NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP 09 2009

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

PHILIP MORRIS USA, INC.,

Plaintiff - Appellant,

v.

CITY AND COUNTY OF SAN FRANCISCO; et al.,

Defendants - Appellees.

No. 08-17649

D.C. No. 4:08-cv-04482-CW

MEMORANDUM [*]

Appeal from the United States District Court
for the Northern District of California
Claudia Wilken, District Judge, Presiding

Argued and Submitted August 12, 2009
San Francisco, California

Before: **KOZINSKI**, Chief Judge, **HUG** and **REINHARDT**, Circuit Judges.

Plaintiff's advertising is protected expressive activity. E.g., 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 508–12 (1996) (plurality opinion). Selling cigarettes isn't, because it doesn't involve conduct with a "significant expressive

[*] This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

element." Arcara v. Cloud Books, Inc., 478 U.S. 697, 701–02, 706 (1986); cf. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 550 (2001). It doesn't even have "an expressive component." Talk of the Town v. Dep't of Fin. & Bus. Servs., 343 F.3d 1063, 1069 (9th Cir. 2003).

San Francisco Ordinance 194–08 limits where cigarettes may be sold; it doesn't prevent plaintiff from advertising. Even assuming it incidentally restricts plaintiff's advertising in a way that wouldn't be permissible as a direct regulation of advertising, that's not enough. "[E]very civil and criminal [regulation] imposes some conceivable burden on First Amendment protected activities." Arcara, 478 U.S. at 706.

Neither does the ordinance have "the inevitable effect of singling out those engaged in expressive activity." Id. at 704, 707. Of the three groups "singled out" by the ordinance—pharmacies, smokers and cigarette companies—only the cigarette companies are even arguably engaged in expressive activity.

And even if the ordinance did have the inevitable effect of singling out expressive activity, "a differential burden . . . is insufficient by itself to raise First Amendment concerns." Leathers v. Medlock, 499 U.S. 439, 452 (1991). The burden must be "directed at, or present[] the danger of suppressing, particular ideas." Id. at 453. No such danger is present here. The censorial motive plaintiff

attributes to defendants is always present when the government restricts sales of a product. That can't be sufficient. Cf. 44 Liquormart, 517 U.S. at 508–12; Lorillard, 533 U.S. at 550.

AFFIRMED.