UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

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

DEFENDANTS' MEMORANDAUM: (1) IN OPPOSITION TO PLAINTIFFS' JOINT MOTIONS FOR SUMMARY JUDGMENT, A PERMANENT INJUNCTION AND A PRELIMINARY INJUNCTION; AND (2) IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

DEFENDANTS,
By their attorneys,
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June 15, 2012

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Defendants, CITY OF PROVIDENCE, Rhode Island (the "City"), PROVIDENCE BOARD OF LICENSES (the "Board of Licenses"), PROVIDENCE POLICE DEPARTMENT, MICHAEL A. SOLOMON, Providence City Council President, in his official capacity (the "City Council"), STEVEN M. PARE, Commissioner of Public Safety, in his official capacity, and ANGEL TAVERAS, Mayor of Providence, in his official capacity (the "Mayor," and collectively, the "Defendants"), submit the following Memorandum:

(1) in opposition to the Joint Motions for Summary Judgment, a Permanent Injunction, and a Preliminary Injunction of plaintiffs (the "Joint Motions"), NATIONAL ASSOCIATION OF TOBACCO OUTLETS, INC. (the "Tobacco Outlet Association"), CIGAR ASSOCIATION OF AMERICA, INC. (the "Cigar Association"), LORILLARD TOBACCO, COMPANY ("Lorillard"), R.J. REYNOLDS TOBACCO COMPANY ("R.J. Reynolds"), AMERICAN SNUFF COMPANY ("American Snuff"), PHILIP MORRIS USA INC. ("Philip Morris"), U.S. SMOKELESS TOBACCO MANUFACTURING COMPANY LLC ("Smokeless Manufacturing"), U.S. SMOKELESS TOBACCO BRANDS INC. ("Smokeless Brands") and JOHN MIDDLETON COMPANY ("Middleton" and collectively, the "Plaintiffs");[1] and

(2) in support of Defendants' Cross-Motion for Summary Judgment.

II. INTRODUCTION

Plaintiffs, some of the world's largest manufacturers and distributors of tobacco products, have challenged two ordinances recently enacted by the City of Providence ("the Ordinances") which prohibit the sale of certain tobacco products in the City. One ordinance (the "Price Ordinance") regulates the sale and/or distribution of price-discounted tobacco products. The other ordinance ("the "Flavored Tobacco Ordinance") regulates the sale of certain flavored and

[1] Only Plaintiffs R.J. Reynolds, Philip Morris, Smokeless Brands and American Snuff are certified to do business in Rhode Island. *See* accompanying Affidavit of City Council Majority Leader Seth Yurdin (the "Yurdin Aff."), ¶ 5 and note 2 at 3.

smokeless tobacco products. Plaintiffs sell price-discounted tobacco products in order to mitigate the effect of public health policies designed to curtail smoking by making it more expensive, and they aggressively market and sell certain flavored and smokeless tobacco products, which are especially popular among the young, in an effort to addict young people to nicotine and thereby replace some of their many former customers who have either died or quit smoking.

Plaintiffs' complaint ("the Complaint") alleges that the Price Ordinance: (1) violates the First Amendment to the U.S. Constitution (Count I); (2) is expressly preempted under the Federal Cigarette Labeling and Advertising Act of 1965 (the "FCLAA"), 79 Stat. 282 (1965), as amended, 15 U.S.C. § 1331 *et seq.* (Count II); and (3) is impliedly preempted under Rhode Island law (Count V).

As to the Flavored Tobacco Ordinance, Plaintiffs allege that it: (1) violates the First Amendment (Count VII); (2) violates the "void for vagueness" doctrine embedded in the First Amendment and the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution (Count VIII); and (3) is expressly preempted by the Family Smoking Prevention and Tobacco Control Act (the "FSPTCA"), 123 Stat. 1776 (2009), as amended 21 U.S.C. § 387 *et seq.* (Count IX).

Finally, Plaintiffs contend that both Ordinances: (1) violate their rights under 42 U.S.C. § 1983 (Counts III and X); (2) were passed in violation of the Rhode Island Open Meetings Act (the "OMA"), RIGL § 42-46-1, *et seq.* (Counts VI and XII); and (3) violate the doctrine of separation of powers under the Rhode Island Constitution (Counts IV and XI).

III. SUMMARY OF ARGUMENT

A. The Ordinances do not violate Plaintiffs' First Amendment rights.

The Ordinances do not restrict, compel, or otherwise regulate commercial speech. In fact, Plaintiffs' entire First Amendment argument is premised upon an intentional misreading of the Ordinances, neither of which prevents Plaintiffs from communicating truthful information about their products.

Contrary to Plaintiffs' claims, the Price Ordinance does not "restrict lawful communications to adults about pricing," *see* Plaintiffs' Memorandum in Support of the Joint Motions ("Plaintiffs' Mem.") at 12-13; and the Flavored Protection Ordinance is neither "triggered by speech," *see id.* at 26, nor does it "prohibit certain statements or claims about the taste or aroma of a non-cigarette product." *See* Plaintiffs' Statement of Undisputed Facts Under Local Rule 56 ("Plaintiffs' Statement of Facts"), ¶ 12 at 3. Instead, the plain language of both Ordinances focuses on specific commercial activity—the local sale and distribution of a particular consumer product—not speech or expressive conduct protected by the First Amendment. Despite their protestations, Plaintiffs remain perfectly free under the Ordinances to communicate whatever information they want to whomever they want about their products.[2] Plaintiffs have thus failed to meet their burden of proving that the commercial activity regulated by the Ordinances is even the kind of "expressive conduct" which would call for First Amendment protection under *United States v. O'Brien*, 391 U.S. 367 (1968), much less the sort of "commercial speech" that merits protection under *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n.*, 447 U.S. 557 (1980). *See infra* at 30-37.

[2] Plaintiffs have attempted to reinforce their fundamental misunderstanding of the Ordinances by assigning them misleading shorthand names. Thus, the Price Ordinance, which does not concern the communication of information related to promotions, is deceptively described by Plaintiffs as the "*Promotion* Ordinance," and the Flavored Tobacco Ordinance, which does not prohibit product descriptions and is confined to the sale of defined flavored tobacco products, is inaccurately referred to as the "Flavored *Description* Ordinance."

The Ordinances are economic legislation enacted pursuant to a municipality's well-recognized police powers; are not vague; do not implicate a fundamental right; impose only civil penalties; and afford alleged violators with the right to a "show cause" hearing before the City Board of Licenses. Thus, the Ordinances must be reviewed under the lenient rational basis test and pass constitutional muster because they are rationally related to a compelling governmental purpose. *See infra* at 37-39, 59-62.

Furthermore, even if this Court were for some reason to apply the *O'Brien* test, or (despite the complete lack of any restriction upon speech) the more stringent test articulated in *Central Hudson*, the Ordinances would still pass constitutional muster since: (1) the U.S. Supreme Court has made clear that "the state's interest in preventing underage tobacco use is substantial, and even compelling." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 564 (2001); (2) the Ordinances directly advance this compelling governmental interest; and (3) the measures are no more extensive than necessary. *See infra* at 42-47.

B. The Ordinances are not pre-empted under either the FCLAA or the FSPTCA.

The FCLAA, which applies only to cigarettes, does not preempt the Price Ordinance. The regulatory context of the FCLAA's enactment, the Act's 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" that would impose conflicting and burdensome obligations on tobacco companies that advertise in numerous jurisdictions. No such concerns are implicated by the Price Ordinance which, as noted, is not concerned with the communication of information, i.e., the content of cigarette labels or the content of advertising and/or of promotional activity, but rather is concerned solely with the actual sale and distribution of a product. *See infra* at 48-56.

For its part, the FSPTCA explicitly preserves the authority of state and local governments to regulate the sale and distribution of tobacco products, *see* 21 U.S.C. § 387p(a), and amends the FCLAA to grant states and localities the power to regulate the time, place, and manner of cigarette advertising. *See* 15 U.S.C. § 1334(c). If, for the sake of argument, the Price Ordinance could be construed as regulating promotional activity, it would constitute a restriction on the *manner* of tobacco price discounting, which has not been preempted under federal law since 2009. *See infra* at 54-56. Moreover, Plaintiffs' claim that the Flavored Tobacco Ordinance is preempted under the FSPTCA is expressly contradicted by the plain language of the Act's two savings clauses, *see* 21 U.S.C. §§ 387 p(a)(i) and 387 p(2)(B), as was made abundantly clear in a recent decision from the Southern District of New York upholding a substantially similar New York City ordinance against a claim of FSPTCA preemption. *See infra* at 56-59.

C. The Flavored Tobacco Ordinance does not violate the "void for vagueness" doctrine.

Plaintiffs' vagueness argument must be reviewed under the deferential, rational basis test applicable to facial due process challenges brought under the Fourteenth Amendment. Thus, Plaintiffs must establish "that no set of circumstances exists under which [the Ordinance] would be valid," or that the Ordinance lacks any "plainly legitimate sweep." As will be discussed, the Flavored Tobacco Ordinance can easily withstand this deferential standard of review. *See infra* at 59-62, quoting *United States v. Stevens*, __ U.S. __, 130 S.Ct. 1577, 1588 (2010).

D. Defendants have not violated Plaintiffs' rights under 42 U.S.C. § 1983 and the City Council has not violated the OMA.

Plaintiffs' section 1983 claim is necessarily premised upon a violation of rights under the U.S. Constitution, and since, as noted, there were no such violations, the claim is fatally flawed.

As to the alleged OMA violations, the claims are moot since any such violations were cured when the City Council approved the Ordinances a second time, as amended, on or about February 17, 2012. *See* Yurdin Aff., ¶ 3 and note 1 at 2.

E. The Price Ordinance is not preempted under state law and the Ordinances do not violate separation of powers under state law.

The Price Ordinance does not contradict but rather complements existing state law regulating tobacco products, i.e., prohibiting youth access to tobacco and mandating that retailers selling discounted tobacco products also post the original, non-discounted, price. Rather than occupying the field, relevant state law explicitly recognizes that local governments have an important role to play in the area. *See infra* at 62-66.

In addition, although Plaintiffs have not directly challenged the Providence ordinance mandating that tobacco retailers be licensed (the "Licensing Ordinance"), there is no conflict between the state's licensing of tobacco retailers for tax purposes and the Licensing Ordinance, which, contrary to Plaintiffs' argument, *see* Plaintiffs' Mem. at 40-41, is not immune from traditional preemption analysis. Indeed, even if this Court were *sua sponte* to find that the City's tobacco retailer licensing scheme was unconstitutional *per se,* the offending portions of the Ordinances should be severed and their remaining provisions upheld. *See infra* at 69-72.

F. Plaintiffs are not entitled to a preliminary injunction.

Finally, if for some reason this Court were to deny the pending motions for summary judgment, Plaintiffs would nonetheless not be entitled to a preliminary injunction as they are unlikely to succeed on the merits, have manifestly failed to show irreparable harm, and providing injunctive relief would not be in the public interest. *See infra* at 72-76.

IV. FACTS

A. The Public Health Threat

The Ordinances address what the United States Supreme Court has called the most significant threat to public health in the United States — tobacco use. *FDA v. Brown & Williamson Tobacco Corp.*, 529 US 120, 161 (2000). Forty-five million Americans still smoke,[3] and every year tobacco kills 443,000 of these smokers—more than 1,200 people every day.[4] Tobacco is the nation's greatest preventable cause of death by a wide margin. It kills ten times as many people as die in automobile accidents, and thirty times the number of people who die from HIV/AIDS.[5] More than 12 million Americans have died from smoking cigarettes since the first Surgeon General's Report on the hazards of smoking was issued in 1964.[6] Tobacco products are unique among consumer goods: they kill up to one-half of the people who use them as they are intended to be used.[7]

Tobacco causes nearly 90% of all deaths from lung cancer in the United States.[8] It also causes numerous other kinds of cancer, including oral cancer, laryngeal cancer, pancreatic cancer, cervical cancer, stomach cancer, and acute myeloid leukemia. At the same time, 70% of all tobacco-related deaths occur from diseases *other* than cancer.[9] Tobacco causes cardiovascular disease (including heart attacks), coronary heart disease, emphysema, and aortic

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[3] U.S. Centers for Disease Control and Prevention ("CDC"), "Youth Risk Behavior Surveillance—United States, 2011," *Morbidity and Mortality Weekly Report MMWR,* 61(4) (June 7, 2012).
[4] CDC, "Vital Signs: Current Cigarette Smoking Among Adults Aged ≥ 18 Years - United States, 2005-2010," *Morbidity and Mortality Weekly Report, MMWR* 60(35):1207-11212 (September 9, 2011).
[5] National Highway Traffic Safety Administration's National Center for Statistics and Analysis, State Motor Vehicle Fatalities, 2010, DOT HS 811 554 (December 2011), http://www-nrd.nhtsa.dot.gov/Pubs/811554.pdf.; CDC"Table 12b. Deaths of persons with an AIDS diagnosis, by year of death and selected characteristics, 2006–2008 and cumulative—United States and 5 U.S. dependent areas," *HIV Surveillance Report, 2009*, vol. 21 (February 2011), http://www.cdc.gov/hiv/surveillance/resources/reports/2009report/pdf/table12b.pdf.
[6] President's Cancer Panel Report at 61 (2006).
[7] World Health Organization, Report on the Global Tobacco Epidemic 8 (2008).
[8] U.S. Dep't. of Health and Human Services ("DHHS"), *The Health Consequences of Smoking. A Report of the Surgeon General* (2004); *see also*, Thun, "Mixed progress against lung cancer," *Tobacco Control* 7:223-226 (1998).
[9] DHHS, *Reducing the Health Consequences of Smoking: 25 Years of Progress. A Report of the Surgeon General* (1989), http://profiles.nlm.nih.gov/NN/B/B/X/S/.

aneurysms. [10] For any given individual, long-term smoking reduces average life expectancy by 14 years.[11] And tobacco smoking costs the nation an estimated $193 billion per year in health care spending and loss of productivity due to disease and premature death resulting from smoking-related disease.[12]

There is, in short, no national health objective greater than reducing the death and disease caused by tobacco.

B. Tobacco and Youth

The key battleground in the fight against tobacco-related death and disease is American youth. Eighty-eight percent (88%) of long-term daily tobacco users try their first cigarette by the time they are 18.[13] That means that if young people avoid tobacco when they are underage, there is a strong likelihood they will never become regular tobacco users. The prime objective of public health policy is therefore to keep young people from initiating tobacco use.

The dangers of losing that battle are critical. Despite our best public health policies, youth tobacco usage remains an enormous problem. Each day in the United States, nearly 4,000 people under 18 smoke their first cigarette, and an additional 1,000 young people under 18 become daily cigarette smokers.[14] Despite the fact that it is illegal in every state for people under 18 to buy tobacco products, more than 23% of American high school students have used tobacco in the past 30 days.[15] Moreover, while smoking rates among youth (and adults) have declined since the 1990s, declines in youth smoking appear to have slowed and the usage rate for smokeless

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[10] DHHS, *The Health Consequences of Smoking. A Report of the Surgeon General* (2004).
[11] National Cancer Institute, Smoking and Tobacco Control Monograph No. 19 at 4 (June, 2008).
[12] CDC, "Smoking-Attributable Mortality, Years of Potential Life Lost, and Productivity Losses—United States, 2000--2004," *MMWR* 57(45):1226-1228 (November 14, 2008), http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5745a3.htm.
[13] DHHS, *Preventing Tobacco Use Among Youth and Young Adults, A Report of the Surgeon General* (2012) (the "SG's Report") at 134.
[14] *Id.*
[15] CDC, "Youth Risk Behavior Surveillance — United States, 2011," *MMWR* 61(SS-4) (June 8, 2012).

tobacco among youth has actually risen. *See* accompanying affidavit of Gregory N. Connolly, D.M.D. M.P.H. (the "Connolly Aff."), ¶¶ 10-11 at 5-6.

The problem is as dire in Rhode Island as it is nationwide. According to statistics compiled by the Rhode Island Department of Health, 35% of students in Rhode Island reported having used tobacco in 2011.[16] 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.[17] 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.[18] In the City of Providence, 20% of high school students and 10% of middle school students smoke. *See* Yurdin Aff., ¶ 6 at 3.[19] In short, the outcome of the battle against tobacco use by our young is still very much in doubt.

One of the main obstacles to public health efforts to stem the use of tobacco among the young is the tobacco industry's efforts to encourage initiation of tobacco use at an early age. As noted, if the tobacco companies are not successful in addicting young people by the time they are 18, there is very little prospect that they will become long-term tobacco users. For both sides, therefore, the struggle to determine what young people will do before they reach the age of 18 is a key to success, as the tobacco industry is well aware.

Over the course of many decades, the tobacco companies have developed and implemented successful strategies to addict young people to their products. These efforts were exhaustively explored in one of the most extensive trials in the history of the United States,

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[16] Rhode Island Department of Health, Youth Risk Behavior Study (1997-2011) ("RIDOH YRBS"), http://www.health.ri.gov /publications/healthriskreports/youth/2009 SmokingHighSchool.pdf.
[17] *Id.*
[18] *Id.*
[19] This belies Plaintiffs' expert's claim that the relevant smoking rates fall "significantly below the nationwide average," which he claims is 19.5% for high school students. *See* Declaration of Cecil B. Reynolds, Ph.D. (the "Reynolds' Decl."), ¶ 42 at 23.

which culminated in an over 1600-page opinion by Judge Kessler of the U.S. District Court for the District of Columbia, who found the tobacco companies guilty of multiple RICO violations. *United States v. Philip Morris USA, Inc.*, 499 F.Supp.2d 1 (D.D.C. 2006), *aff'd. in part, vacated in part, and remanded*, 566 F.3d 1095 (D.C. Cir. 2009), *cert. denied,* 130 S. Ct. 3501 (2010). Regarding the tobacco industry's efforts to addict young people, Judge Kessler specifically found that:

> Defendants knew that youth were highly susceptible to marketing and advertising appeals, would underestimate the health risks and effects of smoking, would overestimate their ability to stop smoking, and were price sensitive. Defendants used their knowledge of young people to create highly sophisticated and appealing marketing campaigns targeted to lure them into starting smoking and later becoming nicotine addicts.

449 F.Supp.2d at 691. *See also id.* at 571 ("Knowing that advertising and promotion stimulated the demand for cigarettes, Defendants used their knowledge of young people, gained through tracking youth behavior and preferences, in order to create marketing campaigns (including advertising, promotion, and couponing) that would appeal to youth, in order to stimulate youth smoking initiation and ensure that young smokers would select their brands").

Unfortunately, tobacco industry efforts to target the young did not cease following the decision in *U.S. v. Philip Morris*. In fact, "tobacco company spending to market their deadly products increased by 52% from 1998 to 2008 (the most recent year for which complete data is available)."[20] The industry has aggressively targeted youth despite the fact that one out of three

[20] U.S. Federal Trade Commission ("FTC") *Cigarette Report for 2007 and 2008* (2011), http://www.ftc.gov/os/2011/07/110729cigarettereport.pdf.; *see also*, FTC *Smokeless Tobacco Report for 2007 and 2008* (2011), http://www.ftc.gov/os/2011/07/110729smokelesstobaccoreport.pdf (data for top 6 manufacturers only).

children and adolescents who are regular smokers will die of a smoking-related disease. *See U.S. v. Philip Morris, supra,* 499 F.Supp.2d at 561-62 at ¶ 2703.[21]

In truth, state and local governments are ill-equipped to battle the tobacco industry's efforts to target America's youth. Major cigarette and smokeless tobacco companies spend an astounding $10.5 billion a year to market tobacco products in the United States, *with an estimated $27.3 million spent annually in the state of Rhode Island alone.*[22] Nationally, the tobacco companies spend $23 to market tobacco products for every one dollar the states spend to prevent kids from smoking and helping smokers quit."[23]

Rhode Island's tobacco prevention and cessation program is funded entirely through the state's general fund. In 2002, Rhode Island approved a plan to sell, or securitize, its rights to $1.19 billion in future tobacco settlement payments under the Master Settlement Agreement (the "MSA"), for a smaller, one-time payment of $600 million.[24] The funds were used to address budget shortfalls and pay capital and operating expenses in FY2002-FY2004. However,

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[21] *See also* CDC, "Projected Smoking-Related Deaths Among Youth-United States," *MMWR* 45(44):971-974 (November 8, 1996), http://www.cdc.gov/mmwr/PDF/wk/mm4544.pdf.

[22] *See* The Campaign for Tobacco Free Kids, *A Broken Promise to Our Children, The 1998 State Tobacco Settlement 13 Years Later* (Nov. 30, 2011) ("*Broken Promise*") at iii, 80, http://www.tobaccofreekids.org/whatwedo/state local/tobacco_settlement/); FTC *Cigarette Report for 2007 and 2008* (2011), http://www.ftc.gov/os/2011/07/110729cigarettereport.pdf; *see also* FTC, *Smokeless Tobacco Report for 2007 and 2008* (2011), http://www.ftc.gov/os/2011/07/110729smokelesstobaccoreport.pdf (data for top 6 manufacturers only).

[23] *See Broken Promise, supra,* at iii, 80.

[24] *Id.* On November 23, 1998, Plaintiffs Philip Morris, RJR and Lorillard along with several other major tobacco companies entered into the MSA with Rhode Island and forty-five other states, thereby ending lawsuits that had been brought by the states' Attorneys General against the tobacco industry. The MSA states that:

> No Participating Manufacturer may take any action, directly or indirectly, to target Youth within any Settling State in the advertising, promotion or marketing of Tobacco Products, or take any action the primary purpose of which is to initiate, maintain or increase the incidence of Youth smoking within any Settling State.

Id. at § 111(a). The MSA also prohibits signatories from continuing to make misrepresentations concerning the health risks associated with smoking, and with limited exceptions, bans the distribution of free samples of tobacco products, as well as billboard, transit and print advertising that directly target underage youth. *See id.* at § III. The MSA is available online, on the website of the National Association of Attorneys General. National Association of Attorneys General, Tobacco, http://www.naag.org/backpages/naag/tobacco/msa/msa-pdf/MSA%20with%20Sig%20Pages%20and%20Exhibits.pdf/file_view.

securitization left Rhode Island with no tobacco settlement funding available for tobacco prevention and other purposes after FY 2004.[25]

The City of Providence is simply unable to make up for this funding shortfall as it struggles with a structural deficit of approximately $70 million for fiscal year 2011 and approximately $110 million for fiscal year 2012. *See* Yurdin Aff., ¶ 24 at 8-9.[26] In these hard economic times, with state and local budgets strained to the limit, the battle against the tobacco industry and its multi-billion dollar efforts to encourage the use of tobacco by young persons is a true David versus Goliath struggle.

C. The Tobacco Companies' Use of Price Discounting to Target Young Persons

A key and well-established feature of tobacco company efforts to market their products to young persons involves price discounting and the use of price-based marketing. There is a clear cause and effect relationship between the price of tobacco products and their use by young persons. *See* accompanying affidavit of Professor Frank J. Chaloupka (the "Chaloupka Aff."), ¶¶ 13, 17, 19 and 23 and Figures 5 and 6 at 6, 9-10 and 12-13 (establishing relationship between prices and consumption).[27]

The tobacco industry is well aware that "youth and young adults are more responsive to increases in cigarette and other tobacco prices, and will not try smoking or continue to smoke if cigarette prices rise." *Philip Morris*, 499 F.Supp.2d at 639; Chaloupka Aff.", ¶¶ 26-41 at 14-23.[28]

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[25] *Broken Promise, supra,* at 80.

[26] *See Report of the Municipal Finances Review Panel* (February 28, 2011), http://www.gcpvd.org/images/reports/2011-02-providence-report-of-the-municipal-finances-reveiw-panel.pdf.

[27] *See also Philip Morris*, 499 F.Supp.2d at 639 (noting "price reductions, initiated by the cigarette company Defendants, such as sharply dropping the wholesale price of cigarettes most popular with young people, have reduced the rate of decline in overall cigarette smoking and contributed to the increases in youth smoking incidence and prevalence observed during much of the 1990s") (citation omitted).

[28] *See also* SG's Report at 699 ("both youth and young adults are more responsive than adults to changes in cigarette prices, with several studies finding youth and young adults to be two to three times as responsive to changes in price as adults").

Tobacco companies' pricing strategies often involve "price-related marketing efforts, including coupons, multi-pack discounts [*e.g.*, "buy two packs, get one free"], and other retail value added promotions . . . [that have] have partially offset the impact of higher list prices for cigarettes, historically and currently, particularly with regard to young people."[29]

The Price Ordinance is an adaptation of one of the most successful tobacco-control policies: maintaining higher prices for cigarettes reduces cigarette consumption—and reduces consumption by young people disproportionately.[30] A substantial body of evidence supports this proposition.[31] It has been adopted as a bedrock principle of tobacco control both nationally and internationally.[32] Frequently, taxation is used to implement this policy: in the last twenty years every single state in the United States has increased its tax on tobacco—most of them very substantially and multiple times—and the federal excise tax on cigarettes has risen from 20 cents per pack in 1992 to $1.01 per pack in 2012.[33] In part, these tax increases have been implemented to raise revenue, but the larger reason for these increases has been the assumption that tobacco product manufacturers will pass on tax increases in the form of higher prices and that the increase in prices will reduce consumption—in particular, consumption by young people. It is

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[29] *Philip Morris, supra,* 499 F.Supp. at 639-40; *see also* SG's Report at 10 ("[t]obacco company expenditures have become increasingly concentrated on marketing efforts that reduce the prices of targeted tobacco products. Such expenditures accounted for approximately 84% of cigarette and more than 77% of the marketing of smokeless tobacco products in 2008."); Pierce *et al.*, *Tobacco industry price subsidizing promotions may overcome the downward pressure of higher prices on initiation of regular smoking*, 14 HEALTH ECONOMICS 1061-1071 (2005) (industry utilization of pricing strategies, including coupons and retail value-added promotions, to reduce the impact of tobacco tax increases has induced price-sensitive consumers, and in particular youth, to smoke).

[30] *See* SG's Report at 525.

[31] *See* Chaloupka Aff., ¶¶ 13, 17, 19 and 23 and Figures 5 and 6 at 6, 9-10 and 12-13.

[32] Institute of Medicine, *Ending the tobacco problem: A blueprint for the nation*, Washington, DC: The National Academies Press (2007) at 182 ("It is well established that an increase in the price of cigarettes decreases their use and that raising tobacco excise taxes is one of the most effective policies for reducing the use of tobacco); World Health Organization, *Framework Convention on Tobacco Control* (2003) at 7 ("The Parties recognize that price and tax measures are an effective and important means of reducing tobacco consumption by various segments of the population, in particular young persons."); CDC, *Best Practices for Comprehensive Tobacco Control Programs*, Atlanta, GA: HHS (October 2007) at 7 ("Research has documented the effectiveness of laws…increasing the unit price of tobacco products. . .")

[33] Orzechowski and Walker, *The Tax Burden on Tobacco*, vol. 46 (2011).

no coincidence that in the last decade, when the average price of cigarettes rose from $3.37 to $5.61 per pack, national consumption fell by 134 million packs (or 31.4 percent).[34]

Rhode Island has been in the forefront of the states using tax policy as a tobacco control strategy. Its previous cigarette tax rate of $2.46 per pack was the highest in the nation for several years, while its current tax rate of $3.46 per pack was highest for a year and now ranks second highest behind New York's $4.35 per pack.[35]

Tobacco companies have responded to tax policies that sharply increase the price of cigarettes by instituting programs of selective, targeted discounts, including:

- Price discounts: price discounts paid to retailers or wholesalers in order to reduce the price of tobacco products to consumers, including off-invoice discounts, buy- downs, voluntary price reductions and trade programs; but excluding retail-value-added expenditures for promotions involving free products and expenditures involving coupons.

- Sampling – sampling of tobacco products, including the cost of these products, all associated excise taxes, and increased costs under the MSA, and the cost of organizing, promoting, and conducting sampling. Sampling includes the distribution of products for consumer testing or evaluation when consumers are able to use the products outside of a facility operated by the company, but not the cost of actual clinical testing or market research associated with such distributions. Sampling also includes the distribution of coupons for free products, when no purchase or payment is required to obtain the coupons or products.

- Retail-value-added – bonus product: Retail-value-added expenditures for promotions involving free products (e.g., buy two packs, get one free), whether or not the free products are physically bundled together with the purchased product, including all expenditures and costs associated with the value added to the purchase of tobacco products (e.g., excise taxes paid for the free product and increased costs under the MSA).

- Coupons: all costs associated with coupons for the reduction of the retail cost of tobacco products, whether redeemed at the point-of-sale or by mail, including all costs associated with advertising or promotion, design, printing, distribution, and redemption. However, when coupons are distributed for free products and no purchase or payment is required to

[34] See *id.*; *see also* U.S. Alcohol and Tobacco Tax and Trade Bureau, Tobacco Statistics.
[35] Orzechowski and Walker, *supra.*

> obtain the coupons or the products, these activities are considered to be sampling and not couponing.

Chaloupka Aff., ¶ 42 at 24.

Indeed, such targeted discounting programs rapidly became the principal strategic element in tobacco companies' marketing plans. *See id.*, Figures 6 and 7 at 25. In 1998, out of a total of the $6.9 billion spent by the major cigarette and smokeless tobacco companies on marketing, only 74 percent was spent on price promotions (including price discounts, promotional allowances, coupons, and retail value added promotions). By 2008, the latest year for which such figures are available, the major tobacco companies spent more than 91 percent on discounting, most of which was highly targeted geographically and demographically to maintain sales in the face of governmental policies designed to reduce those sales.[36]

For all the same reasons that increasing the price of tobacco products is an effective tobacco control policy, targeted discounting as a counter-strategy works to frustrate that policy. If price conscious consumers—particularly those whose addiction may not yet be fully developed and who may have limited disposable income (like many adolescent smokers)—smoke less in response in high prices, then policies that dilute or nullify price increases make them smoke more. If the target of those price reductions is an adolescent who is experimenting with cigarettes and is not yet addicted, the consequence of that targeted price reduction may well be the difference between his becoming addicted or not. The 2012 Surgeon General's report recognized this problem, stating:

> In considering the numerous studies demonstrating that tobacco use among young people is responsive to changes in the prices of tobacco products, it can be concluded that the industry's extensive use of price-reducing promotions has led to higher rates of tobacco use among young people than would have occurred in

[36] FTC *Cigarette Report for 2007 and 2008* (2011), http://www.ftc.gov/os/2011/07/110729cigarettereport.pdf; FTC *Smokeless Tobacco Report for 2007 and 2008*, (2011), http://www.ftc.gov/os/2011/07/110729smokeless tobaccoreport.pdf (data for top 6 manufacturers only).

> the absence of these promotions. Because there is strong evidence that as the price of tobacco products increases, tobacco use decreases, especially among young people, then any actions that mitigate the impact of increased price and thus reduce the purchase price of tobacco can increase the initiation and level of use of tobacco products among young people.[37]

In *U.S. v. Philip Morris*, *supra*, Judge Kessler specifically found that tobacco companies use strategic price reduction strategies such as coupons and multi-pack discounts to target young people:

> Defendants recognize that youth and young adults are more responsive to increases in cigarette and other tobacco prices and will not try smoking or continue to smoke if cigarette prices rise. Despite that recognition, Defendants continue to use price-based marketing efforts as a key marketing strategy. Defendants price-related marketing efforts, including coupons [and] multi-pack discounts, have partially offset the impact of higher list prices for cigarettes, historically and currently, particularly with regard to young people. *Defendants could significantly reduce adolescent smoking by. . .stopping all price related marketing* (i.e., discounting and value added offers of cigarettes, especially in convenience stores, where this kind of marketing is concentrated and where young people are more likely to purchase cigarettes.[38]

In testimony before the Providence City Council's Committee on Ordinances, the Acting Director of the City's Substance Abuse Prevention Council, echoing the Surgeon General, testified that "studies show that a 10% increase in price [of cigarettes] results in a 3% to 5% decrease in smoking rates . . . " *See* Yurdin Aff., ¶ 8 at 3-4; *see also* SG's Report at 699. The Acting Director added that the tobacco industry responded to increased prices resulting from taxation by making free and discount-priced tobacco available to young and minority populations in the City, noting that the industry spends "100,000 [dollars] a day in Rhode Island, 75% of which is being spent on pricing discounts." *See* Yurdin Aff., attached Ex. F at 18.

Tobacco companies know their markets very well and they know how to maximize the value of their strategic price reduction strategies by targeting those policies to states where taxes on cigarettes (and therefore prices) have risen the highest, and nullifying price increases by

[37] SG's Report at 530.

[38] *U.S. v. Philip Morris*, 449 F. Supp. 2d at 639-40 (emphasis added)

targeting discounts on the most price-sensitive consumers—adolescents who may be experimenting but are not yet addicted and who have limited disposable income. Targeting discounts to adolescents works brilliantly for the tobacco companies. In the short run, they sacrifice income on cigarettes they discount. In the long run, they addict a child to their product for the rest of his or her (shortened) life. In fact, that is exactly how the tobacco companies have targeted their discounting policies. *See* Chaloupka Aff., ¶ 61 at 34-35. With one of the highest cigarette taxes in the nation, Rhode Island is a prime target for this strategy—and Rhode Island's youth, who the tobacco companies hope will pay less for cigarettes now, will pay a much higher price in the long run.

Couponing and multi-pack discounts are two effective ways to implement targeted price discounts. Both of them have the effect of reducing the actual price of cigarettes. Young people obtain cigarettes in numerous ways—some of them buy them illegally at convenience stores; some of them may ask an older friend or a sibling to buy them for them; some of them get cigarettes from parents or friends. Regardless of how a young person obtains cigarettes, the lower the price the more of them he or she is likely to obtain. Plaintiffs' expert speculates that young people are less likely to present coupons to a seller because doing so would call attention to themselves. Whether or not this may be the case (and there is no reason to believe that it is),[39] it is immaterial. If coupons make cigarettes cheaper, then young people will obtain more cigarettes. The key is the effective price of the cigarettes. Coupons lower the effective price and the results flow naturally from that fact.

Similarly, multi-pack discounts lower the effective price of cigarettes and have the same effect. A two-for-one discount obviously cuts the price of cigarettes in half. At an individual

[39] Indeed, a recent study suggests that a substantial percentage of Rhode Island's youth obtain cigarettes by buying them in a store or gas station. *See infra* at 44.

level, a young person who is not yet addicted can get twice as many cigarettes for the same price. One does not have to be a research scientist to know that doubling the number of cigarettes a young person has in his pocket is more likely to make him addicted.

D. The Industry's Use of Smokeless Tobacco and Flavored Tobacco Products to Target Youth

Another key feature of the tobacco companies' efforts to encourage tobacco use among youth is the companies' emphasis on particular tobacco products that it believes will appeal to young people – specifically, smokeless tobacco and flavored tobacco products, both smokeless and otherwise.

The danger of smokeless tobacco is well-established. *See* Connolly Aff., ¶¶ 4-8. The U.S. Department of Health and Human Services ("DHHS") has stated flatly that: "there is no safe form of tobacco," adding that "at least 28 chemicals in smokeless tobacco have been found to cause cancer."[40] And DHHS has made clear that "[a]ll tobacco products, including smokeless tobacco, contain nicotine, which is addictive."[41] Not only is smokeless tobacco dangerous in itself, but is also poses dangers as an introductory tobacco product that may serve as a gateway to cigarette smoking. *See* Connolly Aff., ¶ 7 at 4.

Because of the national attention focused on the dangers of cigarettes, however, the major tobacco companies have increasingly been investing heavily in smokeless tobacco products. In recent years, the two largest U.S. tobacco companies, Altria (the parent company of Philip Morris) and Reynolds American Inc., have acquired large smokeless tobacco companies and have aggressively marketed smokeless tobacco products, especially to young people. *See*

[40] U.S. Food and Drug Administration Fact Sheet, *Flavored Tobacco Products* (2010) ("FDA Fact Sheet"), http://www.fda.gov/TobaccoProducts/ProtectingKidsfromTobacco /FlavoredTobacco /ucm183198.
[41] *Id.*; *see also* Connolly Aff., ¶¶ 4-8 at 2-4.

Connolly Aff., ¶ 9 at 4-5. When measured from 2005, smokeless tobacco marketing has more than doubled, from $250.8 million to $547.9 million.[42]

The result of these increased efforts, unsurprisingly, has been increases – or at least no reduction – in smokeless tobacco use among young persons. According to data from the *Monitoring the Future* survey presented by Plaintiffs' expert, the prevalence of smokeless tobacco use among tenth-graders and twelfth-graders nationally has either increased or not declined at all since 2003.[43] As noted by Dr. Connolly, "whatever the progress we are making nationally in reducing adolescent usage of cigarettes, we are not making comparable progress in reducing adolescent usage of smokeless products." Connolly Aff., ¶ 11 at 6.

A further strategy employed by the tobacco companies to encourage the use of their products by young people is the promotion of *flavored* cigarettes, smokeless tobacco products, and products characterized as cigars. *See id.*, ¶¶ 12-14 at 6-8.[44] There is and can be only one reason for this strategy – these products are particularly attractive to young people. As noted by the FDA:

(a) In 2004, 22.8% of 17-year-old smokers reported using flavored cigarettes over the past month, as compared to 6.7% of smokers over the age of 25;

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[42] National Institutes of Health, National Cancer Institute Factsheet: Smokeless Tobacco and Cancer, accessed from http://www.cancer.gov/cancertopics/factsheet/Tobacco/smokeless on June 14, 2012; *see also* FTC Smokeless Tobacco Report for 2007 and 2008 (2011) at 1-2, http://www. ftc.gov/os/2011/07/110729 smokelesstobacco report.pdf) (noting that the five major manufacturers spent a total of $411.3 million on advertising and promotion [of smokeless tobacco products] in 2007, an increase from the $354.1 million spent in 2006, and that such advertising and promotional expenditures rose again in 2008 to $547.9 million).

[43] *See* Reynolds Decl. ¶ 36, at 17. According to these data, in 2003, 5.3% of tenth graders reported current use (past 30-day) of smokeless tobacco, while in 2011 the percentage had risen to 6.6%. *Id.* Nor was 2011 an isolated year. Current smokeless tobacco use by tenth graders exceeded the 2003 level in four of the last five years. *Id.* For twelfth-graders, in 2011, current smokeless prevalence was 8.3%, compared with 6.7% in 2003, and the prevalence of smokeless usage in three of the past five years was higher than that in 2003. By contrast, cigarette use at both the tenth and twelfth grade levels declined appreciably during the same period. *Id.* Smokeless tobacco use is more common among men and boys, so it is worth looking at those data in addition to overall youth use. According to *Monitoring the Future*, 9.6% of tenth grade boys reported using smokeless tobacco in 2003, while the percentage had risen to 11.5% in 2011. Among tenth grade boys, smokeless tobacco use also exceeded the 2003 level in four of the last five years. *Id*

[44] *See* SG's Report at 538-540 (detailing tobacco companies' promotional efforts revolving around flavored cigarettes and smokeless tobacco products).

(b) A poll conducted in March 2008 found that one in five youngsters between the ages of 12 and17 had seen flavored tobacco products or ads, while only one in 10 adults reported having seen them;

(c) According to one study of youth smokers between the ages of 13 and 18, 52% of smokers who had heard of flavored cigarettes reported interest in trying them, and nearly 60% thought that flavored cigarettes would taste better than regular cigarettes; and

(d) Studies of youth expectations around other flavored tobacco products like bidis and hookahs have found that young smokers report choosing flavored products over cigarettes because they 'taste better' and are perceived to be 'safer.'[45]

The problem is particularly acute with respect to smokeless tobacco products. According to UST Inc.,'s 2005 Annual Report, flavored products (that now include flavors such as apple, peach, vanilla, berry blend and citrus blend) accounted for more than 11 percent of all moist snuff sales.[46] A trade publication for convenience stores quoted one retailer stating, "in the case of smokeless tobacco, you get a new flavor once every quarter." [47]

The FSPTCA, enacted by Congress in 2009, prohibited the use of characterizing flavors, other than menthol, in cigarettes, effective in 2009. There is no similar prohibition, however, with respect to smokeless tobacco. Therefore, tobacco companies can with impunity market and sell smokeless tobacco products that are specifically flavored to appeal to young persons. Testimony before the Providence City Council during consideration of the Flavored Tobacco

[45] FDAFact Sheet, *Flavored Tobacco Products* (2010), http://www.fda.gov/TobaccoProducts/ProtectingKidsfromTobacco /FlavoredTobacco /ucm183198).

[46] 2005 Annual Report & 2006 Proxy UST, Inc.,, http://ccbn.mobular.net/ccbn/7/1301/1391/print/print.pdf. UST Inc. was a holding company for its wholly owned subsidiaries: U.S. Smokeless Tobacco Company and International Wine & Spirits Ltd.; *see also Marketing to Kids, supra,* at 11 (noting also that "[t]obacco industry documents, research on the effect of the cigarette companies' marketing efforts on kids, and the opinions of advertising experts combine to reveal the intent and the success of the industry's efforts to attract new smokers from the ranks of children").

[47] "*Flavors Add New Dimension to Tobacco*," Convenience Store News (October 1, 2007). The vice-president of one distributor of such flavored products commented that "it felt as if we were operating a Baskin-Robbins ice cream store." Connolly Aff., ¶ 14 at 8.

Ordinance made clear that the industry has aggressively promoted certain flavored smokeless tobacco products in the City that are particularly attractive to youth, *see* Yurdin Aff., ¶¶ 11-12, 17 at 4-7, confirming recent findings by the Surgeon General. *See* SG's Report at 538.

Similar trends exist with regard to products characterized by their manufacturers as "cigars." Following increased governmental regulation of cigarettes, many manufacturers have simply wrapped tobacco in brown rather than white paper, introduced a small amount of tobacco into the wrapping, and characterized their product as a "cigar." Many of these "cigars" are virtually indistinguishable from cigarettes. When the federal government prohibited the use of characterizing flavors in cigarettes in 2009, some manufacturers simply started offering flavored cigars. *See* Connolly Aff., ¶ 14.

E. Governmental Regulation of Tobacco

1. Federal Law and Regulation

Congress has regulated tobacco products for almost 50 years and on several different occasions. Congress introduced cigarette warning labels in the Federal Cigarette Labeling and Advertising Act of 1965 (as noted *supra*, the "FCLAA"), Pub. L. 89-92, 79 Stat. 282 (1965), 15 U.S.C. § 1331 *et seq.*[48] And in 2009, Congress enacted the Family Smoking Prevention and Tobacco Control Act (as noted *supra*, the "FSPTCA"), 123 Stat. 1776, Pub. L. No. 111-31 (2009), 21 U.S.C. § 387 *et seq.*, which provided the FDA with the explicit authority to regulate tobacco products.

Despite these and other federal laws, Congress has made clear that it has not occupied the field and has explicitly recognized the role to be played by state and local government. *See infra* at 54-59. The need for state and local involvement is highlighted by the fact that chronic disease

[48] The FCLAA has been amended twice since its enactment in 1965. *See infra* at 51.

of the type caused by cigarette smoking and other tobacco use accounts for 75% of American spending on health care. *See* SG's Report at 3.

2. Rhode Island's Regulation of Tobacco

Rhode Island also has a wide range of laws designed to curb tobacco use, in particular among youth. *See Narragansett Indian Tribe of R.I. v. State of R.I.*, 296 F.Supp.2d 153, 163 (D.R.I. 2003) (summarizing state tobacco tax and licensing laws). Under Rhode Island law, it is illegal for a minor to purchase tobacco products, or for anyone to sell or distribute tobacco products to a minor. *See* RIGL § 11-9-13. In addition, it is illegal under state law for a minor to smoke or chew tobacco in public, s*ee* 11-9-14, and the state has attempted to regulate a minor's access to cigarette vending machines. *See* RIGL § 11-9-13.1. The state also requires that those selling cigarettes in the state obtain a license from the state Tax Administrator, *see* RIGL § 44-20-2, and Rhode Island has a minimum price law for tobacco products. *See* RIGL § 16-13-2. In addition, under the state's unfair sales practices act, retailers must post the non-discounted price when offering products, including tobacco products, at a discount. *See* RIGL § 6-13-11.

In 1996, the General Assembly passed an "Act to Stop the Illegal Sale of Tobacco Products to Children," *see* RIGL § 11-9-13.2 *et seq.* (the "Youth Tobacco Act"). In the Youth Tobacco Act, the General Assembly explicitly recognized that:

> The use of tobacco by Rhode Island children is a health and substance abuse problem of the utmost severity. The legislature finds that tobacco product usage by children in Rhode Island is rampant and increasing with over thirty percent (30%) of high school students smoking. *The present law prohibiting the sale of tobacco to children is being ignored by many retailers.* Rhode Island tobacco retailers illegally sell four million eight hundred thousand (4,800,000) packs, over eleven million dollars ($11,000,000) in tobacco product sales, to children annually. *Tobacco industry advertising targets children as the replacement smokers for the one thousand one hundred forty-five (1,145) adults who die daily from tobacco product usage.* Approximately seventy percent (70%) of the Rhode Island high school seniors who are smoking today will be the addicted adult smokers of tomorrow. According to the federal Centers for Disease Control and

> Prevention (CDC), smoking-related direct medical costs in Rhode Island in 1990 climbed to one hundred eighty-six million dollars ($186,000,000).
> According to the federal Centers for Disease Control and Prevention (CDC), smoking-related direct medical costs in Rhode Island in 1990 climbed to one hundred eighty-six million dollars ($186,000,000). *This is an ongoing, escalating financial burden borne by every business, large and small, and every person, smoker and nonsmoker, in Rhode Island.* This is a health and economic drain created by each new generation of children who begin using tobacco products and become addicted to nicotine. It is the intent of this legislation to preserve and protect the health of children by: (1) stopping the illegal sale of tobacco to children, and (2) by severely punishing those who disregard the laws relating to the illegal sale of tobacco products to children.

RIGL § 11-9-13.3 (emphasis added). The Youth Tobacco Act:

(a) reiterated the prohibition against the sale of tobacco to minors while adding a prohibition against the sale of individual cigarettes, or "loosies," *see* § 11-9-13.8;

(b) barred the "distribution of free tobacco products or coupons or vouchers redeemable for free tobacco products to any person under eighteen (18) years of age," as well as prohibiting "the distribution of free tobacco products or coupons or vouchers redeemable for free tobacco . . . regardless of the age of the person to whom the products, coupons, or vouchers are distributed, within five hundred (500) feet of any school," *see* § 11-9-13.10;

(c) prohibited the distribution of tobacco products to minors by mail, *see* § 11-9-13.11; and

(d) provided heightened fines for the sale of a tobacco product without a state retail tobacco products dealer license.

See RIGL § 11-9-13.15.[49]

While conferring regulatory authority upon the Department of Health, *see* § 11-9-13.15, the General Assembly also explicitly recognized in the Youth Tobacco Act that local cities and towns would have an important concurrent role to play. *See, e.g.*, § 11-9-13.6 (directing Health Department to coordinate and promote enforcement with local authorities) and § 11-9-13.11 (conferring joint enforcement power upon local police departments).

[49] The Act defines "tobacco products" broadly as including "any product containing tobacco, including bidi cigarettes . . . which can be used for, but whose use is not limited to, smoking, sniffing, chewing or spitting of the product." § 11-9-13.4(12).

3. The Providence Ordinances Being Challenged

The courts have consistently recognized that regulation of smoking and tobacco by local governments is part of these governments' efforts to exercise their historic powers to protect the public health and safety. *See U.S. Smokeless Tobacco Manufacturing Co., LLC v. City of New York,* 703 F.Supp.2d 329, 333 (S.D.N.Y. 2010) ("*U.S. Smokeless I*") (treating New York City flavored tobacco ordinance similar to Providence's as falling within "the regulation of health and safety matters" that is "historically a matter of local concern" (citations, internal quotations omitted)); *see also Amico's Inc. v. Mattos*, 789 A.2d 899 (R.I. 2002) (upholding a municipal ban on smoking in restaurants and bars while noting that "we do not construe the statutes or our case law as relegating to towns the status of rubber stamps or enforcement arms of the department of health").

Providence, like many other municipalities across the nation, has been active in the area of tobacco regulation. Almost a year prior to enactment of the two Ordinances being challenged, the City Council approved and the Mayor signed the Licensing Ordinance, making it unlawful to sell tobacco products without a tobacco dealer's license. *See* Yurdin Aff., ¶ 4 at 2-3. The Licensing Ordinance confers enforcement authority upon the Providence Police Department and imposes a maximum $500 fine for those found in violation following a "show cause" hearing. *Id.* at § 14-304. To date, some 217 tobacco retailers have obtained the required licenses from the City, although none of the Plaintiffs have done so. *See id..*, ¶ 5 at 3.

The Price and Flavored Tobacco Ordinances at issue in this case were approved by the Providence City Council on February 17, 2012. *See id.*, ¶ 3 at 2.[50] Plaintiffs, quoting various

[50] The Ordinances were the subject of a City Council vote on January 5, 2012, but due to an inadvertent, technical violation of Rhode Island's Open Meetings Act, RIGL § 42-46-1 *et seq.* (*see* Complaint, Counts VI and XII), the Ordinances were the subject of a second approval vote on February 17, 2012, which was properly noticed. *See id.*, ¶ 3 and note 1 at 2.

newspaper accounts, claim that the purpose of the Ordinances was limited to reducing nicotine addiction among the City's youth. *See* Plaintiffs' Mem. at 8. In fact, although youth was a focus and emphasis, the measures also were intended to reduce the overall nicotine addiction rate in the City. *See* Yurdin Aff., ¶ 13 at 5.

The primary sponsor of the Ordinances has affirmed that the Ordinances were designed, in part, "to curtail the effectiveness of industry efforts to increase the nicotine addiction rates among smokers, especially young smokers, in the City, which the tobacco industry was attempting: (a) through various price-related marketing efforts, including giving away tobacco products, using coupons transferable for free or discount-priced products and/or providing multi-pack discounts; and (b) by making certain flavored tobacco products, including smokeless tobacco products that are especially attractive to young people, widely available in the City." *Id.* As noted by Council Majority Leader Yurdin, "by enacting and then aggressively enforcing the Ordinances, the City can have an impact upon nicotine addiction rates, especially among the young, which ultimately will save lives and hundreds of thousands, if not millions, in medical costs." *Id.*, ¶ 25 at 9.

Testimony before the City Council indicated that a recent survey of some 1,300 City residents evidenced widespread popular support for the Ordinances, and the measures were supported by the state Health Department and the CDC. *See id.,* ¶¶ 14(c) at 5. In addition, the measures have won the active support of the Rhode Island Department of Behavorial Healthcare, Developmental Disabilities and Hospitals, the Rhode Island Chapter of the American Academy of Pediatrics, the New England Division of the American Cancer Society, the American Lung Association, the American Lung Association in Rhode Island, the Campaign for Tobacco-Free Kids, the Center for Hispanic Policy and Advocacy, the Chariho Tri-Town Task Force on

Substance Abuse and Prevention, CODAC Behavorial Healthcare, Discovery House, Family Service of Rhode Island, Initiatives for Human Development, the International Institute of Rhode Island, John Hope Settlement House, the Meeting Street Center, the National Association of County and City Health Officials, the National Association of Local Boards of Health, the Rhode Island College School of Nursing, the Rhode Island Medical Society, the Rhode Island Public Health Institute, the Rhode Island State Nurses' Association, the Socioeconomic Development Center for Southeast Asians, the Providence Center, Unified Insight Consulting, the Urban League of Rhode Island and Youth Pride, Inc.. *See id.*, ¶ 15 at 5-6.

The Ordinances were signed by the Mayor on February 20, 2012 and were to become effective March 1, 2012, but pursuant to a stipulation by the parties, the effective date of both was moved to October 15, 2012. *See id.*, ¶ 3 at 2.

a. The Price Ordinance

The Price Ordinance forbids any tobacco license holder to "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 [or cigarettes] without charge or for less than the listed or non-discounted price." Price Ordinance, § 14-303 (1)-(2). The Ordinance further prohibits any tobacco license holder from selling tobacco products [or cigarettes] to consumers though any "multi-pack discounts," or "providing or distributing to consumers any tobacco products [or cigarettes] without charge or for less than the listed or non-discounted price in exchange for the purchase of any other tobacco product [or cigarette]." *Id.* at (3)-(4).

Thus, the Ordinance is broader in scope than state law youth access provisions, which are limited to banning "free" tobacco products and/or products redeemable for "free" tobacco

products. *See* RIGL § 11-9-13.11. The Price Ordinance also defines "tobacco products" more broadly than state law by including cigarettes. Price Ordinance, § 14-300.

b. The Flavored Tobacco Ordinance

The Flavored Tobacco Ordinance "'makes it unlawful for any person to sell or offer for sale any flavored tobacco product to a consumer, except in a smoking bar.'" Flavored Tobacco Ordinance at § 14-309. "Smoking bar" is defined with reference to RIGL § 23-20.10-2(15).[51] "Tobacco product" is defined to exclude products containing tobacco or nicotine, but excluding cigarettes and products approved by the U.S. Food Administration as drugs, such as approved nicotine replacement therapies. "Flavored tobacco product" is defined to include "any tobacco product or any component thereof that contains a constituent that imparts a characterizing flavor," *id.* at § 14-308, ¶ 6, and "characterizing flavor" means:

> A distinguishable taste or aroma, *other than the taste or aromas of tobacco, menthol, mint or wintergreen,* imparted either prior to or during consumption of a tobacco product or component part thereof, including, but not limited to, tastes or aromas relating to any fruit, chocolate, vanilla, honey, candy, cocoa, desert, alcoholic beverage, herb or spice and concepts such as spicy, arctic, ice, cool, warm, hot mellow, fresh and breeze; provided, however, that no tobacco product shall be determined to have a characterizing flavor solely because of the use of additives or flavorings or the provision of ingredient information.

Id. at ¶ 3 (emphasis added). The Ordinance prescribes a schedule of fines in the event of a violation, and provides that the City's Board of Licenses may revoke or suspend the license of any license holder for failure to comply. *Id.*, § 14-310, ¶ 1.

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[51] That law defines "Smoking bar" as:

> an establishment whose business is primarily devoted to the serving of tobacco products for consumption on the premises, in which the annual revenues generated by tobacco sales are greater than fifty percent (50%) of the total revenue for the establishment and the serving of food or alcohol is only incidental to the consumption of such tobacco products. The establishment must annually demonstrate that revenue generated from the serving of tobacco products is greater than the total combined revenue generated by the serving of beverages and food. The division of taxation in the department of administration shall be responsible for the determination under this section and shall promulgate any rules or forms necessary for the implementation of this section.

Id.

Other municipalities have enacted tobacco flavor ordinances similar to Providence's, including New York City, whose ordinance was upheld against a federal preemption challenge by many of the same Plaintiffs appearing and making the same preemption argument in this case. *U.S. Smokeless Tobacco Manufacturing Co., LLC v. City of New York,* C.A. No. 1:09-cv-10511, slip op (November 15, 2011) (McMahon, J.) ("*U.S. Smokeless II*"). Similar measures have been adopted in the states of Maine and New Jersey, though unlike Providence's Ordinance, these laws do not apply to smokeless tobacco products. *See* Me. Rev. Stat. Ann. tit. 22, § 1560-D (2008); N.J. S-6131A-1614.

V. LEGAL ARGUMENT

A. The Standard of Review

Summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). The moving party always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. *Id.* at 323, 106 S.Ct. 2548. The burden then shifts to the nonmoving party who "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250 (1986) (quoting Fed.R.Civ.P. 56(e)).

Once the burden of production shifts, the party opposing summary judgment cannot rest on its pleadings or merely reassert its previous allegations. It is insufficient "simply [to] show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986). Rather, Rule 56(e) "requires the nonmoving

party to go beyond the [unverified] pleadings" and present some type of evidentiary material in support of its position. *Celotex,* 477 U.S. at 324, 106 S.Ct. 2548.

Here, Plaintiffs' have mounted a facial, as opposed to an as applied, constitutional challenge. 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*, __ U.S. __, 130 S.Ct. 2811, 2817 (2010), in which case it would constitute a facial challenge. The requested preliminary injunction and finding of unconstitutionality requested by Plaintiffs clearly "reach beyond the particular circumstances" of the named Plaintiffs, only four of which are even qualified to do business in Rhode Island, and not one of which is licensed to sell tobacco products in the City. *See* Yurdin Aff., ¶ 5 and note 2 at 3.

Thus, to succeed, Plaintiffs have to establish "that no set of circumstances exists under which [the Ordinances] would be valid," or that the Ordinances lack any "plainly legitimate sweep." *See United States v. Stevens*, __ U.S. __, 130 S.Ct. 1577, 1588 (2010), citing *United States v. Salerno,* 481 U.S. 739, 745 (1987) and *Washington v. Glucksberg,* 521 U.S. 702, 740, n. 7 (1997) (STEVENS, J., concurring in judgments) (internal quotation marks omitted). As Judge Smith has noted:

> 'to assert a facial challenge . . . successfully, [the plaintiff] . . . would be required to show that . . . [the challenged provision] . . . is unconstitutional in all of its applications . . .

Hall v. INS, 253 F.Supp.2d 244, 250-51 (D.R.I. 2003), citing *Hoang v. Comfort,* 282 F.3d 1247, 1255 (10th Cir.2002).

In attempting to avoid this difficult standard, Plaintiffs have misconstrued the plain language of the Ordinances and have argued that the commercial transactions prohibited by the

Ordinances are within the ambit of the First Amendment; ignored relevant case law and legislative developments bearing on the issue of federal preemption and the Due Process Clause; and fabricated a non-existent conflict with state law while misapplying the relevant factors bearing on the issue of implied state preemption. In addition, Plaintiffs' Statement of Facts is premised upon unfounded expert opinions which ignore a mountain of well-known evidence to the contrary. *See* Defendants' Response to Plaintiffs' Statement of Facts at Nos. 12, 14-16, 25-32 and Defendants' Counter-Statement of Undisputed Facts Under Local Rule 56 at Nos. 7-10, and 15-27; *see also* accompanying affidavits of Chaloupka, Connolly and Professor and Dean Michael Eriksen.

B. Neither Ordinance Concerns Speech or Expressive Conduct Protected by the First Amendment (Counts I and VIII)

1. The Price Ordinance makes it illegal to "accept or redeem," or to "offer to accept or redeem" certain products and simply has nothing to do with protected speech or expressive conduct.

As Judge Selya noted in *Wine and Spirits Retailers, Inc. v. Rhode Island*, 418 F.3d 36, 49 (1st Cir. 2005), "[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." *Id.* Here, Plaintiffs' have failed to make the required demonstration.

Plaintiffs' First Amendment claim is premised upon their basic assumption that, in their words, the Price Ordinance "targets the essence of constitutionally protected commercial speech: The communication of truthful and nonmisleading price information to consumers legally authorized to buy a product." Complaint, ¶ 51 at 15. However, Plaintiffs' basic assumption is not supported by the plain language of the Ordinance, which focuses upon specific aspects of a sales transaction— i.e., accepting or redeeming, or offering to accept or redeem, certain defined

price-reduction instruments or price-discounted products—not speech or expressive conduct protected by the First Amendment.

Stated another way, the Price Ordinance simply regulates particular *commercial activity* by a tobacco retailer. It in no way affects the ability of the Plaintiffs, none of which are even licensed to sell tobacco products in the City, to continue to disseminate price reduction instruments and multi-pack offers in Providence. The Ordinance merely prohibits their redemption in the City. The Price Ordinance makes it illegal to:

(a) "*accept or redeem*," or to "*offer to accept or redeem*," or to "*cause or hire any person to accept or redeem or offer to accept or redeem*" any coupon that provides any: (i) defined tobacco products, or (ii) cigarettes, "without charge or for less than the non-discounted price;" and/or to

(b) *sell* defined tobacco products or cigarettes "though any multi-pack discounts (e.g., 'buy two get one free'); and/or to

(c) *otherwise provide or distribute* any defined tobacco products or cigarettes "without charge or for less than the listed or non-discounted price" in exchange for the purchase of any other defined tobacco product or cigarette.

See Price Ordinance, § 14-303 (emphasis added). The prohibited transactions do not involve the communication of information about a product and thus, as will be discussed, are squarely within the State's power to regulate.

Plaintiffs claim that it is "important" that the Price Ordinance "does not set a minimum price for tobacco products," Plaintiffs' Mem. at 4, but fail to explain why. Rhode Island already sets such a minimum price by statute, *see* RIGL § 16-13-2, and contrary to Plaintiffs' claim that the Ordinance prohibits them from "communicating price discounts to adult customers," *see* Plaintiffs' Mem. at 4, Plaintiffs remain free to communicate whatever information they want about their products under the Ordinance. The Price Ordinance simply prohibits tobacco retailers from redeeming coupons or honoring multi-pack offers, if application

of such price discounts would result in the sale of tobacco products or cigarettes "without charge or for less than the listed or non-discounted price." *Id.*, § 14-303, ¶ 1. The Ordinance is a price control measure, the intent of which is to prevent the sale of tobacco products at deeply discounted prices. It does not prevent, and is not concerned with, Plaintiffs' ability to communicate information about their products.

2. Plaintiffs have ignored the plain language of the Flavored Tobacco Ordinance, which also does not concern speech or protected conduct.

Plaintiffs' First Amendment argument as to the Flavored Tobacco Ordinance is similarly premised upon a misreading of the Ordinance. Thus, Plaintiffs somewhat disingenuously claim that the Ordinance:

(a) "focuses upon statements made about a product rather than its composition." *See* Complaint, ¶ 101 at 29;

(b) "is triggered by speech." Plaintiffs' Mem. at 26;

(c) "prohibits certain statements or claims about the taste or aroma of a non-cigarette product." Plaintiffs' Statement of Undisputed Facts, ¶ 12 at 3, citing Flavored Tobacco Ordinance, § 14-308, ¶¶ 3, 6; and

(d) "prohibits any reference to an open-ended, non-exclusive list of 'concepts' or 'tastes or aromas' to describe tobacco products." Plaintiffs' Mem. at 26.

In fact, the paragraphs of the Ordinance cited by the Plaintiffs to support their claim that it "prohibits references" are in the definitional section, section 14-308. The only affirmative prohibition is contained within section 14-309, which provides in its entirety that: "It shall be unlawful for any person to sell or offer for sale any flavored tobacco product to a consumer, except in a smoking bar." *Id.*

Plaintiffs' notion that the Flavored Tobacco Ordinance "prohibits certain statements or claims about the taste or aroma of a non-cigarette tobacco product," *see* Plaintiffs' Statement of

Facts, ¶ 12 at 3, stems from an obviously intentional misreading of the plain language of the Ordinance. It is the sale and/or distribution of certain defined flavored tobacco products within the City, not their description, which gives rise to a violation.

The Flavored Tobacco Ordinance bars the sale and/or distribution of a product, however denominated, and simply provides that if it is described by its manufacturer using the very same language used in the Ordinance to describe the product being regulated, the manufacturer's description will be taken at face value. Plaintiffs have seized upon one sentence in the definition of "flavored tobacco product" which provides that:

> A public statement or claim made or disseminated by the manufacturer of a tobacco product, or by any person authorized or permitted by the manufacturer to make or disseminate public statements concerning such tobacco product, that such tobacco product has or produces a characterizing flavor shall constitute presumptive evidence that the tobacco product is a flavored tobacco product.

Id., at ¶ 6. This one sentence simply does not justify Plaintiffs' claim that the measure "focuses upon statements." The fact that local authorities will presume that the Plaintiffs are telling the truth when they claim a product "has or produces a characterizing flavor" does not somehow turn the Ordinance from one that regulates commercial activity into one that regulates speech. The idea that Plaintiffs could magically change a "flavored tobacco product" into one that was not covered by the Ordinance by simply describing it differently, i.e, by changing its label or altering some advertising material, while perhaps reflective of the industry's traditional approach to regulatory efforts, makes little sense.

Plaintiffs remain perfectly free to communicate whatever they want to whomever they want about their flavored tobacco products, as long as they do not actually sell, or offer to sell, the lethal products in the City of Providence, outside of a smoking bar. And the Flavored Tobacco Ordinance makes clear that "no tobacco product shall be determined to have a

characterizing flavor solely because of the use of additives or flavorings or the provision of ingredient information." Flavored Tobacco Ordinance, § 14-308 at ¶ 3.

3. All the First Amendment cases relied upon by Plaintiffs concern restrictions on the dissemination of information, which is not the case here.

Plaintiffs ignore the fact that the Ordinances are fundamentally different from the blanket ban on the communication of liquor prices considered by the U.S. Supreme Court in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 512 (1996), or the ban on the display of alcohol content on beer labels rejected in *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 491 (1995). In fact, all the cases relied upon by Plaintiffs involve restrictions upon the dissemination of information, restrictions which are not applicable here. *See* Plaintiffs' Mem. at 11, 13, citing *Sorrell v. IMS Health Inc.*, __ U.S. __, 131 S. Ct. 2653(2011) (restrictions on use of drug prescriber-identifying information); *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002) (ban on advertisements related to compounded drugs); *Liquormart*, *supra*, 517 U.S. at 496 (ban upon all alcohol advertising); *Lorillard*, *supra*, 533 U.S. at 550-51 (2001) (billboard advertising); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (complete ban on advertisement of prescription drug prices); *S. Ogden CVS Store, Inc. v. Ambach*, 493 F. Supp. 374 (S.D.N.Y. 1980) (drug price advertising); *see also Nat'l. Assoc. of Tobacco Outlets, Inc. v. City of Worcester*, 2012 WL 1071804 (D.Mass. 2012) (outdoor tobacco advertising).

Of course, any sale of any product necessarily involves communicating the price of the product to the purchaser, but that fact does not bring all economic activity within the ambit of the First Amendment. In *Liquormart*, 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, quoting L. Tribe, *American Constitutional Law* § 12-15, p. 903 (2d ed.1988).

It bears repeating that nothing in the Ordinances concerns advertising or prohibits Plaintiffs from communicating truthful information about their products. The communicative aspect of coupons, rebates, and other price reduction instruments is not imperiled by the Ordinance; it only regulates the transactional aspect of such instruments, and prevents them from operating in Providence to deeply discount tobacco products. This critical distinction between the regulation of speech and the regulation of economic activity was recognized by the First Circuit in *Wine and Spirits, supra,* a case which Plaintiffs fail to mention.

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 franchises, to holders of Class A liquor licenses. *See id.* at 41-42, 47. Judge Selya 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, citing *AMSAT Cable Ltd. v. Cablevision of Conn. Ltd. P'ship,* 6 F.3d 867, 871 (2d Cir.1993) and *Young v. Am. Mini Theatres, Inc.,* 427 U.S. 50, 78 (1976) (Powell, J., concurring)

(noting that "[t]he inquiry for First Amendment purposes is not concerned with economic impact; rather, it looks only to the effect of [the challenged] ordinance upon freedom of expression"). As Judge Selya 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.*" *Wine and Spirits, supra,* 418 F.3d at 48 (emphasis added).

Plaintiffs cite *Sorrell, supra,* in support of their claim that the activity prohibited by the Price Ordinance is covered by the First Amendment. *See* Plaintiffs' Mem. at 13, citing *Sorrell,* 131 S.Ct. at 2671. Significantly, however, this Court is not faced with the kind of content-based law restricting speech at issue in *Sorrell.* As Justice Kennedy noted in *Sorrell,* the Vermont statute under review had three components:

> The provision begins by prohibiting pharmacies, health insurers, and similar entities from selling prescriber-identifying information, absent the prescriber's consent. The parties here dispute whether this clause applies to all sales or only to sales for marketing. The provision then *goes on to prohibit pharmacies, health insurers, and similar entities from allowing prescriber-identifying information to be used for marketing,* unless the prescriber consents. *This prohibition in effect bars pharmacies from disclosing the information for marketing purposes.* Finally, the provision's second sentence *bars pharmaceutical manufacturers and pharmaceutical marketers from using prescriber-identifying information* for marketing, again absent the prescriber's consent.

131 S.Ct. at 2660 (emphasis added). By contrast, as noted, the Ordinances before the Court here do not prohibit Plaintiffs from using information for whatever purpose they deem fit. Thus, the Court need not grapple with the distinction dealt with in *Sorrell.*

4. A deferential, rational basis standard of review must be applied to the Ordinances.

As noted, the Ordinances do not infringe upon speech or expressive conduct protected under the First Amendment, and do not otherwise employ a suspect classification or impair a fundamental right. Thus, this Court must employ a deferential, rational basis standard of review. As this Court has emphasized:

> It 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.' *Medeiros v. Vincent,* 431 F.3d 25, 29 (1st Cir.2005). 'Once 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, 775 F.Supp.2d 416, 435 (D.R.I. 2011) (Lisi, C.J.), *aff'd.*, 667 F.3d 17 (1st Cir. 2011) (citations omitted).

For example, in *Nat'l. Paint & Coatings Assoc. v. City of Chicago*, 45 F.3d 1124 (7th Cir. 1995), plaintiffs, a consortium of wholesalers and retailers of paint and markers, challenged a municipal ordinance broadly prohibiting the sale of spray paint and jumbo indelible markers within the limits of the City of Chicago, a measure which was designed to deter the creation of graffiti. *See id.* at 1126. In upholding the Chicago ordinance, the Seventh Circuit (Easterbrok, C.J.) noted that a legislature "need not choose the least restrictive means of regulation. . . 'If there are alternative ways of solving a problem, we do not sit to determine which of them is best suited to achieve a valid state objective.'" *Id.* at 1129, quoting *Bibb v. Navajo Freight Lines, Inc.,* 359 U.S. 520, 524 (1959); *see also Kittery Motorcycle, Inc. v. Rowe*, 320 F.3d 42, 47 (1st Cir. 2003) ("even foolish and misdirected provisions" upheld under rational basis test); *Gun Owners' Action League, Inc. v. Swift*, 284 F.3d 198, 214 (1st Cir. 2002) ("rational basis review does not permit courts to pass judgment on the effectiveness of the legislature's proposed

classifications"); *Antonio Roig Sucrs. v. Sugar Board of Puerto Rico,* 235 F.2d 347 (1st Cir. 1956) ("regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators").

The Ordinances here can easily withstand the applicable rational basis standard of review. 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 Providence ordinance 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. And Dr. Connolly has opined that:

> The policy established in the [Flavored Tobacco] 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. 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." Eriksen Aff., ¶ 15 at 5.

In any event, the Ordinances would pass constitutional muster even if one were to assume for argument's sake that the tests set forth in either *O'Brien* or *Central Hudson* were applicable (which they are not).

5. Since the Ordinances concern conduct and not speech, *O'Brien*, not *Central Hudson*, would apply if one were to assume for argument's sake that the prohibited conduct was protected by the First Amendment (which it is not).

The test for expressive conduct was developed and set forth in *U.S. v. O'Brien*, *supra,* a Vietnam-era case involving a defendant who had burned his draft card in protest against the war. *See* 391 U.S. at 369-370. The case involved a regulation that was not targeted at restricting expression but had that indirect effect. Under these circumstances, the Court held that the draft-card burner could, consistent with the First Amendment, be prosecuted for violating the federal law that prohibited "knowingly destroy[ing]" a Selective Service certificate. *Id.* at 370. The Court reached that result after having determined that a government regulation that incidentally restricts expression is "sufficiently justified" if it meets four conditions:

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

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—in the case of *O'Brien* itself, the orderly operation of the Selective Service System. 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. *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). The record in the First Circuit is the same. *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).

Further, the *O'Brien* test was developed in the context of core political, noncommercial speech—not the less-protected commercial expression that is (if any expression is) at issue here. *See Central Hudson*, 533 U.S. at 562 (First Amendment "accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.") For three decades the *O'Brien* standard was not applied to commercial speech restrictions—perhaps because the standard for direct restrictions on commercial speech was for most of that time the same level of "intermediate scrutiny" applied to expressive conduct restrictions under *O'Brien*. *See Florida Bar v. Went For It, Inc.,* 515 U.S. 618, 623 (1995), citing *Central Hudson Gas & Elec. Corp. v. Pub. Svc. Comm'n*, 447 U.S. 557 (1980). In recent years, however, as the *Central Hudson* test has grown somewhat more stringent, the leniency of the *O'Brien* standard has remained unchanged. 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).

Therefore, there is little basis for Plaintiffs' assertion that the *O'Brien* test currently requires "demanding First Amendment protection" that "largely overlaps" with *Central Hudson*. Plaintiffs' Mem. at 17 and n. 8. In fact, the two 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.[52]

In *Lorillard*, the Supreme Court, applying *O'Brien, upheld a* Massachusetts' ban on self-service displays of tobacco products. 533 U.S. at 569. The Court found that the government met the first two steps of the test because it possessed the authority to enact the regulations and an important interest in preventing youth access to tobacco. Additionally, the Court held that the regulation passed the third step because the government had implemented the ban for a reason unrelated to expression—the prevention of youth access to "unattended displays of tobacco products" that "present an opportunity for access without the proper age verification required by law." *Id.* Finally, the Court decided that the measure met the requirements of the fourth step because it was "an appropriately narrow means" of advancing the state's interest in preventing minors from obtaining tobacco products: "[t]he regulations do not significantly impede adult access to tobacco products" and "retailers have other means of exercising any cognizable speech interest in the presentation of their products." *Id.* The Court added that "the regulations leave open ample channels of communication."

As *Lorillard* makes clear, it is the *O'Brien* test alone which would govern if one were to assume for argument's sake that the conduct regulated by the Ordinances the type of expressive conduct protected by the First Amendment (which it is not); and as will be discussed, the Ordinances would pass constitutional muster under *O'Brien*.

[52] 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 42-47; *see also Discount Tobacco City & Lottery v. United States,* 674 F.3d 509 (2012) (upholding restrictions under *Central Hudson*).

6. The Ordinances would pass constitutional muster under either *O'Brien or Central Hudson.*

a. The *O'Brien* Test.

The Ordinance's restrictions on the use of coupons and multipack sales readily pass the *O'Brien* test. The regulations (1) fall securely within the constitutional power of the City government. *See infra* at 62-69; (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 supra* at 12-18; (3) are targeted not at the suppression of free expression but rather at the avoidance of dangerously low tobacco prices. *See supra* at 16-17; and (4) do not incidentally restrict First Amendment freedoms—here, a business's ability to communicate with its customers—more than necessary, since retailers are still free to advertise through all currently available channels and manufacturers and distributors remain free to offer coupons to Providence residents for use elsewhere. *See O'Brien*, 391 U.S. at 376 (1968).

b. Plaintiff's *Central Hudson* Argument Lacks Merit.

Plaintiffs' reliance upon *Central Hudson* is misplaced as the case simply is not applicable to conduct. Yet, even if one were to assume for argument's sake that *Central Hudson* did apply, the evidence proffered by Plaintiffs—which all relates to the third and fourth prongs of the *Central Hudson* test and attempts to establish that the Ordinances do not "directly advance the governmental interest asserted," and are "more extensive than is necessary to serve that interest" —does not raise a genuine issue of material fact.

i. The Ordinances Directly Advance a Substantial Government Interest

Assuming for argument's sake that (1) protected speech was implicated, the applicable test under *Central Hudson* requires that a court then ask (2) whether there is a "substantial state interest," then (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, supra*, 447 U.S. at 556.

Here, Plaintiffs' argue that the Price Ordinance does not serve a "substantial state interest," and "has nothing to do with reducing underage tobacco consumption" because Rhode Island law already bans the distribution of tobacco products or coupons to minors. *See* Complaint, ¶ 58 at 17, citing RIGL §§ 11-9-13, 11-9-13.10, 11-9-13.8. It is obvious, however, that despite this law, substantial numbers of minors use tobacco products, and as Judge Kessler found in *U.S. v. Philip Morris*, tobacco companies continue to market cigarettes to them. *See supra* at 10-11. And there can be no question but that the City 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 U.S. Supreme Court has noted, "the State's interest in preventing underage tobacco use is substantial, and even compelling . . ." *Lorillard, supra*, 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* SG's Report at 3; *see also* Yurdin Aff., ¶ 25 at 9.

As to whether the Price Ordinance substantially advances this compelling government interest, Plaintiffs contend that "there is no valid and reliable scientific evidence showing that

tobacco product coupons, or multi-pack or multi-product discounts cause underage tobacco use or cause continued underage tobacco use." *See* Plaintiffs' Statement of Facts at No. 26, citing Reynolds Decl., ¶¶ 60–70. Plaintiffs' conclusion is directly contradicted by the detailed findings made by the court in *U.S. v. Philip Morris,* discussed *supra* at 14-18, as well as by the Surgeon General, who found that "the evidence is sufficient to conclude that there is a causal relationship between advertising and promotional efforts of the tobacco companies and the initiation and progression of tobacco use among young people." *See* SG's Report at 10. In addition, as noted, the Surgeon General concluded that, "[t]obacco company expenditures have become increasingly concentrated on marketing efforts that reduce the prices of targeted tobacco products. Such expenditures accounted for approximately 84% of cigarette and more than 77% of the marketing of smokeless tobacco products in 2008." *Id.*; *see also* Chaloupka Aff., ¶¶ 53-54 at 30-31.

The claim of Plaintiffs' expert that "common sense strongly suggests that coupons and multi-pack discounts do not cause underage tobacco use," *see* Reynolds Dec., ¶ 68 at 43, is based upon his conjecture that underage tobacco users "do not tend to purchase tobacco products at retail outlets." *See id.*, ¶ 69 at 43. Yet, the 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, *supra*, thus invalidating Plaintiffs' expert's "common sense" assumption. *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.").

Perhaps Plaintiffs' most imaginative argument is that:

> A ban on the use of coupons and certain price discounts could lead to reduced prices for tobacco products across the board . . . In turn, this could lead to making tobacco products more affordable for everyone, including for underage persons who may be successful in purchasing or otherwise obtaining tobacco products illegally.

Plaintiffs' Mem. at 15, citing Reynolds Dec. at ¶ 69. Of course, the argument is premised upon the bald assumption that Plaintiffs would respond to the Price Ordinance by cutting prices "across the board." Yet, Plaintiffs have not explained whether this is economically feasible, or provided any examples of such counter-intuitive behavior.[53]

Like the Price Ordinance, the Flavored Protection Ordinance "directly and materially" serves a "substantial state interest" by prohibiting the sale and/or distribution of tobacco products that have devastating health consequences, but nonetheless have been aggressively marketed by the tobacco industry as a direct result of their unique appeal to the City's youth.

ii. The Ordinances are narrowly tailored.

The remaining prong of the *Central Hudson* test requires that a court inquire as to 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.

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

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[53] *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").

In addition, the Supreme Court has made clear that it does "not require that empirical data come ... accompanied by a surfeit of background information .... [W]e have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and simple common sense." *Lorillard, supra*, 533 U.S. at 555 (citations and internal quotation marks omitted). As the First Circuit noted in *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 744 (1st Cir. 2002), "the narrow tailoring requirement does not mandate a least restrictive means analysis; 'rather, the requirement of narrow tailoring is satisfied so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Id.*, citing *Ward v. Rock Against Racism*, 491 U.S. 781, 799, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989).

Plaintiffs' expert has compiled a list of alternatives to the Ordinances which, he claims, have not been attempted by the state and/or City. *See* Reynolds Dec., ¶ 78 at 47-49. In fact, 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.[54] Indeed, the sponsor of the Ordinances has made clear 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. And neither the state nor the City has the resources necessary to fund the costly proposals offered by Plaintiffs. *See id.*, ¶ 20, 24 at 7-9.

[54] Plaintiffs' expert's reference to New York City as an example of a municipality that has had success with alternative measures, *see* Reynolds' Dec., ¶ 16 at 7, is curious inasmuch as New York saw the need for a flavored tobacco ordinance substantially similar to the measure enacted in Providence, as discussed.

Plaintiffs' claim that the "smoking bar exception is "extraordinarily narrow," Plaintiffs' Mem. at 5, is based upon their claim that "only two licensed tobacco bar establishments in the entire City of Providence carry smokeless tobacco or cigars of any kind for sale." *Id.* Plaintiffs do not explain why this is the case, but even if true, it is worth noting that the Southern District of New York upheld a measure substantially similar to the Flavored Protection Ordinance which contained a similar exception for "tobacco bars," even though there were fewer than ten such tobacco bars in New York City, which has a population in excess of eight million. *See Smokeless I, supra*, 703 F.Supp. at 342.[55]

Finally, contrary to the claim of Plaintiffs' expert, *see* Reynolds' Dec., ¶¶ 80-83 at 50-53, the CDC's failure to endorse the approach taken by the Ordinances in its 2007 report entitled *Best Practices for Comprehensive Tobacco Control Programs* ("*Best Practic*es") does not support the claim that the approaches adopted by the Ordinances are not valid, or should not be adopted prior to those set forth in Best Practices. As noted, the CDC has filed an amicus brief in support of the Ordinances. Moreover, as noted by the public health official who oversaw the creation of *Best Practices* at the CDC (and who has submitted an affidavit in support of the Ordinances), the recommendations in the report "were developed for one purpose and one purpose only: to assist state health departments in expending their state's allocation from the MSA on evidence-based tobacco control interventions *that required significant financial expenditures.*" Eriksen Aff., ¶ 9 at 3 (emphasis in original).

The Ordinances therefore pass muster even if they are evaluated as restrictions upon commercial speech under the *Central Hudson* test.

[55] By contrast, the population of Providence is a mere 178,042, according to the 2010 census, http://quickfacts.census.gov/qfd/states/44/4459000.html.

C. Neither ordinance is preempted under federal law. (Counts II and IX)

Federal preemption, of course, is a doctrine premised upon the Supremacy Clause of the United States Constitution, which provides that the laws of the United States "shall be the supreme law of the land . . . anything in the constitution or laws of any state to the contrary notwithstanding." U.S. Const. art. VI, cl. 2.

The U.S. Supreme Court has made clear that "the purpose of Congress is the ultimate touchstone in every pre-emption case," *Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (2008), and as the Court noted in *Lorillard, supra,* 533 U.S. at 541-42, a reviewing court must "'work on the assumption that the historic police powers of the States are not to be superseded by the Federal Act unless that is the clear and manifest purpose of Congress.'" *Id.*, quoting *California Div. of Labor Standards Enforcement v. Dillingham Constr., N. A., Inc.,* 519 U.S. 316, 325 (1997); *see also Cipollone v. Liggett Group Inc.*, 505 U.S. 504, 518 (1992) ("presumption against the preemption of state police power regulations . . . reinforces the appropriateness of a narrow reading" of preemption clauses); *Building & Constr. Trades Council v. Associated Builders & Contractors of Mass./R. I., Inc.*, 507 U.S. 218, 224 (1993) (Court is "reluctant to infer preemption"); *Maryland v. Louisiana,* 451 U.S. 725, 746 (1981) ("[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law");

Judge McMahon of the Southern District of New York recently noted that:

> Every instance of preemption falls into one of two overarching categories: express or implied. Express preemption involves an express statement by Congress that prohibits state and local governments from enacting laws in a specific area. As the Supreme Court has observed, 'when Congress has made its intent known through explicit statutory language, the courts' task is an easy one.'

U.S. Smokeless Tobacco I., supra, 703 F.Supp.2d at *333,* citing *English v. Gen. Electric Co.,* 496 U.S. 72, 79 (1990). And as the First Circuit has noted, the burden is on the party asserting pre-emption 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), citing *Int'l Longshoremen's Ass'n v. Davis,* 476 U.S. 380, 399 (1986).

Here, Plaintiffs rely upon express federal preemption.

1. The Price Ordinance and the FCLAA

Plaintiffs make several claims of express preemption under the FCLAA, none of which are valid. Initially, it should be made clear that the FCLAA does not apply to smokeless tobacco or cigars, and thus has no application to the Flavored Tobacco Ordinance. *See Lorillard, supra*, 533 U.S. at 451. As to the Price Ordinance, Plaintiffs claim that:

a. the Price Ordinance is a "'requirement or prohibition' under the FLCAA which is 'based on smoking and health . . . with respect to the advertising or promotion' of cigarettes." *See* Complaint, ¶¶ 62-64 at 19-20.

b. "the offering, acceptance, and redemption of coupons and discounts are 'promotions' within the meaning of the [FCLAA]." *Id.*, ¶65 at 20; and

c. the Price Ordinance "restricts the communication of pricing information to adult consumers based on the content of that communication . . .[without] an exception for [FCLAA's] preemption of regulations concerning the content of cigarette promotion."

Id., ¶ 67 at 20-21.

Plaintiffs' FCLAA preemption claims are premised upon a misreading of the Act and the same misinterpretation of the Price Ordinance upon which their First Amendment claims were premised. In fact, the Price Ordinance simply does not concern itself with the advertisements and/or the content of promotional activity regulated under the FCLAA. In addition, Plaintiffs have badly misconstrued the Act's savings and preemption clauses.

The regulatory context of the FCLAA's enactment, the Act's 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" 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)). As explained by the Supreme Court in *Cipollone* and *Lorillard*, Congress enacted the FCLAA in response to moves by both state legislatures and federal agencies to regulate cigarette packaging and advertising following the Surgeon General's 1964 report emphasizing the adverse health consequences and dangers of cigarette smoking. *See Lorillard*, 533 U.S. at 543; *Cipollone*, 505 U.S. at 513-14.

New York State, for example, adopted its own warning label requirement in June 1965, prior to the Act's passage. *Palmer v. Liggett Group, Inc.*, 825 F.2d 620, 622 n.1 (1st Cir. 1987). In hearings before Congress, the tobacco companies argued that such "conflicting regulations" would be "intolerable." Hearings before the House Committee on Interstate and Foreign Commerce, 88th Cong., 2d Sess., 140 (June 25, 1964) (statement of Bowman Gray, R.J. Reynolds Tobacco Co.). The legislative history of the Act makes clear that the preemption provision was Congress' direct response to this concern. H.R. Rep. No. 449, 89th Cong., 1st Sess., 4 (1965) ("There was general agreement among the witnesses . . . that if the Committee took any action in this field, such a requirement as to labeling should be uniform; otherwise, a multiplicity of State and local regulations pertaining to labeling of cigarette packages could create chaotic marketing conditions and consumer confusion."); S. Rep. No. 195, 89th Cong., 1st Sess., 4 (1965) (same); *see also Cipollone*, 505 U.S. at 519 ("[A] warning requirement

promulgated by the FTC and other requirements under consideration by the States were the catalyst for passage of the 1965 Act.").

In the FCLAA's "Declaration of Policy," Congress made explicit its motivation for the preemption provision. The Declaration 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). As this shows, Congress' primary goal was to avoid the proliferation of state and local laws that would impose varying labeling and disclosure obligations upon tobacco companies.

By contrast, the Price Ordinance poses no risk of "impeding commerce" with "diverse, nonuniform, and confusing" regulations because the Ordinance simply does not concern itself with the content of advertisements or of promotional material. There is simply no evidence that Congress intended to interfere with the traditional police power of state and local governments to regulate the sale and/or distribution of tobacco products, so long as those efforts did not regulate the *content* used by cigarette companies in their labeling and advertising.

a The FCLAA Amendments

The provision relied upon by Plaintiffs —§ 5 of the FCLAA, 15 U.S.C. § 1334—has been amended twice since its enactment in 1965. As originally enacted, the preemption provision read in relevant part:

> (b) 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). In 1970, Congress enacted the Public Health Smoking Act, which prohibited cigarette advertisements on television and radio. As part of that Act, Congress amended the FCLAA's preemption provision to read:

> (b) 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). Although the amendment expanded the FLCAA's preemptive reach, *Cipollone*, 505 U.S. at 520, the legislative history and historical context indicate that Congress' primary intention was to "'clarif[y]' the existing precautions against confusing and nonuniform state laws and regulations," not to dramatically alter the scope of federal preemption. *See id.* at 539-40 (Blackmun, J., concurring in part and dissenting in part).

The legislative history of the Public Health Cigarette Smoking Act of 1969—which was not enacted until 1970—demonstrates 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.*

b. The Supreme Court has "fairly and narrowly" interpreted the 1970 preemption provision

As noted, the U.S. Supreme Court has instructed that courts must "fairly but – in light of the strong presumption against pre-emption – narrowly construe the precise language of § 5(b)." *Cipollone*, 505 U.S. at 523. The two primary cases in which the Supreme Court interpreted 15 U.S.C. § 1334(b)—*Cipollone* and *Lorillard*—construed the reach of this preemption provision in light of Congress' purpose. These cases confirm that the preemption provision was primarily intended to avoid burdening tobacco companies with conflicting or inconsistent requirements

and that the 1970 revisions were meant to expand, but not to "vastly broaden," the scope of the preemption provision.

In *Cipollone,* the Court considered whether section 1334(b) barred common law tort claims against tobacco companies. Although there was no majority decision with respect to whether the 1970 version preempted the claims, "seven of the nine Justices subscribed to opinions that explicitly tethered the scope of the pre-emption provision to Congress' concern with 'diverse, nonuniform, and confusing cigarette labeling and advertising regulations.'" *Lorillard*, 533 U.S. at 597 (Stevens, J., concurring in part and dissenting in part). While the *Cipollone* plurality recognized that the phrase "requirement or prohibition" had expanded the scope of the Act's preemption, it continued to give a narrow reading to the phrase "with respect to the advertising or promotion." The tobacco companies broadly asserted that all common law tort claims that might have some potential impact on tobacco advertising were preempted. Rejecting this argument, Justice Stevens noted that section 1334(b) preempted only regulations "with respect to the advertising or promotion of cigarettes," and he therefore required a careful case-by-case analysis as to whether the plaintiff's claim, if successful, would require the tobacco companies to modify their advertising. *See id.* at 523-24 (discussing the required analysis); *id.* at 528-29 (concluding that plaintiff's claims that tobacco companies' failed to disclose material facts were not preempted).

In *Lorillard*, the Court struck down a Massachusetts regulation that limited the location of outdoor tobacco advertising. The Court rejected the argument that the Act preempted only content-based, and not location-based, advertising regulations, concluding that the 1970 version of the preemption provision made no such distinction. *Lorillard*, 533 U.S. at 551. A contrary result in *Lorillard* would have subjected tobacco companies to "diverse, nonuniform, and

confusing" location-based advertising regulations that would have made compliance by tobacco companies difficult and conflicted with Congress' intent. Tobacco advertisers would potentially have had to comply with different location-based regulations in innumerable local jurisdictions. Additionally, a contrary holding would have permitted states and localities to use location-based restrictions to essentially eliminate all tobacco advertising by very narrowly limiting the locations where tobacco advertising was permissible. According to the Court, this was a result that Congress had sought to avoid. *Lorillard*, 533 U.S. at 549.[56] Nothing in *Lorillard*, however, suggests an expansive interpretation of the phrase "with respect to." Rather, the Court concluded that the location-based restriction at issue in *Lorillard* was "with respect to" advertising because it "*expressly target[ed]* cigarette advertising" as the object of its regulation. *Lorillard*, 533 U.S. at 547 (emphasis added).

The concerns expressed by the Court in both *Cipollone* and *Lorillard* are absent in this case. Unlike the failure to warn claims in *Cipollone* and the location-based restrictions imposed upon tobacco advertisers in *Lorillard*, the regulation of specific commercial activity contained in the Price Ordinance does not present a risk of burdening tobacco advertisers with "diverse, nonuniform, and confusing regulations." Likewise, as has been discussed, the Ordinance does not place any requirements or restrictions upon the *content* of tobacco advertisements or promotional activities.

c. The 2009 amendment to the Act's preemption provision unmistakably demonstrates Congress' intent to narrowly limit the scope of federal preemption.

In 2009, Congress enacted the Family Smoking Prevention and Tobacco Control Act, 123 Stat. 1776, Pub. L. No. 111-31 (2009), as amended 21 U.S.C. § 387 *et seq.* (as noted *supra*, the

[56] In any event, Congress essentially overturned *Lorillard* by adding §1334(c) to the preemption provision in 2009. States are now permitted to regulate the "time, place, and manner" of cigarette advertisements and promotions.

"FSPTCA"), which provided the FDA with authority to regulate tobacco products. Congress also amended the preemption provision of the FCLAA and considerably narrowed its scope. Whatever ambiguity may have existed before, Congress' enactment of FSPTCA further demonstrated its intention to permit—and indeed to encourage—local tobacco control measures such as the Price Ordinance.

FSPTCA left unchanged the language of 15 U.S.C. § 1334(b) (as amended in 1970), but added a new subsection (c) to section 1334 which reads as follows:

> Notwithstanding 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.*

Id. (emphasis added). The plain language of this subsection establishes that Congress intended to preempt only a very narrow category of regulations—those that regulate the "*content*" of cigarette advertising and promotion—and to otherwise provide state and local governments with broad authority to pursue tobacco control measures. Even though the avoidance of "diverse, nonuniform, and confusing" tobacco regulations has been an important congressional goal since 1965, Congress demonstrated in 2009 that its concern for uniformity is clearly secondary to its desire to support aggressive tobacco control efforts by states and localities. The only area remaining off-limits is regulation of the *content* of tobacco based regulations, which would place the most burdensome obligations on national tobacco advertisers by requiring them to reformat their advertisements for each separate jurisdiction, making advertising in nationally-circulated periodical, for example, impractical.

Plaintiffs argue that "every federal court that has considered the question has concluded that, "the text of the Ordinance aside, the offering, acceptance, and redemption of coupons and

pricing discounts are core promotional activities under the [FCLAA]." Plaintiffs' Mem. at 19, citing *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).

This simply is an inaccurate statement of the law. Plaintiffs fail to mention that both *Vilsack* and *Rockwood* were decided well prior to the 2009 enactment of the FSPTCA, which, as noted, made clear that Congress intended to preempt only a narrow category of regulations pertaining to the content of advertising and/or promotions. Following the FSPTCA, it seems likely that *Vilsack* and *Rockwood* would be decided differently. And Plaintiffs neglect to mention that the sections of the law found to have been preempted in *Vilsack* and *Rockwood* bear slight resemblance to the provisions at issue here. *See Vilsack,* 272 F.3d at 1036; *Rockwod*, 21 F.Supp.2d at 420.

2. The Flavored Tobacco Ordinance and the FSPTCA

Plaintiffs' preemption claim with respect to the Flavored Tobacco Ordinance under the FSPTCA is no more compelling than their claim of Price Ordinance preemption under the FLCAA, and in fact was expressly dealt with in *U.S. Smokeless Tobacco Manufacturing Co., LLC v. City of New York,* 703 F.Supp.2d 329 (S.D.N.Y. 2010) ("*U.S. Smokeless I*"). Plaintiffs' rely upon the FSPTCA's preemption clause, to wit:

> 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).

However, the analysis cannot end there. As Judge McMahon explained, the FSPTCA:

contains three clauses that address the power of state and local governments to enact laws relating to tobacco products: a preemption clause, a saving clause and a preservation clause. These clauses create the balance of power between the state and federal governments, and must be considered in light of the following congressional findings, which appear to recognize a parallel role for the states in regulating tobacco products:

> • 'Federal *and State* public health officials, the public health community, and the public at large recognize that the tobacco industry should be subject to ongoing oversight.'
>
> • 'Federal *and State* governments have [historically] lacked the legal and regulatory authority and resources they need to address comprehensively the public health and societal problems caused by the use of tobacco products.'
>
> • 'Because past efforts to restrict advertising and marketing of tobacco products have failed adequately to curb tobacco use by adolescents, *comprehensive restrictions on the sale, promotion, and distribution of such products are needed.*'

Pub. L. No. 111-31, Div. A, § 2 (Findings), 123 Stat. 1776, 1777 (2009) (emphasis added); *see also* 21 U.S.C. § 387 (Findings (6)-(8)).

* * *

The preservation clause, codified at 21 U.S.C. § 387p(a)(1), precedes the Act's preemption and saving clauses structurally. It states that:

> nothing in this subchapter, or rules promulgated under this subchapter, shall be construed to limit the authority of a Federal agency (including the Armed Forces), a State or political subdivision of a State, or the government of an Indian tribe 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 sale, distribution, possession, exposure to, access to, advertising and promotion of, or use of tobacco products by individuals of any age,* information reporting to the State, or measures relating to fire safety standards for tobacco products.

Id.

The Act's preservation clause makes it clear that state and local governments can make an additional (and stronger) 'law, rule, regulation, or other measure' 'with respect to' 'tobacco products,' other than the law passed by Congress or the

> regulations promulgated by the FDA, including laws that "prohibit the sale [or] distribution ... of tobacco products." {footnoted omitted].

Smokeless Tobacco I , supra, 703 F.Supp.2d at 339-41 (emphasis added).

When granting defendants' motion for summary judgment and dismissing plaintiffs' challenge to a New York City Ordinance which, as noted, is strikingly similar to the Flavored Tobacco Ordinance, Judge McMahon noted that:

> Local sales restrictions, including prohibitions of subclasses of tobacco products, are not within the scope of the Preemption Clause at all – notwithstanding the reality that the FDA may eventually promulgate a 'tobacco product standard' that sets a floor for all sales or distributions of a class of tobacco products. *Rather, what are preempted are locally-imposed manufacturing or fabrication requirements that are inconsistent with federal standards of the same sort.*
>
> * * *
>
> *Congress and the FDA say what can be made, and how it must be made; and the States and their subdivisions decide what being made can be sold, where and to whom.* If Plaintiffs were correct that everything Congress allows to be made must be sold everywhere, then the language of the Preservation and Savings Clauses reserving to the States the power to restrict sales and distribution would be meaningless.

Smokeless Tobacco II, supra, slip. op. at 4, 8 (emphasis added).

Here, of course, the Flavored Tobacco Ordinance, like its New York City counterpart, in no way imposes a "locally-imposed manufacturing or fabrication requirements that are inconsistent with federal standards." *Id.* Plaintiffs' contention that the reasoning of the Southern District of New York in *Smokeless Tobacco I, supra*, was undercut by the rationale of the U.S. Supreme Court in *National Meat Ass'n. v. Harris*, __ U.S. __, 132 S.Ct. 965 (2012), *see* Plaintiffs' Mem. at 36-37, is unpersuasive.

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. As Justice Kagan noted, the FMIA's

preemption clause "sweeps broadly" and "prevents a state from imposing any additional or different- even if non-conflicting – requirements that fall within the scope of the Act." *Id.*

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, *Harris* was a straight-forward case of express federal preemption involving a statute containing a broad preemption clause and a state statute which "at every turn" imposed "additional or different requirements" in obvious and clear derogation of federal law. *See id.*

In sum, because the Price Ordinance does not regulate advertising or promotion, or if it does, it regulates only the manner in which cigarettes are promoted, the Ordinance is not preempted under federal law.

D. The Flavored Tobacco Ordinance is not vague and does not violate Plaintiffs' due process rights. (Count VIII)

Plaintiffs claim that the Flavored Tobacco Ordinance contains vague prohibitions which are prohibited under both the First Amendment and the Due Process Clause of the Fourteenth Amendment, objecting to the definition of "characterizing flavor," which, in pertinent part, refers to "a distinguishable taste or aroma . . . including, but not limited to, tastes or aromas relating to any fruit, chocolate, vanilla, honey, candy, cocoa, desert, alcoholic beverage, herb or spice and concepts such as spicy, arctic, ice, cool, warm, hot mellow, fresh and breeze. . ." *See* Complaint, ¶¶ 12-13 at 6-7, quoting Flavored Description Ordinance, § 14-308, ¶ 3.

It should again be emphasized that the Flavored Tobacco Ordinance is economic regulation of purely commercial activity which subjects an alleged violator to at most, civil penalties, and does not involve fundamental rights. Thus, the Ordinance must be reviewed under a deferential, rational basis standard. The U.S. Supreme Court has made clear that:

> Whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. See *Sullivan v. Stroop,* 496 U.S. 478, 485, 110 S.Ct. 2499, 2504, 110 L.Ed.2d 438 (1990); *Bowen v. Gilliard,* 483 U.S. 587, 600–603, 107 S.Ct. 3008, 3016–3018, 97 L.Ed.2d 485 (1987); *United States Railroad Retirement Bd. v. Fritz,* 449 U.S. 166, 174–179, 101 S.Ct. 453, 459–462, 66 L.Ed.2d 368 (1980); *Dandridge v. Williams,* 397 U.S. 471, 484–485, 90 S.Ct. 1153, 1161, 25 L.Ed.2d 491 (1970). Where there are 'plausible reasons' for Congress' action, 'our inquiry is at an end.' *United States Railroad Retirement Bd. v. Fritz, supra,* 449 U.S., at 179, 101 S.Ct. at 461. *This standard of review is a paradigm of judicial restraint. 'The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.' Vance v. Bradley,* 440 U.S. 93, 97, 99 S.Ct. 939, 942–943, 59 L.Ed.2d 171 (1979) (footnote omitted).

F.C.C. v. Beach Communications, Inc., 508 U.S. 307, 313-14 (1993) (emphasis added). And the First Circuit has noted that:

> To comport with the strictures of due process, a law must define an offense "'[1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement." The void-for-vagueness doctrine embraces these requirements.'

URI Student Senate v. Town of Narragansett, 631 F.3d 1, 13-14 (1st Cir. 2011), citing *Skilling v. United States,* __U.S. __, 130 S.Ct. 2896,2927-28 (2010) (quoting *Kolender v. Lawson,* 461 U.S. 352, 357 (1983). Moreover, as the court noted in *Roark & Hardee, LP v. City of Austin*, 522 F.3d 533 (5th Cir. 2008):

> The degree of vagueness that the Constitution tolerates-as well as the relative importance of fair notice and fair enforcement-depends in part on the nature of the enactment. Thus, *economic regulation* is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action .... The Court has also expressed greater

> tolerance of enactments with *civil rather than criminal penalties* because the consequences of imprecision are qualitatively less severe.

Id. at 551-52.

When the appropriate deferential standard of review is applied, it is apparent that Plaintiffs' vagueness argument is without merit. Plaintiffs' claim that the Ordinance:

> (a) "provides no mechanism for determining through testing or observation, whether a tobacco product has a 'distinguishable taste or aroma' that is prohibited." Plaintiffs' Mem. at 6; and
>
> (b) "does not define prohibited 'tastes,' 'aromas,' or 'concepts,' instead banning non-exhaustive lists of terms introduced by the open-ended phrases 'such as' and 'relating to.'"

Id.

The City should not be expected to anticipate the nearly limitless number of specific tastes, aromas and/or concepts which the industry can create to attract youth. As Judge Selya noted in *URI Student Senate, supra*:

> . . . words are rough-hewn tools, not surgically precise instruments. Consequently, some degree of inexactitude is acceptable in statutory language. *See Grayned,* 408 U.S. at 110, 92 S.Ct. 2294 (acknowledging that one 'can never expect mathematical certainty from our language'). Consistent with this reality, 'the fact that a statute requires some interpretation does not perforce render it unconstitutionally vague.' *IMS Health Inc. v. Ayotte,* 550 F.3d 42, 61 (1st Cir.2008); *see also Barr v. Galvin,* 626 F.3d 99, 107 (1st Cir.2010). It follows that "reasonable breadth" in the terms employed by an ordinance does not require that it be invalidated on vagueness grounds.

631 F.3d at 14 (citation omitted); *see also NYC C.L.A.S.H, Inc. v. City of New York*, 315 F.Supp.2d 461, 484 (S.D.N.Y. 2004) ("due process does not require a legislative body to await concrete proof of reasonable but unproven assumptions before acting to safeguard the health of its citizens").

Plaintiffs somewhat disingenuously suggest that "it remains possible that the City may assert that the 'concepts' ban applies to "tobacco, menthol, mint or wintergreen' flavored

products." Plaintiffs' Mem. at 7. However, the plain language of the Ordinance prohibits only the sale of "flavored tobacco products," *see* Flavored Tobacco Ordinance, § 14-309, which are clearly limited to products that impart a "characterizing flavor," *see id.*, § 14-308 at ¶ 3, which in turn is defined so as to clearly and expressly exclude "the taste or aroma of tobacco, menthol, mint or wintergreen." *See id.*

Moreover, Plaintiffs' argument that there are less restrictive alternatives available to the Ordinances ignores the fact that either such alternatives have been tried and found wanting, or the City simply lacks legal authority or the financial resources to pursue them. *See supra* at 46.

Finally, Plaintiffs reliance upon *Reno v. ACLU*, 521 U.S. 844 (1997), *see* Plaintiffs' Mem. at 30, is misplaced. In *Reno*, the Court found that certain provisions of the federal Communications Decency Act of 1996, 47 U.S.C. §§ 223(a)(1) and 223(d), which were designed to protect minors from exposure to harmful materials on the Internet, were overbroad under the First Amendment. *See* 521 U.S. at 872. In so doing, however, the Court emphasized that the measure was subject to heightened scrutiny as content-based blanket restrictions on speech which imposed criminal sanctions. *See id.* at 872-73. As noted, the operative portions of the Flavored Protection Ordinance are *not* concerned with speech or expressive conduct protected under the First Amendment, and the Ordinance does not impose criminal sanctions.

E. The Price Ordinance is not preempted under existing state law. (Count V)

Plaintiffs allege that Rhode Island law criminalizing the sale of tobacco to minors, as well as a state law mandating that retailers offering products at a discount post the non-discounted price, constitute a preemption of the field, thus rendering the Price Ordinance unconstitutional under state law. *See* Complaint, ¶ 77, citing RIGL §§ 11-9-13.8, 11-9-13.10 (prohibiting sales to minors) and RIGL § 6-13-11 (posting of non-discounted price). However, nothing in the cited

provisions conflicts with the Price Ordinance in any way, nor do the provisions evidence an occupation of the field by the General Assembly.

As the Rhode Island Supreme Court noted 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.
>
> Similarly, article I, section 103, of the Providence Home Rule Charter states:
>
> > The city shall have all powers of local self-government and home rule and all powers possible for a city under the Constitution and the laws of the state, including 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. (emphasis added). Section 401 of the Providence Home Rule 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.*

The Rhode Island Supreme 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), citing *Providence City Council v. Cianci*, 650 A.2d 499, 501 (R.I. 1994). In *Town of Warren v. Thornton-Whitehouse*, 740 A.2d 1255, 1261 (R.I. 1999) the Court noted that:

> 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. *See State v. Pascale,* 86 R.I. 182, 186-87, 134 A.2d 149, 152 (1957) (local traffic

> ordinance punishing *any* refusal to comply with order of police officer was preempted by state statute punishing *willful* refusal to comply with police order). *See also* G.L.1956 § 45-6-6. Second, a municipal ordinance is preempted if the Legislature intended that its statutory scheme completely occupy the field of regulation on a particular subject. *See Town of East Greenwich v. Narragansett Electric Co.,* 651 A.2d 725, 729 (R.I.1994) (state statute creating Public Utilities Commission evidenced legislative intent to completely occupy the field of utilities regulation such that local ordinances on the subject were preempted even if they were not disruptive or inconsistent with the state's regulatory scheme).

Id.

Here, there is no express conflict between the Price Ordinance and the cited state law provisions. Contrary to Plaintiffs' half-hearted suggestion, *see* Plaintiffs' Mem. at 25, nothing about the Price Ordinance conflicts with Rhode Island's Unfair Sales Practice Act, RIGL § 16-13-1, *et seq*., the state's minimum price law for cigarettes, *see* RIGL § 16-13-2, or the state's licensing of tobacco retailers for tax purposes. *See* RIGL § 44-20-2. Indeed, as noted, 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* RIGL § 11-9-13.10, underscores the utility of the Ordinance. *See* Yurdin Aff., ¶ 16 at 6.

Plaintiffs, cognizant of the complete lack of actual conflict, rely upon the theory of implied field preemption. *See* Plaintiffs' Mem. at 24, citing *Town of East Greenwich v. O'Neil*, 617 A.2d 104 (R.I. 1992). In *O'Neil,* the court set forth the factors to be used when attempting to identify areas of field preemption, i.e., areas of exclusive state concern where cities and towns are precluded from acting:

> 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. 1 Antieau, § 3.40 at 3-113. Second, whether a particular matter is traditionally within the historical dominion of one entity is a substantial consideration. 1 Antieau, § 3.40 at 3-115; *see Marro v. General Treasurer of Cranston*, 108 R.I. 192, 196, 273 A.2d 660, 662 (1971); *Nugent v. City of East Providence*, 103 R.I. 518, 524-26, 238 A.2d 758, 761- 63 (1968); *Opinion to the House of Representatives*, 80 R.I. 288, 294, 96 A.2d 627, 630 (1953); 2 McQuillin, § 4.85 at 206. 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. 1 Antieau, § 3.40 at 3-115 to 3-119; 2 McQuillin, § 4.85 at 208; *see McCarthy*, 574 A.2d at 1231; *Brancato*, 565 A.2d at 1264; *Bruckshaw*, 557 A.2d at 1223.

617 A.2d at 111; *see also Hourihan v. Town of Middletown*, 723 A.2d 790, 791 (R.I. 1998) (upholding town's right to regulate horse riding on public beaches); *Palombo v. Providence Housing Board of Review*, 92 R.I. 421, 5424, 169 A.2d 613, 615 (1961) (ordinance designed to suppress nuisance in hosing and slums proper exercise of police power).

When one applies the relevant factors, the weakness of Plaintiffs' field preemption argument becomes apparent: First, there has been no credible showing that the sale and/or distribution of tobacco products in the state need be subject to uniform regulation. The Price Ordinance not only does not conflict with the state law cited by Plaintiffs, it is in line with the relevant state law and state policies. *See supra* at 23, citing § 11-9-13.6 (directing Health Department to coordinate and promote enforcement with local authorities) and § 11-9-13.11 (conferring enforcement power upon local police departments). In fact, the very state officials who were given regulatory authority under the Youth Tobacco Act, *see* RIGL § 11-19-13.15, have filed an amicus brief in support of the Ordinances here.

Plaintiffs' suggestion that mere inaction by the General Assembly somehow evidences an intent to preempt, *see* Plaintiffs' Mem. at 25 and note 12, 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); *see also O'Melveny & Myers v. FDIC,* 512 U.S. 79, 85 (1994) ("matters left unaddressed in [a comprehensive and detailed federal] scheme" are presumed to have been left "to the disposition provided by state law").

Second, cases recognizing that the regulation of smoking is traditionally within the domain of a municipality's police power are legion.[57] Moreover, the chief sponsor of the Ordinances 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* Yurdin Aff., ¶ 16 at 6.

And third, "and most critical," the Price Ordinance will have no effect outside of Providence.

F. The Ordinances do not depend upon the validity of the Licensing Ordinance. (Counts IV and XI)

Plaintiffs claim that "business licensing is a matter of statewide concern committed to the exclusive purview of the General Assembly," *see* Complaint, ¶ 71 at 21, and argue that "the General Assembly has not delegated authority to license tobacco retailers, rather, it has enacted a comprehensive, statewide tobacco vendor licensing law." *Id.*, ¶ 72 at 22.

In *Amico's Inc.*, *supra*, the Court noted that "as has long been the case, the Legislature continues to exclusively occupy the fields of education, elections, and taxation, thereby precluding any municipality's foray into these areas, absent specific legislative approval." *Id.* at 903, citing *Malinou v. Board of Elections,* 108 R.I. 20, 26, 271 A.2d 798, 801 (1970); *Royal v. Barry,* 91 R.I. 24, 31, 160 A.2d 572, 575 (1960); and *Opinion to the House of Representatives,* 79 R.I. 277, 280, 87 A.2d 693, 696 (1952). However, in all three areas where the *Amico's Inc.*

[57] *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).

Court alleged that exclusive occupation by the General Assembly had been long-standing, there was a specific constitutional delegation of such authority to the Legislature. *See* R.I. Const, art. 4 (elections), art. 12 (education), and art. 13, sec. 5 (taxes).

Significantly, there is no such exclusive constitutional delegation of power to the General Assembly with respect to any and all licensing. Yet, in *Amico's Inc.*, the court concluded in *dicta* (and 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." *Amico's Inc., supra*, 789 A.2d 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).[58]

Plaintiffs mistakenly have construed this *dicta* as effectively exempting all municipal licensing from a traditional preemption analysis. Plaintiffs contend that absent an express or implied delegation of the specific licensing power from the General Assembly, no municipal licensing scheme of any kind could ever pass constitutional muster, even if it was in full accord with, and/or fully complemented, a parallel state licensing scheme in the relevant area. This is an overbroad reading of *Amico's Inc.*.

In fact, in a majority of jurisdictions, licensing is not *per se* immune from traditional 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

[58] There was no meaningful explanation for the *per se* rule proffered in *Newport Amusement Co., supra*, which was decided prior to the home rule amendment to the state constitution. The Court simply announced that the rule, i.e., a blanket prohibition on municipal licensing in the absence of some delegation from the General Assembly, was "consistent with the view adhered to in most jurisdictions in this country, that is, that the power of a municipal corporation to license an occupation is not an inherent power but may be exercised only when conferred by the state either in express terms or by necessary implication." *Nugent, supra*, 238 A.2d at 523. As will be discussed, this was not an accurate statement of the law.

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). As noted in McQuillin, *The Law of Municipal Corporations*:

> . . . the fact that a state has enacted regulations governing an occupation does not of itself prohibit a municipality from exacting additional requirements; so long as there is no conflict between the two, both the statute and the ordinance will stand.[footnote omitted] Statutes, for example, sometimes require itinerant vendors to take out a state license, and in addition to obtain a local license in each town or city.[footnote omitted] In matters of purely local concern, the municipal power to regulate may be exercised even though statutes of regulatory nature have been adopted pertaining to the same subject considered as a state-wide matter of concern.[footnote omitted].

9 McQuillin, *supra*, 26:28 (3rd. Ed.) (database updated October 2011). According to one commentator, "a detailed examination of the case law invoking the doctrine of implied preemption reveals . . . that courts have looked to the nature of the activity sought to be regulated by the locality and to the type of power sought to be asserted by the locality in resolving alleged conflicts with state regulatory and licensing enactments." *See id.* at §§ 19.86, 26.23.10.

Indeed, absent a constitutional grant of exclusive power to the General Assembly, the *per se* removal of any and all municipal licensing of whatever kind and nature from the mandates of a traditional preemption analysis could well be a violation of home rule, *see supra* at 63, quoting R.I. Const. art. XIII, sections 1 and 2 and the Providence Home Rule Charter at article I, sections 103 and 401, especially in an area such as smoking, which has been universally recognized as being of local concern and where concurrent state and local regulation is commonplace. *See* note 57, *supra*, and accompanying text.

Moreover, when one applies the appropriate preemption analysis, it is apparent that the state's licensing statute, *which does not contain a preemption clause*, *see* RIGL §§ 44-20-1 *et*

seq., was not intended to occupy the field, or to preclude cities and towns from licensing in the area, as long as such local regulation and licensing did not conflict with the relevant state provisions.

State tobacco licensing is limited to sellers of cigarettes, *see* RIGL §§ 44-20-1 and 44-20-2, and licenses are issued by the tax administrator. *See* RIGL § 44-20-4. Nothing in the state's licensing requirements conflicts in any way with the requirements under the Licensing Ordinance. *Compare* Licensing Ordinance, § 14-303 with RIGL § 44-20-4.1 (prohibiting the issuance of licenses to those who, *inter alia*, have been convicted of various crimes); § 44-20-8 (authorizing the tax administrator to suspend or revoke a license in the event of a licensee's failure to keep required records); and §§ 44-20-8 and 44-20-12.2 (mandating compliance with the federal Labeling Act and other laws).

The fact that: (a) the General Assembly has explicitly recognized that there is a role for local governments to play in the area of tobacco product regulation, *see, e.g.*, RIGL § 11-9-13.6, discussed *supra* at 23; and (b) Warwick and Cranston, Rhode Island have had tobacco retailer licensing regimes in effect for some time,[59] evidences that the General Assembly has impliedly delegated the powers necessary to license tobacco retailers to cities and towns.

Assuming, for argument's sake, that this Court adopts the relevant dicta in *Amico's Inc.* and finds that any local licensing of tobacco vendors is *per se* unconstitutional, the Court should

[59]Both municipalities enacted ordinances mandating that those who sell or distribute tobacco products in their cities first obtain a license, which is renewable annually. The ordinances provide that:

> It shall be unlawful to sell or offer for sale at retail, to give away, deliver or to keep with the intention of selling at retail, giving away or delivering tobacco products within the city without having first obtained a tobacco dealer's license pursuant to this article. Such license shall be in addition to any other license required by state and/or federal law.

See Warwick Code of Ordinances, § 10-23 ($250 fine for non-compliance); Cranston Code of Ordinances, § 5.68.020 ($200 fine for non-compliance).

simply sever the language in the Ordinances which refer to local licensing,[60] while upholding their remaining substantive prohibitions. As the U.S. Supreme Court recently emphasized:

> Generally 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., __ U.S. __, 130 S. Ct. 3138, 3161 (2010) (internal quotations omitted; emphasis added). Courts therefore must "strive to salvage" as *much* of a statute as possible, as only the statute, and not the court's ruling, is a product of the democratic process: "we try not to nullify more of a legislature's work than is necessary, for we know that a ruling of unconstitutionality frustrates the intent of the elected representatives of the people." *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 330 (2006) (internal quotation omitted).

Against this presumption in favor of severability, and in the absence of a statutory provision expressly addressing severability (which, as will be discussed, is not the case here), courts apply a two-part test:

> First, after finding a portion of a statute unconstitutional, the court determines whether the remaining portions remain 'fully operative as a law'; if so, the remainder is 'presumed severable.' *INS v. Chadha*, 462 U.S. 919, 934 (1983). Second, that presumption can be defeated if the court finds that it is '*evident*' that Congress would have preferred the rest of the statute (or particular portions) to be invalidated along with the unconstitutional provision.

Free Enterprise Fund, 130 S. Ct. at 3161-62 (emphasis supplied); *see also Ayotte*, 546 U.S. at 330.

[60] *See* Price Ordinance at §14-303 (referring to "a person who holds a license under this article"); Flavored Tobacco Ordinance at § 14-310 (referring to "a tobacco dealer's license holder" and the Board's power to "suspend or revoke the license").

The Rhode Island Supreme Court also has recognized a court's "clear authority to declare and hold a portion of an ordinance invalid and yet to uphold the remaining sections or provisions of the ordinance if the valid portion is not indispensable and can be severed without destroying the real purpose for enactment." *City of Providence v. Employee Retirement Bd. of City of Providence*, 749 A.2d 1088, 1099 (R.I. 2000), citing *Greenwich Bay Yacht Basin Associates v. Washburn*, 560 A.2d 945, 948 (R.I.1989).

Consistent with the underlying objective of preserving the real purpose of a legislative enactment, the Rhode Island Supreme Court has held that "when the validity of an ordinance is at issue, the court must, if possible interpret the ordinance as valid." *Providence City Council v. Cianci*, 650 A.2d 499, 502 (1994), citing *Greenwich Bay Yacht Basin Associates v. Washburn*, 560 A.2d 945 (R.I. 1989); *see also Defenders of Animals v. Department of Env.Mgt.*, 553 A.2d 541, 544 (R.I.1989) ("[T]his court will not interpret legislative enactments in a manner that renders them nugatory or that would produce an unreasonable result"); *Landrigan v. McElroy*, 457 A.2d 1056, 1061 (R.I. 1983) ("it is settled that 'this court must construe a duly enacted statute to be constitutional if such a construction is reasonably possible).'"[61] As the Court noted in *Landrigan, supra:*

> . . . a court may hold a portion of a statute unconstitutional and uphold the rest when the unconstitutional portion is not indispensable to the rest of the statute and can be severed without destroying legislative purpose and intent. *Baffoni v. Rhode Island Department of Health*, 118 R.I. 226, 235-36, 373 A.2d 184, 189 (1977); *Chartier Real Estate Co. v. Chafee*, 101 R.I. 544, 556, 225 A.2d 766, 773 (1967). This principle applies despite the absence of a savings clause in a statute because 'the authority of a court to eliminate invalid elements of an act and yet sustain the valid elements is not derived from the Legislature, but rather flows from powers inherent in the judiciary.' 2 Sutherland, § 44.08 at 350. In exercising this authority, however, we

[61] Quoting *Jamestown School Committee v. Schmidt*, R.I., 405 A.2d 16, 19 (1979), and citing J.*M. Mills, Inc. v. Murphy*, 116 R.I. 54, 71, 352 A.2d 661, 670 (1976); *see* 2A Sutherland, *Statutes and Statutory Construction* § 57.24 at 456 (4th ed. 1973) (citing *Murphy v. Director of Public Works of Rhode Island*, 103 R.I. 451, 238 A.2d 621 (1968)).

> recognize that legislative intent is the decisive factor. *See Rhode Island Federation of Teachers v. Norberg*, 630 F.2d 855, 863 (1st Cir.1980). *The test for determining the separability of portions of a statute is 'whether, at the time the statute was enacted, the legislature would have passed it absent the constitutionally objectionable provision.' Scheinberg v. Smith*, 659 F.2d 476, 481 (5th Cir.1981).

457 A.2d at 1061 (emphasis added); *see also Town of Westerly v. Bradley*, 877 A.2d 601, 606 (R.I. 2005), quoting *Hometown Properties, Inc. v. Fleming*, 680 A.2d 56, 60 (R.I.1996) ("it is the function of the court to adopt an interpretation of an ordinance or statute 'that allows us to avoid a finding of unconstitutionality'"); *Jeff Anthony Props. v. Zoning Bd. of Review*, 853 A.2d 1226, 1230 (R.I.2004), citing *State v. Burke*, 811 A.2d 1158, 1167 (R.I.2002) (when court interprets legislation, it must "determine and effectuate the Legislature's intent and attribute to the enactment the meaning most consistent with its policies or obvious purposes").

Significantly, the City's Code of Ordinances expressly incorporates this severability rule by providing that "the sections, paragraphs, sentences, clauses, and phrases of the City's Code of Ordinances *are severable*." *See Code Ordinances* at § 1-5 (emphasis added).

None of the substantive prohibitions of the Price or Flavored Tobacco Ordinance depend for their validity upon the municipal licensing of those selling tobacco products. Thus, it is clear that the City Council would have passed the Ordinances with or with without the Licensing Ordinance and/or references to local licensing. *See* Yurdin Aff., ¶ 27 at 9. It should be equally clear that even if the Licensing Ordinance were unconstitutional (which it is not), this Court should sever references to licensing in both the Price and Flavored Tobacco Ordinances while upholding their remaining substantive provisions.

G. Plaintiffs' are not entitled to a preliminary injunction

Assuming, for argument's sake, that this Court concludes that there is a genuine issue of material fact or that the parties' motions for summary judgment are for some reason premature,

the Court should nonetheless deny Plaintiffs' motion for a preliminary injunction. As the First Circuit noted in *Phillip Morris, Inc. v. Harshbarger*, 159 F.3d 670, 673-74 (1st Cir. 1989):

> In considering a request for a preliminary injunction, a trial court must weigh several factors: (1) the likelihood of success on the merits, (2) the potential for irreparable harm to the movant, (3) the balance of the movant's hardship if relief is denied versus the nonmovant's hardship if relief is granted, and (4) the effect of the decision on the public interest. *See Ross–Simons of Warwick, Inc. v. Baccarat, Inc.,* 102 F.3d 12, 15 (1st Cir.1996); *Narragansett Indian Tribe v. Guilbert,* 934 F.2d 4, 5 (1st Cir.1991). Likelihood of success is the touchstone of the preliminary injunction inquiry. *See Ross–Simons,* 102 F.3d at 16; *Weaver v. Henderson,* 984 F.2d 11, 12 (1st Cir.1993).

Id.

1. Plaintiffs will not succeed on the merits.

For all the reasons set forth above, which need not be belabored, it is evident that Plaintiffs are not likely to succeed on the merits of their claim, and thus are not entitled to a preliminary injunction.

2. Plaintiffs have failed to establish irreparable harm as a matter of law.

In *Pankos Diner Corp. v. Nassau County Legislature*, 321 F.Supp.2d 520, 524 (E.D.N.Y. 2003), the court, faced with a constitutional challenge to a local smoking ban, emphasized that:

> The movant's demonstration of irreparable harm comprises the "'the single most important prerequisite for the issuance of a preliminary injunction.' " *Bell & Howell: Mamiya Co. v. Masel Supply Co.,* 719 F.2d 42, 45 (2d Cir.1983) (quoting 11 Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure, § 2948 at 431 (1st ed.1973)). Due to the importance of this factor, 'the moving party must first demonstrate that such injury is likely before the other requirements for the issuance of an injunction will be considered.' *Reuters Ltd. v. United Press Int'l, Inc.,* 903 F.2d 904, 907 (2d Cir.1990). To demonstrate irreparable harm, '[t]he movant must demonstrate an injury that is neither remote nor speculative, but actual and imminent and that cannot be remedied by an award of monetary damages.' *Shapiro v. Cadman Towers, Inc.,* 51 F.3d 328, 332 (2d Cir.1995) (quotation marks and citation omitted).

Id. applying a state rule substantially similar to Fed.R.Civ.P. 65 in a case involving a municipal smoking ban, the Supreme Judicial Court of Massachusetts made clear that "economic harm

alone . . . will not suffice as irreparable harm unless 'the loss threatens the very existence of the movant's business.'" *Tri-Nel Mgmt., Inc. v. Board of Health of Barnstable*, 433 Mass. 217, 227-28, 741 N.E.2d 37,46 (2001), citing *Hull Mun. Lighting Plant v. Massachusetts Mun. Wholesale Elec. Co.,* 399 Mass. 640, 643, 506 N.E.2d 140 (1987); *see also Gatley v. Commonwealth of Massachusetts*, 2 F.3d 1221, 1232 (1st Cir. 1993) ("temporary loss of income, which can be recouped at the end of a trial, 'does not usually constitute irreparable injury").

Plaintiffs have not even come close to making the showing required to establish the requisite irreparable harm, relying instead on a classic bootstrap argument. Plaintiffs *assume* that Defendants have violated their constitutional rights, and then use that assumption in lieu of an actual showing of irreparable harm. *See* Plaintiffs' Mem. at 42.[62] Yet, Plaintiffs are unlikely to succeed on the merits and thus are not relieved of the burden of establishing irreparable harm without reference to their constitutional claims.

Plaintiffs vaguely refer to the "significant sums" that the Manufacturer Plaintiffs will allegedly incur in order to "to delete from their packaging and advertising the references to 'concepts,' tastes,' and 'aromas' forbidden by the Flavor[ed] Tobacco] Ordinance [and] continue selling those products in the City." *Plaintiffs' Mem.* at 42-43, citing the Declaration of Michael L. Karrow. Since, as noted, Plaintiffs remain perfectly free (under the Ordinances at least) to describe their products in whatever manner they choose, it is a mystery why they would needlessly incur "significant sums" altering their advertisements.

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[62] Citing *Planned Parenthood League of Mass. v. Bellotti*, 641 F.2d 1006 (1st Cir. 1981), *Asociación de Educación Privada de Puerto Rico v. Garcia-Padilla*, 490 F.3d 1 (1st Cir. 2007) and *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 112 S.Ct. 2031, 119 L.Ed2d 157 (1992). In all three cases, however, the court found that the plaintiffs were likely to establish a constitutional violation, unlike the Plaintiffs here. *See Belotti*, 641 F.2d at 1014 (finding it likely that mandatory waiting period prior to abortion would be found unconstitutional); *Garcia-Padilla*, 490 F.3d at 12-13 (regulation mandating parental approval of textbook budget likely to violate academic freedom under First Amendment); *Morales*, 504 U.S. at 381 (injunction proper in light of federal preemption of provision regulating airline advertising).

On the other hand, it is no mystery why Plaintiffs have failed to even attempt to quantify the amount of "lost sales and lost revenue" they would incur if the Ordinances are not enjoined as these "significant sums" no doubt would pale in comparison to the $10.5 billion that the major cigarette and smokeless tobacco companies spend annually to market tobacco products, *see Broken Promise, supra*, at iii and 18, or even to the comparatively paltry $27.3 million spent in Rhode Island in one year to advertise and otherwise promote their products. *See id.* at 80. And needless to say, without even a ball park estimate as to the alleged economic damage, it is impossible to credit Plaintiffs' argument that the City would be unable to satisfy a judgment in the highly unlikely event that Plaintiffs were to succeed on the merits. *See* Plaintiffs' Mem. at 43.

3. Enjoining enforcement would not be in the public interest.

Plaintiffs employ the same kind of bootstrap argument when arguing that the public interest requires a preliminary injunction as they did when attempting to establish irreparable harm. Plaintiffs rely entirely upon the hardly controversial notion that "the public interest can never be served by the enforcement of an unconstitutional law." *See* Plaintiffs' Mem. at 45, citing *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008). Yet, as noted, there is little likelihood that Plaintiffs will establish a constitutional violation.

Plaintiffs also make the point that "the City of Providence has existed for 378 years without the benefit of [the Ordinances]." *Id.* at 44-45. What Plaintiffs fail to recount is how many lives were tragically cut short during these 378 years as a direct result of smoking. When one weighs the City's interest in preventing even one single child from becoming addicted to nicotine against the Plaintiffs' entirely hypothetical and unquantified assertions of economic loss,

it is apparent that the scale tips wildly in favor of the City's interest, and thus the public interest would be served if Plaintiffs' motion for injunctive relief were denied.

IV. CONCLUSION

For all the above reasons: (1) Plaintiffs' Joint Motions should be denied; (2) Defendants' Cross-Motion for Summary Judgment should be granted; and (3) an order should enter dismissing the Complaint in its entirety and directing the entry of judgment for the Defendants.

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Dated: June 15, 2012

CERTIFICATE OF SERVICE

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

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