IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

NATIONAL ASSOCIATION OF TOBACCO OUTLETS, INC.; CIGAR ASSOCIATION OF AMERICA, INC.; LORILLARD TOBACCO COMPANY; R.J. REYNOLDS TOBACCO COMPANY; AMERICAN SNUFF COMPANY; PHILIP MORRIS USA INC.; U.S. SMOKELESS TOBACCO MANUFACTURING COMPANY LLC; US SMOKELESS TOBACCO BRANDS INC.; and JOHN MIDDLETON COMPANY, *Plaintiffs*	:	
v.	:	Civil Action No. 12-96 ML
CITY OF PROVIDENCE, Rhode Island; PROVIDENCE BOARD OF LICENSES; PROVIDENCE POLICE DEPARTMENT; MICHAEL A. SOLOMON, Providence City Council President, in his official capacity; STEVEN M. PARE, Commissioner of Public Safety for the City of Providence, in his official capacity; and ANGEL TAVERAS, Mayor of Providence, in his official capacity, *Defendants*	:	

MEMORANDUM OF *AMICUS CURIAE*
TOBACCO CONTROL LEGAL CONSORTIUM
IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
AND OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

(FIRST AMENDMENT ISSUES)

CORPORATE DISCLOSURE STATEMENT

No party to this filing has a parent corporation, and no publicly held corporation owns 10% or more of the stock of any party to this filing.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Tobacco Control Legal Consortium is a national network of non-profit legal centers providing technical assistance to public officials, health professionals and advocates concerning legal issues related to tobacco and public health.[1] Among its other activities, the Consortium supports public policies that will reduce the harm caused by tobacco use.[2]

The Consortium serves as *amicus curiae* in cases where its experience and expertise may assist courts in resolving tobacco-related legal issues of national significance. Many of the Consortium's briefs have prominently addressed First Amendment claims brought by the tobacco industry to challenge government regulation, including in the context of retail tobacco sales.

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[1] No counsel of any party to this proceeding authored any part of this brief. No party or party's counsel, or any other person – other than *amicus* and its members – contributed any money to fund the preparation or submission of this brief. This brief is filed pursuant to this Court's order granting the April 16, 2012 Joint Motion for Leave to File as *Amici Curiae*.

[2] The Consortium is based at the Public Health Law Center of the William Mitchell College of Law in St. Paul, Minnesota. Affiliated legal centers include: ChangeLab Solutions, Oakland, California; Legal Resource Center for Tobacco Regulation, Litigation & Advocacy, at University of Maryland School of Law, Baltimore, Maryland; Public Health Advocacy Institute, at Northeastern University School of Law, Boston, Massachusetts; Smoke-Free Environments Law Project, at Center for Social Gerontology, Ann Arbor, Michigan; Tobacco Control Policy and Legal Resource Center at New Jersey GASP, Summit, New Jersey; and Center for Public Health and Tobacco Policy at New England Law | Boston.

To date the Consortium has filed twenty-nine amicus briefs in twenty-six separate cases in the United States, including cases before the Supreme Court of the United States; the Courts of Appeals for the Second, Fifth, Sixth, Ninth, and D.C. Circuits; the U.S. District Court for the District of Columbia; and the state appellate courts of California, Delaware, Florida, Kentucky, Minnesota, Montana, New Hampshire, Ohio, South Carolina, and Washington.

The Consortium exists to protect the public from the devastating health consequences of tobacco use. It has a strong interest in this case, the first time a First Amendment challenge has been brought against a straightforward tobacco pricing ordinance. If this challenge – and its audacious view of what constitutes free speech – succeeds, it would undermine many of the protections that the Consortium has worked to establish.

INTRODUCTION AND SUMMARY OF ARGUMENT

Providence's Price Ordinance brings government oversight to an area at the heart of the City Council's duty "to insure the welfare and good order of the city." Prov. Home Rule Charter, art. IV, § 401(a). Recognizing the danger of lifelong addiction posed by tobacco use, the City has acted to address one of the most prominent and pernicious sales strategies currently employed by the tobacco industry: the use of discount coupons and multipack discounts in tobacco sales to attract new, principally young, smokers. What the City has not done – under any applicable standard – is infringe anyone's free speech rights.

The freedom of speech guaranteed by the First Amendment is one of "the most cherished policies of our civilization." *Bridges v. California*, 314 U.S. 252, 260 (1941). But if the fabric of the First Amendment is stretched too thin, this cherished policy will become meaningless. *See City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989) ("It is possible to find some kernel of expression in almost every activity a person undertakes – for example, walking down the street or meeting one's friends at a shopping mall – but such a kernel is not sufficient to bring the activity within the protection of the First Amendment"). If the First Amendment is to continue to provide meaningful protection to genuine expression, it cannot be invoked and

applied indiscriminately to the most mundane business conduct. *See Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978) (warning in an analogous context of "dilution, simply by a leveling process, of the force of the Amendment's guarantee"). The capacity of government at any level to regulate for the common good will be undermined if virtually every public action can be challenged as violating constitutionally guaranteed expression. *Cf. Lochner v. New York*, 198 U.S. 45, 73 (1905) (Holmes, J., dissenting) (warning that overextension of 14th Amendment "economic liberty" principles would "cripple the inherent power of the states to care for the lives, health, and wellbeing of their citizens").

Fortunately, the First Amendment does not require that all commercial activity be protected as speech, nor that government be hamstrung in its ability to regulate business practices. Under well established law, the sales practices affected by the Price Ordinance do not involve expressive interests significant enough to bring them within the protection of the First Amendment. *See Wine & Spirits Retailers, Inc. v. Rhode Island* (*Retailers I*), 418 F.3d 36, 52 (1st Cir. 2005) ("no First Amendment interest stands in the way of a State's rational regulation of economic transactions"). Discounting is a routine business practice, not protected expression.

Even if the Price Ordinance could be imagined in some way to involve expression protected by the First Amendment, it would be only as an incidental burden on expressive conduct. *See United States v. O'Brien*, 391 U.S. 367, 376 (1968). The Ordinance readily withstands review under the applicable standard: it falls well within the government's authority and promotes a substantial government interest that that would be achieved less effectively absent the regulation. *See Turner Broad. Sys., Inc. v F.C.C.* (*Turner I*), 512 U.S. 622, 662 (1994).

The First Amendment, in sum, provides no plausible basis for a legal challenge to the Price Ordinance.[3]

[3] The First Amendment has nothing at all to do with the Flavored Tobacco Ordinance also challenged in this case. ("It shall be unlawful for any person *to sell or offer for sale* any flavored tobacco product to a consumer, except in a smoking bar." Prov. Code, ch. 14, art. XV, § 14-309 (emph. added).) Plaintiffs' argument that the Flavored Tobacco Ordinance restricts speech because it makes use of tobacco companies' public statements about their products to determine how to classify those products flies in the face of precedent flatly rejecting precisely that sort of hyperbolic extension of the First Amendment. *See Whitaker v. Thompson*, 353 F.3d 947, 953 (D.C. Cir. 2004) ("the First Amendment allows the evidentiary use of speech claims about a product by its manufacturer and vendor"); *accord Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993).

ARGUMENT

I. THE PRICE ORDINANCE IS AN ORDINARY COMMERCIAL REGULATION THAT DOES NOT IMPLICATE THE FIRST AMENDMENT.

A. The Ordinance Is A Regulation Of Commercial Transactions That Is Subject To Minimal Judicial Review.

Providence's Price Ordinance involves nothing more than straightforward regulation of retail pricing. As such it is subject to "rational basis" review, not any of the sorts of heightened scrutiny the tobacco industry plaintiffs purport to find applicable. The Ordinance does not suppress or restrict communication about the lawful pricing of tobacco products; it simply regulates the way those products are priced.

1. Regulation of prices, like regulation of other commercial transactions, is subject to rational basis review.

The law in this area is settled. "[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless … it is of such a character as to preclude the assumption that it rests upon some rational basis." *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938). *See also Maine Cent. R.R. Co. v. Bhd. of Maint. of Way Employees*, 813 F.2d 484, 488 (1st Cir. 1987) ("Economic legislation

… must be upheld … when the legislative means are rationally related to a legitimate governmental purpose").

Regulation of pricing falls squarely within the category of economic regulation subject to rational basis review. "[T]he state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells." *Nebbia v. New York*, 291 U.S. 502, 537 (1934). *See also Mora v. Mejias*, 223 F.2d 814, 816-17 (1st Cir. 1955) (Government "in the exercise of its police power may regulate the prices to be charged by an industry").

The Ordinance is a law regulating prices. Far from representing a government assault on free expression, the Ordinance simply helps to prevent retailers from providing cigarettes and other tobacco products at prices likely to attract and addict youth.[4] It thus closely resembles minimum price laws, which have not been considered constitutionally problematic for 75 years. *See Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp*., 301 U.S. 1 (1937) (in substance overruling *Carter v. Carter Coal Co*., 298 U.S. 238 (1936)); *Simonetti, Inc. v. State ex rel. Gallion*, 132 So. 2d 252, 253 (Ala. 1961) (noting that 38 United States jurisdictions had enacted

[4] Offering discounts to attract new, underage customers to tobacco use in order to exploit their subsequent addiction has been, historically, a banefully successful business strategy for the tobacco industry. *See infra*, sections I.A.2, II.C.4.

minimum price laws, and "the courts have been practically unanimous in affirming the principles of these laws against constitutional attack").[5] *See also Tenoco Oil Co., Inc. v. Dep't of Consumer Affairs*, 876 F.2d 1013, 1022 (1st Cir. 1989) (with respect to maximum price laws) (finding it "beyond dispute that [the government] may legitimately regulate the prices of staples like gasoline if it thinks that the public interest requires").

Restrictions on promotional discount pricing serve to make minimum price laws effective. *See* John Pierce *et al.*, *Tobacco Industry Price-Subsidizing Promotions May Overcome the Downward Pressure of Higher Prices on Initiation of Regular Smoking*, 14 Health Econ. 1061, 1067 (2005) ("tobacco industry expenditures on price-subsidizing promotions … appeared to have overcome the effect of [rapidly] increasing prices and to have halted the decline in the incidence of initiation of regular smoking"); E.C. Feighery *et al.*, *How do minimum cigarette price laws affect cigarette prices at the retail level?*, 14 Tobacco Control 80, 83 (2005) (finding cigarette prices not higher in most states with minimum price laws, most likely because those states allow promotional discount incentives).

[5] As of 2009, twenty-four states – including Rhode Island – had minimum price laws specifically for cigarettes. Ctrs. for Disease Control & Prevention (CDC), *State Cigarette Minimum Price Laws – United States, 2009* (2010), *at* http://www.cdc.gov/mmwr/ preview/mmwrhtml/mm5913a2.htm. None have been found unconstitutional. Seven of those states prohibit discounting. *Id.*

2. Tiered pricing is no more a form of speech than any other pricing practice a business may engage in.

Government regulations of price, whether setting price floors or ceilings, are economic legislation subject to rational basis review. *Maine Cent. R.R. Co.*, 813 F.2d at 488 (1st Cir. 1987); *Eby-Brown Co. v. Wisconsin Dept. of Agriculture*, 295 F.3d 749, 755 (7th Cir. 2002). Plaintiffs nevertheless contend, and seek to have this Court be the first to proclaim, that the outcome is somehow different when retailers implement tiered pricing schemes involving discount coupons or special discounts for multiple purchases. Yet Plaintiffs do not offer any plausible reason that tiered pricing is more inherently communicative than any other pricing scheme.

In fact, tiered pricing is simply one course of commercial conduct that a firm may choose when faced with the question of how to set prices to maximize profits. Discount coupons, for example, enable a seller to maximize revenues by continuing to charge higher prices to consumers whose demand is less price-sensitive (and therefore do not use coupons), while also catering customers who are more concerned about savings. *See, e.g.*, Pierce, *supra*, at 1062; Chakravarthi Narasimhan, *A Price Discrimination Theory of Coupons*, 3 Marketing Science (2) 128 (1984).

Coupons and other special discounts, like temporarily low purchase prices, are also used to attract new consumers who may then continue to purchase a product or brand at the regular price. *See* Douglas Houston & John Howe, *An Economic Rationale for Couponing*, 24 Quarterly J. of Bus. & Econ. 2: 35, 37 (1985).

This practice is particularly important to tobacco companies, whose profits depend on getting new users addicted to their product before those users are old enough to make a reasoned choice about tobacco use. *See* Victoria White *et al*., *Cigarette Promotional Offers: Who Takes Advantage?*, 30 Am. J. Prev. Med. (3) 225, 229 (2006) ("It would be important to tobacco companies to encourage . . . young adult smokers to increase their dependency and to smoke their brand for many years rather than quit before they become heavily addicted"); Pierce, *supra*, at 1062 ("price-subsidizing promotions are likely targeted at the most price-sensitive consumers, including younger new smokers and would-be smokers"); F.J. Chaloupka *et al., Tax, Price, and Cigarette Smoking,* 11 Tobacco Control (Supp. I) i62, i64 (2002) (surveying studies showing that youth smoking varies significantly more with price than does adult smoking).

Consequently, laws regulating variable pricing strategies are subject to the same lenient standards of review applied to other price regulations.

See Safeway Stores, Inc. v. Oklahoma Retail Grocers Ass'n, Inc., 360 U.S. 334, 338 (1959) (rejecting supermarket chain's assertion – ironic in the present context – that its equal protection rights were violated by allowing competitors to undercut statutory minimum price through discounting tactics such as trading stamps, which the Court described as a kind of "coupon[]"). The Court made clear that the statute would have been equally constitutionally valid, under rational basis review, had it *prohibited* such discounting: "We are not concerned with the soundness of the distinctions drawn. It is enough that it is open to Oklahoma to believe them to be valid as the basis of a policy." *Id.* at 342.

B. The Ordinance Does Not Regulate Protected Speech.

Directly contrary to plaintiff's characterization, Plaintiffs' Memorandum in Support of MSJ (Pls.' Mem.) at 11, the Price Ordinance regulates prices themselves, rather than communication about prices. Specifically, by prohibiting the use of various discounting mechanisms to set the actual sale price of cigarettes (and other tobacco products) below the generally applicable listed price, the Ordinance restricts employment of the tiered pricing strategies discussed above.

1. The Ordinance regulates pricing, not communications about pricing.

The closest Plaintiffs come to a substantive argument that the Ordinance regulates speech – their claim that the Ordinance restricts the ability of retailers to "communicate to adult tobacco consumers that the price they are paying is less than the standard price for the product," Pls.' Mem. at 10 – is based on a mischaracterization of the law. The Ordinance prohibits retailers from charging less than the standard price – in exchange for coupons or volume purchases. It follows, of course, that retailers may not communicate that they are doing so; but their inability to advertise an illegal transaction does not violate their First Amendment rights. "Economic regulations, otherwise valid, are not rendered invalid simply because availability of the prohibited activity must be communicated to serve its purpose." *Coldwell Banker Residential Real Estate Servs. v. Missouri Real Estate Comm'n*, 712 S.W.2d 666, 671 (Mo. 1986) (finding that prohibition of discount coupon books as incentive to home buyers did not implicate speech); *see also Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973) ("We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of

narcotics or soliciting prostitutes"). The Ordinance does not prohibit any communication about *lawful* discounts.

Consequently, the classic commercial speech decisions on which plaintiffs rely have no bearing on the present case. If tobacco retailers were legally permitted to sell cigarettes at discounts to purchasers of multiple packs or to redeemers of coupons, but were not allowed to advertise that fact, then Supreme Court cases like *Virginia State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) might indeed be applicable precedent. But this case involves no "suppression of price information," *id.* at 763. To the contrary, tobacco retailers are free to advertise any price that they may legally charge.[6]

The Supreme Court has underscored the significance of the distinction between suppressing price information and regulating prices, specifically designating the latter a permissible, non-speech-restrictive alternative when striking down restrictions on commercial speech as more extensive than necessary. In a case invalidating Rhode Island statutes prohibiting the advertising of liquor prices, the Court reasoned that maintaining "higher

[6] Plaintiffs' reliance on *South Ogden CVS Store, Inc. v. Ambach*, 493 F. Supp. 374 (S.D.N.Y. 1980) is similarly misplaced. In that case the court struck down regulations that severely burdened advertisements for *legal* discounts on prescription medications. *See id.* at 380 ("the information which plaintiff seeks to communicate is not in itself illegal").

prices . . . by direct regulation" would be an "alternative form[] of regulation that would *not involve any restriction on speech.*" *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996) (plur. op.) (emph. added); *accord, id.* at 530 (O'Connor, J., conc. in judgment, joined by 2 others). *See also Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 372 (2002) (capping gross revenue or profit from a particular compounded drug would be a permissible "non-speech-related" alternative to prohibition on advertising compounded prescription drugs). In this case, Providence seeks to maintain a level of pricing that will deter youth smokers and others through direct regulation of pricing practices.

Restrictions on issuing or redeeming coupons for a discount, like restrictions on multiple-pack discounts, are direct regulations of price, rather than of communications about price. *See, e.g., Coldwell Banker*, 712 S.W.2d at 670 (challenge to prohibition on real estate coupon incentive program "fails to distinguish between the inducement itself and the communication of the inducement. The statute . . . does not deal with the means of communication, and would apply even if there were no advertising and Coldwell relied purely on customers who had received the benefit to spread the word. The statute regulates conduct, not speech"); *Coldwell Banker Residential Real Estate Servs., Inc. v. New Jersey Real Estate*

Comm'n, 576 A.2d 938, 942 (N.J. Super. Ct. App. Div. 1990) (Plaintiff "complains that the prohibition of its coupon programs violates the First Amendment's protection of commercial speech. Not so. It is the non-verbal conduct of employing extraneous inducements to produce real estate listings and sales that is prohibited").[7]

2. Offers to engage in illegal activity do not constitute protected speech.

The Ordinance's supplemental restrictions on "offer[ing] to accept or redeem" coupons, Prov. Code, ch. 14, art. XV, § 14-308, raise no First Amendment concerns. "Offers to engage in illegal transactions are categorically excluded from First Amendment protection." *United States v. Williams*, 553 U.S. 285, 297 (2008). The Price Ordinance makes certain transactions illegal – selling tobacco products at a discount in exchange for coupons or for purchases of more than one item. It follows that the First Amendment does not protect "[o]ffers to engage" in such transactions. *Id*. "Any First Amendment interest which might be served by advertising an ordinary commercial proposal . . . is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a

[7] A third Coldwell Banker case found that a prohibition on inducements was in effect an advertising regulation subject to *Central Hudson* review. *Coldwell Banker Residential Real Estate Servs. v. Clayton*, 475 N.E.2d 536, 540 (Ill. 1985). However, unlike the contrary cases, the Illinois Supreme Court offered no analysis in support of its conclusion.

valid limitation on economic activity." *Pittsburgh Press*, 413 U.S. at 389; *see also Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563-64 (1980) ("government may ban . . . commercial speech related to illegal activity"); *Vono v. Lewis*, 594 F.Supp.2d 189, 206 (D.R.I. 2009) ("It is settled that the First Amendment does not protect commercial advertisements of unlawful activities").

The fact that tobacco sales are not prohibited entirely does not change the analysis. The First Amendment does not protect advertisements for illegal commercial transactions involving substances whose sale may be legal in other contexts. Even though alcohol, for example, is a legal substance for adults to purchase, the First Amendment does not require that liquor stores be able to offer alcohol for sale before noon on Sundays, or to advertise that they do so. *See* R.I. Gen. Laws § 3-8-1 (2012). Similarly, the fact that cigarette purchases are legal for adults does not confer First Amendment protection on advertisements for the sale of cigarettes through unlawful discounts.

Nor does the analysis does change simply because the same ordinance that outlaws the activity also outlaws advertising about that activity. *See, e.g., In re Bd. of Pharmacy Decision to Prohibit the Use of Advertisements Containing Coupons for Prescription Drugs*, 465 A.2d 522, 523 (N.J. Super.

Ct. App. Div. 1983) (rejecting pharmacists' First Amendment challenge to determination that issuing coupons for prescription drugs violated state law; plaintiffs' citations to commercial advertising cases were not "in point [because] in none of them would the proscribed commercial advertising have advertised an activity itself unlawful, as on this appeal"); *Coldwell Banker*, 712 S.W.2d at 670 ("If the discount program is contrary to law the plaintiff has no greater right to advertise it than to advertise a chicken fight or a house of prostitution"); *Coldwell Banker*, 576 A.2d at 942 (if coupon inducement program "is lawfully barred, as we conclude it may be, advertising the unlawful conduct is not speech protected by the First Amendment"); *Ralph Rosenberg Court Reporters, Inc. v. Fazio*, 811 F. Supp. 1432, 1442 (D. Haw. 1993) (finding rule "prohibit[ing] court reporters from awarding prizes, bonuses, or 'volume discounts' for use of their services … [was] not directed at speech at all" and, even if it were considered a restriction on commercial speech, that speech was not protected because "the fact that [the government] has substantively banned the underlying transaction means that speech related to the programs is 'related to unlawful activity'").

3. Discount coupons and other discounts do not themselves constitute speech.

Plaintiffs' claim that coupons and other discount mechanisms in and of themselves "constitute protected commercial speech," Pls.' Mem. at 11, is incorrect.

Coupons are not inherently "speech." They may be used communicatively – as, for example, when they are distributed to passersby as the equivalent of handbills touting a product – and they may be used in ways that have nothing to do with communication, as when a checkout clerk keeps the weekly store circular by the cash register and simply scans the relevant coupon's UPC symbol when a customer presents that item at the checkout counter. The Ordinance here does not prevent sellers from distributing circulars with any content that might be included in a coupon; it only prevents those circulars from being used as part of a transaction effecting a specially reduced price. In other words, under the Ordinance, any *communicative* function of a coupon remains perfectly legal.[8]

Neither are discounts in themselves speech protected by the First Amendment. Plaintiffs assert that because discounts are intended to

[8] Moreover, the Ordinance does not outlaw the production and distribution of coupons offering discounts. Tobacco companies are free to send coupons to residents of Providence for use elsewhere.

influence consumers to buy a given product, they are communicative, and therefore protected by the First Amendment. This argument proves far too much. By plaintiffs' reasoning, manipulating nicotine levels in cigarettes, *see U.S. v. Philip Morris USA, Inc*., 566 F.3d 1095, 1107 (D.C. Cir. 2009), is simply a very effective way of persuading smokers to keep smoking, and may therefore not be regulated without heightened scrutiny under the First Amendment. This is not the law. If a new toothpaste flavor influences consumers to brush their teeth more frequently, it does not follow that toothpaste flavoring is speech. Neither nicotine nor toothpaste flavor is any "essential part of any exposition of ideas." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). Nor is pricing. "The censorial motive plaintiff attributes to defendants is always present when the government restricts sales of a product. That can't be sufficient" to raise First Amendment concerns. *Philip Morris USA, Inc. v. San Francisco*, 345 F. App'x 276, 277 (9th Cir. 2009) (unpub.).

C. The Price Ordinance Does Not Regulate Expressive Conduct.

Redeeming coupons and offering multiple-pack discounts are examples of ordinary commercial conduct. These activities do not involve speech. Nor do they constitute even protected expressive conduct.

While virtually any human activity can be described as having some expressive component, *see O'Brien*, 391 U.S. at 376, the First Amendment does not protect all activities that can be so described. *Stanglin*, 490 U.S. at 25. *See also Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706 (1986) ("every civil and criminal remedy imposes some conceivable burden on First Amendment protected activities"). As the Supreme Court has long held, "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language." *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc*. (*FAIR*), 547 U.S. 47, 58 (2006) (quoting *Giboney v. Empire Storage & Ice Co*., 336 U.S. 490, 502 (1949)).

First Amendment protection for conduct extends "only to conduct that is inherently expressive." *FAIR*, 547 U.S. at 66. To receive protection conduct must be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments," *Spence v. Washington*, 418 U.S. 405, 409 (1974). That is, "conduct is entitled to First Amendment protection when it evinces '[a]n intent to convey a particularized message … [and] the likelihood [is] great that the message would be understood by those who viewed it.'" *Gun Owners' Action*

League, Inc. v. Swift, 284 F.3d 198, 211 (1st Cir. 2002) (quoting *Texas v. Johnson*, 491 U.S. 397, 404 (1989)).

Everyday commercial activity is not typically expressive. *See Sorrell v. IMS Health Inc.*, 131 S.Ct. 2653, 2665 (2011) ("restrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct"); *State v. Chepilko*, 965 A.2d 190, 198 (N.J. Super. App. Div. 2009) ("Most human conduct, especially in the commercial realm, is not expressive").

The First Circuit has not hesitated to apply this principle in circumstances parallel to those at issue here. *See Wine And Spirits Retailers, Inc. v. Rhode Island* (*Retailers II*), 481 F.3d 1, 6-7 (1st Cir. 2007) ("The conduct in question is not so inherently expressive as to warrant First Amendment protection under the *O'Brien* doctrine"). *See also Retailers I*, 418 F.3d at 53 (holding regulation that prohibited franchisors or chain stores from holding retail liquor licenses regulated "commercial conduct exhibit[ing] nothing that even the most vivid imagination might deem uniquely expressive").

In order "to avoid creating a rule that all conduct is inherently expressive," the Supreme Court has established that "the person desiring to engage in assertedly expressive conduct [must] demonstrate that the First

Amendment even applies." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984). That is a burden that Plaintiffs here cannot meet.

Price discounts, whether offered through coupon redemptions, special prices for multiple purchases, or any other mechanism, do not and are not intended to "convey a particularized message," much less one that would likely be understood. The closest plaintiffs come to attempting to identify a particularized understandable message that might be expressed by coupon and multiple pack discounts is "Buy this product because it is priced at a discount." Pls.' Mem. at 17. But if that alleged message were sufficiently particular to merit First Amendment protection, then so would be the "message" conveyed by virtually any business activity.

One could as easily argue that the First Amendment is implicated by minimum price laws, because they prevent sellers from conveying through their prices "Buy this product because it costs so little" or "Purchase this item because it costs less than our competitors' products." Monopolistic practices could be said to be constitutionally protected because they express the message "Buy this product because no alternatives are available." Simply offering a product for sale could express the message "Buy this item, because it is safe and suitable for purchase." If so, then any regulation of

sales of a product for safety reasons – prescription drugs, automobiles, handguns – should be subject to First Amendment scrutiny.

Selling a commercial product that is not itself expressive (like a book or movie) does not implicate the First Amendment. *See Mastrovincenzo v. City of New York*, 435 F.3d 78, 94-95 (2d Cir. 2006) ("where an object has a dominant non-expressive purpose, it will be classified as a mere commercial good, the sale of which likely falls outside the scope of the First Amendment"); *id.* at 92 ("To say that the First Amendment protects the sale or dissemination of all objects ranging from 'totem poles' to television sets does not take us far in trying to articulate or understand a jurisprudence of ordered liberty; indeed, it would entirely drain the First Amendment of meaning"). Tobacco products are, it is safe to say, no more expressive than totem poles or television sets. In short, cigarette "advertising is protected expressive activity. Selling cigarettes isn't, because it doesn't involve conduct with a significant expressive element…. It doesn't even have an expressive component." *Philip Morris*, 345 F. App'x at 277.

II. ANY LIMIT ON PROTECTED EXPRESSION IS AN INCIDENTAL EFFECT OF REGULATING CONDUCT AND EASILY PASSES FIRST AMENDMENT REVIEW UNDER THE *O'BRIEN* STANDARD.

If the Price Ordinance can be said to burden protected expression at all – which is unlikely – it can be only as an indirect consequence of the law's regulation of non-communicative business activities. And the Ordinance readily meets the relatively lenient standard for regulations of conduct that have an incidental effect on expression. *See United States v. O'Brien*, 391 U.S. 367 (1968).

A. The Test For Restrictions On Expressive Conduct, Not Commercial Speech, Governs Any Possible First Amendment Inquiry In This Case.

The illogic of Plaintiffs' attempt to argue that the more stringent *Central Hudson* test should apply here is exposed by the lone case that they offer in support of their claim. Plaintiffs cite a section of *Lorillard Tobacco Co. v. Reilly* that struck down limits on the location of in-store *advertisements*. Pls.' Mem. at 17, citing 533 U.S. 525, 567 (2001). But, with the possible exception of advertising for illegal activity, *see supra*, section II.B., this case has nothing to do with advertising. It has, instead, to do with *conduct*. Perhaps recognizing this flaw, Plaintiffs claim, improbably, that "*Central Hudson* applies to laws regulating conduct." Pls.'

Mem. at 17. It doesn't. The *Central Hudson* test applies to commercial *speech*. *See Lorillard*, 533 U.S. at 567, 569.

The irony is that the *Lorillard* decision does in fact address expressive conduct – just not in the section that plaintiffs cite. In its analysis of Massachusetts' regulation prohibiting self-service displays of tobacco products, the Court assumed *arguendo* that merchants may have a protected interest in the communicative effect of product displays. 533 U.S. at 569. And it set out there the test that governs any laws that "regulate conduct that may have a communicative component." *Id*.

B. The *O'Brien* Test Is Not A Stringent Standard.

The constitutional test for restrictions on expressive conduct is a relatively lenient one. A government regulation that incidentally restricts expression is "sufficiently justified" if "it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377.

The fourth element of the test is not rigorous. "So long as the means chosen are not substantially broader than necessary to achieve the

government's interest, . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Turner Broad. Sys., Inc. v F.C.C.* (*Turner II*), 520 U.S. 180, 218 (1997). Rather, "the requirement of narrow tailoring is satisfied so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Turner I*, 512 U.S. at 662.

There is no merit to Plaintiffs' claim that the *O'Brien* test currently requires "demanding First Amendment protection" that "largely overlaps" with the *Central Hudson* standard. Pls.' Mem. at 17 & n.8. Although that assertion might have had some validity in the past, *see, e.g., Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995), in recent years the test for commercial speech has become more difficult to pass[9] but the expressive conduct inquiry has remained notably lenient. In *Lorillard*, for example, the Supreme Court struck down a series of advertising regulations under *Central Hudson* "as applied in our more recent commercial speech cases," 533 U.S.

[9] That is not to suggest that the *Central Hudson* test has become an impassable obstacle; indeed, the recent decision by the Sixth Circuit upholding under *Central Hudson* most of the marketing restrictions in the Family Smoking Prevention and Tobacco Control Act of 2009, *see Discount Tobacco City & Lottery v. United States*, 674 F.3d 509 (2012), illustrates that the test is by no means insurmountable – particularly for government regulations of tobacco.

at 554-55, but sustained an accompanying restriction on expressive conduct under the *O'Brien* standard, *id*. at 569.

Now as before, laws evaluated under *O'Brien* are rarely overturned. Indeed, the Supreme Court has not found a law unconstitutional under the *O'Brien* standard for more than twenty years. *See, e.g.*, *FAIR*, 547 U.S. at 58 (2006); *Lorillard*, 533 U.S. 525, 569 (2001); *Turner II*, 520 U.S. at 189 (1997). The First Circuit has been equally unequivocal. *See Wirzburger v. Galvin*, 412 F.3d 271, 275 (2005); *Gun Owners' Action League, Inc. v. Swift*, 284 F.3d 198, 211 (1st Cir. 2002); *United States v. Johnson*, 952 F.3d 565, 578 & n.10 (1st Cir. 1991); *Welch v. United States*, 750 F. 3d 1101, 1109 (1st Cir. 1985).

C. The Ordinance Readily Passes The *O'Brien* Test.

The Price Ordinance's restrictions on the use of coupons and multipack sales easily withstand review under the standard for limitations on expressive conduct. The Ordinance "advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Turner II*, 520 U.S. at 190. It is a viewpoint- and content-neutral regulation – it does not distinguish among motives for discounts or messages (if any) conveyed thereby. It advances important governmental interests in

preventing youth and other tobacco use that are unrelated to the suppression of free speech. And it does not burden substantially more expression than necessary to further those interests.

More specifically, the law (1) falls squarely within the constitutional power of the City government; (2) promotes the important governmental interest of reducing tobacco use, especially among youth; (3) is targeted not at the suppression of free expression but rather at discounts that endanger health; and (4) does not incidentally restrict substantially more expression than necessary to accomplish the City's goals. *See O'Brien*, 391 U.S. at 376.

1. The ordinance falls squarely within the City's authority.

Providence possesses ample authority to regulate retail tobacco pricing. *See* City's Mem. in Support of MSJ, at § V.E; *Amico's, Inc. v. Mattos*, 789 A.2d 899, 903 (R.I. 2002) (quoting R.I. Const., art. 13, § 2) (granting home rule cities the authority to "legislate with regard to all local matters"); Prov. Home Rule Charter, art. I, § 103 ("The city shall have all powers of local self-government and home rule and all powers possible for a city to have under the Constitution and the laws of the state"), art. IV, § 401 ("The powers and duties of the city council shall include . . . [t]o enact such ordinances as the city council may consider necessary to insure the welfare

and good order of the city and to provide penalties for the violation thereof"). For the reasons stated in the City's brief and the *amicus* brief filed by the American Academy of Pediatrics and other health organizations, the Ordinance is not preempted by either federal or state law.

2. The Ordinance advances important government interests.

The Ordinance readily meets the second requirement of the *O'Brien* test: Providence clearly has an important interest in preventing access to and use of tobacco, especially by youth. Further, that interest is clearly advanced by the Ordinance. *See U.S. v. Philip Morris USA*, 449 F.Supp.2d 1, 640 (D.D.C. 2006) ("Defendants could significantly reduce adolescent smoking by … stopping all price related marketing (i.e., discounting and value added offers of cigarettes), especially in convenience stores, where this kind of marketing is concentrated and where young people are more likely to purchase cigarettes.")

3. The City's purpose in enacting the Ordinance is unrelated to the suppression of expression.

The purpose of the Ordinance is to avoid price discounts that have been shown to encourage youth uptake and increase smoking. The Ordinance is not designed to suppress the expression of tobacco

manufacturers or retailers. The Ordinance doesn't restrict ads, it restricts conduct – the redemption of coupons and the sale of multiple packages for a discount. It doesn't even restrict the distribution of coupons, just their acceptance. If the measure somehow burdens expression, the burden is incidental.

4. The Ordinance is narrowly tailored to accomplish the government's objectives.

The Ordinance is narrowly tailored to limit any burden that it may impose on protected expression. The new law makes certain discounting practices unlawful. If that restriction limits communication, it is only advertisements and other communications touting those same, now unlawful, practices. *See Cent. Hudson*, 447 U.S. at 563-64 (permitting prohibition of commercial speech related to illegal activity). If there is any remaining communication inherent in the accepting of a coupon or multipack discount, it is surely not extensive. Thus the Ordinance cannot be said to "burden substantially more speech than is necessary." *Turner I*, 512 U.S. at 662.

The Ordinance readily meets the requirement that it "promote[] a substantial government interest that would be achieved less effectively absent the regulation." *Id*. Without the law, the government's efforts to limit

access to tobacco, particularly among youth, would not be as effective. *See* U.S. Department of Health and Human Services, *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General* 530 (2012) ("In considering the numerous studies demonstrating that tobacco use among young people is responsive to changes in the prices of tobacco products, it can be concluded that the industry's extensive use of price-reducing promotions has led to higher rates of tobacco use among young people than would have occurred in the absence of these promotions");[10] White, *Cigarette Promotional Offers*, 30 Am. J. Prev. Med. at 228 (finding "strong evidence that tobacco industry [price] promotional offers are particularly appealing to certain market segments, including young adults"). *See also Philip Morris*, 449 F. Supp. 2d at 639 ("price reductions . . . have reduced the rate of decline in overall cigarette smoking and contributed to the increases in youth smoking incidence and prevalence").[11]

Internal industry documents confirm that the tobacco industry has deliberately relied on discount pricing strategies to gain new customers

[10] *At* http://www.cdc.gov/tobacco/data_statistics/sgr/2012/index.htm.
[11] Among other effects, discounting tobacco products may well make adults more willing, because of reduced expense, to purchase those products for minors. *Cf. People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 37 Cal.4th 707, 718 (2005) ("free distribution of cigarettes encourages tobacco use, and in particular is a recognized source by which minors obtain tobacco products").

among youth. A 1984 R.J. Reynolds memo, for example, after noting that that young smokers are more price-sensitive, advised: "Tactically, extended periods of closely targeted pack promotion (B1G1F (buy-one get-one free), sampling) in selected sites (e.g., convenience stores, military exchanges, special events) could lead to brand loyalty from repeated trial. This should be considered an investment program.") Chaloupka, *supra* at i69-i70.

Finally, the Ordinance "leaves open ample channels of communication," *Lorillard*, 533 U.S. at 569. The Ordinance does not foreclose any medium of communication open to Plaintiffs before its passage. Any communicative component of a coupon may still be conveyed via a circular or flier. Indeed, coupons may be distributed to residents of Providence as long as they direct consumers to tobacco outlets that are located outside city limits. All the rest of the vast array of advertising and other tobacco marketing techniques used at the point of sale (whether protected by the First Amendment or not) remain available. *See* Fed. Trade Comm'n, Cigarette Report for 2006 (2009).[12] Although broadcast media are not available by congressional mandate, *see* 15 U.S.C. § 1335, any further limitations like the restrictions on outdoor and print advertising agreed to in

[12] *At* http://www.ftc.gov/os/2009/08/090812cigarettereport.pdf.

the Master Settlement Agreement with the States[13] are the result not of legislative imposition but of voluntary agreements by the tobacco industry to avoid financial liability. Such self-imposed measures undertaken in settlement are not properly part of an assessment whether ample channels of communication remain as a result of government restrictions. Fundamentally, the enactment of the Pricing Ordinance does not significantly alter the channels of communication open to sellers of tobacco.

In sum, even if this Court examines the Ordinance as an incidental restriction on protected expression, the law will stand.

CONCLUSION

A law restricting coupon redemption and multipack sales of tobacco does not violate – indeed, it does not even implicate – the First Amendment. Plaintiffs' free speech challenge to the Price Ordinance should be denied.

[13] *At* http://ag.ca.gov/tobacco/msa.php.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and 32(a)(7)(B) because this brief contains 6900 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced 14-point typeface including serifs. The typeface is Times New Roman, prepared using Microsoft Word 2008 for Mac, version 12.3.3.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

DATED: June 15, 2012

/s/ Raymond A. Marcaccio

CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2012, a true copy of the within MEMORANDUM OF *AMICUS CURIAE* was filed electronically via the Court's CM/ECF System, where it is available for viewing and downloading, with true and accurate copies also provided to the following counsel by electronic mail:

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