

08-____-CV

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

NEW YORK STATE RESTAURANT ASSOCIATION,

Plaintiff-Appellant,

v.

NEW YORK CITY BOARD OF HEALTH, ET AL.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK IN 2008 CIV. 1000
HONORABLE RICHARD J. HOLWELL

**EMERGENCY MOTION TO CONTINUE
STAY OF ENFORCEMENT PENDING APPEAL**

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April 22, 2008

Plaintiff-Appellant, New York State Restaurant Association (“NYSRA”), respectfully requests that this Court enter a stay, pending appeal, of enforcement of a new regulation that requires national chain restaurants with locations in New York City to post calorie information on their menus and menu boards in the manner mandated by the regulation. The New York City Board of Health justifies the regulation—the first of its kind—on the theory that it “might” reduce obesity in New York City.

Defendants first proposed a version of the regulation more than a year and a half ago. Defendants consented to—and the district court ordered—a series of stays of enforcement of the regulatory initiative. Exs. A-C.¹ The district court struck down the original regulation in September 2007, but upheld a new version of the regulation on April 16, 2008. Defendants would not consent to a further stay pending appeal. After the close of business on Friday, April 18, 2008, the district court issued an order refusing to grant a stay pending appeal but extended the stay then in effect only to April 25, 2008 to provide plaintiff time to apply to this Court. Ex. D; Milburn Dec. ¶¶21.²

FACTS

In September 2006, the Board of Health announced its plan to begin requiring calorie labeling in national chain restaurants. *See* Ex. E. The Board did not

¹ Documents and declarations referenced herein are attached as Exhibits (“Ex. _”) to the Declaration of Nancy G. Milburn (“Milburn Dec.”), dated April 22, 2008, submitted herewith.

² Notwithstanding this stay until April 25, the Department of Health has currently posted on its website a compliance document stating that enforcement of the regulation shall begin as of April 22, 2008. Milburn Dec. ¶¶ 21, 27; Ex. W.

invoke its emergency powers, available to address “grave and imminent peril” to the public health. NYC Charter § 563. Rather, the Board followed an ordinary notice and comment schedule and adopted its calorie-labeling regulation in December 2006. Milburn Dec. ¶3. By its terms, the regulation was to become effective on July 1, 2007, seven months after its adoption. At that time, the Board viewed the new regulation as an experiment: “Because we are breaking new ground with this initiative, it is crucial that we evaluate our efforts so we can assess their impact and help combat obesity in New York City and the nation.” Ex. F.

On June 14, 2007, plaintiff filed an action challenging the 2006 regulation on preemption and First Amendment grounds. *NYSRA v. New York City Board of Health*, No. 2007 Civ. 5710 (“*NYSRA I*”). Defendants then consented to a three-month stay of all enforcement (to October 2007) to allow more time for defendants to brief the issues and for the district court to deliberate. Milburn Dec. ¶¶6, 16.

In September 2007, the district court entered a final judgment permanently enjoining enforcement of the regulation because it was preempted by the Nutrition Labeling and Education Act (“NLEA”), 21 U.S.C. §§ 343(r), 343-1(a)(5). Ex. G (enclosing *NYSRA I*, 509 F. Supp. 2d 351 (S.D.N.Y. 2007)). However, in *dicta*, the court suggested a revision to the regulation that it believed would allow defendants to avoid preemption. The court made the suggestion *sua sponte*. It was not briefed by either party.

Defendants elected not to appeal. Instead, they followed the district court’s suggestion on how to rewrite the regulation. The Board proposed the new regulation on October 24, 2007 and (after notice and comment) adopted it on January 22.

Ex. H. The regulation was to take effect March 31. Plaintiff immediately brought a new action to enjoin the modified regulation, moving for a preliminary injunction.³ After briefing and argument, defendants consented to—and the district court ordered—two additional stays of enforcement to allow further deliberation on the motion. Exs. B, C. The district court then denied the injunction. Ex. I. It also denied a stay pending appeal, but did enter the above-referenced interim stay, to allow time for plaintiff to apply to this Court for a stay. Ex. D.

ARGUMENT

In deciding whether to continue a stay or injunction pending appeal, this Court considers: “(1) whether the movant will suffer irreparable harm absent a stay, (2) whether a party will suffer substantial injury if a stay is issued, (3) whether the movant has demonstrated ‘a substantial possibility, although less than likelihood, of success’ on appeal, and (4) the public interests that may be affected.” *Hirschfeld v. Bd. of Elections*, 984 F.2d 35, 39 (2d Cir. 1993).

1. Substantial Possibility of Success on Appeal. This appeal involves two serious constitutional questions of first impression concerning the power of a local regulator to impose burdens on its citizens.

a. Preemption. The dispositive preemption issue is this: when restaurants post calorie information on their menus, are such statements “claims” that charac-

³ As required by the Southern District’s internal operating procedures, because the new case was not a related case, see *Irish Lesbian and Gay Organization v. Giuliani*, 918 F. Supp. 728 (S.D.N.Y. 1996), it went into the random assignment system and was assigned to the Honorable Colleen McMahon. However, shortly after the parties had appeared before her and set a briefing schedule, Judge McMahon reassigned the case to the judge who decided *NYSRA I*. According to the transfer order, “Judge Holwell called to inform me that he wants to take the case because it implicates his prior ruling.” Ex. J.

terize the level of a nutrient in food within the meaning of the NLEA and the regulations thereunder promulgated by the FDA? *See* 21 U.S.C. § 343(r)(1), 21 C.F.R. § 101.13(b). If so, then the statements must comply with the FDA's regulations promulgated under the NLEA's subsection (r)—which govern nutrient content “claims” made by all purveyors of food—even though the statements are not covered by subsection (q), which requires nutrition fact panels on packaged food, and from which restaurants are largely exempt. 21 U.S.C. §§ 343(q), (r).

If the statements are “claims” within the meaning of the statute, then they are covered by the express preemption provision that corresponds to subsection 343(r). 21 U.S.C. § 343-1(a)(5). This is so even though the statements may not be covered by the different preemption provision that corresponds to subsection (q), 21 U.S.C. § 343-1(a)(4). The preemption provision relating to “claims” provides:

[N]o State or political subdivision of a State may directly or indirectly establish under any authority or continue in effect as to any food in interstate commerce —* * *

(5) any requirement respecting any claim of the type described in section 343(r)(1) of this title, made in the label or labeling of food that is not identical to the requirement of section 343(r) of this title, except a requirement respecting a claim made in the label or labeling of food which is exempt under section 343(r)(5)(B) [covering claims by restaurants concerning cholesterol, saturated fat and dietary fiber and nutrients determined by the FDA to increase the risk of disease].

21 U.S.C. § 343-1(a)(5) (emphasis supplied).

The Board's regulation is indisputably “not identical to” the relevant regulations promulgated under the NLEA. Federal law gives restaurants discretion and flexibility in whether or how to present nutrition information such as calories.

21 C.F.R. § 101.10;⁴ *see* Ex. K. The Board's regulation removes that discretion and mandates the precise manner of presentation.

The central preemption question, then, is whether a restaurant's statement of the amount of calories (e.g., "100 calories") is a "claim" within the meaning of the NLEA. This question was resolved conclusively by the FDA, which defined a "claim" under the NLEA as "any direct statement about the level (or range) of a nutrient in the food, e.g., 'low sodium' or 'contains 100 calories.'" 21 C.F.R. 101.13(b)(1). This definition, promulgated under the agency's delegated authority after notice and comment, is entitled to controlling weight. *United States v. Haggart Apparel Co.*, 526 U.S. 380, 390, 392 (1999).

(i) *NYSRA I*. In *NYSRA I*, defendants argued that the mere statement of the amount of calories (e.g., "100 calories") is not a "claim" under the statute. They argued that only "qualitative" statements (as opposed to "quantitative" statements) should be considered "claims" under the statute. Defendants based this argument on "legislative intent" gleaned from snippets of legislative history (mainly floor statements); the "architecture" of the statute (that is, the relationship between subsection (q)'s labeling requirements and subsection (r)'s regulation of claims); and a perceived "regulatory vacuum" that would exist by virtue of the express preemption provision if the FDA's definition were allowed to stand.

In *NYSRA I*, the court correctly rejected these arguments. The FDA's

⁴ "Presentation of nutrition labeling may be in various forms, including those provided in § 101.45 [concerning certain unprocessed foods] and other reasonable means." Under §101.10/ §101.45, a restaurant may communicate nutritional information through any combination in-store signs, posters, brochures, notebooks, charts, and "other reasonable means." 21 C.F.R. 101.45.

definition—which has the force of law—plainly encompasses quantitative statements (“100 calories”) as well as qualitative statements (“low in fat”). 21 C.F.R. § 101.13(b);⁵ *accord NYSRA I*, 509 F. Supp. 2d at 359-60.

But the court in *NYSRA I* did not stop there. It suggested a way for the Board to rewrite the regulation in order to save it. The regulation before the court applied only to restaurant chains that already supplied nutritional information (including calories) voluntarily, albeit not in the format that the Board demanded. Ex. E. The district court suggested that the Board rewrite the regulation to apply to *all* national chains. Because the restaurants would now be subject to a state mandate, the court contended, they would then be providing the information “involuntarily” rather than “voluntarily.” And, according to the court’s *dicta*, if the statement was “involuntary” (that is, mandated by state or local law), the express preemption provision would no longer apply. 509 F. Supp. 2d at 362-63.

No one had briefed this “voluntary”/“mandatory” theory. Nor had any other

⁵ Before promulgating the regulation containing this definition, the FDA had been asked to *exclude* statements about “simple factual information” from the definition of “claim.” 58 Fed. Reg. 2302, 2303 (Jan. 6, 1993). The FDA, however, at pp. 2303-04, determined that a quantitative factual statement about the amount of a nutrient is a “claim” within the meaning of the statute:

The agency * * * does not agree that the scope of the statute and the regulations excludes statements of the amount of a nutrient in a food. The [distinction] the comment draws between “nutrient descriptors” and “nutrient content” claims is unpersuasive. * * * [I]f statements of the amount and percentage of nutrients were not subject to section 403(r)(1)(A) of the act, there presumably would have been no need for Congress to express its desire that such claims be permitted by the regulations. Accordingly, FDA concludes that section 403(r)(1)(A) of the act and therefore these final regulations apply to statements of the amount of a nutrient in food as well as to statements of the level of a nutrient in food.

court ever considered it. Milburn Dec. ¶8. Indeed, so far as we have been able to discern, the decision in *NYSRA I* was the first time anyone had ever suggested that section 343-1(a)(5) applied *only if* the claims at issue were “voluntary,” and that a state could escape the preemption statute by “mandating” the statements otherwise covered by subsection (r) and its corresponding preemption provision.

(ii) *NYSRA II* (the instant case). Defendants elected not to appeal. Instead, they followed the district court’s guidance and changed their regulation so that it applied to all chain restaurants with more than fifteen locations, as suggested in *NYSRA I*. In opposing the motion for a preliminary injunction against the revised regulation, defendants supported the “voluntary”/“involuntary” distinction with essentially the same arguments they had offered in *NYSRA I*—the “architecture” of the statute, the claimed relationship between subsections (q) and (r), the floor statements supposedly revealing “legislative intent,” and a perceived “regulatory vacuum” if the preemption statute were applied as written.

This time, the court upheld the regulation (the substance of which it had earlier suggested). Several profound flaws infect the district court’s reasoning.

First, and most important, the district court simply ignores the FDA’s regulatory definition of “claim.” That definition does not say that a “claim” is “any voluntary direct statement.” The definition says that a “claim” is “any direct statement.” The district court ignored this dispositive definition.⁶

⁶ The district court also ignored additional regulatory language:

Information that is required [e.g., calories] or permitted [e.g., potassium] by § 101.9 [mandatory nutrition labeling requirements for packaged food per section 343(q)] or § 101.36 [mandatory labeling requirements for dietary supplements],

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Second, the district court's decision would, if accepted, turn the concept of express preemption on its head. The purpose of a preemption statute is to preclude state mandates. But now, according to the district court, state and local authorities have plenary authority to exempt themselves from the preemption provision simply by "mandating" the very thing otherwise preempted. The very thing the statute is designed to prohibit—state mandates—is removed from the coverage of the statute by the very fact that the state mandates it. That is an odd way to read a preemption statute. In fact, the reading renders section 343-1(a)(5) meaningless.

Third, the district court mistakenly believed that Congress had expressly preserved all state power to impose menu labeling requirements on restaurants. Ex. I at 9. The court observed that subsection (q) does not apply to restaurants and that consequently its preemption provision (§ 343-1(a)(4)) does not apply to restaurants either. *Id.* But the district court incorrectly thought that this non-applicability was the same thing as an express "preservation" of plenary state power to regulate, notwithstanding any other provision of federal law. That is faulty logic. When Congress intends to reserve all regulatory power in a particular

Footnote continued from previous page

as applicable, to be declared in nutrition labeling, ***and that appears as part of the nutrition label***, is not a nutrient content claim and is not subject to the requirements of this section. ***If such information is declared elsewhere in the label or in labeling, it is a nutrient content claim and is subject to the requirements for nutrient content claims.***

21 CFR § 101.13(c) (emphasis supplied). The district court disregarded the highlighted text of the regulation. That text provides that a simple factual statement is a claim unless it "appears as part of the nutrition label." Nutrition statements in restaurants do not appear on "the nutrition label" referenced in the regulation, because restaurants are not subject to 21 C.F.R. § 101.9, per section 343(r). Such statements thus appear "elsewhere...in labeling," and are thus "subject to the requirements for nutrient content claims." *Id.*

field to the states, it does so expressly. To take one prominent example, the McCarran-Ferguson Act provides: “The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance.” 15 U.S.C. § 1012. The restaurant exception in section 343(q)(a)(4) is nothing like that. Unlike the McCarran-Ferguson Act, the exception here says nothing about whether any other federal law will or will not preempt state law.

Fourth, the district court seems to have felt compelled to ignore the FDA’s definition of a “claim” and to read the preemption provision in the odd way described above to avoid what the court thought was a “regulatory vacuum.” However, if there were a regulatory gap in the statute, it would be the court’s duty to point that out to Congress, not to rewrite the statute or regulations. *See Rowe v. New Hampshire Motor Transport Ass’n*, 128 S. Ct. 989, 998 (2008) (Ginsburg, J., concurring separately “to emphasize the large regulatory gap left by an application of the FAAAA perhaps overlooked by Congress, and the urgent need for the National Legislature to fill that gap.”).

More significantly, there is no regulatory gap. In fact, Congress filled the space that the district court believed to be empty. Congress expressly delegated to the FDA the power to permit state or local labeling regulations on a case-by-case basis irrespective of the express preemption provision of the statute. Under a separate provision of the NLEA, the FDA can waive the preemption provision if

the agency concludes that the proposed state regulation “would not unduly burden interstate commerce” and “is designed to address a particular need for information” not met by the federal scheme. 21 U.S.C. § 343-1(b). The FDA has promulgated detailed regulations outlining what showing needs to be made. The district court simply ignored this statute and its accompanying regulations.

In denying plaintiff a stay, the district court acknowledged that “no court of appeals has addressed the preemption issue.” Ex. D at 3. Typically, the existence of a serious question of first impression weighs heavily in support of a stay pending appeal.⁷ But the district court went on to say that its analysis is “entirely consistent with the analysis of two other district courts.” *Id.* That is incorrect. Neither of those courts held (or even suggested) that nutrition information statements lose their status as “claims” by operation of state law.⁸ No court, other

⁷ *Miller v. Brown*, 465 F. Supp. 2d 584, 596 (E.D. Va. 2007) (“While the Court cannot say that Defendants are likely to prevail in their appeal, the Court does recognize that this case raises an issue of first impression. Because the Fourth Circuit may resolve the issue differently, Defendants have at least demonstrated a ‘substantial case on the merits.’”); *Simon Property Group, Inc. v. Taubman Centers, Inc.*, 262 F. Supp. 2d 794, 798 (E.D. Mich. 2003) (a party can satisfy the “likelihood of success” factor “where substantial legal questions or matters of first impression are at issue and the equities favor maintaining the status quo”); *Goldstein v. Miller*, 488 F. Supp. 156, 175 (D. Md. 1980) (“[D]espite this Court’s strong belief as to the correctness of its views . . . , there is little doubt that at least some of the issues raised in these cases present serious questions of first impression. For that reason, this Court concludes that plaintiffs have met the burden imposed by the [likelihood of success] standard.”).

⁸ The district court also cites plaintiff’s earlier description, in briefing *NYSRA I*, of subsection (q) as “mandatory” and subsection (r) as governing “voluntary” statements. Ex. I at 5 n.5. Subsection (r) does not mandate that food providers publish anything; it only sets forth requirements – definitions, appearance, placement of claims – that must be followed in the event claims are made. Therefore, when discussing subsection (r), plaintiff in *NYSRA I* (like the FDA itself) referred to statements by restaurants as being voluntary because, in fact, they were not mandated by the NLEA. The same is true of the term’s use in *Reyes v. McDonald’s Corp.*, 2006 WL 3253579 *4 (N.D. Ill. Nov. 8, 2006). No court or commentator before *NYSRA I* ever suggested that subsection (r) was somehow limited, as a matter of law, to “voluntary” statements, let alone that states could escape the plain meaning of the statute and regulation by “mandating” statements otherwise governed under subsection (r) and preempted by subsection 1(a)(5).

than the district court here, has confronted the question. And in *NYSRA I*, where the “voluntary”/“involuntary” distinction was first drawn, the parties did not brief or argue the question. Milburn Dec. ¶8.

b. First Amendment. Regulation 81.50 also violates the First Amendment. The protections afforded to commercial speech are in flux. *See generally Nike, Inc. v. Kasky*, 539 U.S. 654 (2003). The district court was therefore confronted with three possible standards of review, as follows:

1. Defendant argued for the “reasonableness” standard articulated in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985). The theory underlying *Zauderer* was that the value of commercial speech was limited to its utility in the commercial marketplace, so that if the state wished to compel commercial speech (*i.e.*, “disclosure”), the speaker had minimal First Amendment protections.

2. Plaintiff argued that the standard in *Zauderer* has been limited by later cases. Most specifically, plaintiff relied on *United States v. United Foods, Inc.*, 533 U.S. 405 (2001). There, the Supreme Court held that First Amendment values are put at “serious risk” by a law compelling commercial speech “on the side that [the government] favors.” 533 U.S. at 412. As the Supreme Court put it in *United Foods*, “[t]he subject matter of the [commercial] speech may be of interest to but a small segment of the population; yet those whose business and livelihood depend in some way upon the product involved no doubt deem First Amendment protection to be just as important for them as it is for other discrete, little noticed groups in a society which values the freedom resulting from speech in

all its diverse parts.” *United Foods*, 533 U.S. at 410. So too, in *Edenfield v. Fane*, 507 U.S. 761, 767 (1993), the Court explained: “The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented.”⁹

3. Alternatively, plaintiff argued for application of *Central Hudson*, under which any regulatory burden on non-misleading and lawful commercial speech must “directly advance” a substantial government interest and the state must show that “the governmental interest could be served as well by a more limited restriction on speech.” *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 566 (1980).

The Board essentially conceded that it could not meet the more rigorous tests of *United Foods* or *Central Hudson*. But the district court adopted the *Zauderer* standard and did not comment on the plaintiff’s likelihood of success if this Court were to follow the other two possible standards.

⁹ *Accord Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 480-81, 490-91 (1997) (Souter, J., dissenting) ([C]ompelling cognizable [commercial] speech officially is just as suspect as suppressing it, and is typically subject to the same level of scrutiny. * * * [We disagree with the] assumption that regulation of commercial speech is justified solely or largely on preservation of public access to truthful information.... Truth is indeed a justifiable objective of commercial speech protection, but so is nonmisleading persuasion directed to the advertiser’s own choice of what to promote....”); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 522 (1996) (Thomas, J., dissenting) (“I do not see a philosophical or historical basis for asserting that ‘commercial’ speech is of ‘lower value’ than ‘noncommercial’ speech.”); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 494 (1995) (Stevens, J., concurring) (“[E]conomic motivation or impact alone cannot make speech less deserving of constitutional protection.... Neither can the value of speech be diminished solely because of its placement on the label of a product.”).

(i) *United Foods*. In *United Foods*, the Court held that a monetary assessment imposed on mushroom growers pursuant to a federal act to fund advertisements of mushrooms violated the First Amendment because it compelled certain growers to subsidize commercial speech with which they disagreed. *United Foods*, 533 U.S. at 411-16; accord *International Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 71 (2d Cir. 1996) (“The right not to speak inheres in political and commercial speech alike . . .”).

As the Supreme Court explained, even in the context of commercial speech, the government simply may not force a private party to convey the *government's* message as if it were the private party's message when the private party wishes to convey a different message or no message at all. Here, Regulation 81.50 forces private restaurant owners to convey the government's message. It transforms the restaurants' simple message (“Hamburger, \$1.99”) into the government's health message (“Hamburger, 500 calories”). There can simply be no doubt that Regulation 81.50 was designed first, to force private restaurant owners to convey the government's message about calories, and, second, to force customers to look at the message if they want to eat at the restaurant in question. As Mayor Michael Bloomberg declared, “Anyone who thinks we're going to walk away from trying to tell the public what they're eating and what it's doing to them doesn't understand the obligation this city's health department has We have to tell people how to lead better lives.” Ex. L.

In requiring restaurants to post calorie counts on menus and menu boards next to the price, Regulation 81.50 forces restaurants to voice the government's

point of view—namely that patrons *must* consider the caloric content of food when ordering in a restaurant, and that calories are the only nutritional criterion that patrons need to consider. Indeed, this is a stronger case of compelled speech than *United Foods*, where the plaintiff was “required simply to support speech by others, not to utter the speech itself.” 533 U.S. at 413; *cf. Int’l Dairy Foods*, 92 F.3d at 71-72 (striking down law requiring labeling disclosure of growth hormone in milk on the ground that “it compel[led] [plaintiffs] ‘to convey a message regarding the significance of rBST use that is “expressly contrary” to their views.’”).

The district court’s refusal to apply *United Foods* or *International Dairy Foods* was error. *Zauderer* permitted the government to require disclosure in order to “prevent deception of consumers.” 471 U.S. at 651. Like obscenity or “fighting words,” deceptive commercial speech merits no First Amendment protection. *See In re R.M.J.*, 455 U.S. 191, 203 (1982) (“Misleading advertising may be prohibited entirely.”). In *United Foods*, the Supreme Court specifically limited *Zauderer* to cases of potentially misleading speech, finding *Zauderer* inapplicable because there was no suggestion “that the mandatory assessments [at issue in *United Foods*] . . . [were] somehow necessary to make voluntary advertisements nonmisleading for consumers.” 533 U.S. at 416.

The district court, however, was led astray by this Court’s *dicta* in *National Electric Manufacturers Ass’n v. Sorrell*, 272 F.3d 104 (2d Cir. 2001). *Sorrell* suggested that *Zauderer* could also apply to laws requiring “purely factual and uncontroversial” disclosure of otherwise unknown safety information in order “to better inform consumers” and not merely “to prevent ‘consumer confusion or

deception' *per se*." 272 F.3d at 114-15 (quoting *Zauderer*, 471 U.S. at 651). *Sorrell* was decided a few months after *United Foods*, but the *Sorrell* court did not mention *United Foods*. Of course, this case is different than *Sorrell*. The compelled speech at issue here is not "purely factual and uncontroversial;" rather, Regulation 81.50 forces restaurants to use their most valuable communication tool to convey the government's viewpoint with which they specifically disagree. *See, e.g.*, Ex. M, ¶¶4-8, 11; Ex. N, ¶¶3-5, 14-17. Indeed, one recent government-sponsored report (relied on by defendants) stressed the lack of consensus and "sometimes strong views that the topic generates among stakeholders." Ex. O at p. 70.

(ii) **Undue Burden on Protected Speech.** Regulation 81.50 also fails the *Central Hudson* test for two reasons. *First*, the Board never demonstrated that the regulation advances public health in a "direct and material way." *See Edenfield*, 507 U.S. at 767. This burden cannot be met by "speculation or conjecture;" the constitutional interests at stake require the government to "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.* at 770-71. Here, the government never offered any study demonstrating a link between posting calories and reducing obesity. *See* Ex. P at pp. 29-30. Defendants never disputed the statement by plaintiff's expert that there are no studies at all that reach this conclusion. Rather, the City relied on an observational survey it conducted hoping to compare "before" and "after" behavior during a single meal in restaurants affected by Regulation 81.50. (The City's study has not been completed, and thus it relies only on data collected in the "before"

phase.) The district court discussed this study as the only evidence supporting the conjecture that the regulation will reduce obesity. Ex. I at 24. But the City's Deputy Commissioner of Health, who designed the survey, did not go as far as the district court. Rather, she said only that data collected in the survey "show that it is reasonable to believe that routine provision of calorie information might contribute to reducing obesity levels." Ex. Q, ¶11 (emphasis supplied).

Defendants submitted Deputy Commissioner Bassett's write-up of this survey to the weekly journal published by the Centers for Disease Control, *Morbidity and Mortality Weekly Report*. The CDC editor rejected it, specifically disagreeing with Deputy Commissioner Bassett's theory:

The conclusions being drawn in the study are, of course, problematic because of the lurking probability that people who look at caloric information are much different from everybody else, a priori. . . . **In my mind, it is not possible to conclude that looking at the caloric info is causally related to caloric purchase** . . . yes, there is an association, no doubt, but the association might just be reflecting the psychology of people who both look at caloric information and eat fewer calories.

Ex. R (attaching, as exhibit B therein, the above quoted email).

Second, Regulation 81.50's infringement on speech is more extensive than necessary to serve the City's asserted interest. Even when a governmental burden on speech is effective to a material degree, it must still be "narrowly tailored to achieve the desired objective." *Lorillard Tobacco v. Reilly*, 533 U.S. 525, 556 (2001). In this case, there are many alternatives for providing customers with caloric information in restaurants that would not so heavily burden restaurants' First Amendment rights by co-opting their most important communication tool and

using it to convey a message with which they disagree. *See, e.g.*, Ex. S, ¶2; Ex. T, ¶¶8-9; Ex. O at pp. 128-33. The district court did not disagree with these points. It simply refused to evaluate the regulation under *Central Hudson*.

2. Irreparable Harm to Plaintiff's Members Absent a Stay. Where “plaintiffs allege deprivation of a constitutional right, no separate showing of irreparable harm is necessary.” *Statharos v. New York Taxi & Limousine Comm.*, 198 F.3d 317, 322 (2d Cir. 1999).

Enforcement of a local law that is preempted by a federal statute constitutes irreparable harm. In *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992), the Court affirmed an injunction against threatened enforcement of state consumer protection laws preempted by the Airline Deregulation Act. The Court explained that parties threatened by such enforcement had no adequate remedy at law, because, absent an injunction, they were “faced with a Hobson’s choice: continually violate the [preempted local] law and expose themselves to potentially huge liability; or violate the law once as a test case and suffer the injury of obeying the law during the pendency of the proceedings and any further review.” *Id.* A preemption statute constitutes a “federally created right to have only one regulator” with regard to the issue at hand. *Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773, 784 (5th Cir. 1990), *aff’d Morales*, 504 U.S. at 381. Hence, “permitting states to regulate” where Congress has preempted state regulation “would violate the Supremacy Clause, causing irreparable injury.” *Id.*

The district court agreed that the plaintiff would suffer “some degree” of irreparable harm, but considered the injury slight because plaintiff could not point

to specific economic harm and because preemption is a “structural” right rather than a “personal” right. Ex. D at pp. 4-5. But the preemption provision in this case specifically protects persons engaged in interstate commerce. These are the very persons targeted by the City’s regulation. Congress determined that a patchwork of local laws like Regulation 81.50 would be an undue burden on those engaged in interstate commerce. The fact that the economic burden cannot be measured with precision supports, rather than diminishes, the irreparability of the harm.

Similarly, the district court acknowledged that “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Int’l Dairy Foods*, 92 F.3d at 71; *accord* Ex. D at 4. But the district court considered the rights of plaintiff’s members to be less worthy of First Amendment protection than those of non-commercial speakers. For this, the court relied on the utilitarian conception of commercial speech outlined in the Supreme Court’s 1985 *Zauderer* opinion. Ex. D at p. 4. But the district court’s dismissal of the inherent worth of commercial speech cannot be reconciled with the Supreme Court’s recognition, in the years since *Zauderer*, that commercial speech is not just of utilitarian value because it gives information to consumers, but is of vital importance to the First Amendment. *See supra*, p. 12 & n. 8.

3. No Injury to Defendants If a Stay Is Issued. Continuing the stay of enforcement pending an expedited appeal will not harm defendants. They have never invoked their emergency public health powers. Milburn Dec. ¶3. They have followed the ordinary regulatory process, with many months between proposal and effectiveness of this regulation. They have voluntarily stayed enforcement for

many months.

Given this history, defendants cannot legitimately contend that a public health emergency requires implementation of the regulation before its constitutionality is adjudicated by this Court. The case of *Goldstein v. Miller*, 488 F. Supp. 156 (D. Md. 1980), is instructive on this point. There, the government agreed to postpone enforcement of a regulation during district court proceedings. The district court upheld the regulation, and the government then refused to consent to a further stay pending appeal. Even though it had denied the preliminary injunction, the court stayed enforcement pending appeal. The court noted that the government had already agreed to postpone enforcement of the law during two months of district court proceedings: "Such postponement seemingly did not cause any irreparable injury to defendants," and thus a further postponement would not cause irreparable injury either. 488 F. Supp. at 175. The same is true here.

In denying a stay, the district court distinguished *Goldstein* by contending that the voluntary delays should not be considered evidence "that the City will suffer no injury from continued stay of enforcement." Ex. D. at p. 6 n.5. But, the voluntary stays and deliberative adoption of the regulation surely *is* evidence that the regulation is not a needed cure for some acute public health emergency requiring instantaneous action. The Department of Health conceded it is "breaking new ground" here. Ex. F. Defendants' own witness admits that the Board's key evidence supports only the conclusion that the regulation "might contribute to reducing obesity levels." Ex. Q ¶11. The regulation is an experiment. The Board itself has postponed enforcement for many months. The district court considered

the legality at a deliberative pace without objection.

4. Public Interest. In evaluating the public interest, the district court considered only the Board's public health contentions, and not the public's interest in having its government obey the rule of law. But it is "clearly in the public interest to ensure that governmental agencies . . . fully comply with the law, especially when that law concerns the parameters of a party's First Amendment rights to effectively communicate its health message to consumers." *Pearson v. Shalala*, 130 F. Supp. 2d 105, 119 (D.D.C. 2001). Similarly, the public interest factor is satisfied when the stay "seeks to enforce express federal preemption." *See Biogonic Safety Brands, Inc. v. Ament*, 174 F. Supp. 2d 1168, 1179 (D. Col. 2001); *Bank One v. Guttau*, 190 F.3d 844, 847-48 (8th Cir. 1999).

CONCLUSION

The Court should extend the stay of enforcement pending appeal and issue a scheduling order expediting consideration of the appeal.

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Respectfully submitted,

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