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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF NYC C.L.A.S.H., INC.,
Appellant,

-against-

No. 46

NEW YORK STATE OFFICE OF PARKS,
RECREATION AND HISTORIC PRESERVATION,
Respondent.

20 Eagle Street
Albany, New York 12207
February 10, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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1 CHIEF JUDGE DIFIORE: Okay, next on the
2 calendar is number 46, Matter of the City of New York
3 - - - of New York City C.L.A.S.H. v. New York State
4 Office of Parks, Recreation and Historic
5 Preservation.

6 MR. PALTZIK: Good afternoon, Your Honors,
7 thank you for the opportunity to be heard; Edward
8 Paltzik for New York City C.L.A.S.H., with my
9 colleague, Yan Margolin. Your Honor, may I
10 respectfully request five minutes in reserve, please?

11 CHIEF JUDGE DIFIORE: You may, and you have
12 it.

13 MR. PALTZIK: Thank you very much, Your
14 Honor. This court should reverse the ruling of the
15 Third Department and reinstate the trial court's
16 ruling, the Supreme Court's ruling, Justice Ceresia,
17 because the Third Department's decision directly
18 contradicts this court's ruling in the Hispanic
19 Chambers of Commerce case, the so-called Sugary Drink
20 case, for several reasons. And most importantly,
21 Your Honors, this measure, Rule 386, 9 NYCRR 386.1
22 promulgated by the respondent, is a public health
23 measure masquerading as an operational measure, as a
24 Parks Management measure.

25 JUDGE STEIN: So - - - so do we have to

1 then get into determining what was the real
2 motivation behind these regulations? Is - - - is
3 that a relevant factor?

4 MR. PALTZIK: That's - - - that's an
5 excellent question, Your Honor, and that's exactly
6 right. And there are several red herrings here that
7 bear that out. It's actually directly relevant and
8 we know - - -

9 JUDGE STEIN: I - - - I thought we had to
10 look at, you know, whether they exceeded the - - -
11 the authority that was given to them to regulate and
12 - - -

13 MR. PALTZIK: Sure, sure.

14 JUDGE STEIN: So why would their intent - -
15 -

16 MR. PALTZIK: Well - - - well, yes.
17 Whether - - - whether the agency exceeded its
18 authority is also critically important. However, the
19 question about whether it's a - - - your - - - to
20 your question, whether it's a public health measure
21 or whether it's an operational measure, is also
22 critical because the fourth Boreali factor here is
23 whether or not the rule required any special
24 expertise or technical comp - - - competence on the
25 agency's part to promulgate. And in this case, it

1 did not require any particular technical expertise by
2 the agency, and the way we know that is because when
3 we look at this agency's, at Park's, rationale and we
4 strip away that rationale, we're left with only one
5 option which is that it was a public health measure
6 which would be wholly impermissible.

7 And the way we know that, to your question,
8 Your Honor, is that one of their rationales is
9 prevention of wildfires, yet the rule only applies to
10 five percent of the total Parks' acreage.

11 JUDGE STEIN: Okay, but wouldn't it be
12 legitimate for them to say, you know, we're in charge
13 of these parks and we're given the authority to make
14 sure that everyone gets to enjoy them in a healthy
15 way, and we - - - and we want to make sure that
16 everybody can enjoy them, and so we think one way to
17 do that is we have some people that like to smoke and
18 we have some people that don't like to smoke and so,
19 you know, we'll give them different areas in which
20 they can either be free of smoke or they can smoke.

21 MR. PALTZIK: Well - - -

22 JUDGE STEIN: What's - - - what's wrong
23 with that?

24 MR. PALTZIK: Well, Your Honor, in theory,
25 yes, but in practice, no. Because what happened is

1 the rule allows the commissioner to designate any
2 area in the park as no smoking. And in the record,
3 Record 205 to 213, there's a nine-page list of
4 designated no-smoking areas, and the commissioner's
5 discretion - - - and this is critically important - -
6 - the commissioner's discretion here is unlimited.
7 So one year you could have a nine-page list of no-
8 smoking areas, the next year it could be eighteen
9 pages, and you could have one hundred percent of the
10 park acreage could be no smoking.

11 So it's completely open-ended. It does not
12 accomplish the rationale - - - it does not accomplish
13 the purpose that would be consistent with the stated
14 rationale. So, for example, you have - - -

15 JUDGE STEIN: How is it different from some
16 of the regulations that they've already made, such as
17 you can only drink alcoholic beverages in certain
18 areas, you have to be quiet at certain times? How is
19 this different?

20 MR. PALTZIK: Well, Your Honor, the subject
21 of alcohol regulation hasn't really been
22 controversial since Prohibition.

23 JUDGE STEIN: So - - - so the difference is
24 that it's controversial?

25 MR. PALTZIK: Well, that - - - and that - -

1 - yes, critically important, 42.1 million smokers in
2 the United States still, New York State the - - - the
3 eighth-highest prevalence of - - - of smoking. And
4 the alcohol regulations that Parks has, those were
5 promulgated to combat alcohol-related nuisance in the
6 park, same thing with the noise regulations, the
7 dogs-on-a-leash regulations.

8 JUDGE ABDUS-SALAAM: But why wouldn't no-
9 smoking regulations do the same thing? For example,
10 there may be an area of the park that is, you know,
11 vegetated and if a cigarette is thrown down or some
12 lighter, match, or something, it might go up in
13 flames and that's a safety issue. And isn't the park
14 - - - is - - - isn't the Parks Department in charge
15 of safety in the parks?

16 MR. PALTZIK: Well, Your - - - Your Honor,
17 that's the identical argument that the New York City
18 Board of Health made in the Sugary Drink case that
19 they simply have unlimited management authority. But
20 in this case, Parks already has a - - - a regulation
21 in 9 NYCRR 375, which actually requires that any
22 burning object, cigar, cigarette, tobacco pipe be
23 tossed into a receptacle, so this is actually
24 duplicative. That's number one, Your Honor.

25 Secondly, the courts have traditionally

1 treated smoking as a distinct social issue from these
2 other issues, and that was actually stated by the
3 Justiana court, a federal decision citing Boreali.
4 And the Justiana court stated that the Boreali court
5 considered the issue of smoking so intertwined with
6 the issue of public health that it cannot be
7 separated, and that is borne out by the fact that
8 between the 2001 legislative sessions and the 2014
9 legislative sessions, we had twenty-four bills that
10 failed in - - - in the legislature. We don't have
11 twenty-four bills that failed for dogs on a leash or
12 for noise in the campgrounds or for alcohol in the
13 campgrounds because - - -

14 JUDGE FAHEY: And usually that's the
15 weakest part of the Boreali test, though, the - - -
16 the legislative inaction. That's a tough one to make
17 a case on. You know what strikes me on this is - - -
18 is that we talk about the - - - the regulations and
19 everything else, but I thought initially when you
20 spoke of the - - - the Portion Control Cups, that
21 regulation, the Sugary Drinks Portion Control, it
22 seemed to strike at the heart of - - - of what's
23 really going on here, because when I read this at
24 first, my Libertarian instincts within me say to
25 myself, why shouldn't I be able to go to a park where

1 I'm not bothering anybody and have a cigarette, and -
2 - - and why should the State be able to regulate that
3 at all. And you look at this Sugary Drinks Portions
4 Cup argument and you say to yourself that there was
5 clearly - - - it seemed in my mind, anyway, an
6 overreaching there.

7 But the difference is is in - - - in that
8 case in the - - - in the Portion Control Cup, a
9 person was only - - - if they're any damage to
10 themselves by drinking Slurpees twelve times a day,
11 they're giving themselves diabetes, that's their
12 problem. They're doing it to themselves. The idea
13 behind smoking is - - - is that it - - - it is not
14 limited to you, and I - - - that's the way I
15 understand the basis of the public health portion of
16 the argument in that - - - so it isn't - - - it's not
17 a restraint on your individual liberty; it's a
18 restraint on your ability to affect my liberty, and
19 that seems to me really to be the heart of this
20 argument.

21 MR. PALTZIK: Well, yes, Your Honor, and
22 actually - - - and that - - - and that goes directly
23 to possibly the most important factor in the Boreali
24 analysis, which not coincidentally is also the first
25 factor, which is whether or not the agency is

1 weighing the goal of promoting health - - -

2 JUDGE FAHEY: Right.

3 MR. PALTZIK: - - - against the social
4 costs, and I would agree - - - and I would agree with
5 Your Honor about that. However, what makes this
6 different is that the legislature has articulated
7 four extremely specific outdoor smoking prohibitions.
8 So we have the MTA railroad platform ban, we have on
9 the grounds of general hospitals, we have next to the
10 entrances of - - - of schools, and actually, most
11 relevant, we have playgrounds.

12 JUDGE STEIN: Maybe the legislature thought
13 that it - - - the Parks and Recreation had - - - you
14 know, leave it to them.

15 MR. PALTZIK: Well, Your Honor, in answer -
16 - - in answer to that notion, we have 133
17 playgrounds, according to respondent's brief. We
18 have 133 playgrounds on the grounds in the Parks
19 system supposedly. And 1399 of the Public Health Law
20 covers playgrounds, so Parks could have simply banned
21 smoking at - - - at playgrounds, for example, in the
22 parks because that would be consistent with 1399.

23 JUDGE STEIN: That would only be in the
24 parks, though. That wouldn't cover other
25 playgrounds, right?

1 MR. PALTZIK: Well - - - well, other
2 playgrounds outside of the park system, outside of
3 the - - - the purview of this agency are - - - are
4 also covered, but consistent with that, OPRHP could
5 have also made a regulation banning smoking in their
6 playgrounds, although that - - - that would be
7 duplicative.

8 But what - - - what the point is, Your
9 Honor, is they don't have the authority to say well,
10 smoking is banned on our beaches or smoking is - - -
11 is banned in - - - in campgrounds, because that
12 hasn't been addressed yet by the legislature, which
13 specifically excluded all other areas other than the
14 four carve-outs that they have in Public Health Law
15 1399. So they have announced where outdoor smoking
16 is to be banned.

17 And I - - - and I - - - going back to Your
18 Honor's point about weighing the social costs, one of
19 the indicators - - - one of the classic indicators of
20 a - - - a trespass into the legislative domain is
21 when the agency's rule is substantially more
22 restrictive than what's on the books by the
23 legislature.

24 JUDGE FAHEY: So what if they just carved
25 out areas and said you couldn't smoke here rather

1 than just having an outright ban in the seven parks
2 in the city? Because upstate, they've carved out
3 areas where you can't smoke, but there are areas
4 where you can smoke in the parks, right?

5 MR. PALTZIK: Right.

6 JUDGE FAHEY: Yeah.

7 MR. PALTZIK: Absolutely, yeah.

8 JUDGE FAHEY: So - - - so would that be
9 acceptable to you then?

10 MR. PALTZIK: No, no. Because if they are
11 banning smoking, Your - - - Your Honor, if they are
12 banning smoking in places that the legislature does
13 not permit smoking bans, then they've - - - then
14 they've run afoul of Boreali. Even - - - even if it
15 - - - if the - - - the idea may seem wise, even if
16 many - - - many people obviously don't like smoking,
17 even accounting for all that, there's a reason that
18 the Boreali doctrine exists. It's to restrain the
19 actions of these agencies. And it's a cornerstone
20 concept of - - - of good government, Your Honor.

21 And to the point of substantially more
22 restrictive, I would note that in Public Health Law
23 1399 - - - I believe it's o(1)(2), that is the
24 enforcement provision of - - - of the playground
25 prohibition, that provision specifically states that

1 a peace officer, any law enforcement officer, police
2 officer, cannot arrest, stop, ticket, or question any
3 person based solely on an observed violation of the
4 playground smoking ban. In contact, the Parks
5 Department here can simply issue a - - - a ticket and
6 a 250-dollar fine. So - - -

7 JUDGE STEIN: What - - - what about Public
8 Health Law 1399-r(3), does that contemplate that
9 smoking can be prohibited by other state agencies and
10 municipalities by its language?

11 MR. PALTZIK: Well, Your Honor, yeah, and
12 that was one of the respondent's arguments, Your
13 Honor. 1399-r(3) actually states that an agency or -
14 - - or any other governmental entity simply - - -
15 simply can't allow smoking where it is already
16 prohibited by any other regulation or - - - or
17 statute. So if there is already a regulation on the
18 books which is consistent with the legislature's
19 mandate about smoking or if there's already a law
20 about it, well - - - well, then an - - - an agency
21 can't say well, we're going to allow smoking in this
22 area.

23 CHIEF JUDGE DIFIORE: Thank you, counsel.

24 MR. PALTZIK: So it's more of a negative.
25 Thank you, Your Honor.

1 CHIEF JUDGE DIFIORE: Thank you.

2 MR. PALTZIK: Thank you.

3 CHIEF JUDGE DIFIORE: Counsel.

4 MR. PALADINO: Good afternoon, Your Honors.

5 CHIEF JUDGE DIFIORE: Good afternoon.

6 MR. PALADINO: Even a Libertarian would
7 acknowledge the adage that your right to extend your
8 arm ends at the tip of my nose, and for most park
9 patrons, smoking is a nuisance. And the Office of
10 Parks as the manager of the parks - - -

11 JUDGE FAHEY: You understand that was my
12 point, that - - - that smoke imposes upon the person
13 next to me.

14 MR. PALADINO: When I see a softball, I hit
15 it.

16 JUDGE FAHEY: As opposed to drinking a
17 sugary drink, right.

18 MR. PALADINO: The manager of the parks is
19 allowed to put in place rules that regulate nuisance
20 activities. Some people like to smoke, most people
21 find it a nuisance, we don't prohibit smoking
22 entirely. This is not some paternalistic measure.
23 If you want to smoke, you can go to the designated
24 area and smoke all that you want.

25 JUDGE STEIN: Can - - - can every state

1 agency regulate smoking on - - - outside its
2 buildings or - - -

3 MR. PALADINO: In the areas within its
4 jurisdiction. And the reason why you're not allowed
5 to smoke around the courthouse is because the Office
6 of General Services has a rule that says that you
7 can't. You can't smoke in the prison yards because
8 the Department of Correctional Services has a rule
9 that says that you cannot smoke except in designated
10 areas. Those rules are promulgated in accordance
11 with 1399-r(3). My opponent says - - -

12 JUDGE ABDUS-SALAAM: They're not - - -
13 they're not promulgated in connection or in
14 conjunction with the Department of Health. It's just
15 the agency itself promulgating these rules, right?

16 MR. PALADINO: That - - -

17 JUDGE ABDUS-SALAAM: Just like here.

18 MR. PALADINO: That's correct, Your Honor.
19 As long as the agency can point to some source of
20 authority and that its rule restricting smoking
21 furthers the legislative goals expressed in its
22 enabling statute, it can restrict smoking. Not - - -

23 JUDGE RIVERA: So is the goal - - - is the
24 goal you're pointing to trying to balance the
25 competing interests of patrons? Is that - - - is

1 that the goal you're talking about?

2 MR. PALADINO: There - - - there are
3 multiple goals. I mean my opponent does correctly
4 note that the rule reflects a balance between the
5 interests of smokers and nonsmokers. There's
6 absolutely nothing wrong with that. The type of
7 balancing that's problematic is when the agency takes
8 into account factors unrelated to its statutory
9 mission and for which there are no statutory
10 guidance.

11 Here we have policies expressed in the
12 Parks Law. It says "promote and enhance the park
13 experience." Having a smoke-free environment
14 promotes and enhances the park experience. It
15 provides patrons with a healthy environment in which
16 to regulate. It gives the majority of patrons what
17 they want. The legislature also said, preserve and
18 promote and protect park resources. A rule that
19 restricts smoking furthers those goals. It reduces
20 litter and it prevents forest fires.

21 And on that issue, he says that this has to
22 be a pretext because why do you allow smoking in the
23 areas where people congregate, but not in the areas
24 where - - - where fire would be an even greater risk.
25 What he ignores is that the rule has several purposes

1 and it's trying to do several things at once. To the
2 extent smoking is prohibited, fires are prevented.
3 But we're trying to do many other things. If the
4 rule were only concerned with preventing fires, the
5 rule would look different.

6 So we do have policies in the legislation
7 that the Office of Parks can point to that provide
8 the policies that underlie the rule. We're not just
9 writing on a clean slate.

10 JUDGE STEIN: Well, should we - - - should
11 we give any weight to the fact that the legislature
12 seems to have enacted - - - well, it's enacted
13 comprehensive indoor nonsmoking policies, but not
14 outdoor. It's - - - it's really only limited that to
15 certain areas. Why shouldn't the - - - that be an
16 indication that the legislature wants to handle this?

17 MR. PALADINO: Well, again, you pointed
18 yourself to 1399-r(3). Local governments can act - -
19 - enact more stringent smoking requirements. And
20 smoking may not be permitted where prohibited by a
21 rule of any other state agency. That's a recognition
22 that if another state agency has authority to
23 prohibit smoking, it may do so, and - - - and this
24 statute, Article 13(e) of the Public Health Law,
25 isn't entirely preempting the field.

1 JUDGE STEIN: so what - - - what, if any -
2 - - what, if any, significance do we give to the fact
3 that the legislature has acted in these certain
4 pockets of outdoor nonsmoking but not in others?

5 MR. PALADINO: I don't think it's
6 dispositive because it recognizes that other agencies
7 may have good reasons to restrict smoking. We
8 certainly have good reasons that further the guiding
9 principles in the Parks Law that I just addressed.
10 Counsel refers to the Sugary Drinks case, but in that
11 case, like in Boreali, under the first factor, the
12 rule was filled with exceptions unrelated to the
13 agency's statutory mission. They considered social
14 and economic concerns. It smacked of political
15 compromise, the sort of horse-trading you would
16 expect in legislation.

17 There is no such horse-trading going on
18 here. The only balancing that's going on is the
19 legitimate kind of balancing that the Office of Parks
20 is allowed to engage in when it's formulating rules.
21 I think Your Honor pointed to some of the examples.
22 Some people like it quiet, some people like to play
23 music. We have a rule that says you can play music
24 but not too loud. That reflects a balance between
25 competing interests. I could go on. You know, you

1 don't - - - maybe you're allowed to do - - - you're
2 allowed to ride a bike but only in certain places.

3 That's because park patrons have different
4 preferences. The manage - - - the manager of the
5 parks has to balance those preferences and come up
6 with conduct-regulating rules. Now, counsel says,
7 well, this is just a disguised public health measure.
8 Well, first I would point out that the Parks Law does
9 say that the Office of Parks may provide for the
10 health, safety, and welfare of the public. You can
11 have a rule that says you can't swim without a
12 lifeguard; you might drown. You can have a rule - -
13 -

14 JUDGE FAHEY: No, but the closest thing
15 that comes to my mind is - - - is consumption of
16 alcohol, and how is that regulated in the parks?

17 MR. PALADINO: I believe you're not allowed
18 to drink in most places in - - - in the parks. What
19 the point - - -

20 JUDGE FAHEY: Apparently, Mr. Paladino, you
21 haven't been in many parks recently, because - - -
22 because they - - - because the ones I've been in - -
23 - I've never driven through one where people aren't
24 drinking at picnics.

25 MR. PALADINO: Rules are broken, Your

1 Honor.

2 JUDGE FAHEY: I'm shocked by that, but - -
3 -

4 MR. PALADINO: And one of the reasons why
5 most park patrons don't want smoking is not only
6 because it's a nuisance but because it's unhealthy,
7 and one of the missions of the Office of Parks is to
8 provide a healthy environment for people to recreate.
9 So that's a legitimate way in which to consider
10 public health. It's not primarily public - - -

11 JUDGE RIVERA: But that's about the - - -
12 the utility of the venue, and that's the whole point
13 of the park or one of the points of the park, is that
14 what you mean?

15 MR. PALADINO: Yes, Your Honor. We're
16 trying to give most park patrons what - - - what they
17 want. We're trying to prohibit nuisance activities.
18 We're trying to reduce fires. We're trying to reduce
19 litter. People use the - - -

20 JUDGE RIVERA: It's not a smoking lounge,
21 necessarily.

22 MR. PALADINO: It's - - -

23 JUDGE RIVERA: It's an area where people go
24 to have, as you say, recreational activities, perhaps
25 be with their children, and so forth.

1 MR. PALADINO: Yes, but the Office of Parks
2 also recognizes that if there are areas where a
3 person can - - - can go and light up and enjoy a
4 cigarette or a cigar, that's permissible.

5 JUDGE RIVERA: Um-hum. Um-hum.

6 MR. PALADINO: And I - - - that's where the
7 management expertise comes in here. Why we have a
8 different situation in New York City - - -

9 JUDGE RIVERA: Can I ask, is that - - - is
10 that the fine line between trying to promote a social
11 public health agenda, where you're discouraging
12 smoking, versus creating an environment where people
13 can, as you described it, recreate, which is part of
14 the goal of a park system and what you're trying to
15 manage?

16 MR. PALADINO: Exactly, Your Honor. That -
17 - - that's part of it. I mean, the off - - - the
18 manager has to balance competing patron preferences.
19 We have come up with a way to allow people to smoke.
20 In New York City, the parks are very small, it's very
21 easy to walk outside the park, so we have a rule
22 where you can't smoke except in certain designated
23 areas. There is one arboretum in New York and the
24 reason for that is that it's a very highly sensitive
25 flora and fauna. The situation is reversed elsewhere

1 in the state where generally you're allowed to smoke,
2 except we prohibit smoking in certain areas. That's
3 where management - - -

4 JUDGE STEIN: So how is that - - -

5 MR. PALADINO: - - - expertise comes in.

6 JUDGE STEIN: So how is that different from
7 the Department of Health? So what if the Department
8 of Health said, our mission is to promote good health
9 in the state of New York, therefore, we're going to
10 now estab - - - make a regula - - - regulation that
11 you can't smoke anywhere but in your own home or your
12 car?

13 MR. PALADINO: Well, that would have made
14 Boreali a much closer question, but what the Health
15 Department did, or the Public Health Counsel did in
16 Boreali, is it allowed a number of exceptions that
17 were completely unrelated to public health concerns,
18 exceptions that reflected the sort of political
19 compromise. It was a much more controversial subject
20 at the time. There were a number of bills that were
21 considered by the legislature. I mean, here we have
22 some bills, but they - - - most of them never got out
23 of committee.

24 JUDGE STEIN: Why is that significant?

25 MR. PALADINO: Well, I think that is - - -

1 I think, as Judge Fahey pointed out, the - - - for
2 the least powerful factor - - - I mean, I think that
3 you can envision any number of reasons why the
4 legislature might not have passed those bills,
5 including that it recognized that the Office of Parks
6 had the authority to regulate the issue and, for that
7 reason, left the matter to the Office of Parks. So
8 it's very hard to draw any positive inferences from
9 legislative inaction.

10 JUDGE RIVERA: I thought in part you had
11 been arguing that it's not as controversial in the
12 sense there's a consensus, and that is reflected by,
13 what I thought you had argued in your papers, a
14 majority of patrons who want no-smoking areas.

15 MR. PALADINO: Yes, that's an additional
16 point, Your Honor. I mean, ninety-one percent of the
17 people who commented on this rule favored it. It is
18 appropriate in determining what can and cannot be
19 done in the park to - - - to have majority rule. I
20 recognize that, you know, smoking a cigarette
21 implicates questions of personal autonomy, but so
22 does drinking alcohol, playing music, running around
23 naked. I mean, there are all sorts of activities - -
24 -

25 JUDGE RIVERA: Drinking a lot of soda.

1 MR. PALADINO: Yes, Your Honor, but this is
2 - - - what we're concerned here is the impact of the
3 conduct of someone smoking a cigarette on other
4 people. Can you put that out, it's near my child?
5 The next thing you know, an argument ensues. That's
6 why we have these rules saying there's certain places
7 that you can go and smoke.

8 Unless the court has any other questions,
9 that's it. Thank you.

10 CHIEF JUDGE DIFIORE: Thank you, sir.

11 MR. PALADINO: Thank you, Your Honors.

12 CHIEF JUDGE DIFIORE: Counsel.

13 MR. PALTZIK: Your Honor, for some people
14 in society, smoking has - - - has become this - - -
15 this hated bogeyman or goblin, and it's so important
16 to hold the line in this case on the separation of
17 powers doctrine precisely because smoking is disliked
18 by some people. It - - - it's not easy to uphold
19 this - - - this doctrine, and that's why this case is
20 so important. There might be a case where the issue
21 is easier, but when we have something which is un - -
22 - in unpopular in some segments of society, all the
23 more reason to preserve such an important doctrine
24 because it has - - - it has to be able to withstand
25 even hard cases like this.

1 Now, Your Honors, there was the Smoke-Free
2 Parks Act of 2015 which was before the - - - the
3 legislature last year, and I - - - I don't believe it
4 made it past the senate. That is the appropriate
5 remedy. And the very fact that the legislature was
6 considering that - - - and it - - - it was explicit,
7 no smoking in - - - in public parks in the state of
8 New York. That right there would be - - - would be
9 the way to deal with it. And also - - -

10 JUDGE ABDUS-SALAAM: Well, wouldn't that be
11 worse than what is happening now with the Parks
12 Department saying you can smoke in certain areas than
13 to have a absolute ban?

14 MR. PALTZIK: Well - - - well, Your Honor,
15 actually - - -

16 JUDGE ABDUS-SALAAM: Maybe that's why the
17 legislature left it to Parks to decide?

18 MR. PALTZIK: Your Honor, it would be
19 better, because it would be done by the legislature.
20 And - - - and ultimately, that's why this case is
21 about separation of powers, smoking is ultimately a
22 proxy. It - - - it's - - - and it makes it a hard
23 case but that's why it's so important. It would be
24 better - - - even if there was an outright ban, if it
25 was done by the legislature, it would be better

1 because it would respect the Constitution. That's
2 what makes it so important.

3 And importantly, since we touched on the
4 topic of legislative inaction, one of the cases that
5 we cited in our reply brief, the Leonard case, there
6 was - - - it was a federal case, there was actually
7 no record of any legislative debate but what was
8 important is that there was vigorous lobbying. There
9 was a record that there was vigorous lobbying and
10 there were interested public factions, so there
11 doesn't have to be any record whatsoever, under
12 Boreali, of legislative debate. The key is whether
13 at the time there is heated public debate.

14 And there are two New York Times articles
15 cited in our reply brief which I would urge Your
16 Honors to look at it again, because no less an
17 authority than the New York Times characterized the
18 debate for the New York City Parks' smoking ban as a
19 quote "raucous showdown and a bitter debate." And
20 this was in 2010 and - - - and 2011, so - - - so very
21 recent, and the state of public opinion is critically
22 important here. And we're not dealing with window
23 guards in high-rise buildings, such as in the Sugary
24 Drink case that was one of the analogies. We're not
25 dealing with the purity of drinking water issues

1 where there are no value judgments, where there are
2 no issues of personal autonomy. We're not dealing
3 with that. We're dealing with a very heated, very
4 live issue here, Your - - - Your Honors.

5 And if I could briefly touch on what Mr.
6 Paladino mentioned about, you know, alcohol, Your
7 Honor, you know, alcohol nuisance in the parks.
8 There - - - there are a number of quotes, record 87
9 and then 94 through 95, quote, "promotion of smoking
10 cessation efforts" - - - this is Parks' rationale for
11 the rule - - - "preventing children from becoming
12 addicted to tobacco, healthy lifestyles."

13 Now, the mission of Parks, in their
14 enabling statute, it clearly says that their purview
15 is to manage these important sites, these historic
16 sites, these outdoor sites within New York, to manage
17 and maintain these locations. Their mission is not
18 to promote smoking cessation efforts. That is a
19 mission for local departments of health, the State
20 Department of Health. So Your Honors only need to
21 look at their own words. Their own words state what
22 they really wanted to do here, and there's nothing in
23 the Parks and Historic Preservation Law which talks
24 about combating social ills. And very - - -

25 JUDGE RIVERA: But what - - - what about -

1 - -

2 MR. PALTZIK: Yes.

3 JUDGE RIVERA: What about to the extent
4 that the law refers to health, to health and the
5 recreating in the park?

6 MR. PALTZIK: Well, health, safety, and - -
7 - and welfare, Your Honor. But so many - - - so many
8 agencies have the ability to regulate health, safety,
9 and welfare, you know, in areas within their purview.
10 But that doesn't mean they can trespass into areas
11 that are clearly designated for health-related
12 agencies and ultimately for the legislature, as has
13 been decided by Boreali.

14 And, Your Honor, if I may say one last
15 thing. The - - - the alcohol - - - the alcohol-
16 related regulations in the parks, those - - - those
17 weren't designed to combat broader issues of alcohol
18 problems in society. Those were simply designed to
19 prevent drinking in campgrounds at night, that sort
20 of thing.

21 And I thank Your Honors for the
22 opportunity. Thank you.

23 CHIEF JUDGE DIFIORE: Thank you.

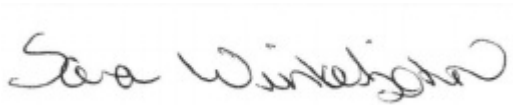
24 (Court is adjourned)

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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of NYC C.L.A.S.H., Inc. v. New York State Office of Parks, Recreation and Historic Preservation, No. 46 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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