Case No. 13-1053

UNITED STATES COURT OF APPEALS
FIRST CIRCUIT

NATIONAL ASSOCIATION OF
TOBACCO OUTLETS, INC., *et al*.,

Plaintiffs-Appellants,

v.

CITY OF PROVIDENCE, *et al.*,

Defendants-Appellees.

On Appeal from the U.S. District Court
for the District of Rhode Island
Hon. Mary M. Lisi, Chief Judge

BRIEF OF APPELLEES,
CITY OF PROVIDENCE, *et. al.*

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Defendants-Appellees (collectively, the "City") believe oral argument will assist in the efficient resolution of the issues raised and for that reason join Plaintiffs-Appellants in requesting oral argument pursuant to Fed. R. App. P. 34(a). In addition, the City concurs with Appellants that this Court has jurisdiction to decide the federal questions and issues relating to state law preemption raised in the appeal pursuant to 28 U.S.C. §§ 1291, 1331 and 1343(a)(3).

The City, however, does not concur that this Court has jurisdiction to decide the state constitutional home rule issue raised by Appellants for, *inter alia*, the reasons stated by the court below. *See infra* at 50-55.

IV. STATEMENT OF THE ISSUES ON APPEAL

1. Are two municipal ordinances designed to protect public health by prohibiting, respectively: (a) the sale of certain flavored non-cigarette tobacco products outside of "smoking bars;" and (b) the redemption of coupons and other transactions facilitating the sale of price-discounted tobacco products (including cigarettes), lawful local regulations which are not preempted by either federal or state law?

2. Is the non-expressive, transactional conduct regulated by the ordinance prohibiting coupon redemption and other transactions facilitating the

sale of price-discounted tobacco products outside the scope of the First Amendment?

3. Are both ordinances rationally related to a legitimate governmental purpose so as to pass muster under the rational basis test?

V. STATEMENT OF THE CASE

1. The Ordinances

Providence Code of Ordinances, § 14-309 (the "Flavor Ordinance") (Joint Appendix ("JA") 506), makes it unlawful for any person "to sell or offer for sale any flavored tobacco product to a consumer, except in a smoking bar." *Id.*[1] A "flavored tobacco product" is defined to include products containing tobacco or nicotine that "contain a constituent that imparts a characterizing flavor," excluding cigarettes, but including all flavored non-cigarette tobacco products, such as smokeless (or chewing) tobacco, and flavored cigars. *Id.* at § 14-308.[2]

Providence Code of Ordinances, § 14-303 (the "Price Ordinance") (JA 502), has four (4) substantive subsections, making it illegal to:

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[1]For ease of reference, the City will use the abbreviations adopted by the district court and refer to the "Flavor Ordinance" and the "Price Ordinance" (collectively, the "Ordinances"). A "smoking bar" is defined in the Flavor Ordinance with reference to R.I. Gen. Laws § 23-20.10-2(15), which includes establishments where annual revenue generated by tobacco sales are greater than fifty per cent of the total revenue generated. *Id.*

[2] The Ordinance does not regulate nicotine replacement therapies approved by the U.S. Food and Drug Administration (the "FDA"). *Id.*

(1) accept or redeem, offer to accept or redeem, or cause or hire any person to accept or redeem or offer to accept or redeem any coupon that provides any tobacco products without charge or for less than the listed or non-discounted price; or

(2) accept or redeem, offer to accept or redeem, or cause or hire any person to accept or redeem or offer to accept or redeem any coupon that provides any cigarettes without charge or for less than the listed or non-discounted price; or

(3) sell tobacco products to consumers through any multi-pack discounts (e.g. 'buy-two-get-one-free') or otherwise provide or distribute to consumers any tobacco products without charge or for less than the listed or non-discounted price in exchange for the purchase of any other tobacco product; or

(4) sell cigarettes to consumers through any multi-pack discounts (e.g. 'buy-two get-one-free') or otherwise provide or distribute to consumers any cigarette without charge or for less than the listed or non-discounted price in exchange for the purchase of any other cigarette.

Id., § 14-303(1)-(4). "Tobacco products" is broadly defined and, unlike the Flavor Ordinance, the Price Ordinance includes cigarettes. *Id*. at § 14-300.[3]

The Ordinances prescribe a schedule of fines in the event of a violation, and provide that the City's Board of Licenses may revoke or suspend the municipal license of any tobacco retailer for failure to comply. *Id*. at § 14-310.

[3] But like the Flavor Ordinance, products approved by the FDA as nicotine replacement therapies are excluded.

2. The Proceedings and Decision Below

On February 13, 2012, Plaintiffs filed a complaint below ("the Complaint") (JA 12), which sought declaratory and injunctive relief to prevent the City from enforcing either the Price Ordinance or the Flavor Ordinance.[4] A motion and cross-motion for summary judgment were filed, and on December 10, 2012, Judge Lisi issued a thirty-seven page memorandum and order denying Plaintiffs' motion for injunctive relief and for summary judgment, and granting the City's cross-motion for summary judgment (the "Decision"). *See* Addendum to the Appellants' Br. (the "Add.") at 3.

The district court held that the Flavor Ordinance was not preempted by the Family Smoking Prevention and Tobacco Control Act (the "FSPTCA"), 123 Stat. 1776, Pub. L. No. 111-31 (2009), as codified primarily at 21 U.S.C. § 387 *et seq.*, because the court found that the Act does not preempt local measures which are focused exclusively on "the sale and/or distribution of tobacco products" without reference to "tobacco product standards." *Id*. at 27. In addition, the court below held that the Price Ordinance was not preempted by the Cigarette Labeling and Advertising Act (the "Cigarette Labeling Act"), 79 State. 282, as amended, 15

[4] Although the City did agree to a brief stay of enforcement pending a decision on the merits to minimize legal expenses, it did not thereby "acknowledge the seriousness of Plaintiffs' claims," as alleged by Appellants. *See* Appellants' Brief ("Appellants' Br.") at 5.

U.S.C. § 1331 *et seq*., as the court found that the measure only regulated conduct that was "specifically excluded from preemption by 15 U.S.C. § 1334 (c)." Decision at 24.

As Judge Lisi emphasized, the Price Ordinance:

> does not regulate the content of . . . coupons, nor does it preclude Plaintiffs from disseminating the coupons within the City, whether for promotional purposes or otherwise; instead, it only prohibits the redemption of coupons.

Id. at 23. She added that the Ordinance:

> does not regulate the information provided on cigarette packaging, it only prohibits the sale of cigarettes through multi-pack discounts or the distribution of cigarettes for less than the listed price in exchange for the purchase of other cigarettes.

Id. at 23.

The First Amendment was not implicated because, according to the court below, the Price Ordinance did not impinge "commercial speech or expressive conduct," and therefore "its prohibition against certain coupon discount and other price reduction practices does not conflict with the Plaintiffs' exercise of their First Amendment rights." *Id.* at 15. As to the Flavor Ordinance, the district court found it to be "an economic regulation of the sale of a particular product and, as such, it involves neither commercial speech nor expressive conduct." *Id*. at 17.

Chief Judge Lisi also held that there had been no due process violation under the Fourteenth Amendment or civil rights violation under 42 U.S.C. § 1983 as the Flavor Ordinance was not unconstitutionally vague. *Id*. at 28-31.[5]

Moreover, the district court found that the Ordinances were not preempted under Rhode Island law, noting that the R.I. Supreme Court had made clear that there was "no indication that the General Assembly even impliedly intended to occupy the field of regulating smoking." *Id.* at 35, quoting *Amico's, Inc. v. Mattos*, 789 A.2d 899, 907 (R.I. 2002). As to whether the licensing of tobacco retailers was within the City's powers under the state's Home Rule Amendment, the court concluded that the issue was "not before the Court," because:

> licensing is implicated only if a violation occurs . . .[and] . . . it would be improper for this Court to determine the constitutionality of the City's licensing requirement and issue what amounts to an advisory opinion.

Id. at 32.

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[5] The district court did strike certain language from the Flavor Ordinance defining "characterizing flavor," which referred to "concepts such as spicy, arctic, ice, cool, warm, hot, mellow, fresh and breeze," finding that it "confused, rather than clarified, the definition." *See id.* at 30, n. 11.

Finally, the district court held that both Ordinances passed muster under the rational basis standard of review as they both were rationally related to a legitimate governmental purpose. *Id*. at 18-20.

Judgment for the City entered on December 10, 2012 (Add. 1).

VI. SUMMARY OF ARGUMENT

The court below was correct when it held that the Ordinances were lawful public health measures, were not preempted by either federal or state law, did not implicate Plaintiffs' First Amendment rights, and were rationally related to the government's substantial interest in reducing the number of its residents—especially its younger residents—who become addicted to nicotine.

As noted by the court below, the Flavor Ordinance's sales restrictions are expressly allowed by the FSPTCA, which recognizes the authority of state and local governments to regulate the sale and distribution of tobacco products. S*ee* 21 U.S.C. § 387p(a)(i) (preservation clause, quoted *infra* at 14); 15 U.S.C. § 1334(c) (preemption clause, quoted *infra* at 15); and 21 U.S.C. § 387p(a)(2)(B) (savings clause, quoted *infra* at 15). This was made abundantly clear in a recent decision from the Second Circuit—the only case to date which is directly on point—upholding a substantially similar New York City ordinance and rejecting a federal preemption challenge by many of the same parties here. *See U.S. Smokeless*

Tobacco Manufacturing Co., LLC v. City of New York ("*Smokeless Tobacco II*"), 708 F.3d 428 (2nd Cir. 2013). Like the Flavor Ordinance, the New York City provision had nothing to do with the "tobacco product standards" referenced in the FSPTCA. *See id.* at 435. Indeed, even if the Flavor Ordinance did relate to "tobacco product standards" (which it obviously does not), the Ordinance nonetheless would be exempt from preemption because, like its New York City counterpart, the Flavor Ordinance is a "requirement relating to the sale…[or]… distribution…[or] …promotion of, or use of, tobacco products" within the meaning of the applicable savings clause. *Id.* at 434, quoting 21 U.S.C. § 387p(a)(2)(B) (quoted *infra* at 15).

As to the Price Ordinance, the regulatory context of the Cigarette Labeling Act's enactment, its statement of purpose and its legislative history all indicate that Congress' primary purpose in including a preemption provision was to avoid "diverse, nonuniform, and confusing cigarette labeling and advertising regulations" which would impose conflicting and burdensome obligations on tobacco companies that advertise in numerous jurisdictions. No such concerns are implicated by the Price Ordinance, which is a sales restriction not concerned with the communication of information, i.e., the *content* of cigarette labels or the *content* of advertising or promotional activity. The Price Ordinance is concerned solely with actual commercial transactions themselves, i.e., the redemption of a

coupon good for a tobacco product or the sale of certain price-discounted tobacco products.

In fact, the FSPTCA expressly grants states and localities the power to regulate the "time, place, and manner, but not content" of cigarette advertising. *See* 15 U.S.C. § 1334(c) (quoted *infra* at 14). Thus, even if one were to conclude that the Price Ordinance regulated the kind of promotional activity contemplated by the Cigarette Labeling Act—despite the fact that by its plain terms it has nothing to do with the *content* of promotional activity—the Ordinance nonetheless would constitute a permissible restriction on the *manner* of tobacco price discounting, which is expressly permitted.

Moreover, the Price Ordinance does not restrict, compel, or otherwise regulate commercial speech or expressive conduct and therefore is outside the ambit of the First Amendment. *See, e.g., Wine and Spirits Retailers, Inc. v. Rhode Island*, 418 F.3d 36, 48 (1st Cir. 2005). The Ordinance is economic legislation enacted pursuant to a municipality's well-recognized police powers. Thus, like the Flavor Ordinance, the Price Ordinance must be reviewed under the lenient rational

basis test, a test which both Ordinances pass easily because they are rationally related to a legitimate governmental purpose.[6]

In addition, the Price Ordinance does not contradict, but rather complements existing state law prohibiting youth access to tobacco and mandating that sellers of discounted tobacco products also post the original, non-discounted, price. Indeed, rather than occupying the field of "coupons and other discounts for tobacco products," Appellants' Br. at 57, relevant state law explicitly recognizes that local governments have an important role to play in the area.

Finally, even if the state constitutional home rule issue raised by Appellants was ripe (which it is not, as found by the court below), and even if Plaintiffs had standing to raise the issue (which they did not), the Ordinances were a legitimate exercise of the municipality's traditional power concerning the health and safety of its residents.

VII. ARGUMENT

A. THE STANDARD OF REVIEW

This Court has noted that the review of a district court's entry of summary judgment is *de novo*, "taking the facts and all reasonable inferences therefrom in

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[6] Indeed, even if one were to assume for argument's sake that the First Amendment was applicable, the Price Ordinance would pass muster under either *United States v. O'Brien*, 391 U.S. 367 (1968) (which would be applicable) or *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980), as will be discussed. *See infra* at 37-43.

the light most hospitable to the nonmoving party." *Rared Manchester NH, LLC v. Rite Aid of New Hampshire, Inc.*, 693 F.3d 48, 52 (1st Cir. 2012) (citation omitted). The district court should be affirmed if the record reveals "'that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Id*. (citation omitted).

This Court also has emphasized that "[t]his standard of review permits us to embrace or reject the rationale employed by the lower court and still uphold its order for summary judgment. In other words, we may affirm such an order on any ground revealed by the record." *Id*. (citation omitted).

B. THE ORDINANCES ARE NOT PREEMPTED BY FEDERAL LAW

The Supreme Court has made clear that "the purpose of Congress is the ultimate touchstone in every preemption case." *Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (2008). And the Court has emphasized that "[t]he regulation of health and safety matters is primarily, and historically, a matter of local concern," and therefore among those powers reserved to the states. *Hillsborough County, Fla. v. Automated Med. Labs., Inc*., 471 U.S. 707, 719 (1985). As the Court noted in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541-42 (2001), a reviewing court must "'work on the assumption that the historic police powers of the States are not

to be superseded by …[federal law]… unless that is the clear and manifest purpose of Congress.'" *Id*. (citations omitted).

Federal preemption may be either express or implied, involving either an express Congressional statement (as Appellants argue here), or an inference when it is either: [1] impossible for a private party to comply with both state and federal law;" or [2] when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372–73 (2000) (internal quotations omitted). And as this Court has noted, the burden is on the party asserting federal preemption to make an "affirmative showing" that the regulated activity is governed exclusively by federal law. *See Rhode Island Hospitality Ass'n. v. City of Providence*, 667 F.3d 17, 37 (1st Cir. 2011).

Plaintiffs did not meet this burden.

1. Congress' Intent to Narrowly Limit the Scope of Federal Preemption Was Made Perfectly Clear When It Enacted the FSPTCA in 2009

The Cigarette Labeling Act was enacted in 1965. Its primary purpose was to avoid "diverse, nonuniform, and confusing cigarette labeling and advertising regulations" that would impose conflicting and burdensome obligations on tobacco companies that advertise in numerous jurisdictions. Pub. L. No. 89-92, § 2 (1965)

(codified as amended at 15 U.S.C. § 1331 (2011)).[7] The Act's preemption provision—§ 5 of the Act, 15 U.S.C. § 1334—has been amended twice. As originally enacted, the provision read in relevant part:

> No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

Pub. L. No. 89-92, § 5 (1965), as codified at 15 U.S.C. § 1334(b). In 1970, Congress amended the provision to read:

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

Pub. L. No. 91-222, § 5(b) (1970), as codified at 15 U.S.C. § 1334(b). Although this amendment broadened the Act's preemptive effect, the Supreme Court has instructed that courts must "fairly but—in light of the strong presumption against preemption—*narrowly* construe the precise language of § 5(b)," making clear that the 1970 revisions were meant to expand but not, as Appellants argue, "vastly

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[7] The Act's "Declaration of Policy" states that "commerce and the national economy may be (A) protected to the maximum extent consistent with [the objective of adequately informing smokers of the risks of smoking] and (B) *not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations* with respect to any relationship between smoking and health." Pub. L. No. 89-21, § 2 (1965) (emphasis added).

broaden," the scope of the preemption provision. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 405, 523 (1992) (emphasis added).[8]

However, whatever ambiguity may have existed as to the extent of federal preemption prior to 2009, Congress made it perfectly clear that it intended to permit—and indeed to encourage—local tobacco control measures such as the Flavor Ordinance and the Price Ordinance when it enacted the FSPTCA in 2009 and included preservation, preemption, and savings clauses which considerably narrowed the scope of federal preemption.

The preservation clause in the FSPTCA provides that:

> [e]xcept as provided in [the Preemption Clause], nothing in this subchapter, or rules promulgated under this subchapter, shall be construed to limit the authority of ... a State or political subdivision of a State ... to enact, adopt, promulgate, and enforce any law, rule, regulation, or other measure *with respect to tobacco products that is in addition to, or more stringent than, requirements established under this subchapter, including a law, rule, regulation, or other measure relating to or prohibiting the . . . advertising and promotion of . . . tobacco products*….

21 U.S.C. § 387p(a)(1) (emphasis added). Congress was thus clearly concerned with preserving state and local authority to regulate certain aspects of the tobacco industry, including (explicitly) "advertising and promotion." *Id*.

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[8] The relevant legislative history underscores that the goal of the revised preemption provision remained "to avoid the chaos created by a multiplicity of conflicting regulations." S. Rep. 91-566, 91st Cong., 2d Sess., 11 (1969). The Senate Report emphasized that the revised preemption provision was "narrowly phrased" to accomplish this goal. *Id.*

The FSPTCA preemption clause provides that:

> No State or political subdivision of a State may establish or continue in effect with respect to a tobacco product any requirement which is different from, or in addition to, any requirement under the provisions of this subchapter *relating to tobacco product standards*, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards, or modified risk tobacco products.

21 U.S.C. § 387p(a)(2)(A) (emphasis added). Congress also included a saving clause in the FSPTCA, which states that the preemption clause:

> does not apply to requirements relating to the sale, distribution ... advertising and promotion of ... tobacco products by individuals of any age.

21 U.S.C. § 387p(a)(2)(B). By providing exceptions to a preemption provision regarding tobacco product standards, the savings clause echoes the FSPTCA's preservation clause, which recites that "requirements relating to … the advertising and promotion of … tobacco products" are explicitly *not* preempted.

In other words, in 2009 Congress underscored, not once but twice, its intent to preserve state and local authority to regulate advertising and promotion unrelated to content.

And Congress did not stop there. In 2009 Congress also added a new subsection to the preemption provisions of the Cigarette Labeling Act, which reads as follows:

> [n]otwithstanding subsection (b), a State or locality may enact statutes and promulgate regulations, based on smoking and health, that take effect after the effective date of the [FSPTCA] *imposing specific bans or restrictions on the time, place, and manner, but not content, of the advertising or promotion of any cigarettes.*

15 U.S.C. § 1334(c) (emphasis added).

2. The Flavor Ordinance Is Not Preempted by the FSPTCA

As is apparent from the above, Appellants' claim that the Flavor Ordinance is preempted by the FSPTCA is flatly contradicted by the plain language of the Act. Essentially, Appellants argue that any and all local bans on any tobacco product sales that would be permissible under federal law are, *ipso facto*, "different from, or in addition to" federal "tobacco product standards," arguing that the "distinction between sales and manufacturing elevates form over substance." Appellants' Br. at 41-42. The argument ignores the fact that it is a distinction that was expressly made by Congress.

Indeed, the FSPTCA contains a detailed definition of "tobacco product standards, *see* 21 U.S.C. § 387g(a)(4), and it has nothing to do with the

prohibitions contained within the Flavor Ordinance.[9] As the Second Circuit recently noted in *Smokeless Tobacco II*:

> . . . the preservation clause of § 916 expressly preserves localities' traditional power to adopt any 'measure relating to or prohibiting the sale' of tobacco products. 21 U.S.C. § 387p(a)(1). That authority is limited only to the extent that a state or local regulation contravenes one of the specific prohibitions of the preemption clause. *Id*. The only prohibition relevant here forbids local governments to impose 'any requirement ... relating to tobacco product standards.' *Id*. § 387p(a)(2)(A). Even then, pursuant to the saving clause, local laws that would otherwise fall within the preemption clause are exempted if they constitute 'requirements relating to the sale ... of ... tobacco products.' *Id*. § 387p(a)(2)(B). *In other words, § 916 distinguishes between manufacturing and the retail sale of finished products; it reserves regulation at the manufacturing stage exclusively to the federal government, but allows states and localities to continue to regulate sales and other consumer-related aspects of the industry in the absence of conflicting federal regulation.*

708 F.3d at 433-34. (emphasis added).[10]

The Flavor Ordinance, like its New York City counterpart, in no way imposes "locally-imposed manufacturing or fabrication requirements that are inconsistent with federal standards." *U.S. Smokeless Tobacco Mfg. Co. v. City of New York* ("*Smokeless Tobacco I*"), 703 F.Supp.2d 329, 344-45 (S.D.N.Y. 2010);

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[9] This distinguishes the Price Ordinance from the statute considered by the Court in *Engine Mfrs. Ass'n. v. S. Coast Air Quality Mgmt. Dist*., 541 U.S. 246 (2004), which made express reference to specific standards set forth in the federal Clean Air Act. *See id.* at 249-50.

[10] Indeed, the recently-upheld New York City provision, *see* NYC Admin. Code, § 17-715, is *strikingly* similar to the Flavor Ordinance. *See Smokeless Tobacco II*, 708 F.3d at 431-32 (describing provision).

nor has the fact that the Flavor Ordinance employs the term "constituent" somehow turned it into a preemptive manufacturing regulation, contrary to Appellants' claim. Like New York City, the City of Providence:

> . . . does not care what goes into the tobacco or how the flavor is produced, but only whether final tobacco products are ultimately characterized by—or marketed as having—a flavor. No matter the level of generality used to define 'flavored tobacco products,' the ordinance is not easily read to direct manufacturers as to which ingredients they may or may not include in their products. We are therefore not persuaded that the City is infringing on the role reserved for the federal government, and in particular the scientifically expert FDA, of assessing the relative risks of specific ingredients or methods of production.

Smokeless Tobacco II, 708 F.3d at 435.[11]

Appellants also claim that the effect of the Flavor Ordinance is to regulate the "content of the tobacco products" which is "making a mockery of . . . preemption." *See* Appellants' Br. at 43. The claim makes little sense when one refers to the plain language of the Ordinance, which has absolutely nothing to do with "the content of the tobacco products." The Flavor Ordinance only makes a

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[11] It also should be noted that neither the NYC regulation nor the Flavor Ordinance represents a product ban as the products are available in tobacco (or smoking) bars. *See* Flavor Ordinance at § 14-309; *Smokeless Tobacco II*, 708 F.3d at 436 n. 3. Indeed, it is interesting to note that at the time of the decision in *Smokeless I*, there were only ten smoking bars in the City of New York (with a population of some eight million), *see Smokeless I*, 703 F.Supp. at 342, as compared with Providence, which has almost as many smoking bars (even if one assumes, as Appellants' claim, that only two sell flavored tobacco products) for a population of a mere 178,052, according to the 2010 census (available at http://quickfacts.census.gov/qfd/states/44/4459000.html).

"mockery of preemption" if one erroneously assumes that regulation of local sales has been federally preempted.[12]

Appellants' also argue that the reasoning of the courts in *Smokeless Tobacco I and II* was undercut by the U.S. Supreme Court in *Wos v. E.M.A.*, 133 S.Ct. 1391 (2013) and *National Meat Ass'n. v. Harris*, 132 S.Ct. 965 (2012). *See* Appellants' Br. at 43. Again, the argument is not persuasive. Unlike the situation here, which involves the application of subsequent preservation clauses to conduct which was not within the scope of the relevant federal legislation, *Wos* and *Harris* were comparatively straight-forward cases of express federal preemption bearing slight resemblance to the relevant issues.[13] Distinguishing *Harris*, the Second Circuit noted that the "effort to characterize the ordinance as a manufacturing standard is tantamount to describing a ban on cigarettes as a manufacturing standard mandating that cigars be manufactured in minimum sizes and with tobacco-leaf rather than paper wrappings." *Smokeless Tobacco II*, 708 F.3d at 435.

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[12] *See* 21 U.S.C. § 387p(a)(2)(B) (quoted *supra* at 15).

[13] In *Wos*, the Court held that the plain language of the federal Medicaid anti-lien provision, which prohibited any claim to any part of a Medicaid beneficiary's tort recovery not "designated as payments for medical care," preempted a North Carolina statute from arbitrarily deeming one-third of any beneficiary's tort recovery as representing such "payment for medical care." *Id*. at 1396. In *Harris*, the Court held that the Federal Meat Inspection Act ("FMIA"), 21 U.S.C. § 601 *et seq*., expressly preempted a California statute criminalizing the sale for human consumption of meat from "non-ambulatory" animals, and requiring the immediate euthanization of non-ambulatory animals. *See* 132 S.Ct. at 970.

Finally, even if one were to assume for argument's sake that the Flavor Ordinance did relate to "tobacco product standards" within the meaning of the FSPTCA preemption clause, the Act's savings clause in effect trumps the preemption clause by expressly providing that the preemption clause "does not apply" to provisions like the Flavor Ordinance, which clearly is a "requirement relating to the sale, distribution ... advertising and promotion of ... tobacco products. . ." *See* 21 U.S.C. § 387p(a)(2)(B) (quoted *supra* at 15).

3. The Price Ordinance is Not Preempted By the Cigarette Labeling Act

Appellants' claim that the Cigarette Labeling Act expressly preempts the Price Ordinance is no more persuasive, and would not be persuasive even if the Cigarette Labeling Act's preemption provision had not been amended and clarified by Congress in 2009.[14] Although the Price Ordinance is a "requirement or prohibition" and, as Appellants argue, it is "based on smoking and health," it is not "with respect to the. . .promotion of cigarettes" within the meaning of 15 U.S.C. § 1334(b).

Appellants' argument loses sight of the fact that Congress' primary purpose in including a preemption provision in the Cigarette Labeling Act was, as noted, to

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[14] As Appellants concede, the Cigarette Labeling Act does not apply to smokeless tobacco or cigars, and thus has no application to the Flavor Ordinance. *See* Appellants' Br. at 25; *Lorillard,* 533 U.S. at 451.

avoid "diverse, nonuniform, and confusing cigarette labeling and advertising regulations." *See supra* at 12-13, quoting Pub. L. No. 89-92, § 2 (1965) (codified as amended at 15 U.S.C. § 1331, *et seq*. (2011). By contrast, the Price Ordinance poses no risk of "impeding commerce" with "diverse, non-uniform, and confusing" regulations. It simply has nothing to do with the *content* used by cigarette companies in their labeling, or in advertising or promotional material.

Appellants argue that the Second and Eighth Circuits have determined that "cigarette advertising and promotion includes coupon and discount offers." Appellants' Br. at 19-20, citing *23-34 94th St. Grocery Corp. v. N.Y.C. Bd. of Health*, 685 F.3d 174, 182 (2d Cir. 2012); *Jones v. Vilsack*, 272 F.3d 1030, 1036 (8th Cir.2001); and *Rockwood v. City of Burlington*, 21 F. Supp. 2d 411, 419–20 (D. Vt. 1998). However, both *Vilsack* and *Rockwood* involved restrictions on the *distribution* of coupons for free samples (which is not prohibited by the Price Ordinance), not a restriction limited to actual coupon redemption and/or sales having nothing to do with "cigarette labeling and advertising regulations." *See supra* at 12, quoting Pub. L. No. 89-92, § 2 (1965); *but see People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 37 Cal. 4th 707, 725 (2005) (including coupons

within Act's preemption provision "would infringe on the state's retained powers to regulate cigarette use and sales").[15]

Indeed, even if one were to assume for argument's sake that the Price Ordinance did regulate the type of promotional activity referenced in 15 U.S.C. § 1334(b), that fact would hardly be dispositive, as the Second Circuit made clear in *23-34 94th St. Grocery Corp.*—the only post-2009 amendment case cited by Appellants. That case dealt with a municipal regulation requiring all tobacco retailers to display signs bearing graphic images showing certain adverse health effects of smoking, *see* 685 F.3d at 179-80, a content-based measure aimed directly at the message retailers were sending to potential consumers which bears slight resemblance to the Price Ordinance. As was noted by the Second Circuit (in direct contradiction to Appellants' argument):

> [t]o be clear, we do not hold that every state or local regulation affecting promotion violates the Cigarette Labeling Act's preemption clause. Section 1334(c) provides a safe harbor for laws regulating the time, place, or manner of promotional activity. [footnote omitted]. For example, the City's requirement that retailers display cigarettes only behind the counter or in a locked container, *see* N.Y. Pub. Health L. § 1399-cc(7), clearly affects promotional display, but would fall within this exception, as it only affects the place and manner of the display. *Only requirements or prohibitions directly affecting the*

[15] Both *Vilsack* and *Rockwood* were decided well prior to the 2009 enactment of the FSPTCA, after which it seems likely that they would be decided differently, whether or not coupons and discount offers were considered to be promotional activity.

> *content of the manufacturers' promotional message to consumers are preempted*.

Id. at 184 (emphasis added).

Unlike the Second Circuit, Appellants fail to recognize that not all promotional activity is preempted, and ignore the fact that determining whether an activity constitutes the "promotion of any cigarette" within the meaning of 15 U.S.C. § 1334 (b) (*quoted supra* at 13), is hardly the end of the necessary inquiry. The remaining material issue is whether the activity concerns the *content* of a promotional message, and the sales activity regulated by the Price Ordinance clearly does not. [16]

Appellants also have misconstrued the holding of the court below which, contrary to their claim, did not hold that the Price Ordinance "does not regulate speech or promotions at all." *See* Appellants' Br. at 24. In fact, for purposes of argument, the district court accepted "Plaintiffs' argument that coupons are a form of promotion," *see* id. at 25, albeit a promotion devoid of protected speech or conduct. *See id*. at 23. As noted by the court below:

> [e]ven accepting Plaintiffs' argument that coupons are a form of promotion, [the Price Ordinance] does not regulate the content of such

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[16] Appellants' misperception is evidenced by their suggestion that certain post-2009 references to the word "promotion," which arguably include coupons and price discounting as a form of promotion—*see* Appellants' Br. at 20, citing FTC, *Cigarette Report for 2007 and 2008* and Providence Code Ordinances, § 14-300, ¶ 3—are somehow dispositive.

> coupons, nor does it preclude Plaintiffs from disseminating the coupons within the City, whether for promotional purposes or otherwise; instead, it only prohibits the redemption of coupons. Likewise [the Price Ordinance] does not regulate the information on cigarette packaging, it only prohibits the sale of cigarettes for less than the listed price in exchange for the purchase of other cigarettes.

Decision at 23.

Finally, Appellants' claim that the Ordinance is not a valid "time, place and manner" restriction is not supported either by the plain language of the Cigarette Labeling Act (which, as noted, focuses expressly upon "*content*," *see* 1334 (c) (quoted *supra* at 15) or the cited cases. *See* Appellants' Br. at 20-25. Appellants' argument is premised upon the erroneous assumption that First Amendment jurisprudence relative to "time, place, and manner" restrictions in non-tobacco cases involving restrictions upon highly protected speech can be mechanistically applied to a local sales regulation which does not involve protected speech in an area (tobacco) where express statutory language and common sense dictate that the jurisprudence is not in all respects applicable.

Appellants in effect suggest that any and all regulation of tobacco promotion *ipso facto* includes content, which, of course, is not correct, and would make it impossible to regulate any activity which could under any light be viewed as promotional. In fact, as noted, Congress expressly mandated that there was to be no preemption of local restrictions of "advertising *or promotion*" that regulated

"time, place and manner, *but not content*." *See* 15 U.S.C. § 1334(c) (quoted *supra* at 15) (emphasis added).

Indeed, even if one were to mechanistically apply First Amendment "time, place, and manner" jurisprudence applicable in areas not involving tobacco, the "principal inquiry," as noted by the Supreme Court (and ignored by Appellants) would remain "determining content neutrality." *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). As the Court noted, ". . . in speech cases generally and in time, place, or manner cases in particular, the principal inquiry is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Id*.

Not surprisingly, all the "time, place and manner" cases relied upon by Appellants involve restrictions on the content of protected speech and/or conduct, most often of the most highly protected variety, restrictions which form no part of the Price Ordinance.[17] Yet, Appellants do not adequately consider the many First

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[17] *See* Appellants' Br. at 20-25, citing *City of Los Angeles v. Alameda Books*, 535 U.S. 425 (2002) (plurality op.) (city ordinance prohibiting operation of multiple adult businesses in single building); *Turner v. Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) (provisions of Cable Television Consumer Protection and Competition Act of 1992 that required carriage of local broadcast stations on cable systems); *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993) (city ordinance prohibiting distribution of "commercial handbills" on public property); *Ward*, 491 U.S. at 790 (municipal noise regulation containing use guidelines for band shell); *Heffron v. Int'l. Soc'y. for Krishna Consciousness, Inc*., 452 U.S. 640 (1981)(state fair rule prohibiting sale or distribution on fair grounds of any merchandise including printed or written material except from fixed location); *Linmark Assocs., Inc. v. Township of Willingboro*, 431

Amendment cases upholding provisions which, like the Price Ordinance, restrict "manner" rather than "content."[18] In so doing, Appellants fail to recognize that the regulation of the sale of goods differs in kind from the regulation of information about goods, a distinction which, as noted, Congress expressly recognized when it added a subsection to the Cigarette Labeling Act's preemption clause, *see* 15 U.S.C. § 1334(c) (quoted *supra* at 14), and which, as will be discussed, the Supreme Court has recognized in the context of the First Amendment. *See infra* at 32.

In short, Appellants' attempt to equate highly protected speech with the non-expressive transactional conduct regulated by the Price Ordinance would, if successful, do violence to both First Amendment theory governing "time, place and manner" restrictions which (unlike the Price Ordinance) actually impinge upon protected speech or conduct, as well as to federal preemption law governing local efforts to safeguard public health.

U.S. 85 (1977) (ordinance banning “For Sale” and “Sold” signs from residential property); and *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc*., 425 U.S. 748 (1976) (statute declaring it unprofessional conduct for a licensed pharmacist to advertise the prices of prescription drugs).

[18] *See, e.g., Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984) (rule barring sleeping in tents in public parks); *Heffron*, 452 U.S. at 648 (rule prohibiting solicitation of money and sales except in a booth at the state fair except from a booth); *City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (law banning the posting of signs on utility poles).

a. Even if the Price Ordinance's Applicability to Cigarettes is Preempted, the Ordinance Should be Severed, But Otherwise Affirmed

Assuming, for argument's sake, that this Court finds that the Cigarette Labeling Act is preemptive, the Court should, contrary to Appellants' argument, simply sever any reference to cigarettes and uphold the Price Ordinance with respect to smokeless tobacco and the other defined tobacco products that are not cigarettes, and thus not covered by the Cigarette Labeling Act. After all, the City's Code of Ordinances expressly provides that "the sections, paragraphs, sentences, clauses, and phrases of the City's Code of Ordinances *are severable*." *See Providence Code of Ordinances*, § 1-5 (emphasis added). And as the U.S. Supreme Court recently emphasized:

> [g]enerally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem, severing any problematic portions while leaving the remainder intact. Because the unconstitutionality of a part of an Act does not necessarily defeat or affect the validity of its remaining provisions, *the normal rule is that partial, rather than facial, invalidation is the required course*.

Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3161 (2010) (internal quotations omitted; emphasis added).

Appellants' bald speculation that "it is doubtful that the City Council would have enacted the Price Ordinance without covering cigarettes," Appellants' Br. at 26, disregards the fact that the Ordinance treats cigarettes in separate sections. *See*

Price Ordinance at § 14-303(2) and (4) (quoted *supra* at 3). Appellants also ignore the fact that non-cigarette smokeless and flavored tobacco products and cigars are particularly attractive to young people, the primary (though not exclusive) target of the Price Ordinance. *See* Affidavit of City Council Majority Leader Seth Yurdin (the "Yurdin Aff."), ¶ 13 at 5 (JA 494); affidavit of Gregory N. Connolly (the "Connolly Aff."), ¶ 11-14 at 6-8 (JA 620-22).

Thus, contrary to Appellant's claim, severance would not leave "gaping loopholes" in the Ordinance.

C. THE PRICE ORDINANCE DOES NOT RESTRICT SPEECH OR CONDUCT PROTECTED BY THE FIRST AMENDMENT

Plaintiffs mounted a facial, as opposed to an as applied, First Amendment challenge to the Price Ordinance. In making this determination, the U.S. Supreme Court has noted that "the important point" is whether the plaintiffs' claim and the relief that would follow "reach beyond the particular circumstances of . . . [the specific] . . . plaintiffs," *see John Doe No. 1 v. Reed*, 130 S.Ct. 2811, 2817 (2010), in which case it would constitute a facial challenge.

The finding of unconstitutionality requested by Plaintiffs as to the Price Ordinance clearly "reach[ed] beyond the particular circumstances" of the named Plaintiffs, none of which were even tobacco retailers in the City. *See* Yurdin Aff., ¶ 5 and note 2 at 3 (JA 492). Therefore, it is obvious that Plaintiffs commenced a

facial challenge. To have succeeded, they would have had to establish "that no set of circumstances exists under which [the Price Ordinance] would be valid," or that the Ordinance lacked any "plainly legitimate sweep." *See United States v. Stevens*, 130 S.Ct. 1577, 1588 (2010) (citations omitted).

The court below was correct in concluding that Plaintiffs did not meet this heavy burden.

In *Wine and Spirits*, this Court noted that "[i]t is the duty of the party seeking to engage in allegedly expressive conduct to demonstrate that the First Amendment applies to that conduct." 418 F.3d at 49. Yet, Appellants have not demonstrated that any speech or conduct prohibited by the Price Ordinance lies within the ambit of the First Amendment. Instead, their claim is premised upon their naked *assumption* that, in their words, the Ordinance "concerns classic commercial speech—promotion and advertising." Appellants' Br. at 29.

In fact, regulation of pricing is outside the ambit of the First Amendment and falls squarely within the category of economic measures subject to rational basis review. *See, e.g., Nebbia v. New York*, 291 U.S. 502, 537 (1934); ("state may regulate a business in any of its aspects, including prices to be charged for the products or commodities it sells"); *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"); *see also 44 Liquormart, Inc. v. Rhode Island*, 517

U.S. 484, 507 (recognizing that maintaining "higher [liquor] prices . . . by direct regulation" would be an "alternate form[] of regulation that would not involve any restriction on speech").

Appellants attempt to avoid this inconvenient fact by claiming that the Price Ordinance regulates promotional activity, and then equating such activity with highly communicative advertising. However, unlike such advertising, promotional activity devoid of a significant communicative aspect is not *per se* protected, Appellants' bald conclusion to the contrary notwithstanding. *See, e.g., Vilsak*, 272 F.3d at 1037 (8th Cir. 2001) ("We may not conflate the 'advertising' and 'promotion' of cigarettes") (quoting *Lorillard*, 533 U.S. at 542). The Price Ordinance does not even regulate such promotional activity since any conceivable communicative aspect of a coupon program lies in the distribution, not the actual redemption, of the coupons and, as noted, the Price Ordinance only regulates the latter activity. Indeed, the Ordinance does not even regulate free sampling of tobacco.

In *Wine and Spirits*, the plaintiffs, who were liquor franchisors, claimed that various statutes effectively preventing franchisors and/or defined "chain store organizations" from holding a Class A liquor license violated their rights under the First Amendment by adversely affecting their ability to sell business advice, i.e., marketing and management plans geared toward franchisors. *See id*. at 41-42,

47. This Court rejected the argument, noting that "stripped of rhetorical flourishes":

> [plaintiff's] real complaint is that [the relevant statute] will have the incidental effect of suppressing or eliminating the market demand for the particular type of business advice that [plaintiff] offers (that is, marketing and management strategies whose successful implementation requires the coordination of business activities with those of other market players). That circumstance does not suffice to hoist the red flag of constitutional breach: the First Amendment does not guarantee that speech will be profitable to the speaker or desirable to its intended audience.

Id. at 47-48 (citations mitted). As this Court emphasized, "*the First Amendment's core concern is with the free transmission of a message or idea from speaker to listener, not with the speaker's ability to turn a profit or with the listener's ability to act upon the communication*." *Id*. at 48 (emphasis added).

Appellants' bald assumption that the Price Ordinance somehow impinges upon protected speech is not supported by the plain language of the Ordinance, which focuses solely upon specific aspects of a sales transaction— i.e., accepting or redeeming, or offering to accept or redeem, coupons and certain other defined price-reduction instruments or price-discounted products—not speech or expressive conduct protected by the First Amendment, as was recognized by the court below. *See* Decision at 23. Indeed, all the cases relied upon by Appellants involve restrictions upon the distribution or dissemination of information, restrictions that are not contained in the Price Ordinance. *See* Appellants' Br. at

28-29.[19]

Va. Bd. of Pharmacy involved a ban on advertising. *See* 425 U.S. at 749-50. *Bailey* involved a Texas statute prohibiting chiropractors from *soliciting* employment from accident victims and certain others in special need of chiropractors. S*ee* 190 F.3d at 322 n.2. *Rockwood* involved a ban on the distribution (not redemption) of coupons. 21 F.Supp.2d at 414, 421-23. And *S. Ogden CVS Stores, Inc.* concerned a ban upon advertisements which included prescription price information. *See* 493 F.Supp. at 376.

Thus, unlike the Price Ordinance, the regulations considered in these cases all involved prohibitions that covered the "distribution or … dissemination of pricing *information*," a crucial distinction ignored by Appellants which was properly emphasized by the court below. *See* Decision at 14 (emphasis added); *see also supra* at 5 (quoting Decision at 23).

Appellants' reliance upon *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509 (6th Cir. 2012) is no more persuasive. Unlike Appellants, the Sixth Circuit recognized the need to focus upon whether a challenged regulation actually impinges upon the "communicative aspects" of an activity. *See id*. at 538-

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[19] Citing *Va. Bd. of Pharmacy*; *Bailey v. Morales*, 190 F.3d 320 (5th Cir. 1999); *Rockwood v. City of Burlington*, 21 F.Supp.2d 411 (D.Vt. 1998); and *S. Ogden CVS Store, Inc. v. Amb*ach, 493 F.Supp. 374 (S.D.N.Y. 1980).

39. In fact, none of the banned activities considered in *Discount Tobacco City & Lottery* would even be covered by the Price Ordinance. *See id*. at 541.[20] If anything is to be gleaned from *Discount Tobacco City & Lottery,* it is the ease by which the Ordinances would pass muster under *Central Hudson* (were it applicable). *See infra* at 37-43.

Appellants argue that the Price Ordinance regulates what is said about prices. *See* Appellants' Br. at 30. Of course, any sale of any product necessarily involves communicating the price of the product to the purchaser, but contrary to Appellants' argument, that fact does not automatically bring all economic activity within the ambit of the First Amendment. In *44 Liquormart, Inc.,* the Court expressly recognized this distinction, which this Court applied in *Wine & Spirits*. The Court made clear that ". . . a State's regulation of the sale of goods differs in kind from a State's regulation of accurate information about those goods," 517 U.S. at 512, and went on to note that "'the entire commercial speech doctrine, after all, represents an accommodation between the right to speak and hear expression about goods and services and the right of government to regulate the sales of such goods and services.'" *Id.* at 499 (citation omitted).

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[20] The free sampling program considered by the court in *Discount Tobacco City & Lottery,* which arguably has a communicative aspect not present in the mere redemption of a coupon, would not be prohibited by the Price Ordinance, which would apply only if the sampling involved an exchange for the purchase of another tobacco product. *See* Price Ordinance, §§ 14-303(3) - (4) (quoted *supra* at 3).

In arguing that specific offers to redeem coupons or consummate multi-pack discount offers in the City—the only activity regulated by the Price Ordinance which arguably concerns speech (and the very subject of the Ordinance's prohibitions)—are protected, Appellants ignore the fact that the U.S. Supreme Court has made clear that offers to engage in illegal activity are not protected by the First Amendment. *See United States v. Williams*, 553 U.S. 285, 297 (2008) and *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 388 (1973). And the analysis does not change simply because the same ordinance that outlaws the activity also outlaws advertising about that activity.[21]

By ignoring this common sense limitation upon the applicability of the First Amendment—as well as the distinction between restrictions upon the sale of tobacco (which necessarily includes price information), and restrictions upon truthful information about tobacco—Appellants have concocted a novel definition of commercial speech. However, such a wildly expansive definition would subject nearly all legislation regulating any economic activity to First Amendment scrutiny, which would be directly contrary to the Supreme Court's repeated admonitions that "regulatory legislation affecting ordinary commercial transactions

[21] *See, e.g., 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); *Coldwell Banker Residential Real Estate Servs. v. N.J. Real Estate Comm'n*., 576 A.2d 938, 942 (N.J. Super.Ct. App. Div. 1990); *Ralph Rosenberg Court Reporters, Inc. v. Fazio*, 811 F.Supp. 1432, 1442 (D. Haw. 1993).

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).[22]

Appellants simply ignore the admonitions.

1. Assuming for Argument's Sake that the First Amendment Was Applicable, *O'Brien*, Not *Central Hudson*, Would Apply

As the Supreme Court noted in *Central Hudson*, "[a]t the outset we must determine whether the expression is protected by the First Amendment. . ." 447 U.S. at 589. Here, as has been noted, the *only* speech or arguably expressive conduct regulated by the Price Ordinance consists of offers to engage in the very conduct prohibited by the Ordinance. Yet, if one were to assume for argument's sake that the First Amendment was applicable, it is clear that *O'Brien*, and not *Central Hudson*, would apply.

In *O'Brien*, the Court held that a government regulation that incidentally restricts expression is "sufficiently justified" if it meets four conditions:

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[22]Indeed, under Appellants' definition, the minimum price law for cigarettes adopted by Rhode Island and twenty-four other states would be subject to First Amendment scrutiny, *see* Ctrs. for Disease Control & Prevention ("CDC"), *State Cigarette Minimum Price Laws - United States, 2009* (2010) (available at http://www.cdc.gov/ mmwr/preview/ mmwrhtm1/mm5913a2.htm), as would countless other labor, consumer protection and regulatory statutes which touch on commercial transactions.

> [1] if it is within the constitutional power of the Government;
> [2] if it furthers an important or substantial governmental interest;
> [3] if the governmental interest is unrelated to the suppression of free expression; and
> [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377.

The *O'Brien* standard involves a relatively relaxed level of scrutiny because where it applies the government is not trying to suppress expression, but rather to regulate conduct. The test has always been in practice a lenient one: as *O'Brien* itself illustrates, laws are rarely overturned under this standard. Indeed, in the past two decades, the Supreme Court has never struck down a law under the *O'Brien* standard.[23] And the record in this Circuit is the same.[24]

In recent years, as the *Central Hudson* test has grown somewhat more stringent, the leniency of the *O'Brien* standard has remained unchanged.[25] Therefore, there is little basis for Appellants' assertion that the *O'Brien* test "largely overlaps" with *Central Hudson*. *See* Appellants' Br. at 38. In fact, the two

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[23] *See, e.g., Rumsfeld v. FAIR*, 547 U.S. 47, 58 (2006); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 569 (2001); *City of Erie v. Pap's A.M., Inc.*, 529 U.S. 277, 289 (2000) (plur. op.); *Turner Broadcasting System, Inc. v. F.C.C.*, 520 U.S. 180, 189 (1997).

[24] *See, e.g., Wirzburger v. Galvin*, 412 F.3d 271, 275 (2005); *Gun Owners' Action League, Inc. v. Swift*, 284 F.3d 198, 211 (1st Cir. 2002).

[25] The two tests have become quite distinct. *Compare Lorillard*, 533 U.S. at 554-55 (holding *Central Hudson* "as applied in our more recent commercial speech cases" sufficiently rigorous) *with id.* at 569 ("reject[ing]" argument for invalidation under *Central Hudson* test and instead upholding under *O'Brien* standard); *see also Note: Making Sense of Hybrid Speech: A New Model for Commercial Speech and Expressive Conduct*, 118 Harv.L.Rev. 2836, 2852 (2005).

standards have grown apart. Recent decisions under each standard have little bearing on the other, as was made clear in *Lorillard*, which was the first, and so far the only, Supreme Court decision to apply the *O'Brien* standard in the retail context.[26]

In *Lorillard*, the Supreme Court, applying *O'Brien*, upheld a Massachusetts' ban on self-service displays of tobacco products. 533 U.S. at 569. *Lorillard* makes clear that it is the *O'Brien* test alone which would govern if one were to assume (for argument's sake) that the transactional conduct regulated by the Price Ordinance is the type of expressive conduct protected by the First Amendment.

a. The Price Ordinance Easily Passes Muster Under *O'Brien*

The Price Ordinance's restrictions on the use of coupons and multipack sales readily pass the *O'Brien* test. The restrictions (1) are within the constitutional power of the City government. *See infra* at 45-50; (2) promote the compelling governmental interest of reducing tobacco use, especially tobacco use by youth, by helping to prevent pricing practices that are more likely to put tobacco into children's hands. *See infra* at 38-42; (3) are targeted not at the suppression of free expression, but rather at the avoidance of dangerously low tobacco prices. *See*

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[26] This of course does not mean that a law is unlikely to withstand scrutiny under the *Central Hudson* standard. Indeed, in this case, the opposite is true. *See infra* at 38-44; *see also Discount Tobacco City & Lottery*, 674 F.3d at 541 (upholding restrictions under *Central Hudson*).

supra at 29, 40-41; and (4) do not incidentally restrict First Amendment freedoms more than necessary, since, as noted, retailers are still free to advertise through all currently available channels and manufacturers and distributors remain free to offer coupons to City residents, as long as the coupons are redeemed outside the City. *See infra* at 42-43.

2. The Price Ordinance Would Pass Muster Under *Central Hudson* Were That Test Applicable

Assuming, again, for argument's sake, that (1) protected speech (rather than conduct) was implicated, and the threshold first prong of *Central Hudson*— that the challenged provision regulate commercial speech concerning a lawful activity that is not misleading—was met, *Central Hudson* requires that a court then ask: (2) whether there is a "substantial state interest;" (3) whether the measure "directly advances the governmental interest asserted;" and finally (4) whether the provision is "more extensive than is necessary to serve that interest." *Central Hudson*, 447 U.S. at 556.

a. The Second Prong - The City Has a Substantial, Even Compelling, Interest in Preventing Underage Tobacco Use and Generally Reducing Nicotine Addiction Rates

Contrary to Appellants' argument, the City clearly has a "substantial interest" in reducing the number of its residents, and especially the number of its younger residents, who become addicted to nicotine. As the Supreme Court has noted, "the

State's interest in preventing underage tobacco use is substantial, and even compelling . . ." *Lorillard*, 533 U.S. at 564.

If nothing else, the cost to the City in the form of additional medical and emergency services necessary to cope with heightened nicotine addiction rates is substantial. As noted recently by the Surgeon General, 75% of American spending on health care pertains to the very same chronic diseases that are caused by smoking. *See* U.S. Dep't Health and Human Services, *Preventing Tobacco Use Among Youth and Young Adults, A Report of the Surgeon General* (2012) (the "SG's Report") at 3; *see also* Yurdin Aff., ¶ 25 at 9 (JA 498).

b. The Third Prong - The Price Ordinance Directly Advances this Substantial Governmental Interest

It is illegal in Rhode Island and every other state for anyone under eighteen years of age to purchase tobacco products. *See Nat'l. Ass'n. of Tobacco Outlets, Inc. v. City of Worcester*, 851 F.Supp.2d 311, 313 (D. Mass. 2012); R.I.Gen.Laws § 11-9-13.8. Yet, despite this fact, more than 23% of American high school students have used tobacco in the past 30 days.[27] And the problem is as dire in Rhode Island and the City as it is nationwide, as was made clear to the court below. According to statistics compiled by the R.I. Department of Health, 35% of

[27] See Center for Disease Control ("CDC"), "*Youth Risk Behavior Surveillance — United States, 2011*," *MMWR* 61 (SS-4) (June 8, 2012).

students in Rhode Island reported having used tobacco in 2011.[28] Nearly six percent of those students reported having tried chewing tobacco, snuff, or dip, while 13.3% reported having tried cigarillos, or little cigars, on one or more of the past thirty (30) days.[29] Moreover, 17.9% of students reported that they smoked cigars or cigarettes, or used chewing tobacco, snuff or dip within the past thirty (30) days.[30]

In the City, 20% of high school students and 10% of middle school students smoke. *See* Yurdin Aff., ¶ 6 at 3 (JA 492).[31] Indeed, the chief sponsor of the Price Ordinance has indicated that the City Council was motivated, in part, by the fact that smoking rates in the City remain unacceptably high, especially among the young, despite the cited state provisions. *See id*., ¶ 16 at 6 (JA 495). In addition, the utility of the Ordinance is underscored by a gap in state law, which bans merely "free" tobacco products while ignoring the millions the industry spends to make discount-priced tobacco products available to youth. *See* R.I. Gen. Laws § 11-9-13.10; Yurdin Aff., ¶ 16 at 6 (JA 495).

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[28] Rhode Island Department of Health, Youth Risk Behavior Study (1997-2011) ("RIDOH YRBS"), (available at http://www.health.ri.gov/publications/healthriskreports/youth/2009SmokingHighSchool.pdf).
[29] *Id.*
[30] *Id*.
[31] Appellants' erroneous claim that the Price Ordinance restricts lawful communications, *see* Appellants' Br. at 33, has been addressed. *See supra* at __. The Price Ordinance is nothing like the provisions considered in the two cases cited by Appellants, both of which concerned prohibitions on outdoor advertising. *See id*. at 33, citing *Lorillard* and *City of Worcester*.

Appellants erroneously claim that there is no evidence linking underage smoking with coupons, multi-pack offers, or other discount programs. *See* Appellants' Br. at 32. The claim is directly contradicted by the detailed findings of the court in *United States v. Philip Morris USA, Inc.*, 499 F.Supp.2d 1, 638-40 (D.D.C. 2006), findings which were cited to the district court.[32]

Appellants also erroneously claim that there was "no evidence that underage persons in Providence are using coupons or multi-pack discounts to purchase tobacco products illegally from licensed retailers." Appellants' Br. at 34. Yet, as was noted to the court below, the R.I. Department of Health reported recently that "25.5% of students under 18 in Rhode Island reported getting their own cigarettes by buying them in a store or gas station." *See* RIDOH YRBS; *see also* SG's Report at 543 ("In 2006, cigarette sales generated nearly $400,000 in revenue per convenience store; these sales accounted for one-third of all sales inside a convenience store . . .About one-third of adolescents shop in convenience stores two or three times a week, and 70% shop in them at least weekly.").

Finally, Appellants highlight their affiant's speculation that the Price Ordinance might not be effective since, in his opinion, it might not prevent tobacco

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[32] Industry efforts to develop successful strategies to addict young people to their products were explored in one of the most extensive trials in history, which culminated in an over 1600-page opinion by Judge Gladys Kessler of the U.S. District Court for the District of Columbia, who found the tobacco companies guilty of multiple RICO violations. *See id*. at 691.

retailers from discounting their products, consistent with the state's minimum price law. *See* Appellants' Br. at 34. The speculation—nothing more than an attempt to second-guess legitimate policy choices made by a local legislative body —has been squarely refuted by three nationally prominent experts. *See* supporting affidavits of Dr. Frank J. Chaloupka (the "Chaloupka Aff."), ¶ 65 at 38 (JA 564); Dr. Connolly, ¶ 36 at 18 (JA 632); and Professor Eriksen, ¶ 15 at 5 (JA 664).[33]

In short, the Ordinance provides far more than the "incremental benefit" Appellants claim is required.

c. The Fourth Prong - The Ordinances Are Narrowly Tailored

The remaining prong of the *Central Hudson* test requires that a court inquire whether the relevant measure is more extensive than necessary. However, the Supreme Court has explained that:

> What our decisions require is a 'fit' between the legislature's ends and the means chosen to accomplish those ends"…a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served'; that employs not necessarily the least restrictive means but, as we have put it in the other contexts discussed above, a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decision makers to judge what manner of regulation may best be employed.

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[33] *See also* Nevo and Wolfram, *Why Do Manufacturers Issue Coupons? An Empirical Analysis of Breakfast Cereals*, 33 RAND J. Econ. (2) 319, 320 (2002) ("shelf prices are generally lower when there is a coupon available").

Bd. of Trustees of the State University of New York v. Fox, 492 U.S. 469, 480 (1989) (citations omitted).

One of Appellants' affiants compiled a list of alternatives to the Ordinances which, he claims, have not been attempted by the City. *See* Appellants' Br. at 36-37. In fact, as was made clear to the district court, many of the supposed alternatives have in fact been tried or are being implemented, with less than satisfactory results. *See* Yurdin Aff., ¶¶ 16-17, 20 at 6-7 (JA 495-96).

Indeed, the sponsor of the Ordinances noted that "merely prohibiting the sale and/or distribution of such products to minors has not adequately addressed the problem, or effectively removed youth access to the products." *Id*. As noted in the legislative history of the Ordinances, one out of five vendors in the City sells tobacco products to minors, despite the state ban on distributing "free" tobacco products to minors, while some 20% of City high school students are using or have tried tobacco. *See id*., ¶ 6 at 3 (JA 492).

It is always possible to second-guess policy choices and conjure alternatives. The fact that Appellants have done so here does not refute the conclusions of the City's experts that the Ordinances are a reasonable fit with the goal of reducing the scourge of smoking in the City. *See* Decision at 19-20 (citing City's expert affidavits).

D. BOTH ORDINANCES ARE LOCAL ECONOMIC REGULATIONS DESIGNED TO PROTECT PUBLIC HEALTH WHICH SATISFY THE LENIENT RATIONAL BASIS TEST

As this Court has emphasized:

> [i]t is well established that [l]egislation or regulation which neither employs a suspect classification nor impairs fundamental rights, will survive constitutional scrutiny, provided the remedy is rationally related to a legitimate governmental purpose . . . [o]nce a rational basis is identified, the challenged legislation must be upheld even when there is no empirical data in the record to support the assumptions underlying the chosen remedy.

Rhode Island Hospitality Ass'n. v. City of Providence, 667 F.3d 17, 40 (1st Cir. 2011) (citations and internal quotations omitted). Since Appellants have abandoned their First Amendment claim with respect to the Flavor Ordinance, it is beyond dispute that the rational basis standard of review should be applied. This same deferential standard should be applied to the Price Ordinance because, as noted, the court below was correct in dismissing Plaintiffs' First Amendment challenge.

As Chief Judge Lisi recognized, the Ordinances here can easily withstand the applicable rational basis standard of review. *See* Decision at 19-20. As noted by Professor Chaloupka:

> The availability of price-reducing tobacco company marketing offers, including coupons and multi-pack discounts that result in lower prices for tobacco products will increase the prevalence and use of these products, with a larger impact on use among young people given their greater price sensitivity. Given this, the [Price] [O]rdinance which

> bans the redemption or acceptance of coupons and/or the sale of cigarettes and other tobacco products using multi-pack discounts (e.g. buy-one-get-one-free) will be effective in reducing tobacco use and its consequences, particularly among young people.

Chaloupka Aff., ¶ 65 at 38 (JA 564). And Dr. Connolly opined that:

> The policy established in the [Flavor] Ordinance would restrict the sale of flavored tobacco products to smoking bars, i.e., venues where underage consumers are not permitted to be present. In my judgment, this ordinance would substantially reduce the sale of flavored tobacco products to underage consumers and would reduce the attractiveness of these products to underage consumers by removing them from sales counters frequented by adolescents. The result of such a policy would be a substantial benefit to public health.

Connolly Aff., ¶ 36 at 18 (JA 632). And, finally, Professor and Dean Michael Eriksen has affirmed that "the tobacco control measures contained in the Providence Ordinances are prudent and likely to be effective strategies that will reduce smoking rates among adults and young people and will likely keep some young people from beginning to smoke in the first place." Affidavit of Dean Michael Eriksen, ¶ 15 at 5 (JA 664).

E. THE PRICE ORDINANCE IS NOT PREEMPTED BY STATE LAW

As the R.I. Supreme Court explained in *Bruckshaw v. Paolino*, 557 A.2d 1221, 1223 (R.I. 1989):

> The Rhode Island Constitution grants the authority to every city and town to enact a home rule charter. Once it adopts such a charter, the city or town has 'the right of self government in all local matters' as long as the charter is 'not inconsistent with this [Rhode Island] Constitution and laws enacted by the general assembly in conformity with the powers reserved to the general assembly.' R.I. Const. art. XIII, sections 1 and 2.

Id.[34] The Court has noted that "absent a direct conflict between a statute and ordinance, or some other clear indication, either express or implied, that the General Assembly intended to occupy the field . . . to the exclusion of local . . . authorities, state law will not be held to preempt local ordinances in the area." *El Marocco Club, Inc. v. Richardson*, 746 A.2d 1228, 1232 (R.I. 2000). In *Town of Warren v. Thornton-Whitehouse*, 740 A.2d 1255, 1261 (R.I. 1999) the Court noted that:

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[34] R.I.'s Home Rule Amendment is set forth at Art. 13, § 1 of the R.I. Constitution and states that "[i]t is the intention of this article to grant and confirm to the people of every city and town in this state the right of self government in all local matters." *Id.* Section 2 provides that "[e]very city and town shall have the power at any time to adopt a charter, amend its charter, enact and amend local laws relating to its property, affairs and government not inconsistent with this Constitution and the laws enacted by the general assembly in conformity with the powers reserved to the general assembly." *Id.* Article I, § 103, of the Providence Home Rule Charter grants the City "the power and authority to act in all local and municipal matters and to adopt local laws and ordinances relating to its property, affairs and government." *Id.* And § 401 of the Charter empowers the City Council to enact ordinances "for the welfare and good order of the City," as long as they do not conflict with existing state law. *Id.*

> A local ordinance or regulation may be preempted in two ways. First, a municipal ordinance is preempted if it conflicts with a state statute on the same subject . . . Second, a municipal ordinance is preempted if the Legislature intended that its statutory scheme completely occupy the field of regulation on a particular subject.

Id. (citations omitted).

Appellants concede that there is no express conflict between the Price Ordinance and state law covering the field of "coupons and other discounts for tobacco products." Appellants' Br. at 57. Nor can Appellants point to any state law provision which expressly preempts the field.

Thus, Appellants must argue that the state has impliedly occupied the field. *Id.*, citing R.I. Gen. Laws §§ 11-9-13.8 (making it illegal to sell or distribute tobacco products to minors) 11-9-13.10 (prohibiting the sale or distribution of such products within five hundred (500) yards of a school) 6-13-11 (mandating that sellers offering product at discount also post the regular price at the point of purchase) and 44-20-8 (punishing violators of § 6-13-11 with reference to state tobacco licensing procedures).

However, not one of the cited state provisions even mentions coupons or multi-pack discounts. And as noted by the court below, none of the statutes cited by Appellants "contains an express reservation of power over the regulation or the distribution of tobacco products." Decision at 37.

The R.I. Supreme Court set forth the factors to be evaluated when attempting to identify areas of implied field preemption in *Town of East Greenwich v. O'Neil*, 617 A.2d 104, 111 (R.I. 1992):

> First, when it appears that uniform regulation throughout the state is necessary or desirable, the matter is likely to be within the state's domain. . . .Second, whether a particular matter is traditionally within the historical dominion of one entity is a substantial consideration. . . Third, and most critical, if the action of a municipality has a significant effect upon people outside the home rule town or city, the matter is apt to be deemed one of statewide concern.

Id. (citations omitted).

1. Appellants' Theory of Implied Field Preemption Preemption Does Not Pass Muster Under *O'Neil*

When one applies the relevant *O'Neil* factors, the weakness of Appellants' implied field preemption argument becomes apparent: *First*, as to the need for uniform regulation throughout the state, there has been no credible showing that "coupons and other discounts for tobacco products" needs to be subject to uniform state regulation. Indeed, Appellants have not even addressed the issue.

Moreover, the Price Ordinance not only does not conflict with the state law relied upon by Appellants, it is in line with relevant state law and policies. In fact, the R.I. General Assembly has recognized that there is an important role for local governments to play in the area. *See, e.g.*, R.I. Gen. Laws §§ 11-9-13.6 (directing Health Department to coordinate and promote enforcement of prohibition of

tobacco sale to minors with local authorities); and 11-9-13.11 (conferring enforcement power upon local police departments). Indeed, the very state officials who were given regulatory authority under the state Youth Tobacco Act, *see* R.I. Gen. Laws§ 11-19-13.15, filed an amicus brief in support of the Ordinances in the court below.

In addition, the state's licensing statutes, which do not contain a preemption clause, were enacted primarily to ensure the accurate collection of state taxes, *see* R.I. Gen. Laws §§ 44-20-1 *et seq*., not to occupy the field of "coupons and other discounts for tobacco products," or to preclude cities and towns from licensing in the area.[35] Moreover, absolutely nothing about the Price Ordinance conflicts with Rhode Island's Unfair Sales Practice Act.

Second, as to whether the matter "is traditionally within the historical dominion of one entity," the Rhode Island Supreme Court had made clear that "the General Assembly at no time disclosed, by implication or otherwise, its intent to occupy exclusively the field of regulating smoking. . ." *Amico's, Inc. v. Mattos*, 789 A.2d 899, 907 (R.I. 2002).[36] In addition, cases outside of Rhode Island which

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[35] State tobacco licensing is limited to sellers of cigarettes, *see* R.I. Gen. Laws §§ 44-20-1 and 44-20-2, and licenses are issued by the tax administrator. *See* R.I. Gen. Laws § 44-20-4. Nothing in the state's licensing requirements conflicts in any way with the requirements under the Price Ordinance.

[36] In *Amico's Inc*. the R.I. Supreme Court held that a municipality had authority to regulate smoking in restaurants more extensively than the state. 789 A.2d at 907. The ordinance banned

recognize that the regulation of smoking is traditionally within the domain of a municipality's police power are legion.[37]

Third, "and most critical," the Price Ordinance will by its express terms have no effect outside of Providence.

Finally, Appellants' suggestion that mere inaction by the General Assembly somehow evidences an intent to preempt, *see* Appellants' Br. at 58 and note 8, flatly contradicts the U.S. Supreme Court's admonition that when divining preemption, legislative silence "lacks persuasive significance." *See Brown v. Gardner*, 513 U.S. 115, 121 (1994).

2. The District Court Was Correct Not To Decide the Legality of the City's Licensing Ordinance

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smoking entirely in restaurants, or alternatively, required an enclosed smoking area, whereas no similar prohibition had been enacted at the state level. *Id*. at 902 n.1.

[37] *See, e.g.*, Smokeless II (granting defendants' motion for summary judgment and denying challenge to municipal ban on the sale of flavored tobacco products); *Beachfront Entertainment, Inc. v. Town of Sullivan's Island*, 379 S.C. 602, 666 S.E.2d 912 (2008) (ban on smoking in the workplace upheld); *Foothills Brewing Concern, Inc. v. City of Greenville*, 377 S.C. 355, 660 S.E.2d 264 (2008) (ban on smoking in restaurants); *American Lithuanian Naturalization Club v. Board of Health of Athol*, 446 Mass. 310, 844 N.E.2d 231 (2005) (private associations); *Lexington Fayette Cty. Food & Beverage Assoc. v. Lexington-Fayette Urban Cty. Gov't.*, 131 S.W.3d 745 (Kty. 2004) (prohibiting smoking in public buildings); *NYC C.L.A.S.H, Inc. v. City of New York*, 315 F.Supp.2d 461 (S.D.N.Y. 2004) (upholding municipal smoking ban in bars and restaurants); *City of Tucson v. Grezaffi*, 200 Ariz. 130, 23 P.3d 675 (2001) (restaurants); *Tri-Nel Mgmt., Inc. v. Board of Health of Barnstable*, 433 Mass. 217, 741 N.E.2d 37 (2001) (restaurants and bars).

Under the R.I. Constitution

Appellants, evidently aware that their state law, implied field preemption argument is not convincing, attempt to backstop the argument by claiming that the R.I. General Assembly has exclusive authority over any and all licensing, and therefore both the Price Ordinance and Flavor Ordinance are an unconstitutional violation of the Home Rule Amendment to the Rhode Island Constitution because, Appellants argue, both Ordinances "are enforced through a municipal licensing scheme" and "apply only to retailers who have obtained a license from the Providence Board of Licenses." Appellants' Br. at 52. Thus, instead of directly challenging the validity of the City's licensing ordinance, *see* Providence Code Of Ordinances, §§ 14-300, 302 (the "Licensing Ordinance"), Appellants presume its invalidity as a means of indirectly attacking the Price and Flavor Ordinances, even though the Licensing Ordinances was enacted a year prior to either the Flavor Ordinance or the Price Ordinance. *See* Yurdin Aff., ¶ 4 at 2-3 (JA 491-92).[38]

[38]Indeed, other cities and towns in Rhode Island have had tobacco retailer licensing regimes in effect for some time. *See* Warwick Code of Ordinances, § 10-23 ($250 fine for non-compliance); Cranston Code of Ordinances, § 5.68.020 ($200 fine for non-compliance). In addition, Appellants erroneously assume that the Ordinances are enforceable *solely* through the City's allegedly illegal licensing provisions. In fact, the Ordinances are enforceable by fines of up to $500 prior to any penalty relating to licensure. See Providence Code Ordinances, § 14-310.

Perhaps Appellants have not directly challenged the constitutionality of the City's Licensing Ordinance because they lack standing to do so.[39] In any event, the court below, without reaching the standing issue, concluded that "the question of whether the licensing requirement is an unauthorized overreaching by the City [was] not before the Court." Decision at 32. Chief Judge Lisi concluded that since no violations had occurred, "it would be improper for this Court to determine the constitutionality of the City's licensing requirement and issue what amounts to an advisory opinion." *Id.*

Appellants, on the other hand, argue that they "need not subject themselves to enforcement proceedings before the Board of Licenses to ripen their claim," Appellants' Br. at 55, simply ignoring the basic fact that they are not license holders and therefore did not have that option. Yet, even if one were to ignore Appellants' lack of standing, the court below was correct not to decide Appellants' Home Rule argument under the ripeness doctrine.

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[39] The standing issue was raised below by the City's attorney during oral argument. See JA 803. None of the Appellants are tobacco retailers in Providence, or have applied for or have obtained a tobacco retailer's license in Providence. Yurdin Aff., ¶ 5 at 3 (JA 492). Thus, they lack third party standing. *Eulitt v. Maine Dep't. of Education*, 386 F.3d 344, 352 (1st Cir. 2004). The Association Appellants—National Association of Tobacco Outlets, Inc. and Cigar Association of America, Inc.—are national associations who claim Providence tobacco retailers as members. However, their failure to specifically identify any such member or to explain how precisely they would be damaged by the Licensing Ordinance would be fatal to their standing as an association. *See United Seniors Ass'n, Inc. v. Philip Morris USA*, 500 F.3d 19, 23 (1st Cir. 2007).

The ripeness doctrine recently was discussed by this Court in *Sindicato Puertorriqueno de Trabajadores v. Fortuno*, 699 F.3d 1 (1st Cir. 2012), where it noted that: "[t]he determination of ripeness depends on two factors: 'the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" 699 F.3d at 9 (citation omitted). As to the hardship to the parties, this Court has noted that:

> [t]he hardship element requires a court to consider 'whether the challenged action 'creates a direct and immediate dilemma for the parties.' [citation omitted]. . . Generally, a 'mere possibility of future injury, unless it is the cause of some present detriment, does not constitute hardship.' *Simmonds v. INS*, 326 F.3d 351, 360 (2d Cir.2003).

Id. Appellants, who bear the burden of proof, have made no credible showing that enforcement of the Ordinances in the smallest state in the union would create a "direct and immediate dilemma" for parties with such ample financial resources. Moreover, the proper parties were and are perfectly capable of raising the state constitutional issue in state court.

Indeed, the federal abstention doctrine, which admittedly was not briefed or argued below, suggests that the lower court was correct in declining to decide the state constitutional question. As this Court has made clear:

> in cases where the relief being sought is equitable in nature or otherwise discretionary, federal courts not only have the power to stay the action based on abstention principles, but can also, in otherwise

> appropriate circumstances, decline to exercise jurisdiction altogether by either dismissing the suit or remanding it to state court.

Currie v. Group Ins. Com'n., 290 F.3d 1, 9 (1st Cir. 2002), citing *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 720 (1996). This Court has explained that:

> . . . *Burford* abstention is concerned with avoiding the 'awkward circumstance of turning the federal court into a forum that will effectively decide a host of detailed state regulatory matters, to the point where the presence of the federal court, as a regulatory decision-making center, makes it significantly more difficult for a state to operate its regulatory system.'

Guillemard-Ginorio v. Contreras-Gomez, 585 F.3d 508, 523-34 (1st Cir. 2009) (citations omitted).

Abstention is especially appropriate here since: (a) Plaintiffs sought equitable and injunctive relief; (b) the state law is unclear, and interwoven with state and local policy issues; and (c) aside from the issue of pendent jurisdiction, there would be no independent basis of federal jurisdiction or logical connection between the facts relevant to Appellants' state constitutional argument and their federal preemption and First Amendment claims.

Finally, this Court has emphasized that:

> [i]n deciding whether the district court should *exercise* its power to retain jurisdiction over the …[state law]…claims, we look to 'considerations of judicial economy, convenience, and fairness to the litigants.'

Pueblo Intern., Inc. v. De Cardona, 725 F.2d 823, 826 (1st Cir. 1984) (citations omitted).

Here, there is no reason why a party with standing could not have commenced, or could not now commence, an action in state court directly alleging that the City's Licensing Ordinance violates the R.I. Constitution. Indeed, there is no reason such an action will not be commenced regardless of this Court's ruling, which would not be binding upon a state court hearing such a challenge.

3. If It Were to Exercise Jurisdiction, This Court Should Find that The Ordinances Were a Lawful Exercise of Municipal Authority

As noted, in *Amico's Inc*., the R.I. Supreme Court held that a municipality had authority under the Home Rule Amendment to the R.I. Constitution and its town charter to regulate smoking in restaurants more extensively than the state. *See* note 36, *supra*, at 49. The Court reasoned that the authority to regulate had been impliedly delegated to the town by the state through relevant state licensing provisions pertaining to restaurants. *See* 789 A.2d at 906. In *dicta*, the Court stated (without analysis or explanation) that "licensing is not a local matter, and therefore, the General Assembly retains exclusive power over the licensing of Rhode Island businesses." *Id*. at 904, citing *Newport Amusement Co. v. Maher*, 92 R.I. 51, 56, 166 A.2d 216, 218 (1960) and *Nugent v. City of East Providence*, 103

R.I. 518, 522, 526-27, 238 A.2d 758, 761, 762-63 (1968).[40] Appellants have seized upon this *dicta* and argued that any and all municipal licensing is prohibited and exempt from a traditional preemption analysis.

In fact, in a majority of jurisdictions, licensing is not *per se* immune from preemption analysis. Absent a relevant constitutional provision, the majority rule is that municipal licensing is subject to the same analysis with respect to preemption as any other local law. *See, e.g., Coast Cigarettes Sales, Inc. v. Mayor and City Council of Long Branch*, 121 N.J.Super. 439, 445-47 (1972) (applying traditional preemption analysis to municipal ordinance requiring licensing of cigarette vending machines); *Minnetonka Electric Co. v. Village of Golden Valley*, 273 Minn. 301, 141 N.W.2d 138, 140-41 (1966) (applying traditional preemption analysis to licensing of electricians); and *Atwater v. City of Sarasota*, 38 So.2d 681 (Fla. 1949) (licensing of plumbers); *see also* 9 McQuillin, *The Law of Municipal Corporations*, 26:28 (3rd. Ed.) ("fact that a state has enacted regulations governing an occupation does not of itself prohibit a municipality from exacting additional requirements").

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[40]Yet, the Court also recognized that the state Constitution delegated exclusive power to the General Assembly in only three areas, and these areas—education, elections, and taxation—did not include licensing. *Id*. at 903 [citations omitted]; *see* R.I. Const, art. 4 (elections), art. 12 (education), and art. 13, sec. 5 (taxes).

Indeed, absent a constitutional grant of exclusive power to the General Assembly (which, as noted, is not the case with respect to licensing, *see* note 40, *supra*, at 56), the *per se* removal of any and all municipal licensing of whatever kind and nature from the mandates of a traditional preemption analysis would itself be a violation of the state's Home Rule Amendment and the City Charter, *see* note 34 *supra*, at 46, especially in an area such as smoking, which has been widely recognized as being of local concern and where concurrent state and local regulation is commonplace. *See* note 38, *supra* at 51.

If, however, this Court considers the issue and decides that licensing tobacco retailers is beyond the City's power, the Court should simply sever the language in the Ordinances which refer to local licensing, while upholding their remaining substantive prohibitions and penalties unrelated to licensing. *See supra* at 26-28.[41]

VIII. CONCLUSION

For all the above reasons, the City respectfully requests that this Court dismiss the appeal and affirm the December 10, 2012 Judgment of the District Court for the District of Rhode Island in its entirety.

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[41] Appellants misstate the holding in *State v. Krzak*, 196 A.2d 417 (R.I. 1964). In *Krzak*, the court struck down the relevant ordinance in its entirety simply because, unlike the Price and Flavored Protection Ordinances, its penalty provision directly contravened enabling state law, which expressly prohibited fines in excess of $500. *See id*. at 419-420.

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IX. CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitations of Fed.R.App.P. 32(a)(7)(B) because it contains 13,991 words, excluding the parts exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirement of Fed.R.App.P. 32(a)(6) because it has been prepared in proportionately spaced typeface using Microsoft Word, in 14-point, Times New Roman font.

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X. CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system on May 28, 2013 will be sent electronically to the registered participants as identified on the Notice of Electronic Filing on said date.

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