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

NATIONAL ASSOCIATION OF TOBACCO OUTLETS, INC., *et al.*, Plaintiffs, v. CITY OF PROVIDENCE, *et al.*, Defendants.	Civil Action No. 12-00096-ML

MEMORANDUM IN SUPPORT OF PLAINTIFFS' JOINT MOTIONS FOR SUMMARY JUDGMENT, A PERMANENT INJUNCTION, AND A PRELIMINARY INJUNCTION

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INTRODUCTION

The manufacture, marketing, and promotion of tobacco products are subject to intensive regulation by the federal Government. The federal regulatory scheme attempts to strike a balance between federal and state authority over the regulation of tobacco products.

By passing the two ordinances at issue here, the City of Providence has upset this balance, violated the First Amendment, and confiscated the State of Rhode Island's exclusive powers. The first ordinance, entitled "An Ordinance Amending Section 14-300 and Section 14-303 of Article XV of Chapter 14 of the Code of Ordinances of the City of Providence, Entitled: 'Licenses – Tobacco Dealers'" ("Promotion Ordinance") (attached as Ex. 1), forbids the acceptance of all tobacco product coupons and the offering of many pricing discounts (*e.g.*, "buy-one-get-one-free") for tobacco products in Providence. The second ordinance, entitled "An Ordinance Amending Article XV of Chapter 14 of the Code of Ordinances of the City of Providence, Entitled: 'Licenses' by Adding Thereto the Following Sections" ("Flavor Description Ordinance") (attached as Ex. 2), banishes certain flavored tobacco products from Providence and seeks to dictate how tobacco manufacturers may describe their products to consumers.

The Promotion Ordinance is unconstitutional and invalid for the following reasons:

- It violates the First Amendment to the United States Constitution because it prohibits Plaintiffs from conveying truthful pricing information about tobacco products to adult tobacco consumers. U.S. Const. amend. I.
- It is preempted by the Federal Cigarette Labeling and Advertising Act (the "Labeling Act"), which forbids states and localities from establishing a "requirement or prohibition"

that is "based on smoking and health" and "with respect to the advertising or promotion of any cigarettes." *See* 15 U.S.C. § 1334(b).

- It violates the Home Rule Amendment to the Rhode Island Constitution because it is based on a business licensing scheme that is itself unconstitutional because the General Assembly has not delegated authority to municipalities to address business licensing.
- It is preempted by Rhode Island law because of the State's extensive regulation of tobacco coupons and discount offers.

The Flavor Description Ordinance is similarly unconstitutional and invalid for the following reasons:[1]

- It violates the First Amendment because it presumptively bans the sale of certain tobacco products based on what Plaintiffs say about them. In addition, it is unconstitutionally vague in violation of the First Amendment and the Due Process Clause.
- It is preempted by the federal Family Smoking Prevention and Tobacco Control Act (the "FSPTCA") because it imposes requirements that are "different from," or "in addition to," federal requirements "relating to tobacco product standards" and tobacco product "labeling." *See* 21 U.S.C. § 387p(a)(2)(A).
- It violates the Home Rule Amendment to the Rhode Island Constitution for the same reason that the Promotion Ordinance does: The Ordinance is based on a local business licensing scheme established by the City, without authority from the General Assembly.

[1] Plaintiff Lorillard Tobacco Company does not sell any products in Providence that would be deemed "flavored tobacco products" within the meaning of the Flavor Description Ordinance. *See* Complaint ¶ 3, ECF No. 1. Accordingly, Plaintiff Lorillard joins in the challenge to the Promotion Ordinance, but not the challenge to the Flavor Description Ordinance. All references to "Plaintiffs" in portions of this memorandum of law regarding the challenge to the Flavor Description Ordinance shall mean all Plaintiffs other than Lorillard.

The resolution of each of these claims turns on dispositive questions of law. As demonstrated below, there are no disputed issues of material fact, in light of the applicable legal standards. Because the Ordinances violate Plaintiffs' constitutional rights, overturn the careful balance between federal and state authority, and violate the Constitution and laws of Rhode Island, this Court should enter summary judgment in Plaintiffs' favor and permanently enjoin enforcement of the Ordinances.

The City of Providence has agreed to stay enforcement of the Ordinances until July 30, 2012. If additional time is required to bring this matter to final judgment, the Court should preliminarily enjoin enforcement of the Ordinances. Each of the factors for issuing a preliminary injunction is easily satisfied here. First, Plaintiffs are likely to succeed on the merits. Second, enforcement of the Ordinances will impose irreparable injury on the Plaintiffs, violating their constitutional rights and levying unrecoverable costs. Third, the harm to Defendants and third parties if enforcement of the Ordinances is not enjoined is not comparably severe; the long term status quo will be preserved and no other purported interest at issue here can outweigh a violation of Plaintiffs' constitutional rights. Fourth, the public interest is not served by the enforcement of a patently unconstitutional law.

BACKGROUND

I. THE PROMOTION ORDINANCE

The Promotion Ordinance prohibits licensed tobacco retailers to accept, or offer to accept, any coupons for tobacco products, and to offer any discounts in exchange for the purchase of more than one pack of cigarettes or other tobacco products or for the purchase of another tobacco product. *See* Providence Code of Ordinances, § 14-303. An example of a prohibited discount would be a "buy one pack, get another free" that is ubiquitous in many industries.

Specifically, the Promotion Ordinance forbids any licensed tobacco retailer 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 without charge or for less than the listed or non-discounted price." Providence Code of Ordinances, § 14-303 ¶ 3(1). The Ordinance further prohibits any tobacco retailers from offering "multi-pack discounts" or from "provid[ing] or distribut[ing] to consumers any tobacco products without charge or for less than the listed or non-discounted price in exchange for the purchase of any other tobacco product." *Id.* ¶ 3(3).

Importantly, the Promotion Ordinance does not set a minimum price for tobacco products. Instead, it prohibits Plaintiffs from *communicating* price discounts to adult consumers who may lawfully purchase tobacco products. Coupons and multi-pack discounts, in comparison to lowering the everyday price, convey to customers that the price they are paying is less than the "listed or non-discounted price." As an example, a retailer may charge $8 for a package of cigarettes to everyone. But he may not post a price of $10 per package in his store, and redeem a coupon for $2 off, thereby communicating to the consumer that the price is discounted. Likewise, under the Promotion Ordinance, that same retailer may charge $8 per package of cigarettes, but may not post a price of $16 per package and offer a "buy-one-get-one free" promotion. The Ordinance regulates *what is said* about prices rather than the prices themselves.

The regulation of cigarettes, in particular, is integrated throughout the Ordinance. The Promotion Ordinance defines "tobacco products" as "any substance containing tobacco leaf, including, but not limited to, *cigarettes*, cigars, pipe tobacco, snuff, chewing tobacco, dipping tobacco, orbs, sticks, dissolvable tobacco products, and electronic cigarette cartridges," with an exception for certain FDA-approved medical treatment products. *Id.* § 14-300 ¶ 6 (emphasis

added). Redundantly, the Ordinance contains two sets of substantially identical provisions, including separate prohibitions on the same types of coupons and discounts that apply to cigarettes alone. *Id.* § 14-303 ¶ 3(2), (4).

II. THE FLAVOR DESCRIPTION ORDINANCE

The Flavor Description Ordinance prohibits tobacco manufacturers and retailers from making many public statements describing tobacco products and bans the sale of certain "flavored tobacco products." *Id.* §§ 14-308–14-310.

The Flavor Description Ordinance prohibits the sale of any non-cigarette tobacco product that imparts a "characterizing flavor," except in a "smoking bar." *Id.* §§ 14-308 ¶ 6, 14-309. The exception for smoking bars is extraordinarily narrow, requiring that the business be "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." *Id.* § 14-308 ¶ 9 (incorporating R.I. Gen. Laws § 23-20.10-2(15)). This smoking bar provision in state law is principally directed at allowing indoor smoking on the premises. *See* R.I. Gen. Laws § 23-20.10-2(15)(c). The Rhode Island Division of Taxation identified twenty-one establishments that are smoking bars in the City of Providence. *See* Declaration of Kyle Zambarano (Mar. 30, 2012) ¶ 4 ("Zambarano Decl.") (attached as Ex. 3). Of these, three are now out of business, and of the eighteen in business, seven do not appear to sell tobacco-related products. *Id.* ¶¶ 9–11. Of the remaining eleven establishments, two do not sell flavored tobacco products, and seven are hookah bars that do not sell smokeless tobacco products or cigars. Declaration of Robin Laquerre (Mar. 30, 2012) ¶¶ 2–16 ("Laquerre Decl.") (attached as Ex. 4). Only *two* licensed tobacco bar establishments in the entire City of Providence have smokeless tobacco or cigars of any kind for sale. *See* Laquerre Decl. ¶¶ 15–16.

The Flavor Description Ordinance's text demonstrates its focus on communications about the taste or aroma of tobacco products. The Flavor Description Ordinance provides no mechanism for determining, through testing or even observation, whether a tobacco product has a "distinguishable taste or aroma" that is prohibited. *See* Providence Code of Ordinances, § 14-308 ¶ 3. Rather, the Flavor Description Ordinance explicitly relies on what is *said* about the tobacco product. In defining a "flavored tobacco product," the Flavor Description Ordinance 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. ¶ 6 (emphasis added). There is no provision in the Flavor Description Ordinance about how the presumption can be rebutted.

The Flavor Description Ordinance proscribes a broad range of "public statements . . . that [a] tobacco product has or produces a characterizing flavor." *Id.* This sweeping scope arises from the definition of "characterizing flavor," which includes:

> [A] distinguishable taste or aroma, other than the taste or aroma of tobacco, menthol, mint or wintergreen, imparted either prior to or during consumption of a tobacco product or component thereof, including, but not limited to, tastes or aromas relating to any fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, herb or spice and *concepts such as spicy, arctic, ice, cool, warm, hot, mellow, fresh, and breeze*.

Id. ¶ 3 (emphasis added). As discussed further below, the text of this definition presents two troubling ambiguities.

First, the Flavor Description Ordinance 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." It bans reference to "tastes or aromas *relating to* any fruit, chocolate,

vanilla, honey, candy, cocoa, dessert, alcoholic beverage, herb or spice." *Id.* (emphasis added). For concepts, there can be no reference to "concepts *such as* spicy, arctic, ice, cool, warm, hot, mellow, fresh, and breeze." *Id.* (emphasis added). Although the Ordinance is restricting speech, it does not say where the list of banned speech ends. We discuss in detail below the implications of the Ordinance's open-ended ban on an undefined list of "tastes," "aromas," and "concepts."

Second, a reasonable interpretation of the definition is that the "concepts" ban applies only to products that otherwise impart a prohibited "characterizing flavor." Under this interpretation, the ban on statements referencing "concepts" does not apply to products that are "tobacco, menthol, mint or wintergreen" flavored, because these are excepted from the prohibition on "characterizing flavors." One of the Plaintiffs has pressed the City to take a view on the interpretation of the Ordinance, but the City has not done so.[2] Thus, it remains possible that the City may assert that the "concepts" ban applies to "tobacco, menthol, mint or wintergreen" flavored products. And under that interpretation, the Ordinance bars accurate, non-misleading descriptions of products that are entirely legal to sell in Providence. For example, Plaintiffs would be banned from accurately describing otherwise permissible mint-flavored products as having a "cool" or "fresh" flavor.

[2] On February 10, 2012, Reynolds American, Inc. ("RAI"), the parent company of Plaintiffs R.J. Reynolds Tobacco Company ("RJRT") and American Snuff Company ("ASC"), sent a letter to the City asking it to confirm its agreement with this interpretation by February 17. *See* Letter from Reynolds American, Inc. to City Solicitor Padwa (Feb. 10, 2012) (noting that under the Ordinance, a product that imparts the "taste or aroma" of "tobacco, menthol, mint or wintergreen" does not impart a "characterizing flavor" and, therefore, is not a "flavored tobacco product") (attached as Ex. 5). As of the date of this filing, RAI has not received a response.

III. THE PURPOSE OF THE ORDINANCES AND THEIR PASSAGE

The Providence City Council claims to have designed these Ordinances to reduce tobacco use by those under the age of 18. *See* Answer ¶ 57, ECF No. 30 (admitting the purpose of the Ordinances). Angel Taveras, Mayor of the City of Providence, signed the Ordinances because "Providence's children represent the future of our city, and we must put their health and wellness above the economic interests of the tobacco industry."[3] Michael A. Solomon, President of the City Council, explained: "I think it's very important that we take the pro-active approach to try to protect our youth from the dangers of nicotine."[4] Providence City Council member Seth Yurdin underscored the health motives behind the Ordinances, announcing at a press conference:

> It's really a fantastic day to see a community effort like this. We're just one part of it, but all of these different groups here are really going to work to make sure that children stay away from cigarettes, they make healthy choices in their lives, and they go on to live healthy, satisfying lives.[5]

See also Rescue SCG, Price Survey Report Prepared by Rescue SCG for City of Providence Mayor's Substance Abuse Prevention Program, at 3 (Dec. 2011) ("Price Survey Report") (attached as Ex. 7) (containing questions seeking opinions concerning promotions and youth tobacco consumption).

The City Council first read and voted on the Ordinances on January 3, 2012. *See* No. 1 Providence City Council Special Meeting, Minutes, 5–6 (Jan. 3, 2012) ("Jan. 3, 2012 City

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[3] *See Providence, R.I., Bans Sale of Flavored Tobacco Products*, CSPNET.COM (Jan. 13, 2012), http://www.cspnet.com/news/tobacco/articles/providence-ri-bans-sale-flavored-tobacco-products (last visited Mar. 30, 2012).

[4] *See* Providence Committee on Ordinances Meeting, 24 (Dec. 15, 2011) ("Committee Tr.") (attached as Ex. 6) (comments of Providence City Council President M. Solomon).

[5] *See* Alison Bologna, *City hopes ordinances will keep kids away from tobacco*, TURNTO10.COM (Jan. 12, 2012), http://www.turnto10.com/news/2012/jan/12/city-hopes-ordinances-will-keep-kids-away-tobacco-ar-894216/ (last visited Mar. 30, 2012).

Council Meeting Minutes") (attached as Ex. 8); Rules of the Providence City Council 17 (Feb. 15, 2007) (attached as Ex. 9) ("No ordinance shall be passed until it has been read on two separate days, and until at least forty-eight hours shall have elapsed between such two readings . . . .").

The final vote and enactment of the Ordinances occurred on January 5, 2012. *See* No. 3 Providence City Council Special Meeting, Minutes, at 3 (Jan. 5, 2012) ("Jan. 5, 2012 City Council Meeting Minutes") (attached as Ex. 10). For that critical meeting, however, the City Council only gave public notice the previous day, on January 4, 2011, providing less than the forty-eight hours' notice required by Rhode Island's Open Meetings Act. *See* R.I. Gen. Laws § 42-46-6(b); Providence City Council, January 5, 2012 Meeting Notice (attached as Ex. 11); Rhode Island Sec'y of State, Providence City Council January 5, 2012 Meeting Notice, *available at* http://sos.ri.gov/openmeetings/?page=meeting&id=118292 (last visited Mar. 30, 2012); Complaint ¶¶ 10, 86, 131, ECF No. 1; Answer ¶¶ 10, 86, 131. Mayor Taveras signed the Ordinances on January 9, 2012. As alleged in the Complaint, and as admitted in the Answer, the City Council's actions were in clear violation of the Open Meetings Act. *See* Complaint ¶¶ 80–88, 129–132; Answer ¶¶ 10, 86–87, 130–131. This legislative process led to the present lawsuit.

On February 17, 2012, four days after the Complaint in this action was filed, the Parties filed a stipulation staying enforcement of the Ordinances until the close of business on July 30, 2012. *See Stipulation Regarding Stay Of Enforcement* ¶ 2, No. 12-0096-ML (D.R.I. Feb. 17, 2012), ECF No. 23. That same day, the Providence City Council summarily reenacted the Ordinances, at a hearing for which fifty hours' notice was given. *See* No. 8 Providence City Council Special Meeting, Minutes, at 3–4 (Feb. 17, 2012) ("Feb. 17, 2012 City Council Meeting Minutes") (attached as Ex. 12); Rhode Island Sec'y of State, Providence City Council February

17, 2012 Meeting Notice, *available at* http://sos.ri.gov/openmeetings/?page=meeting& id= 120643 (last visited Mar. 30, 2012).

ARGUMENT

I. THE COURT SHOULD GRANT SUMMARY JUDGMENT INVALIDATING THE ORDINANCES.

Summary judgment is appropriate where there "is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). A fact is "material" only if it "might affect the outcome of the suit under the governing law." *Anderson*, 477 U.S. at 248; *see also MacGlashing v. Dunlop Equip. Co.*, 89 F.3d 932, 936 (1st Cir. 1996). In other words, "[f]actual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 U.S. at 248.

There is no genuine issue of material fact in this case when the text of and the justifications for the Ordinances are measured against applicable legal principles: The Ordinances violate the Constitution and laws of the United States, as well as the Constitution and laws of Rhode Island. This Court should grant Plaintiffs summary judgment.

A. The Promotion Ordinance Violates The Constitution And Laws Of The United States And Of Rhode Island.

1. The Promotion Ordinance Violates The First Amendment.

The Promotion Ordinance improperly restricts Plaintiffs' communications with adult consumers about the price of tobacco products. Through coupons and discount offers, manufacturers and retailers communicate to adult tobacco consumers that the price they are paying is less than the standard price for the product. *See* Declaration of Victor D. Lindsley, III (Mar. 27, 2012) ¶¶ 6, 9–10 ("Lindsley Decl.") (attached as Ex. 13); Declaration of Michael L. Karrow (Mar. 23, 2012) ¶ 8 ("Karrow Decl.") (attached as Ex. 14); Declaration of Jody L. Begley (Feb. 13, 2012) ¶ 20 ("Begley Decl.") (attached as Ex. 15). The Promotion Ordinance,

however, prohibits retailers from accepting or redeeming any coupons that will reduce the price of a tobacco product below the listed, non-discounted price or from providing a discount when more than one tobacco product or package is purchased. *See* Providence Code of Ordinances, § 14-303. The Promotion Ordinance does not mandate a minimum price. The Ordinance regulates *what is said* about prices, rather than the prices themselves.

The Supreme Court repeatedly has held that communication about the price of products is at the core of constitutionally protected commercial speech. Here, such speech enables adult tobacco consumers to choose between Plaintiffs' lawful products. *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762–64 (1976) (price advertising is core protected speech because a consumer's interest in accurate price information "may be as keen, if not keener by far, than his interest in the day's most urgent political debate"); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 496 (1996) (plurality op.) ("the public's interest in receiving accurate commercial information . . . supports an interpretation of the First Amendment that provides constitutional protection for the dissemination of accurate and nonmisleading commercial messages"); *see also S. Ogden CVS Store, Inc. v. Ambach*, 493 F. Supp. 374, 379–80 (S.D.N.Y. 1980) (recognizing that coupons and discount advertisements constitute protected commercial speech).

The Supreme Court's well-established framework first requires that challenged commercial speech be lawful and not misleading. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980). Any restriction on such speech is invalid *unless* the

government proves that the restrictions directly serve a *substantial governmental interest* and are *narrowly tailored* to that interest. *Id.* The Promotion Ordinance plainly fails this test.[6]

First, the speech restricted by the Promotion Ordinance is truthful and non-misleading. There is nothing untruthful, unlawful, or misleading about tobacco retailers and manufacturers communicating accurate information about price discounts for tobacco products through the use of coupons or multi-pack discount offers to adults.

Second, the Promotion Ordinance does not serve a substantial governmental interest. The avowed purpose of the Ordinance is to reduce underage tobacco use. *See* Answer ¶ 57; Committee Tr. at 17–18, 24. But the Promotion Ordinance is entirely unrelated to that interest. The legislative record does not show there is even a real problem—that underage persons in Providence actually use coupons or multi-pack discounts to obtain tobacco products. *See* Declaration of Dr. Cecil R. Reynolds ¶ 62 ("Reynolds Decl."), ECF No. 33. To the contrary: Rhode Island law already bans the distribution of coupons for free tobacco products to persons under eighteen years of age, *see* R.I. Gen. Laws § 11-9-13.10, and the sale of tobacco products to such persons *at any price*, *see id.* §§ 11-9-13, 11-9-13.8. The Promotion Ordinance's only addition to existing law is to restrict *lawful* communications to adults about pricing and

[6] Plaintiffs believe that content-based commercial speech restrictions should be governed by strict scrutiny requiring a compelling state interest and narrow tailoring. In recent years, the Supreme Court has indicated an increasing willingness to apply strict scrutiny to commercial speech. *See, e.g.*, *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1342–43 (2010) ("I have never been persuaded that there is any basis in the First Amendment for the relaxed scrutiny this Court applies to laws that suppress nonmisleading commercial speech.") (Thomas, J., concurring in part and concurring in the judgment); *see also Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011) ("The First Amendment requires heightened scrutiny whenever the government creates a regulation of speech because of disagreement with the message it conveys. . . . Commercial speech is no exception." (internal quotation marks omitted)). Although Plaintiffs expressly preserve this issue for later review, this brief applies controlling precedent, under which the Promotion and Flavor Description Ordinances are unconstitutional.

promotional offers for purchase. *See Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2740–41 (2011) (measuring the governmental interest in a First Amendment case in terms of incremental benefit provided over existing law).

That is an unconstitutional addition to existing law. Restricting speech to affect *adult* decision-making regarding a legal product is barred by the First Amendment. The fact remains "that the sale and use of tobacco products by adults is a *legal activity*." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 564 (2001) (emphasis added). The Supreme Court has repeatedly "rejected the notion that the Government has an interest in preventing the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with that information." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002); *see also 44 Liquormart*, 517 U.S. at 503 (plurality op.) ("The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."). Accordingly, as the Supreme Court explained in *Reilly*, "so long as the sale and use of tobacco is lawful for adults, the tobacco industry has a protected interest in communicating information about its products and adult customers have an interest in receiving that information." 533 U.S. at 571.

Even if communications regarding coupons or certain volume-based discounts actually influence adult consumers' choices to purchase tobacco products, the First Amendment prohibits the government from restricting speech on that basis. "That the State finds expression too persuasive does not permit it to quiet speech or to burden its messengers." *Sorrell*, 131 S. Ct. at 2671. If the City of Providence is concerned about the effect of Plaintiffs' speech on adult consumers' lawful choices to purchase tobacco products, then the City "can express that view through its own speech," rather than "hamstring" Plaintiffs' plainly protected speech. *Id.* To the

extent, then, that the Promotion Ordinance prevents adults' exposure to certain tobacco product promotions "in order to prevent [adults] from making bad decisions with the information," *W. States Med. Ctr.*, 535 U.S. at 374, it is irreconcilable with the Supreme Court's admonition that the "*people*," rather than the government, "will perceive their own best interests," and that "the best means to that end is to open the channels of communication rather than to close them." *Va. Bd. of Pharmacy*, 425 U.S. at 770 (emphasis added).

Third, in any event, the City cannot demonstrate that the Promotion Ordinance directly and materially advances the only remotely plausible substantial governmental interest—reducing underage tobacco use. *See 44 Liquormart*, 517 U.S. at 505 (plurality op.) ("[T]he State bears the burden of showing not merely that its regulation will advance its interest, but also that it will do so 'to a material degree.'" (quoting *Edenfield v. Fane*, 507 U.S. 761, 771 (1993))). The legislative record reveals no scientifically valid evidence that underage persons in Providence are using coupons or multi-pack discounts to get tobacco products illegally. Nor is there evidence that these types of promotions cause more underage persons to start using tobacco products. *See* Reynolds Decl. ¶¶ 61–70. There is a reason for this. The manufacturer Plaintiffs take extensive measures to verify the age of those to whom they distribute coupons and other promotional offers. *See* Lindsley Decl. ¶¶ 5, 11–14; Karrow Decl. ¶¶ 8–9; Begley Decl. ¶¶ 10–13. These measures are as robust as those taken by government agencies to verify age in other settings. *See* Begley Decl. ¶ 10. Moreover, multi-pack and multi-product discounts offered at retail are not available to persons who are not of legal age to purchase tobacco products in the first place.

Whatever their validity, studies suggesting that underage tobacco users are sensitive to price are irrelevant here because the sale of tobacco products to underage persons at any price is already prohibited by Rhode Island law. *See* Reynolds Decl. ¶ 62. Furthermore, none of those

studies address whether coupons or multi-pack discounts attract underage tobacco users. *See id.* ¶¶ 63–66. And common sense points in the opposite direction. Illegal purchasers of a product are highly unlikely to take the extra step of redeeming coupons, or to encourage adults who are illegally purchasing tobacco for them to do so, because it draws undesired attention to an illegal transaction. *See id.* ¶¶ 62, 68–69. Similarly, multi-pack or multi-product discounts are unlikely to have particular appeal to underage persons who cannot legally purchase tobacco products in any event, and the legislative record contains no evidence that underage would-be purchasers select retailers for an illegal transaction based on the presence of such promotions. Simply put, neither the legislative record nor any scientific study creates a genuine issue of material fact that restricting these types of price promotions will directly and materially advance the goal of reducing underage tobacco use.

Indeed, the Promotion Ordinance could have the opposite effect. A ban on the use of coupons and certain price discounts could lead to reduced prices for tobacco products across the board. *See id.* ¶ 69. 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.[7] The City of Providence cannot meet its demanding legal burden of showing that the Promotion Ordinance directly advances its stated interest and that it does so to a "material degree." *See 44 Liquormart*, 517 U.S. at 505 (plurality op.) (quoting *Edenfield*, 507 U.S. at 771).

[7] As the examples cited above make clear, the Ordinance permits straight price discounts that reach *all* consumers who purchase tobacco products, while prohibiting functionally equivalent pricing through the use of coupons and multi-pack discounts that would reach only a limited number of consumers. It makes sense that the Ordinance would thus encourage retailers to lower prices across the board. *See* Reynolds Decl. ¶ 69.

Fourth, the Promotion Ordinance is more restrictive than necessary to serve any purported governmental interest and therefore fails *Central Hudson*'s narrow tailoring requirement. *Cent. Hudson*, 447 U.S. at 566. Under this requirement, if "the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government *must do so*." *W. States Med. Ctr.*, 535 U.S. at 371 (emphasis added); *44 Liquormart*, 517 U.S. at 529 (O'Connor, J., concurring in judgment); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 491 (1995). Here, however, the City has not shown that it adequately considered alternative measures that would not burden speech whatsoever, or that would burden less speech. There are numerous and obvious alternatives to furthering the City's stated interest in curtailing underage tobacco consumption that do not restrict speech. For example, Providence could engage in its own counter-marketing campaign or work with the State of Rhode Island to increase enforcement of existing state laws prohibiting minors from purchasing and consuming such products, *see* R.I. Gen. Laws §§ 11-9-13, 11-9-14, and enhance the penalties for retailers who sell tobacco products to minors in violation of state law.

The City also could increase support for tobacco control educational programs aimed at addressing the social factors that cause tobacco use; or some combination of the above alternatives. *See* Reynolds Decl. ¶¶ 78–80 (explaining the proven efficacy of increasing support for (i) training programs for youth on avoiding peer influence, (ii) educational programs to encourage parents to avoid using tobacco around their children, (iii) programs to prompt siblings not to facilitate tobacco use by their underage siblings, and (iv) educational programs for clerks and store personnel about enforcing underage sales restrictions). The City puts forth no evidence "why these possibilities, alone or in combination, would be insufficient" to further any interest in reducing youth tobacco usage. *W. States Med. Ctr.*, 535 U.S. at 373. That, however, is the least

Providence is required to do before trampling the free speech rights of private parties. As the Supreme Court has repeatedly held, "[i]f the First Amendment means anything, it means that regulating speech must be a last—not first—resort." *Id.*

Finally, even if Plaintiffs' promotion of tobacco products were to be considered "conduct" and not speech, that conduct would still be subject to demanding First Amendment protection because it is expressive conduct that conveys a message to consumers—namely, "buy this product because it is priced at a discount." Under the Supreme Court's holding in *Reilly*, *Central Hudson* applies to laws regulating conduct, provided that the laws are designed to regulate the communicative impact of advertisements or promotions. *See, e.g.*, *Reilly*, 533 U.S. at 567 (applying *Central Hudson* to "height requirement" placed on indoor advertising because the height restriction was "an attempt to regulate directly the communicative impact of indoor advertising"). The Promotion Ordinance is precisely such a law. It is purportedly designed to screen underage persons from certain types of promotions in the hope that those promotions will not influence them to purchase tobacco products. Whether regulating expressive conduct or commercial speech, it is unconstitutional.[8]

2. The Labeling Act Preempts The Promotion Ordinance.

a. The Promotion Ordinance Meets All The Criteria For Preemption Under The Labeling Act.

The Promotion Ordinance is expressly preempted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331, *et seq.* (the "Labeling Act"), through which "Congress has crafted a comprehensive federal scheme governing the advertising and promotion of cigarettes."

[8] In any event, the test applicable to bans on expressive conduct established by *United States v. O'Brien*, 391 U.S. 367, 377 (1968) largely overlaps with the *Central Hudson* test. *See Lindsay v. City of San Antonio*, 821 F.2d 1103, 1106 n.5 (5th Cir. 1987) (explaining that the second, third, and fourth *Central Hudson* factors parallel the second, third, and fourth *O'Brien* factors).

Reilly, 533 U.S. at 541; *see also* 15 U.S.C. § 1331 (explaining that the Labeling Act "establish[es] a comprehensive Federal Program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health"). Balancing the competing interests of public health with protection of the national economy, Congress has prohibited states and localities from imposing "diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health." 15 U.S.C. § 1331(2)(B).

To protect federal legislative decisions about whether and to what extent to regulate cigarette advertising and promotion, the Labeling Act provides that:

> 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 chapter.

15 U.S.C. § 1334(b). The City of Providence ignored Congress's clear prohibition on lawmaking in this area; the Promotion Ordinance is a wholesale attack on cigarette promotion.

The Promotion Ordinance plainly meets all the criteria for preemption under the Labeling Act. First, it is a "prohibition" because it forbids licensed retailers of tobacco products, including cigarettes, from engaging in certain activities. Indeed, it is part of Section 14-303 of Article XV of Chapter 14 of the Code of Ordinances of the City of Providence, the title of which is "*Prohibitions* applicable to license holders, their employees and agents." (Emphasis added).

Second, the Promotion Ordinance is "based on smoking and health." The Labeling Act "prohibit[s] state cigarette advertising regulations *motivated* by concerns about smoking and health" and, as the Supreme Court explained, "concern about youth exposure to cigarette advertising is intertwined with the concern about cigarette smoking and health." *Reilly*, 533 U.S. at 548 (emphasis added). The Mayor's Director of Policy laid out the City's "motivations," describing the Promotion Ordinance as a "great step[] towards reducing the public health costs

and the pain associated with nicotine addiction." Committee Tr. at 16; *see also* Answer ¶ 57 (admitting that "the Promotion Ordinance was designed, in part, to deal with the problem of underage tobacco consumption").

Third, the Promotion Ordinance is "with respect to the advertising or promotion" of cigarettes. The Promotion Ordinance makes this plain by defining key terms in relation to both the promotion and advertising of cigarettes. For example, the Promotion Ordinance defines "Coupon" to mean "any card, paper, note, form, statement, ticket or other issue distributed for commercial or *promotional purposes*." Providence Code of Ordinances, § 14-300 ¶ 3 (emphasis added). And "Listed or non-discounted price" is defined to mean "the higher of the price listed for a tobacco product on its package or the price listed on any related shelving, posting, *advertising* or display at the place where the tobacco product is sold." *Id.* ¶ 4 (emphasis added).

The text of the Ordinance aside, the offering, acceptance, and redemption of coupons and pricing discounts are core promotional activities under the Labeling Act. Every federal court to consider the question has so recognized. *See Jones v. Vilsack*, 272 F.3d 1030, 1036 (8th Cir. 2001); *see also Rockwood v. City of Burlington*, 21 F. Supp. 2d 411, 419–20 (D. Vt. 1998). As the Eighth Circuit explained, "promotion" for purposes of the Labeling Act refers to "the act of furthering the growth or development of something; *especially*: the furtherance of the acceptance and sale of merchandise through advertising, publicity, or *discounting*." *Jones*, 272 F.3d at 1036 (emphasis added). As a result, "promotion" includes "'[a]ll forms of communication other than advertising that call attention to products and services by adding extra

values toward the purchase [and] temporary discounts, allowances, premium offers, *coupons*, contests, sweepstakes, etc.'" *See id.* (emphasis added).[9]

Indeed, the City itself recognizes that price discounting is "promotion." A survey conducted by the City refers to "buy-one-get-one-free" offers, which are directly targeted by the Promotion Ordinance, as a "promotion." *See* Price Survey Report, at 3. The City Council President acknowledged that the purpose of the Promotion Ordinance is to "circumvent these incentives" by banning them. Committee Tr. at 24.

Recent amendments to the Labeling Act do not save the Promotion Ordinance. A provision added in 2009 allows states to regulate the "time, place, and manner" of cigarette advertisements or promotions, notwithstanding the Labeling Act's preemption provision. 15 U.S.C. § 1334(c) (emphasis added). Critically, however, the provision does not allow states to regulate the "content" of advertisements or promotions. *Id.* ("Notwithstanding subsection (b), a State or locality may enact statutes and promulgate regulations, based on smoking and health . . . imposing specific bans or restrictions on the time, place, and manner, *but not content*, of the advertising or promotion of any cigarettes." (emphasis added)). The Promotion Ordinance is manifestly directed at the *content* of the price information communicated to adult consumers. A discount offer is banned precisely because it has the content of offering a reduced unit price for purchasing multiple products or packages. And, it is the content of written communications

[9] Still further, when requesting and reporting information from tobacco manufacturers under 15 U.S.C. § 46(b), the Federal Trade Commission defines tobacco product "promotion" to include activities such as "[r]etail value added expenditures . . . involving free cigarettes (*e.g.*, buy two packs, get one free)," conduct expressly prohibited by the Promotion ordinance. *See* FTC, Cigarette Report for 2007 and 2008 app. (2011), *available at* http://www.ftc.gov/os/ 2011/07/110729cigarettereport.pdf; Providence Code of Ordinances, § 14-303 ¶ 3(3), (4).

with adult tobacco consumers—an offer to bring the communication to the store for a discount on a tobacco product—that activates the ban on coupons.

Applying the statutory text and clear precedent to the undisputed facts, the Court should grant Plaintiffs summary judgment because the Promotion Ordinance is preempted by the Labeling Act.

b. The Entire Promotion Ordinance Is Preempted By The Labeling Act.

The Labeling Act requires invalidation of the entire Promotion Ordinance. To be sure, the Labeling Act applies only to cigarettes, and the Promotion Ordinance reaches other tobacco products. But Rhode Island courts will strike a portion of a statute and leave the remainder intact only if doing so will not destroy the intent of a legislative body. *See Landrigan v. McElroy*, 457 A.2d 1056, 1061 (R.I. 1983); *see also Bouchard v. Price*, 694 A.2d 670, 678 (R.I. 1997) (denying severance where the invalid portion is "indispensable to the rest of the act and [could not] be severed without destroying legislative intent").

The City cannot carry that heavy burden. The regulation of cigarette promotion is integrated throughout the text of the Promotion Ordinance. Two provisions of the Promotion Ordinance ban coupons and multi-pack discounts for cigarettes only. *See* Providence Code of Ordinances, § 14-303 ¶ 3(2), (4). But the parallel provisions for "tobacco products" also include cigarettes. *See id.* § 14-303 ¶ 3(1), (3); *id.* § 14-300 ¶ 6 (defining "Tobacco products" as "any substance containing tobacco leaf, including, but not limited to *cigarettes* . . . " (emphasis added)). Any attempt to sever cigarettes from the rest of the Promotion Ordinance would require this Court to leave "gaping loopholes" in the Ordinance text. *See Randall v. Sorrell*, 548 U.S. 230, 262 (2006).

In any event, it is hardly evident that the City Council would have enacted the Promotion Ordinance and taken on the necessary enforcement costs if it did not cover cigarettes. Cigarettes are by far the highest volume tobacco product and the largest asserted public health risk. Indeed, the legislative record reflects a City Council fixated on "smoking," not smokeless tobacco. *See, e.g.*, Committee Tr. at 17 ("The most effective policy that communities have had to curb *smoking* rates and the pain and cost that they bring about in communities is taxation and the increase in overall pack price.") (emphasis added); *id.* (criticizing "pricing discounts to cushion the blow for new *smokers* and existing *smokers*") (emphases added).

The Court should let the democratically elected City Council decide whether to reenact another version of the Promotion Ordinance without targeting cigarettes. This remedy preserves the democratic process, as the unicameral council can quickly express its intent through legislation. Whatever temptations courts may have to sever invalid portions of federal legislation, which must go through a burdensome and unlikely-to-recur series of approvals by both houses of Congress and the President, those sentiments do not apply to the City's streamlined legislative process.

3. The Promotion Ordinance Violates The Rhode Island Constitution.

The Providence City Council lacked authority under the Rhode Island Constitution to enact the Promotion Ordinance because it is based on the City's tobacco retailer licensing scheme, and business licensing is a matter of statewide concern reserved to the State.

Under the Home Rule Amendment to the Rhode Island Constitution, R.I. Const. art. XIII, §§ 2, 4, "[t]he power to regulate occupations and businesses by licensing provisions . . . is not an incident of municipal administration and may not be exercised by municipalities except where it is lawfully delegated to them in particular instances expressly or by necessary implication." *Newport Amusement Co. v. Maher*, 166 A.2d 216, 218 (R.I. 1960). Business licensing is a

matter of statewide concern committed to the exclusive purview of the General Assembly. *See Amico's, Inc. v. Mattos*, 789 A.2d 899, 903 (R.I. 2002); *see also Newport Amusement Co.*, 166 A.2d at 218 (explaining that the Rhode Island Home Rule Amendment "grant[s] the right of self-government only in all *local* matters," that "[l]icensing is definitely not a local matter," and noting the General Assembly's "exclusive power over licensing").

The General Assembly has not delegated authority to Providence or any other municipality to enact laws requiring local tobacco licenses. To the contrary, Rhode Island has a comprehensive, statewide tobacco retailer licensing law. *See* R.I. Gen. Laws § 44-20-2. That law provides that "[e]ach person engaging in the business of selling cigarette products in this state, including any distributor or dealer, shall secure a license from the [state tax] administrator before engaging in that business, or continuing to engage in it." *Id.* There are state law penalties for selling tobacco products without a license and for licensees who fail to follow state tobacco laws, such as those prohibiting sales to minors, and unfair sales practices laws, such as those governing coupons. *Id.* § 44-20-8.[10]

The Promotion Ordinance is invalid because it is predicated on the City of Providence's unauthorized tobacco retailer licensing regime. Providence's tobacco licensing ordinance provides that "[i]t shall be unlawful to sell, distribute, deliver, offer for sale, or give away. . . tobacco products within the city without having first obtained a tobacco dealer's license" from the Providence Board of Licenses. Providence Code of Ordinances, §§ 14-300–

[10] In 2002, the General Assembly declined to amend the state-wide tobacco licensing statute by delegating to "[t]he several cities and towns . . . authori[ty] to impose a volume based license fee upon retail vendors of tobacco products." S. 2632, 2002 Leg., Jan. Sess. (R.I. 2002). That decision reinforces that the General Assembly has reserved to the State authority over tobacco retailer licensing. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 600–01 (1983).

14-302. The Promotion Ordinance amends this local tobacco retailer licensing regime by prohibiting any "person who holds a license issued under this article" from engaging in listed price promotions. *Id.* § 14-303.

When "licensing constitutes the sole enforcement mechanism of [an ordinance]," "the authority to carry out that enforcement *must* flow from a delegation of power to do so from the General Assembly." *Amico's Inc.*, 789 A.2d at 904 (emphasis added); *see Newport Amusement Co.*, 166 A.2d at 218. There is no delegation here. The Promotion Ordinance has been grafted onto an unconstitutional local licensing scheme and is thus invalid.

4. The Promotion Ordinance Is Preempted By Rhode Island Law.

The Promotion Ordinance is also preempted because Rhode Island law extensively regulates the use of coupons and pricing discounts for tobacco products.[11] A local ordinance is preempted by state law and invalid "if it conflicts with a state statute on the same subject" or "if the Legislature intended that its statutory scheme completely occupy the field of regulation on a particular subject." *Town of Warren v. Thornton-Whitehouse*, 740 A.2d 1255, 1261 (R.I. 1999). The state shows its intention to occupy a field of regulation if the "state legislature has made provision for the regulation of conduct in a given situation and has provided punishment for the failure to comply therewith." *Wood v. Peckham*, 98 A.2d 669, 670 (R.I. 1953).

Rhode Island criminally prohibits: (i) selling tobacco products to persons under eighteen years of age, R.I. Gen. Laws § 11-9-13.8; (ii) "distribut[ing] . . . free tobacco products or coupons or vouchers redeemable for free tobacco products to any person under eighteen (18)

[11] Rhode Island courts address issues of state law preemption and municipal authority under the Home Rule Amendment to the Rhode Island Constitution separately. *See, e.g.*, *Town of E. Greenwich v. O'Neil*, 617 A.2d 104, 109 (R.I. 1992) ("We address the issues of preemption and home rule separately.").

years of age"; and (iii) distributing such products, coupons, or vouchers to *any* person "regardless of the age of the person . . . within five hundred (500) feet of any school," *id.* § 11-9-13.10. Rhode Island's unfair sales practices laws regulate how businesses can utilize price discounts and other promotions by, for example, making it "unlawful to use, communicate, or publish any advertisement that states that an item or product is being sold or offered for sale at below the regular price . . . without posting the regular price at the point of purchase." *Id.* § 6-13-11. Tobacco retailers who violate the state's unfair sales practices laws are subject to punishment through the state tobacco licensing law. *See id.* § 44-20-8.

Moreover, the Ordinance conflicts with the General Assembly's repeated determination not to further regulate the use of discounts and coupons for the sale of tobacco products. Indeed, on numerous occasions, the General Assembly has considered and declined to enact measures with language virtually identical to the Promotion Ordinance. *See, e.g.*, H.R. 7700, 2010 Leg., Jan. Sess. (R.I. 2010); S. 2576, 2010 Leg., Jan. Sess. (R.I. 2010); H.R. 5551, 2009 Leg., Jan. Sess. (R.I. 2009); S. 742, 2009 Leg., Jan. Sess. (R.I. 2009); H.R. 7500, 2006 Leg., Jan. Sess. (R.I. 2006); S. 2621, 2006 Leg., Jan. Sess. (R.I. 2006).[12]

[12] For example, in 2009, both the House bill and the Senate bill proposed to restrict licensed tobacco retailers from: (i) "[s]ell[ing] or distribut[ing] a tobacco product for commercial purposes for free or . . . at a nominal or discounted price," H.R. 5551 §§ 1(a)(1), 1(c); (ii) "[d]istribut[ing] any coupon or other item redeemable by buyers in this state to obtain a tobacco product for free or . . . at a nominal or discounted price," *id.* §§ 1(a)(2), 1(c); (iii) [a]ccept[ing] or redeem[ing], offer[ing] to accept or redeem, or caus[ing] or hir[ing] any person to accept or redeem or offer to accept or redeem any coupon for providing members of the general public any tobacco product for free or . . . at a nominal or discounted price," *id.* §§ 1(a)(3), 1(c); (iv) "[c]aus[ing], requir[ing], or induc[ing] any person or persons to buy more than one pack or carton of cigarettes or one package of any other tobacco product at a time by reducing the price of the additional packs," *id.* § 1(a)(4); and (v) "[d]istribut[ing], sell[ing] or offer[ing] for distribution or sale any cigarettes or other tobacco product for free or through a two-packs-for-the-price-of-one, buy-two-get-one-free, buy-two-cartons-get-one-free, or any similar arrangement." *Id.* § 1(a)(7).

The Promotion Ordinance is an attempt to revise regulatory lines carefully drawn by the General Assembly with regard to the use of coupons and discounts for tobacco products. Rhode Island municipalities are forbidden from making such revisions. Accordingly, the Promotion Ordinance is preempted by Rhode Island law.

B. The Flavor Description Ordinance Violates The Constitution And Laws Of The United States And Rhode Island.

1. The Flavor Description Ordinance Violates The First Amendment.

The Flavor Description Ordinance impermissibly restricts speech in two ways. First, the Flavor Description Ordinance's ban is triggered by *speech*, expressly providing that "[a] *public statement or claim* . . . shall constitute presumptive evidence that the tobacco product is a flavored tobacco product." Providence Code of Ordinances, § 14-308 ¶ 6 (emphasis added). The Flavor Description Ordinance provides that a product will not be determined to have a prohibited flavor "solely because of the use of additives or flavorings." *See id.* ¶ 3. Rather, it presumptively bans products based on what Plaintiffs *say* about them.

Second, the Flavor Description Ordinance prohibits any reference to an open-ended, non-exclusive list of "concepts" or "tastes or aromas" to describe tobacco products.[13] No one knows the full list of the "concepts" that can never be referenced in describing a product because the Ordinance prohibits "concepts, *such as* spicy, arctic, ice, cool, warm, hot, mellow, fresh, and breeze." *Id.* (emphasis added). And, indeed, under one possible reading of the Ordinance,

[13] If the Flavor Description Ordinance were interpreted to prohibit using the specified "concepts" to describe otherwise permissible "tobacco, menthol, mint or wintergreen" flavored products, then the constitutional error would be even clearer. Under the doctrine of constitutional avoidance, however, "when 'a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [a court's] duty is to adopt the latter.'" *Harris v. United States*, 536 U.S. 545, 555 (2002) (quoting *United States ex rel. Att'y Gen. v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909)).

reference to a "concept" on this amorphous list would be prohibited even where the underlying product is seemingly exempt from the Ordinance. For example, it would prohibit Plaintiffs from truthfully describing menthol products as having a "cool" flavor.

These speech restrictions cannot survive *Central Hudson* scrutiny. First, the speech restrictions do not further a substantial governmental interest. Because Rhode Island law already bans the sale of tobacco products to persons under eighteen years old, *see* R.I. Gen. Laws § 11-9-13.8, the only plausible purpose is to interfere with the right of *adults* to receive information describing lawful tobacco products. However, the Supreme Court has held repeatedly that "the fear that people would make bad decisions if given truthful information cannot justify content-based burdens on speech." *Sorrell*, 131 S. Ct. at 2670–71 (internal quotation marks omitted). Thus, "the State may not seek to remove a popular but disfavored product from the marketplace by prohibiting truthful, nonmisleading advertisements . . . . That the State finds expression too persuasive does not permit it to quiet the speech or to burden its messengers." *Id.* at 2671; *see also 44 Liquormart*, 517 U.S. at 501 (plurality op.) (there is no "vice" exception under the First Amendment). Nor does the First Amendment tolerate bans of communications with adults about lawful products, simply to affect the behavior of youth unauthorized to purchase these products. *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 (1983) ("The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox."); *see also Sorrell*, 131 S. Ct. at 2671; *Reilly*, 533 U.S. at 571.

Second, even if the Flavor Description Ordinance could be said to be directed at underage tobacco use, it is unconstitutional. As in all commercial speech cases, "the State bears the burden of showing not merely that its regulation will advance its interest, but also that it will do so 'to a material degree.'" *44 Liquormart*, 517 U.S. at 505 (plurality op.) (quoting *Edenfield*,

507 U.S. at 771). "Consequently, the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose." *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 188 (1999) (internal quotation marks omitted). Here, Rhode Island law already bans the sale of tobacco products to persons under eighteen years old, and the public possession or use of tobacco by those persons. *See* R.I. Gen. Laws §§ 11-9-13.8, 11-9-14. Will the *additional* restrictions of the Flavor Description Ordinance "*significantly* reduce" youth tobacco use? *44 Liquormart*, 517 U.S. at 505 (plurality op.). There is nothing in the legislative record to so indicate. *See* Reynolds Decl. ¶¶ 72–74.

Third, the City of Providence cannot show that the Flavor Description Ordinance is "narrowly tailored." Like the Promotion Ordinance, the Flavor Description Ordinance is "over-inclusive" and thus fails to reflect a "careful[] calculat[ion] [of] the costs and benefits associated with the burden on speech imposed." *Reilly*, 533 U.S. at 561 (citation omitted). The Ordinance bans a wide variety of flavors and aromas without regard to whether they have been demonstrated to have any particular appeal to youth when used in a tobacco product. Likewise, the Ordinance vaguely bans reference to "concepts" with no limiting principle on whether those concepts will appeal to underage youth.

While some studies speculate that certain descriptions of tobacco products may attract underage youth, *see* Reynolds Decl. ¶ 76, the Ordinance reflects no effort to focus on those particular examples. The scientific literature does not remotely support a ban of the Ordinance's breadth. *See id.* ¶¶ 72–77. The First Amendment strikes down laws when only a subset of the banned speech serves a substantial state interest. *See, e.g.*, *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 481-86 (1989).

Moreover, the Supreme Court has "made clear" that "if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so." *W. States Med. Ctr.*, 535 U.S. at 371. As with the Promotion Ordinance, the City of Providence cannot show why "numerous and obvious less-burdensome alternatives to the restriction on commercial speech," *BellSouth Telecomms., Inc. v. Farris*, 542 F.3d 499, 509 (6th Cir. 2008), would not further the City's interest at least as well as the Flavor Description Ordinance. Dr. Reynolds explained these many alternatives. The City could take additional steps to enforce existing laws on the sale and use of tobacco products or engage in a counter-marketing campaign. Reynolds Decl. ¶¶ 78, 82. As important, the people of Rhode Island could take measures to address the principal causes of underage initiation and use: peer and parental imitation. *Id.* ¶¶ 78–80. Moreover, if Rhode Island and its political subdivisions want to curb underage tobacco use, they should make underage possession illegal in all settings. *Id.* ¶ 78; R.I. Gen. Laws § 11-9-14. But Providence left these and other measures unexplored.

Finally, the Flavor Description Ordinance is unconstitutionally vague. The First and Fourteenth Amendments require laws to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Vague laws are particularly troubling where, as here, they "abut[] upon sensitive areas of basic First Amendment freedoms," because they chill speech by pushing the regulated parties to steer "far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Id.* (internal quotation marks and citations omitted). Here, the Flavor Description Ordinance bans a non-exhaustive list of "tastes" and "aromas"—*i.e.*, a list "*including, but not limited to*," the enumerated flavors. Providence Code of Ordinances, § 14-308 ¶ 3 (emphasis added). It likewise bans a non-exhaustive list of "concepts *such as* spicy,

arctic, ice, cool, warm, hot, mellow, fresh, and breeze." *Id.* (emphasis added). It is, therefore, impossible for regulated parties to know whether any particular "taste," "aroma," or "concept" not expressly listed will run afoul of the law. Such open-ended regulations of speech are constitutionally intolerable. *See Reno v. ACLU*, 521 U.S. 844, 884–85 (1997).

Whatever evidence the City may marshal to link particular descriptions of certain flavors in tobacco products to underage initiation and use, it will not support a speech ban of the Flavor Description Ordinance's breadth and vagueness. No genuine issue of material fact is presented here. Summary judgment for the Plaintiffs is required.

2. The Flavor Description Ordinance Is Preempted By The FSPTCA.

On June 22, 2009, Congress enacted the FSPTCA, Pub. L. No. 111-31, 123 Stat. 1776 (June 22, 2009) (codified at 15 U.S.C. §§ 1331-1340, 15 U.S.C. §§ 4401-4408, 21 U.S.C. §§ 387-387u). The FSPTCA amends the Federal Food, Drug and Cosmetic Act to add a new Chapter IX, titled "Tobacco Products," that applies to "all cigarettes, cigarette tobacco, roll-your-own tobacco, and smokeless tobacco." 21 U.S.C. § 387a(b). Its stated purposes include:

- to grant to the Food and Drug Administration ("FDA") broad power "to regulate tobacco products," including "regulatory authority with respect to the manufacture, marketing, and distribution of tobacco products";
- "to authorize the [FDA] to set national standards controlling the manufacture of tobacco products and the identity, public disclosure, and amount of ingredients used in such products";
- "to continue to permit the sale of tobacco products to adults in conjunction with measures to ensure that they are not sold or accessible to underage purchasers"; and

- "to ensure that the [FDA] has the authority to address issues of particular concern to public health officials, especially the use of tobacco by young people . . . ."

21 U.S.C. § 387 note.

Congress expressly preempted any state or local regulation that sets forth requirements "different from, or in addition to," any of the FSPTCA's requirements relating to, among other things, the federal "tobacco product standards" and tobacco product "labeling." *See* 21 U.S.C. § 387p(a)(2)(A) (the "Preemption Clause"). The Preemption Clause makes it possible for tobacco manufacturers to focus on complying with a single set of product specifications and labeling requirements, nationwide—rather than having to grapple with potentially hundreds of different requirements set by different states and localities governing the same set of products.

Because the Flavor Description Ordinance attempts to establish local requirements that are "different from" and "in addition to" federal requirements related to tobacco product standards and tobacco product labeling, the Ordinance is expressly preempted by the FSPTCA.

a. Federal Tobacco Product Standards Preempt The Flavor Description Ordinance.

Section 907 of the FSPTCA, titled "Tobacco Product Standards," establishes federal control over what types of tobacco products may be sold in the United States by providing for federal "tobacco product standards" governing, among other things, "the construction, components, ingredients, additives, constituents, including smoke constituents, and properties of the tobacco product." 21 U.S.C. § 387g(a)(4)(B)(i). A tobacco product that fails to conform to an applicable tobacco product standard is an "adulterated" product, which may not be sold in the United States. *Id.* §§ 387b(5), 331(a), (c).

Congress established certain tobacco product standards directly in the FSPTCA, and it granted the FDA power to "revise the tobacco product standards," or to adopt additional tobacco

product standards, including tobacco product standards for smokeless tobacco. *See id.* § 387g(a)(2), (3). Before promulgating or revising any tobacco product standard, the FDA must find that the new standard is "appropriate for the protection of the public health." *Id.* § 387g(a)(3)(A). The FDA must consider scientific and other evidence concerning, among other things, (1) "the risks and benefits to the population as a whole, including users and nonusers of tobacco products, of the proposed standard," *id.* § 387g(a)(3)(B)(i), and (2) "the countervailing effects of the tobacco product standard . . . such as the creation of a significant demand for contraband . . . ." *Id.* § 387g(b)(2).

The FSPTCA contains a federal tobacco product standard that prohibits *cigarettes* that "contain, as a constituent . . . or additive, an artificial or natural flavor (other than tobacco or menthol) or an herb or spice, . . . that is a characterizing flavor of the tobacco product or its smoke," and lists several prohibited examples such as various fruit or candy flavors. *See id.* § 387g(a)(1) (the "Federal Flavor Standard"). Congress elected to expressly limit this prohibition only to "a cigarette or any of its component parts"—the Federal Flavor Standard does not apply to smokeless tobacco or other non-cigarette tobacco products. *Id.*

The Flavor Description Ordinance violates the Preemption Clause because it extends the scope of the Federal Flavor Standard to non-cigarette tobacco products, including smokeless tobacco, thereby establishing a requirement "different from" and "in addition to" the flavor requirements set by Congress. *Id.* § 387p(a)(2)(A).

In addition to extending the Federal Flavor Standard beyond cigarettes, the Flavor Description Ordinance also sets forth requirements "different from" and "in addition to" the Federal Flavor Standard, *see id.*, because the Federal Flavor Standard applies only to cigarettes that actually "contain, as a constituent . . . or additive" an ingredient that imparts a

"characterizing flavor." *Id.* § 387g(a)(1). By contrast, the Flavor Description Ordinance presumptively applies to any tobacco product publicly *described* as containing a "characterizing flavor"—or by descriptive "*concepts* such as spicy, arctic, ice, cool, warm, hot, mellow, fresh, and breeze"—regardless of the product's constituents. *See* Providence Code of Ordinances, § 14-308 (emphasis added).

b. Federal Labeling Requirements Preempt The Flavor Description Ordinance.

Separately, the federal Government carefully and extensively has regulated tobacco product labeling. The FSPTCA itself imposes many affirmative labeling requirements on tobacco products. *See, e.g.*, 21 U.S.C. § 387c(a) (requiring that labels state the name and place of the manufacturers, product count, and net weight, among other things); *id.* § 387k(b)(2) (barring certain label statements and descriptors suggesting that a tobacco product bears a "modified risk," without pre-approval from the FDA). Importantly, the Act requires all smokeless tobacco product labels to bear specified health warning statements and specifies the font, placement, and content of those statements. *See* 15 U.S.C. § 4402(a). The FDA has authority to impose additional labeling requirements and has done so. *See* 21 U.S.C. § 387a-1. For example, the FDA has banned references to certain brand names of non-tobacco products on the labels of smokeless tobacco packages. *See* 21 C.F.R. § 1140.16. The FDA also has the authority to modify the labeling requirement of mandated health warnings. *See* 15 U.S.C. § 4402(d). To protect the national uniformity of the federal labeling requirements, the Preemption Clause expressly preempts any state or local requirements that are "different from, or in addition to" federal requirements "relating to . . . labeling." 21 U.S.C. § 387p(a)(2)(A).

By prohibiting certain "public statements," including on tobacco product labels, the Flavor Description Ordinance imposes local labeling requirements that are different from and in

addition to federal labeling requirements. Specifically, the Flavor Description Ordinance prohibits "public statements" that associate certain tobacco products with "concepts such as spicy, arctic, ice, cool, warm, hot, mellow, fresh, and breeze," as well as references to an open-ended list of "tastes or aromas." Providence Code of Ordinances, § 14-308 ¶¶ 3, 6. Many of the Plaintiffs' product labels include references to "concepts," "tastes," or "aromas" that are not prohibited by federal labeling requirements. *See* Declaration of Andrew Kerstein, dated Feb. 15, 2012 ¶ 5 ("Kerstein Decl.") (attached as Ex. 16); Declaration of Craig P. Williamson, dated Feb. 15, 2012 ¶ 5 ("Williamson Decl.") (attached as Ex. 17); Begley Decl. ¶¶ 24–26; *see also* Karrow Decl. ¶¶ 19–21. The Flavor Description Ordinance will require the Plaintiffs to create special labels for Providence, Rhode Island, in order to comply with the City's labeling requirements. *See* Kerstein Decl. ¶ 5; Williamson Decl. ¶ 5; Karrow Decl. ¶ 23; Begley Decl. ¶ 28. Because of Providence's imposition of a labeling requirement, manufacturers will not be able to create one label for nationwide distribution of a tobacco product. Rather, if the Flavor Description Ordinance and other state and local regulations concerning how a tobacco product is described on its label are permitted, manufacturers may be required to create as many labels as there are states and cities. That would destroy the national uniformity for tobacco product labeling that Congress intended, and it is yet an additional reason why the Flavor Description Ordinance is expressly preempted by the FSPTCA.

c. The FSPTCA's Saving Clause Does Not Save The Flavor Description Ordinance From Preemption.

The Flavor Description Ordinance is crafted as a prohibition on the *sale* of tobacco products that contain certain characterizing flavors or are described in certain ways. The City likely will argue that, as a result of this artful drafting, the Flavor Description Ordinance is protected by the Saving Clause, a limited exception to the Preemption Clause. The Saving

Clause exempts from preemption certain types of state and local requirements, including those "relating to the sale" of tobacco products. 21 U.S.C. § 387p(a)(2)(B) (the "Saving Clause"). And the City likely will rely on the decision of the United States District Court for the Southern District of New York in *U.S. Smokeless Tobacco Mfg. Co. v. City of New York*, No. 09 Civ. 10511, 2011 WL 5569431 (S.D.N.Y. Nov. 15, 2011)—currently pending on appeal—in which the district court declined to hold a New York City ordinance prohibiting certain flavored tobacco products preempted by the FSPTCA.

But the interpretation of the Saving Clause adopted by the district court in *U.S. Smokeless* is belied by the language, structure and purpose of the FSPTCA, as well as by the reasoning of the Supreme Court in a recent opinion decided after *U.S. Smokeless* that rejects essentially the same argument. *National Meat Ass'n v. Harris*, 132 S. Ct. 965 (2012).

The Supreme Court has made clear that courts must read saving clauses to work in harmony with the corresponding preemption clauses, not to "upset the careful regulatory scheme established by federal law." *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 870 (2000) (citation omitted). And reading of the FSPTCA's Saving Clause to allow for local sales bans based on a tobacco product's contents, constituents or labeling unquestionably would upset the "careful regulatory scheme" established by the FSPTCA. *Id.* If the Saving Clause were read this broadly, a state or local government effectively could impose its own requirements for tobacco product content or labeling merely by prohibiting the sale of products whose content and labels comply with the federal standards. And if one local government can do that, then any or all can, creating a nationwide patchwork quilt of conflicting standards that would utterly vitiate Congress's express intent to "set *national* standards controlling the manufacture of tobacco

products and the identity, public disclosure, and amount of ingredients used in such products." *See* 21 U.S.C. § 387 note (emphasis added).

The Preemption Clause would be rendered a mere inconvenience to be cleverly drafted around. There is no real-world difference between establishing local standards "different from" or "in addition to" the federal standards, which are plainly preempted, and banning the sale of products that do not comply with a state or local government's more stringent standards.

For example, the FSPTCA authorizes the FDA to set standards governing the amount of nicotine contained in tobacco products. 21 U.S.C. § 387g(a)(4)(A)(i). Allowing states and localities to establish more stringent nicotine requirements than the federal standard simply by banning the *sale* of tobacco products that contain more nicotine than the state wishes would lead to disparate nicotine requirements nationwide, far from Congress's express goal of "set[ting] uniform *national* standards." *See* 21 U.S.C. § 387 note (emphasis added). Similarly, despite Congress's decision to create a national process for premarket review of new tobacco products, *see* 21 U.S.C. § 387j—and to preempt states from requiring any different or additional measures with respect to premarket review, *see* 21 U.S.C. § 387p(a)(2)(A)—states and localities could undercut this federal system by prohibiting the sale of any new products that have not been vetted through their own, unique premarket review process.

Barely two months ago, after the district court's decision in *U.S. Smokeless*, a unanimous Supreme Court rejected a highly similar attempt by a local government to use a sales ban to skirt federal preemption. In *Harris*, 132 S. Ct. at 965, the Supreme Court held that states and localities cannot evade express federal preemption by using sales restrictions to achieve more stringent operational standards than those set forth by federal law. *Harris* involved the scope of a preemption clause in the Federal Meat Inspection Act ("FMIA"), which regulates the activities

of slaughterhouses. Like the FSPTCA, the FMIA contains an express preemption clause that prohibits states from promulgating standards (for the operation of slaughterhouses) that are "in addition to, or different than those made under this [Act]." *Id.* at 969 (quoting 21 U.S.C. § 678). Although the FMIA authorized slaughterhouses to receive and slaughter nonambulatory animals in certain circumstances, the California statute imposed a ban on buying or selling nonambulatory animals, effectively undermining the federal law. The Court held that the state statute was preempted by the FMIA, even though "the FMIA's preemption clause does not usually foreclose state regulation of the commercial sales activities of slaughterhouses." *Id.* at 972. Justice Kagan, writing for a unanimous court, explained:

> [T]he sales ban . . . functions as a command to slaughterhouses to structure their operations in the exact way [that California wanted, and that was precluded by the FMIA]. And indeed, if the sales ban were to avoid FMIA's preemption clause, then any State could impose any regulation on slaughterhouses just by framing it as a ban on the sale of meat produced in whatever way the State disapproved. That would make a mockery of the FMIA's preemption provision.

Id. at 973.

Here, as in *Harris*, "if the [Flavor Description Ordinance's] sales ban were to avoid the [FSPTCA's] preemption clause, then any State could impose any regulation on [tobacco product contents or labeling] just by framing it as a ban on the sale of [tobacco products] produced [or labeled] in whatever way the State disapproved." *Harris*, 132 S. Ct. at 973. And as the Supreme Court has observed, "if one State or political subdivision may enact such rules, then so may any other; and the end result would undo Congress's carefully calibrated regulatory scheme." *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 255 (2004).

The broader statutory scheme of the FSPTCA confirms that local laws like the Flavor Description Ordinance are preempted. That statute makes clear that the federal tobacco product standards and labeling requirements were intended to govern what products can be *sold* in the

United States—and not simply what products can be manufactured here. A tobacco product that fails to conform to an applicable tobacco product standard is an "adulterated" product, 21 U.S.C. § 387b(5), and a tobacco product that fails to comply with federal labeling requirements is a "misbranded" product, *id.* § 387c(a)(9). *Sales* of adulterated or misbranded products in the United States are prohibited. *See id.* § 331(a), (c). But the FDCA expressly permits, within limits, the domestic *manufacture* of tobacco products and packages that do not comply with federal tobacco product standards or labeling requirements, provided such products are intended exclusively for export to countries where they lawfully may be sold. *See id.* § 381(e)(1) (excluding from the definitions of "adulterated" and "misbranded" products items intended for export that conform to the law of the country in which they are to be sold and the specifications of the purchaser, are not sold or offered for sale in domestic commerce, and are labeled as intended for export). And, conversely, products lawfully manufactured in another country that do not conform to federal tobacco product standards or labeling requirements may not be sold in the United States. *See id.* § 331(a), (c). Given this statutory scheme, Congress clearly intended to implement uniform, national standards governing the content and labeling of tobacco products *sold* in the United States. Accordingly, it defies logic that Congress would have intended, through the Saving Clause, to allow the states to undermine this uniform federal system by implementing sales bans such as the Flavor Description Ordinance.

The plain language of the Saving Clause and surrounding provisions also confirms that Congress did not intend to authorize state and local evasion of federal standards through the use of sales bans. The Saving Clause protects state and local "requirements relating to the sale, distribution, possession, information reporting to the State, exposure to, access to, the advertising and promotion of, or use of, tobacco products by individuals of any age." *Id.* § 387p(a)(2)(B).

But the sale provision is part of a series and where words in a statute appear in a series, they must be interpreted as having related meanings. *See, e.g.*, *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995) (applying the *noscitur a sociis* canon of statutory construction). Each of the eight areas in this series that are saved from preemption relate to activities taken with respect to finished tobacco products, and only after Congress or the FDA has decided that the sale of such product in the United States is lawful. This contrasts with the eight areas listed in the Preemption Clause, which principally relate to the content, composition, and labeling of tobacco products. *See* 21 U.S.C. § 387p(a)(2)(A) (preempting state and local measures relating to "tobacco product standards, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards, or modified risk tobacco products"). The Flavor Description Ordinance falls in the latter category.

Also, when Congress wanted to give states the authority to *prohibit* sales of tobacco products, it said so expressly: Just two paragraphs before the Saving Clause—in the very same Section of the Act—Congress explicitly preserved states' authority to enact laws "relating to *or prohibiting*" sales, except as preempted by the Preemption Clause. *Id.* § 387p(a)(1) (the "Preservation Clause") (emphasis added). Congress's decision to use "relating to or prohibiting" sales in the Preservation Clause, but to omit the "or prohibiting" language from the nearly identical phrase in the Saving Clause just three sentences later, demonstrates that it did not intend to save for the states the power to prohibit sales of tobacco products that comply with federal standards. Instead, the Saving Clause preserves the traditional authority of state and local governments to regulate how, when, where, and to whom, such products may be sold.

Finally, while the Flavor Description Ordinance contains a limited exception, allowing for sales of tobacco products that contain—or that are described as containing—characterizing

flavors in a "smoking bar," Providence Code of Ordinances, §§ 14-308 ¶ 6, 14-309, this meaningless exception does not transform the Flavor Description Ordinance into an acceptable time, place or manner restriction. The applicable definition of a "smoking bar" is extraordinarily narrow, applying only to businesses "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." *Id.* § 14-308 ¶ 9 (incorporating R.I. Gen. Laws § 23-20.10-2(15)). Because there are only *two* licensed tobacco bar establishments in the entire City of Providence believed to have flavored smokeless tobacco or flavored cigars of any kind for sale, *see* Zambarano Decl. ¶¶ 4–12 ; Laquerre Decl.¶¶ 2–16, the Flavor Description Ordinance makes it impracticable, if not impossible, for consumers to purchase flavored tobacco products. Accordingly, the Flavor Description Ordinance constitutes a *de facto* ban on the sale of flavored products that is expressly preempted by the FSPTCA.

The Court should grant summary judgment that the Flavor Description Ordinance is preempted by the FSPTCA.

3. The Flavor Description Ordinance Violates The Rhode Island Constitution.

As with the Promotion Ordinance, the Providence City Council lacked authority under the Rhode Island Constitution to adopt the Flavor Description Ordinance. Business licensing is a matter of statewide concern committed to the exclusive authority of the General Assembly. *See* R.I. Const. art. XIII, §§ 2, 4; *Newport Amusement Co.*, 166 A.2d at 218; *see also supra* Section I.A.3. The Rhode Island General Assembly has not delegated authority to municipalities to establish their own local tobacco licensing regimes. The City of Providence ignored this restriction when setting up its tobacco retailer licensing system.

The City also ignored this constitutional limitation when adding the Flavor Description Ordinance to that same unconstitutional tobacco retailer licensing scheme. *See* Providence Code of Ordinances, §§ 14-308–14-310 ("Article XV of Chapter 14 of the Code of Ordinances . . . is hereby amended by adding thereto the following."). The Flavor Description Ordinance expressly provides that it is to be enforced through the issuance of "citation[s] that will require the tobacco dealer's license holder to appear . . . before the [Providence] Board of Licenses." *Id.* § 14-310.

Like the Promotion Ordinance, the Flavor Description Ordinance was added to a local licensing scheme that is itself unconstitutional, and therefore, the Flavor Description Ordinance is also unconstitutional. Summary judgment should be granted.

II. PLAINTIFFS ARE ENTITLED TO A PRELIMINARY INJUNCTION AGAINST ENFORCEMENT OF THE ORDINANCES.

The City has agreed to stay enforcement of the Ordinances until July 30, 2012. If the Court needs additional time to bring this case to final judgment, the Court should preliminarily enjoin the Ordinances' enforcement. Courts consider four factors when deciding whether to grant a preliminary injunction: (1) plaintiffs' likelihood of success on the merits; (2) the anticipated irreparable harm absent a preliminary injunction; (3) whether the threatened hardship to plaintiffs outweighs any potential harm to defendants and third parties; and (4) the public interest. *Mercado-Salinas v. Bart Enters. Int'l, Ltd.*, _ F.3d _, 2011 WL 6350535, at *6 (1st Cir. Dec. 20, 2011); *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 15 (1st Cir. 1996). Each of these factors weighs decisively in favor of granting a preliminary injunction.

A. Plaintiffs Are Likely To Succeed On The Merits Of Their Challenges To The Ordinances.

Of the four factors to be considered by the Court on a motion for preliminary relief, "likelihood of success carries particular weight." *Nat'l Org. for Marriage v. Daluz*, 654 F.3d 115, 117 (1st Cir. 2011); *see New Comm Wireless Servs., Inc. v. SprintCom, Inc.*, 287 F.3d 1, 9

(1st Cir. 2002) ("The sine qua non of this four-part inquiry is likelihood of success on the merits."). Indeed, "the probability-of-success component in the past has been regarded by [the First Circuit] as critical in determining the propriety of injunctive relief." *Lancor v. Lebanon Hous. Auth.*, 760 F.2d 361, 362 (1st Cir. 1985).

For all the reasons set forth in Section I of this memorandum, Plaintiffs are likely to succeed on the merits.

B. Plaintiffs Will Suffer Irreparable Harm Absent A Preliminary Injunction.

The question of "irreparable harm . . . necessarily turns on whether . . . the requirement[] at issue [is] likely to be constitutional or unconstitutional." *Planned Parenthood League of Mass. v. Bellotti*, 641 F.2d 1006, 1023 (1st Cir. 1981). Here, Plaintiffs have established a likelihood of success as to a number of constitutional claims, including claims that the Ordinances violate Plaintiffs' First Amendment rights. "'[T]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Asociación de Educación Privada de Puerto Rico v. Garcia-Padilla*, 490 F.3d 1, 21 (1st Cir. 2007) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality op.)). Plaintiffs also will suffer irreparable injury from enforcement of an ordinance that violates the Supremacy Clause of the U.S. Constitution because it is preempted by federal law. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992) (holding that injunctive relief was warranted where local law enforcement officials threatened to apply a state statute in the face of a preemptive federal law).

In addition to resulting in these constitutional deprivations, enforcement of these invalid Ordinances will impose economic harm on the Plaintiffs. The manufacturer Plaintiffs would need to expend significant sums to delete from their packaging and advertising the references to "concepts," "tastes," and "aromas" forbidden by the Flavor Description Ordinance in order to

continue selling those products in the City. *See* Karrow Decl. ¶ 23; *see also* Begley Decl. ¶ 28. The Manufacturer Plaintiffs develop their packaging and labels for nationwide distribution: Creating and implementing "Providence-only" materials would cost substantial amounts of money and employee hours in design costs and distribution inefficiencies. *See* Karrow Decl. ¶ 23. Plaintiffs National Association of Tobacco Outlets's and Cigar Association of America's members likewise would need to change their policies and practices, resulting in reduced sales. The Promotion Ordinance also would involve significant implementation costs as the Plaintiffs seek to bring their price advertising and promotional materials into compliance. *See* Kerstein Decl. ¶ 4; Williamson Decl. ¶ 4; Karrow Decl. ¶ 12. Hampered by the Promotion Ordinance in their ability to communicate price and certain promotional discounts to consumers and to compete with their competitors, the Plaintiffs face lost sales and lost revenue. *See* Kerstein Decl. ¶ 4; Williamson Decl. ¶ 4; Karrow Decl. ¶ 8; Begley Decl. ¶ 20.

Although these harms are economic, they also are "irreparable." Because the City—a governmental entity—is causing the damages to the Plaintiffs, it may prove ultimately impossible for Plaintiffs to recover damages from the City. Many judicial doctrines protect the City from damages awards. Accordingly, courts have held that "where, as here, the plaintiff . . . cannot recover damages . . . due to the defendant's sovereign immunity, any loss of income suffered by a plaintiff is irreparable *per se*." *Feinerman v. Bernardi*, 558 F. Supp. 2d 36, 51 (D.D.C. 2008); *see also Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 771 (10th Cir. 2010); *Cal. Pharmacists Ass'n v. Maxwell–Jolly*, 563 F.3d 847, 849, 852 (9th Cir. 2009), *vacated due to changed circumstances, sub nom. Douglas v. Indep. Living Ctr. of S. California, Inc.*, 132 S. Ct. 1204 (2012); *Temple Univ. v. White*, 941 F.2d 201, 215 (3d Cir. 1991). Likewise, out-of-pocket costs incurred from compliance with an invalid law or regulation

are irreparable. *See, e.g.*, *Bracco Diagnostics, Inc. v. Shalala*, 963 F. Supp. 20, 29 (D.D.C. 1997) (finding that ongoing out-of-pocket costs, while "admittedly economic" in nature, nonetheless amount to irreparable injury warranting a preliminary injunction where "there is 'no adequate compensatory or other corrective relief' that can be provided at a later date").

C. The Threatened Hardship To Plaintiffs Outweighs Any Potential Harm To Defendants Or Third Parties.

Absent a preliminary injunction, Plaintiffs will suffer serious and irreparable harm, as described above. By contrast, Defendants and third parties cannot show any comparatively meaningful harm that they might suffer if enforcement of these unconstitutional and invalid Ordinances is preliminarily enjoined.

Where a "plaintiff shows a substantial likelihood that the challenged law is unconstitutional, no substantial harm to others can be said to inhere in its enjoinment." *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville*, 274 F.3d 377, 400 (6th Cir. 2001). In addition, whereas a "burden on protected speech always causes some degree of irreparable harm" to the party whose speech is restricted, *see Black Tea Soc'y v. City of Boston*, 378 F.3d 8, 15 (1st Cir. 2004), "[t]he main hardship to the [City] is a delay in the application of the [Ordinances]," *IMS Health Corp. v. Rowe*, 532 F. Supp. 2d 153, 181–82 (D. Me. 2008), *rev'd sub nom. IMS Health Inc. v. Mills*, 616 F.3d 7 (1st Cir. 2010), *vacated sub nom. Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011). That delay, however, merely reflects "[t]he traditional function of the preliminary injunction," which "is to preserve the status quo." *Crowley v. Local No. 82, Furniture & Piano Moving*, 679 F.2d 978, 995 (1st Cir. 1982), *rev'd*, 467 U.S. 526 (1984).

Importantly, Rhode Island already has laws and regulations in place to prevent the sale of tobacco products to minors, as well as to prevent the use of coupons or discounts for tobacco products by minors. *See supra* pp. 21–23. The City of Providence has existed for 378 years,

without the benefit of the Promotion and Flavor Description Ordinances. It is difficult to contend that the City's claimed interest will be imperiled if the status quo is preserved should this Court require time beyond July 30, 2012 to resolve the serious constitutional issues in this case.

D. The Public Interest Requires A Preliminary Injunction.

Finally, the public interest can never be served by the enforcement of an unconstitutional law. *See Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008) ("[I]t is always in the public interest to protect constitutional rights."); *Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1237 (10th Cir. 2005) ("Vindicating First Amendment freedoms is clearly in the public interest."); *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 974 (9th Cir. 2002) ("Courts considering requests for preliminary injunctions have consistently recognized the significant public interest in upholding First Amendment principles."); *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights.").

Here, the public interest is served by enjoining enforcement of ordinances that violate the United States and Rhode Island Constitutions, as well as federal and state law.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter summary judgment declaring the Promotion Ordinance and the Flavor Description Ordinance null and void and permanently enjoining enforcement of the Ordinances. In the event that the Court requires time beyond July 30, 2012 to bring the case to final judgment, Plaintiffs respectfully request that the Court preliminarily enjoin enforcement of the Ordinances.

Dated: March 30, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 30th day of March, 2012, the within Memorandum was served upon all counsel of record through this Court's electronic filing system as identified on the Notice of Electronic filing, and paper copies will be sent to those indicated as nonregistered participants.

/s/ John B. Daukas