



National Association of Tobacco Outlets, Inc. v. City of Providence

731 F.3d 71 (1st Cir. 2013)

Providence's Law Prohibiting the Redemption of Coupons and the Sale of Flavored Tobacco Products Upheld

Background

On January 5, 2012, the city of Providence enacted two tobacco control ordinances, one to prohibit the redemption of coupons (pricing ordinance) and one to prohibit the sale of flavored non-cigarette tobacco products (flavor ordinance). On February 13, 2012, an association of tobacco retailers, an association of cigar manufacturers and seven tobacco product manufacturers filed suit in the U.S. District Court for the District of Rhode Island alleging that the two ordinances were preempted by the Tobacco Control Act, were in violation of the Rhode Island and U. S. Constitutions, and were an unlawful deprivation of civil rights.¹ The tobacco industry argued that the Providence coupon restriction governed "cigarette promotion," which is preempted by FCLAA, and that the flavored product restriction set a "product standard," which is a power reserved to the FDA by the Tobacco Control Act.² Both sides filed motions for summary judgment and the court held a hearing on August 22, 2012 to hear testimony.

The District Court's Decision

On December 10, 2012, Judge Lisi dismissed the tobacco industry's motion and granted the city's motion upholding both of Providence's ordinances. The court found that the city's pricing ordinance was not preempted by FCLAA, as amended by the Tobacco Control Act, and that the flavor ordinance also was not preempted by the Tobacco Control Act. Specifically, the court held that the pricing ordinance does not impose additional requirements on labeling and advertising of cigarettes or the content of promotional materials but merely regulates the sale of cigarettes. This puts the restriction squarely in the category of conduct that is excluded from FCLAA's preemption provision.³ In deciding whether or not the flavor ordinance was preempted, the court partially relied on the opinion in *U.S. Smokeless Tobacco Manufacturing Company, LLC v. City of New York*, and came to the same conclusion: the flavor ordinance did not create a product standard which is preempted by federal law; rather it imposed a restriction on the sale of tobacco products, which is not preempted.⁴ The tobacco industry appealed the decision to the U.S. Court of Appeals for the First Circuit.

The Court of Appeals' Decision

On September 30, 2013, the U.S. Court of Appeals for the First Circuit affirmed the district court's ruling that neither the pricing ordinance or flavor ordinance were preempted by federal law.⁵ The court relied on previous court of appeals decisions in other circuits for the assumption that the activities regulated by the pricing ordinance were "promotion." Nonetheless, the court held that the pricing ordinance's restrictions fell under FCLAA's exception for content-neutral, "time, place, or manner" restrictions on promotion. The court determined that to qualify as a "content" restriction a regulation must relate to health claims or specific health information requirements, which the pricing ordinance did not.⁶ Further, the court declared that regulating coupons and multi-pack discounts did not materially differ from regulating the "manner" of promotion through price restrictions (such as minimum price laws) that the tobacco industry had conceded were excluded from FCLAA preemption.⁷

The Court of Appeals also ruled that the flavor ordinance did not effectively create a preempted tobacco product standard by banning non-cigarette flavored tobacco products because their sale was still permitted in smoking bars. The court also emphasized the absence of an outright prohibition in determining that the flavor fell under the Tobacco Control Act's "savings clause" that specifically exempts regulations "relating to" the sale of tobacco products from preemption.⁸

Litigation Status

The National Association of Tobacco Outlets applied for, and was granted, an extension of the period to petition for appeal to the U.S. Supreme Court—extending the period for appeal to February 27, 2014.⁹ The Association did not, however, file a petition for appeal to the Supreme Court¹⁰ and did not file a petition for rehearing by the 1st Circuit en banc, rendering the Court of Appeals' decision final.

Last Updated: September 24, 2014

Notes

¹ Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence, No. 12-96-ML, 2012 WL 6128707 (D.R.I. Dec. 10, 2012).

² *Id.* at *10–11.

³ *Id.* at *11.

⁴ *Id.* at *12–13 (citing 703 F. Supp. 2d 329, 340 (S.D.N.Y. 2010)).

⁵ Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence, 731 F.3d 71 (1st Cir. 2013).

⁶ *Id.* at 80.

⁷ *Id.* at 81.

⁸ *Id.* at 82–83.

⁹ National Ass'n of Tobacco Outlets, Inc. v. City of Providence, Docket No. 13A626 (last modified Dec. 19, 2013), <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/13a626.htm>.

¹⁰ *Id.*