

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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NYC C.L.A.S.H., INC., :

Plaintiff, :

- against - :

CITY OF NEW YORK, THOMAS R. FRIEDEN, :
IN HIS OFFICIAL CAPACITY AS :
COMMISSIONER OF THE CITY OF NEW YORK :
DEPARTMENT OF HEALTH AND MENTAL HYGIENE, :
ELLIOT SPITZER, IN HIS OFFICIAL :
CAPACITY AS ATTORNEY GENERAL OF THE :
STATE OF NEW YORK, and :
ANTONIA C. NOVELLO, IN HER OFFICIAL :
CAPACITY AS COMMISSIONER OF THE NEW :
YORK STATE DEPARTMENT OF HEALTH, :

03 Civ. 5463 (VM)

DECISION AND ORDER

Defendants. :
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VICTOR MARRERO, United States District Judge.

Plaintiff NYC C.L.A.S.H., Inc. ("CLASH") brings this action to challenge the constitutionality of the smoking restrictions contained in the recently-amended New York State Clean Indoor Air Act and the New York City Smoke Free Air Act. Although CLASH challenges the recent amendments to these statutory provisions that prohibit smoking in most indoor places, it focuses its challenge on the prohibition of smoking in bars and food service establishments. The defendants in this action include the City of New York, and Thomas R. Frieden ("Frieden"), in his official capacity as the Commissioner of the New York City Department of Health and Mental Hygiene (collectively, the "Municipal Defendants"). Also named as defendants are Eliot Spitzer, in his official

219 n.19)).¹⁴ The Court discerns none of the traditional indicators of a suspect or quasi-suspect classification in smokers to a sufficient degree that would warrant the use of a heightened level of scrutiny in this case. Nor do the Smoking Bans interfere with any fundamental right or any important governmental interest. **To the contrary, as discussed in greater detail below, the Smoking Bans serve to protect an important governmental interest -- the health and welfare of persons exposed to ETS in New York State.**

While it is true that the Smoking Bans do single out a particular class of persons and place some greater burdens on their activities, this circumstance alone is insufficient to render the governmental action violative of the Equal Protection Clause. As the Supreme Court stated over 130 years ago, "persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the State." Slaughter-House Cases, 83 U.S. 36, 62 (1872). In particular, clean air and other environmental controls always place burdens on some groups

¹⁴ To the extent that some individuals may smoke under the influence of a nicotine addiction, this circumstance would not alter the analysis herein. In instances of addiction, the act of smoking results from a medical condition, which in some cases is treatable, and thus, would not inherently be a part of a person's individuality that would merit First Amendment protection. The Court notes that there is a whole industry dedicated to assisting smokers to become non-smokers. See generally, Joseph A. Page, Federal Regulation of Tobacco Products and Products That Treat Tobacco Dependence: Are the Playing Fields Level?, 53 Food Drug L.J. 11, 14-15 (1998) (discussing smoking cessation programs).

"signed the bill because he believes a statewide ban on smoking in the workplace will lead to a healthier New York and will reduce the cost of health care for New Yorkers." James M. Odatu, Pataki Signs Ban on Smoking, Times Union, Mar. 27, 2003, available at 2003 WL 5008030.

With regard to Local Law 47, the record illustrates that the New York City Council also considered the mounting evidence against ETS as a basis for its enactment. In testimony before the New York City Council Committee on Health a few months prior to the enactment of Local Law 47, Frieden discussed the justification for considering more restrictive smoking regulations:

You have the opportunity to enact legislation that can ... serve as a national model for worker protection - protection from deadly secondhand smoke that disproportionately affects minority workers, underpaid and working long hours.

Every day, the Health Department registers the deaths of 25 New Yorkers who were killed by tobacco. About one out of every 10 people who die from tobacco die because of other people's smoke.

The evidence that second-hand smoke kills is clear and consistent. The evidence comes from studies of the chemicals in second-hand smoke, from animal studies, and from studies analyzing the health of hundreds of thousands of people. There is no scientific doubt about the matter.

Second-hand smoke is an occupational hazard whether you are a waiter or a secretary, a bartender or a banker. African-Americans, Latinos and Latinas, and those with low incomes are twice as likely to have to breathe second-hand smoke on the job.

Owners don't have the right to expose workers to the hazardous chemicals in second-hand smoke. The fundamental principle of worker safety is that workers should not have to choose between their health and their jobs.

(Testimony of Thomas R. Frieden, Mun. Decl. at Ex. E.) **As this passage discusses, Local Law 47 was enacted as a measure to further protect New Yorkers in response to the evidence that ETS exposure poses serious health effects.**²⁹

4. CLASH's Evidence

CLASH counters with an effort to discredit the juggernaut of scientific ETS evidence that Defendants have submitted in support of the Smoking Bans.³⁰ Specifically, CLASH submits voluminous amounts of documents, including articles, reports of independent medical research, and other miscellaneous reports that criticize the findings that ETS is harmful. (See Mulhearn Aff. at Exs. C-Q; Jenkins Aff. at ¶¶ 8-17.) While some of these documents seek to discredit ETS research in general, a large portion of CLASH's ETS evidence (and CLASH's arguments) is targeted particularly at discrediting the 1992 EPA Report, presumably as a result of Defendants' stated reliance on this report and on its conclusion that ETS is a carcinogen. (See Mulhearn Aff. at Exs. C-G, K-L, EE; Stewart

²⁹ Prior to the effective date of Local Law 47, a public hearing was held where testimony and written comments were received and reviewed. (See Mun. Decl. at Ex. F.)

³⁰ It bears noting that the 15 documents listed in Grannis' affidavit discuss or make reference to other scientific ETS research and studies.

medical evidence. For, in the final analysis, the test is not whether the scientific materials the legislators relied upon was medically sound or empirically correct, but whether the enactments find some rational basis on some "conceivable state of facts." Heller, 509 U.S. at 320.

Upon careful consideration of all the evidence submitted by the parties in a light most favorable to CLASH, the Court finds that the Smoking Bans easily survive this rather expansive standard. **New York State's and New York City's stated basis for enacting the Smoking Bans -- protecting its citizenry from the well-documented harmful effects of ETS -- provides a sufficient rational basis to withstand CLASH's constitutional challenges.** See Hill v. Colorado, 530 U.S. 703, 715 (2000) ("It is a traditional exercise of the States' police powers to protect the health and safety of their citizens.") (internal quotations and citation omitted). The record is clear that both the New York State Legislature and the New York City Council had more than ample "footing in the realities of the subject" to justify enactment of the Smoking Bans. Heller, 509 U.S. at 321. The Smoking Bans are the classic exercise of the well-recognized and far-reaching police power of the state over the health and welfare of its