Taxi and Limousine Commission, "The State of the NYC Taxi" (2006), available at, http://www.nyc.gov/html/tlc/downloads/pdf/state_of_taxi.pdf. (accessed Mar, 17, 2011).

⁸⁵ Id.

⁸⁶ Vango Media, Inc. v. City of New York, 829 F. Supp. 572, 574.

away tobacco advertisers. Advertisements for cigarettes were extremely prevalent among Vango's ads – in fact, “Vango's taxi-top advertising primarily featured cigarette companies.”⁸⁷ No less than 75% of its advertising revenue came from cigarette advertisers.⁸⁸ Further, due to the terms of Vango's contract with the Metropolitan Taxi Board of Trade, which represented fourteen hundred of Vango's sixteen hundred taxis, Vango would have had to pay for the space on all of the company's cabs, regardless of whether Vango was able to obtain advertising to fill the space.⁸⁹ Considering how central tobacco advertising was to Vango's business, the public health message provision of the Act posed a grave threat.

Vango alleged six causes of action in its attempt to overturn the provision or at least invalidate its applicability to the City's taxi fleet, and the company sought summary judgment on three of these claims. First, Vango claimed that FCLAA preempted the provision. Next, the company claimed that the law violated its First Amendment Rights by requiring it to display messages contrary to the cigarette advertisements it displays. Last, Vango claimed that, with respect to some of its advertising, it was exempt from the law because of the terms of its contract with the City.⁹⁰ The judge granted summary judgment to Vango on the basis of his holding that FCLAA preempted the Local Law as it was applied to privately owned taxicabs for whose advertising space the city issued permits.⁹¹ The court did not express an opinion on the other grounds for summary

⁸⁷ David W. Chen, *Deal for Taxi-Top Ads*, N.Y. TIMES, Mar. 21, 1997.

⁸⁸ Vango, 829 F. Supp. at 575.

⁸⁹ Vango, 829 F. Supp. at 575.

⁹⁰ Vango, 829 F. Supp. at 574.

⁹¹ See Vango.

judgment offered by Vango, and it did not reach the issue of whether the Federal Act preempts the Local Law as applied to City-owned property.

The Court cited the Supreme Court's ruling in Cipollone v. Liggett Group, Inc.,⁹² a case that considered whether civil damage actions were preempted by FCLAA, to support its conclusion that "Congress intended to preempt precisely the type of local regulation at issue here."⁹³ The Justices in Cipollone disagreed about several aspects of the FCLAA preemption provision's scope, and two concurrences were filed in addition to Justice Steven's main opinion. However, according to the Court in Vango, all three opinions in Cipollone agreed that Congress intended the FCLAA preemption provision to preempt "positive enactments such as statutes and regulations."⁹⁴ The court in Cipollone also noted that the 1969 amendments to FCLAA broadened the Act's scope by prohibiting local laws creating requirements "*with respect to the advertising or promotion*,"⁹⁵ rather than the original text disallowing local requirements for statements "in the advertising."⁹⁶

The City argued that the Local Law was not preempted because it "[did] not require or prohibit anything with respect to the content, format or display of cigarette advertisements."⁹⁷ Following Cipollone's precedent, the court rejected this argument and read the preemption provision of FCLAA quite liberally. The Court stated that the Local Law was within the scope of the preemption provision because it "condition[ed] the legality of displaying cigarette advertisements on compliance with the letter of the Local

⁹² Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992).

⁹³ Vango, 829 F. Supp. at 578.

⁹⁴ Vango, 829 F. Supp. at 580 (quoting Cipollone at 521).

⁹⁵ FCLAA, § 1334. (emphasis added).

⁹⁶ Cipollone at 520

⁹⁷ Vango, 829 F. Supp. at 580.

Law.”⁹⁸ The court also rejected the City’s argument that the preemption provision does not reach the Local Law because the law does not regulate tobacco promoters or advertisers themselves, but rather those who own advertising space. In response, the court stated that the provision preempts local rules with respect to cigarette promotion or advertising and is not limited to laws that affect promoters or advertisers.⁹⁹ In short, the court held that the preemption provision applies when a local law is triggered by the placement of cigarette advertisements or when a local law “operates upon the same object” as the Federal Act.¹⁰⁰ Further, the court cited Congress’s second stated purpose of FCLAA, to avoid impeding commerce. Reading the Act consistently with this purpose, the court concluded that the Local Law undermined Congress’s intent by creating obligations that were exactly “diverse, nonuniform, and confusing.”¹⁰¹

The City appealed the ruling, but the 2nd Circuit Court of Appeals affirmed the District Court’s ruling one year after the initial decision. The Appeals court acknowledged the “laudable purpose” of the Local Law,¹⁰² but agreed with the lower court that the means of achieving that purpose were unlawful. The court echoed Madison’s advocacy of centralization, expressing a strong view of preemption as necessary to give force to the Supremacy Clause,¹⁰³ while it gave a brief nod towards the

⁹⁸ Id.

⁹⁹ Vango, 829 F. Supp. at 580.

¹⁰⁰ Vango, 829 F. Supp. at 582.

¹⁰¹ Vango, 829 F. Supp. at 583.

¹⁰² Vango Media, Inc. v. City of New York, 34 F.3d 68, 70 (2d Cir. 1994).

¹⁰³ Vango, 34 F.3d at 71.

presumption, motivated by federalism concerns, against federal preemption of states' police powers.¹⁰⁴

The Appeals Court took on its “relatively straightforward” task to “determine whether the Local Law is within the domain expressly preempted” by breaking down the preemption clause of FCLAA into its “three essential phrases.”¹⁰⁵ whether the law is a “requirement,” “based on smoking and health,” “with respect to the advertising or promotion of any cigarettes.” First, according to the court, Cipollone established that a “positive enactment” like the Local Law is plainly a “requirement” for the purposes of FCLAA.¹⁰⁶ Second, the court rejected the City’s argument that passage of the Local Law was motivated by the economic costs of smoking, as evidenced by a portion of the Local Law’s declaration of legislative findings and intent that discussed the increased healthcare costs and loss of productivity caused by smoking among City residents.¹⁰⁷ The court took a broader view of the intent and effect of the Local Law, and concluded that economic concerns were “secondary” to health as the City’s motivation.¹⁰⁸

Last, the court, admitting that this prong of its inquiry was the “most contentious,”¹⁰⁹ concluded that the Local Law created obligations with respect to advertising or promotion of cigarettes, even if it did so “only at the edges.”¹¹⁰ The court performed a textual analysis to delineate the scope of FCLAA’s preemption clause,

¹⁰⁴ Id.; See also New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995).

¹⁰⁵ Vango, 34 F.3d at 72.

¹⁰⁶ Id.

¹⁰⁷ Id., at 73

¹⁰⁸ Id.

¹⁰⁹ Id.

¹¹⁰ Id., at 74.

focusing on the meaning of the phrase “with respect to.”¹¹¹ The Appeals court cited the Supreme Court’s treatment of this phrase in Cipollone and its expansive reading of the similar phrase, “relating to,” in its relevant jurisprudence.¹¹² Acknowledging that the actual cigarette advertisements would not look different were the Local Law enforced, nor was the Law aimed at advertisers or promoters, the court found the fact that “advertisers and promoters like Vango would be substantially impacted” persuasive.¹¹³ Further, the court speculated that it may not have read FCLAA’s original language to preempt the local law, but, like the Cipollone court, it was influenced by the broadening effect of the 1969 amendment.¹¹⁴ Although the court recognized the potential benefits of the law, it based its conclusion solely on its reading of Congress’s clear intent to preempt this type of City ordinance.

B. Tobacco Advertising Restriction Near Schools and Playgrounds

Despite the defeat in Vango, New York City continued to pursue legislation with the goal of decreasing the health and economic burden of cigarette smoking among its residents. In 1998, the City Council voted overwhelmingly¹¹⁵ to pass the “Youth Protection Against Tobacco Advertising and Promotion Act,”¹¹⁶ after at least six public hearings had been held on the matter in as many months.¹¹⁷ This portion of the Administrative Code (Article 17-A) prohibited placement of advertising of tobacco

¹¹¹ Id., at 73.

¹¹² Id., at 74.

¹¹³ Id.

¹¹⁴ Id.

¹¹⁵ Abby Goodnough, *Law Limiting Cigarette Ads Is Overturned*, N.Y. TIMES, Dec. 16, 1998.

¹¹⁶ New York City Administrative Code §§ 27-508.1 to 27-508.6

¹¹⁷ Greater New York Metro. Food Council, Inc. v. Giuliani, 1998 WL 879721, 1 (S.D.N.Y. Dec. 16, 1998) *aff’d in part, rev’d in part*, 195 F.3d 100 (2d Cir. 1999) *abrogated by* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001).

products “within one thousand feet, in any direction, of any school building, playground, child day care center, amusement arcade or youth center, in any outdoor area.”¹¹⁸ Further, advertisements on the interior of buildings within the same radius were prohibited if they were likely to be visible from outside.¹¹⁹ Exceptions were made for motor vehicles,¹²⁰ some displays of Cigarette Company names,¹²¹ and, notably, for generic black and white signs (sometimes called “tombstone” signs¹²²), under a specified maximum size, that merely indicated that tobacco products were sold on premises.¹²³ Article 17-A granted the City the right to seek injunctive relief to remove advertisements in violation of the ordinance,¹²⁴ but it did not impose criminal liability on violators.¹²⁵

Immediately after Mayor Giuliani signed the law, a District Court Judge blocked enforcement of Article 17-A pending the outcome of a lawsuit filed by a trade association of small grocery stores, a group of national associations of advertisers, and a New York professional association with members from the advertising field.¹²⁶ Opponents of 17-A characterized it as an attempt by the City to meddle in legitimate advertising activities and as outside the scope of City authority,¹²⁷ and the District Court largely agreed, granting summary judgment to the plaintiffs. As in Vango, the plaintiffs brought both a First Amendment violation claim and FCLAA preemption challenge; and, as in Vango, the Court avoided the constitutional issue by deciding the case based on an analysis of

¹¹⁸ Administrative Code § 27-508.3(a)

¹¹⁹ Administrative Code § 27-508.3(b).

¹²⁰ Administrative Code § 27-508.3(e).

¹²¹ Administrative Code § 27-508.3(d), § 27-508.5.

¹²² Greater New York Metro. Food Council, 1998 WL 879721, 1

¹²³ Administrative Code § 27-508.3(c).

¹²⁴ Administrative Code § 27-508.4, § 27-508.6.

¹²⁵ Administrative Code § 27-508.7.

¹²⁶ Goodnough, *supra*.

¹²⁷ Id.

FCLAA’s preemption clause. The Court relied on the “clear guidance” provided by the Second Circuit in Vango¹²⁸ and applied the “three essential phrases” analysis that case established, using Cipollone to inform its interpretation of the scope of the FCLAA preemption provision.

The court found that 17-A was clearly a “requirement,” but it characterized the other two phrases as more contentious. On the question of whether 17-A created requirements “based on smoking and health,” the City argued, as it had in Vango, that the bill was motivated by non-health related concerns. In this case, the non-health concern the City invoked was the lack of enforcement of a pre-existing City law that prohibited the sale of tobacco to minors; in fact, the express purpose of the ordinance focused on this concern and did not mention health. However, the Court refused to take the City’s stated purpose “at face value,”¹²⁹ noting that the majority of references at the public hearings related to children’s health and that health was in fact the underlying purpose of 17-A.¹³⁰ Because “the health dangers posed to youth from smoking was of paramount importance in enacting the ordinance...the Court concludes that Article 17-A is ‘based on smoking and health.’”¹³¹

Whether the third phrase, “with respect to the advertising or promotion of any cigarettes,” was fulfilled “engendered the deepest split of opinions in this litigation.”¹³² In this case, the City argued for the Court to recognize a distinction between those requirements affecting the *content* of cigarette advertisements and those affecting their

¹²⁸ Greater New York Metro. Food Council, 1998 WL 879721, 3

¹²⁹ Id., at 4-5.

¹³⁰ Id.

¹³¹ Id., at 6.

¹³² Id.

location, with the latter being outside the scope of FCLAA preemption. The court rejected this distinction, again citing Vango in support of its reading of the “with respect to” part of the phrase as connoting “broad preemptive effect.”¹³³ The court also asserted that, even if it did adopt the City’s proposed distinction, its decision would not change,¹³⁴ because the “tombstone” sign provision of 17-A mandated the content of the generic signs – indeed, 17-A specified the exact text, color, and size of these signs.¹³⁵

The City found some success in its Appeal to the Second Circuit Court.¹³⁶ Upon reviewing the District Court’s findings *de novo* the Appeals court took a narrower view of FCLAA preemption, holding that only one provision, the “tombstone” sign requirement, of 17-A was preempted by FCLAA. The Court declined to read the FCLAA preemption provision literally, stating that such a reading would lead to absurd results in which a City could be disallowed from “prohibit[ing] a cigarette company from handing out free cigarettes in an elementary school yard.”¹³⁷ Further, the court cautioned against overly expansive readings in the preemption context as “subvert[ing] the presumption against preemption.”¹³⁸ Accordingly, the Second Circuit took a less textual and more purposive approach than did the District Court, asserting that even broad language like “with respect to,” should only be given effect as far as required to implement

¹³³ Id.

¹³⁴ Id., at 7.

¹³⁵ Administrative Code, § 27-508.3(c), *supra*

¹³⁶ Greater New York Metro. Food Council, Inc. v. Giuliani, 195 F.3d 100, 103 (2d Cir. 1999), *abrogated by* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001).

¹³⁷ Greater New York Metro. Food Council, 195 F.3d, at 105

¹³⁸ Id., at 106.

congressional intent¹³⁹ – in this case to avoid “diverse, nonuniform, and confusing” advertising standards.¹⁴⁰

With this Congressional intent in mind, the Court held that the tombstone provision was preempted because it created “unique regulations governing the content and format of cigarette advertising information.”¹⁴¹ The City offered two arguments on this matter, neither of which the Court found persuasive. First, the City argued that the provision was not a “requirement” because it only created voluntary obligations since retailers were not required to post tombstone signs at all. In response, the court stated that the provision did in fact impose conditions upon the display of these signs and therefore was not distinguishable from Vango in this respect. Second, the City claimed, as it had in the District Court, that 17-A was not “based on smoking and health” because it was motivated by law enforcement concerns rather than health. The Court instead followed Vango by looking “both [to] the purpose of the ordinance as a whole, and [to] the ordinance's actual effect, to determine whether it is ‘based on smoking and health’”¹⁴² and finding that a concern for health was “inherent” to 17-A.¹⁴³

Yet the Court went on to state that, except for the tombstone sign requirement, 17-A created only location restrictions, and therefore did not impose obligations “with respect to” advertising. According to the court, location-only restrictions, just like zoning regulations, do not burden advertisers or undermine the comprehensive federal

¹³⁹ Id.

¹⁴⁰ Id., at 107.

¹⁴¹ Id.

¹⁴² Id., at 108.

¹⁴³ Id.

scheme.¹⁴⁴ the judge could not see how “mere location restrictions can lead to the sort of ‘diverse, nonuniform, and confusing’ advertising standards that Congress sought to avoid when it enacted § 1334(b).”¹⁴⁵ Further, the Circuit Court stated that the presumption against preemption is particularly strong when dealing with States’ traditional police powers – of which zoning regulations and those directed at children’s safety and welfare are among the most fundamental and “intensely local.”¹⁴⁶ The intent of Congress was not sufficiently clearly stated to overcome such traditional state powers.

This small victory for the City was destined to be short-lived. Although a petition for a writ of certiorari submitted by the Plaintiffs was denied,¹⁴⁷ a case based on a controversy related to a strikingly similar law reached the Supreme Court in 2001 and abrogated the effect of the Second Circuit’s decision.¹⁴⁸ Lorillard Tobacco Co. v. Reilly involved a FCLAA preemption challenge, brought by four cigarette manufacturers,¹⁴⁹ a maker of smokeless tobacco products,¹⁵⁰ and several cigar manufacturers and retailers, to a law passed in Massachusetts. Like 17-A, the law at issue in Lorillard prohibited parties from displaying tobacco product advertisements either outdoors or indoors and visible from the outside, “in any location that is within a 1,000 foot radius of any public playground, playground area in a public park, elementary school or secondary school”¹⁵¹ and from placing advertisements “lower than five feet from the floor of any retail

¹⁴⁴ Id., at 109.

¹⁴⁵ Id.

¹⁴⁶ Id., at 109-10.

¹⁴⁷ Greater New York Metro. Food Council, Inc. v. Giuliani, 529 U.S. 1066 (2000).

¹⁴⁸ Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001).

¹⁴⁹ Lorillard Tobacco Company, Brown & Williamson Tobacco Corporation, R.J. Reynolds Tobacco Company, and Philip Morris Incorporated.

¹⁵⁰ U.S. Smokeless Tobacco Company

¹⁵¹ Code of Mass. Regs., § 21.04(5)(a)

establishment” within this radius.¹⁵² Further, the Massachusetts Act created a “tombstone” sign exception very similar to that of 17-A.¹⁵³

Writing for the Court, Justice O’Connor engaged in a similar process of statutory interpretation as the court in Vango, comparing the original and amended language of the preemption provision to conclude that Congress intended to expand its reach.¹⁵⁴ First, the court found that the “with respect to” element of FCLAA was fulfilled because “there is no question about an indirect relationship between the [Massachusetts] regulations and cigarette advertising because the regulations expressly target cigarette advertising.”¹⁵⁵ Next, the Court echoed the District Court in Greater Metro Food Council when it choose to reject the State’s argument that the “based on smoking and health” element was not fulfilled because, “the youth exposure concern is intertwined with the smoking and health concern.”¹⁵⁶ Further, Justice O’Connor found the content-location distinction that Massachusetts and New York City had introduced to be inconsistent with the text and the purpose of FCLAA,¹⁵⁷ despite having “some surface appeal.”¹⁵⁸

Justice O’Connor went on to briefly address the extent to which “local community interests” were restricted by the holding in this case. She attempted to specify the outer limits of the Court’s holding by stating that FCLAA preemption does not prevent states or cities from “enact[ing] generally applicable zoning restrictions on the location and size of advertisements that apply to cigarettes on equal terms with other products” or from

¹⁵² Code of Mass. Regs., § 21.04(5)(b)

¹⁵³ Code of Mass. Regs., § 21.04(6)

¹⁵⁴ Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 526.

¹⁵⁵ Id., at 547.

¹⁵⁶ Id., at 526-527.

¹⁵⁷ Id., at 527.

¹⁵⁸ Id., at 548.

“regulat[ing] conduct as it relates to the sale or use of cigarettes.”¹⁵⁹ In other words, despite the fact that, “from a policy perspective, it is understandable for the States to attempt to prevent minors from using tobacco products,”¹⁶⁰ Massachusetts could ban cigarette advertisements near schools and playgrounds only if it banned advertisements for all other products in the same enactment. Justice O’Connor went on to explain that, although the policy choices of local governments with respect to a local concern are limited by the enactment by Congress of a comprehensive scheme that attempts to address that same concern, “States and localities remain free to combat the problem of underage tobacco use by appropriate means.”¹⁶¹

Justice Stevens offered a dissenting opinion with respect to Justice O’Connor’s determination of FCLAA preemption, with which three other Justices joined. Justice Stevens emphasized that “under prevailing principles, any examination of the scope of a preemption provision must start with the assumption that the historic police powers of the States [are] not to be superseded by...Federal Act unless that [is] the clear and manifest purpose of Congress.”¹⁶² Justice Stevens went on to say that preemption provisions should be interpreted narrowly when applied to regulations, like the one at issue in Lorillard, which implicate “powers that lie at the heart of the States' traditional police power.”¹⁶³

This type of narrow reading of the FCLAA preemption provision, in the context of the Act’s purpose, structure, and legislative history, lead the dissenters to conclude that

¹⁵⁹ Id.

¹⁶⁰ Id., at 570.

¹⁶¹ Id., at 571.

¹⁶² Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 591 (Stevens, J. concurring in part, concurring in the judgment in part, and dissenting in part) (internal quotes removed).

¹⁶³ Id.

“all signs point inescapably to”¹⁶⁴ a content-location distinction in the FCLAA preemption provision.¹⁶⁵ Only preemption of the content of cigarette advertising would be necessary to achieve Congress’s intention to prevent a “difficult and costly...patchwork regulatory system.”¹⁶⁶ On the other hand, location-based regulations would not even “impose a significant administrative burden” on advertisers, because “divergent local zoning restrictions on the location of sign advertising are a commonplace feature of the national landscape and cigarette advertisers have always been bound to observe them.”¹⁶⁷ Further, restrictions on the location of advertising would not be confusing because “laws prohibiting a cigarette company from hanging a billboard near a school in Boston in no way conflict with laws permitting the hanging of such a billboard in other jurisdictions.”

To address the claim by the Court’s majority that the 1969 amendment had greatly expanded the scope of FCLAA’s preemption provision, Justice Stevens argued that when the provision is not “ripped from its context...it is quite clear that the 1969 amendments were intended to expand the provision to capture a narrow set of content regulations...not to fundamentally reorder the division of regulatory authority.”¹⁶⁸

Although Lorillard did not specifically overrule Greater Metro, it did indirectly abrogate its holding. The New York Times characterized the case as a victory for tobacco companies, and speculated that the decision “may well have a fatal effect” on the New

¹⁶⁴ Id., at 595.

¹⁶⁵ See Id. at 592.

¹⁶⁶ Id., at 593.

¹⁶⁷ Id., at 594, (quoting Greater New York Metro. Food Council, Inc. v. Giuliani, 195 F.3d 100, 109).

¹⁶⁸ Id., at 595.

York's similar law, as well as laws passed in Chicago and Baltimore.¹⁶⁹ Jeffrey D. Friedlander, first assistant corporation counsel for the City of New York stated that it would be "unlikely given today's decision by the Supreme Court" that New York could find "differences that would allow the city to argue that our law can go into effect."¹⁷⁰

*C. Point of purchase posters*¹⁷¹

One of New York City's most recent efforts to discourage cigarette smoking among its residents was a counter-advertising campaign passed into law in September, 2009 that required bodegas, convenient stores, and other businesses selling cigarettes to post "tobacco health warning and smoking cessation signage" near the cash register or where cigarettes were displayed.¹⁷² The New York City Health Department proposed the rule that, for the first time in the country, would require people about to buy cigarettes at the corner store to be confronted with images of "what a blackened lung looks like...what mouth cancer looks like...what it looks like when you have throat cancer."¹⁷³ Over the summer, the department worked on drafting the law and announced a plan to hold a hearing and vote.¹⁷⁴

During the months the law was in effect, it created specific requirements for stores that fell under its control, comprising approximately 12,000 retail stores in the

¹⁶⁹ Linda Greenhouse, *The Supreme Court: Supreme Court Roundup; Justices Rein in Local Regulation of Tobacco Ads*, N.Y. TIMES, June 29, 2001.

¹⁷⁰ *Id.*

¹⁷¹ O'Connor, *supra*

¹⁷² 24 RULES OF THE CITY OF NEW YORK § 181.19

¹⁷³ John Valenti, *New York may require warning signs for tobacco retailers*, Newsday, June 25, 2009.

¹⁷⁴ *Id.*

municipality.¹⁷⁵ The law applied to any person in the business of selling cigarettes *face-to-face* to consumers in New York City.¹⁷⁶ These businesses had to use signage designed by the Department of Health and Mental Hygiene (DHMH), which were to contain information about the adverse health effects of tobacco used, a pictorial image illustrating these effects, and information about how to get help to quit using tobacco.¹⁷⁷ The signs would be produced in two sizes from which retailers could choose; one no larger than 1 square foot – meant to be small enough to fit on a cash register – and the other, as large as 4 square feet.¹⁷⁸ The small sign was to be posted “on or within 3 inches of each cash register...unobstructed...and...read easily,”¹⁷⁹ while the large sign was to be posted at the place in the store where tobacco products at a specified height.¹⁸⁰ The retail stores were required to display modified signage if DHMH chose to edit the content of the posters,¹⁸¹ and the owners could be prosecuted through an agency adjudicative proceeding for any violation.¹⁸² DHMH ultimately designed three signs: one depicted a brain damaged by a stroke, another showed a decaying tooth and gums, and the last displayed a diseased lung.¹⁸³

¹⁷⁵ Jennifer 8. Lee, *City Proposes Antismoking Signs at Cash Registers*, N.Y. TIMES, Jun. 24, 2009.

¹⁷⁶ 24 R.C.N.Y. 181.19(a)

¹⁷⁷ 24 R.C.N.Y. 181.19(b)(1)(a)-(c)

¹⁷⁸ 24 R.C.N.Y. 181.19(b)(2)(a)-(b)

¹⁷⁹ 24 R.C.N.Y. 181.19(c)(1)

¹⁸⁰ 24 R.C.N.Y. 181.19(c)(2)

¹⁸¹ 24 R.C.N.Y. 181.19(d)

¹⁸² 24 R.C.N.Y. 181.19(e)

¹⁸³ Images of the posters can be accessed at:

http://reason.com/assets/mc/jsullum/2010_10/anti-smoking-poster-lungs.jpg,

http://reason.com/assets/mc/jsullum/2010_10/anti-smoking-poster-tooth.jpg, and

http://reason.com/assets/mc/jsullum/2010_10/anti-smoking-poster-brain.jpg

After the “gruesome” posters were developed and released, two New York Retail Associations, the country’s three largest tobacco companies,¹⁸⁴ and two individual New York City grocery stores¹⁸⁵ promptly sued the City. Through the media, these parties announced their claim that the antismoking poster rule violated the First Amendment rights of the retail stores by forcing the stores to “undertake...advocacy on behalf of the city”¹⁸⁶ The Plaintiffs were eventually granted summary judgment, but not on the claim of a First Amendment violation. Rather, Judge Rakoff of the United States District Court for the Southern District of New York held that the New York City law was preempted by FCLAA.¹⁸⁷ The court did not reach the other grounds claimed by the plaintiffs: that the law constituted a free speech violation and that the Board of Health had exceeded its authority by promulgating the rule.

Not surprisingly, Judge Rakoff’s ruling focused most heavily on an analysis of FCLAA’s preemption provision. The City conceded that the ordinance is a “requirement based on smoking and health,”¹⁸⁸ so the analysis focused on the “with respect to advertising or promotion of any cigarettes” portion of the provision. In the City’s defense, it first argued that a reading of the provision must construe the phrase “with respect to” sufficiently narrowly so not to lead to absurd results.¹⁸⁹ If read literally, the City argued, this provision could preempt even state laws designed to curb fraud in

¹⁸⁴ R.J. Reynolds, Philip Morris and Lorillard

¹⁸⁵ Alison Gendar, *Tobacco giants Reynolds, Philip Morris & Lorillard claim graphic NYC smoking posters go too far*, N.Y. DAILY NEWS, June 03, 2010.

¹⁸⁶ Id.

¹⁸⁷ 23-34 94th St. Grocery Corp. v. New York City Bd. of Health, 10 CIV 4392 JSR, 2010 WL 5392876 (S.D.N.Y. Dec. 29, 2010) 4.

¹⁸⁸ Id., at 2.

¹⁸⁹ Id.

cigarette advertising and promotion.¹⁹⁰ Similarly to the court in Vango, the District Court here cited FCLAA’s legislative history, particularly the 1969 amendment, to discount this argument in favor of a narrow reading of the Act. Holding that the test articulated by the Second Circuit in Vango applied equally to promotion as it did to advertising, the court articulated a refined rule, stating, “A local regulation with even an indirect relationship to cigarette... promotion is nonetheless preempted by [FCLAA] if it imposes conditions that substantially impact such ...promotion.”¹⁹¹ Applying this rule, the court held that “calling for tobacco retailers to post a large anti-smoking sign...plainly imposes conditions on the promotion of cigarettes.” As for the smaller sign posted near the cash register, the court said, “A clear nexus still exists.”¹⁹²

Next, the City argued that most precedent on preemption under FCLAA dealt with advertising as opposed to promotion, as did the controversy in Vango. The word “promotion” is not defined within the act itself, and the City argued for a narrow conception of the word “promotion” that would include only activities that “add extra value to the consumers’ underlying purchase, [such as] a discount...[or] free samples.”¹⁹³ The court, however, read the word promotion as a commercial term of art to include “any act...that furthers the sale of merchandise,”¹⁹⁴ and in the context of cigarette advertising, to clearly encompass point-of-purchase displays.¹⁹⁵ Further, the court stated that the addition of the word “promotion” to FCLAA’s preemption provision in the 1969

¹⁹⁰ Id.

¹⁹¹ Id., at 4, (quoting Vango, 34 F.3d 68, at 71-75) (internal quotation marks removed).

¹⁹² Id., at 4.

¹⁹³ Id., at 3

¹⁹⁴ Id., at 3, (quoting Jones v. Vilsack, 272 F.3d 1030, 1036 (8th Cir. 2001)) (internal quotations removed).

¹⁹⁵ Id., at 4.

amendments, along with the modification that added the phrase “with respect to,” served to indicate Congress’s intention to broaden the preemptive scope of the Act.¹⁹⁶ Using the its reading of Congress’s intent based on legislative history to bolster its interpretation of the “plain meaning” of the provision, the court concluded that the public health posters required by the ordinance constituted promotion under FCLAA “by any standard.”¹⁹⁷ The City plans to appeal.¹⁹⁸

IV. Conclusion

In all of these cases, with the exception of the dissenters in Lorillard and the Second Circuit Judge who wrote the decision in the Greater Metro Food Council appeal, the court did no more than acknowledge the presumption against preemption. Its relevance to their analysis seemed to end there. In contrast, their reverence for the Supremacy Clause is strong. It may seem as though a principle that is explicit in the Constitution should be given more weight than a common law “presumption,” but this presumption reflects a concern for Federalism – a principle that is also enshrined in the Constitution, in the powers reserved to the states under the Tenth Amendment. By not fully considering this presumption, the opinions can be less than satisfying. In Vango, for example, it remains unclear from the court’s argument why this law would be particularly “confusing” with respect to cigarette advertising.

The non-conforming judges found a way to reconcile the Tenth Amendment and Article VI of the Constitution by considering the values implicated by each when

¹⁹⁶ Id.

¹⁹⁷ Id.

¹⁹⁸ Katherine Hobson, Wall Street Journal Health Blog, *NYC Will Appeal Judge’s Decision on Anti-Smoking Posters*. (Dec. 30, 2010, 10:43 AM) <http://blogs.wsj.com/health/2010/12/30/nyc-will-appeal-judges-decision-on-anti-smoking-posters/>

interpreting the Congressional grant of authority represented by FCLAA. Their interpretation did a better job of protecting the comprehensive federal scheme established by Congress through FCLAA from being undermined by local laws, without invalidating local laws that did not threaten the Act's purpose. If the preemption clause is in fact ambiguous, as it likely is given the 5-4 split of Supreme Court justices on the question of its proper scope, then, for the reasons stated above, cities should be given a wide berth as when seeking achieve laudable public health goals. It is ironic and unfortunate that, under FCLAA preemption jurisprudence, cities must avoid characterizing local laws as motivated by health concerns in order to avoid preemption.

Through its savings and preservation provisions, FSPTCA is unlikely to be used to invalidate local laws to the extent that FCLAA has. The legal regime that it creates has left space for "local sensibilities." This paper illustrates that Cities can experience very real limitations when Congress instead includes an express preemption provision like the one in FCLAA. New York City has been able to enact strict regulations with respect to smoking, including a recent victory in which the City expanded its smoking ban to parks and beaches.¹⁹⁹ But if courts took the presumption against preemption more seriously, cities like New York would gain valuable policy-making power, making them better able to address local problems and to shape their own identity as one of our democratic society's "multiple utopias."

¹⁹⁹ Hernandez, *Smoking Ban for Beaches and Parks Is Approved*, supra.