No. 13-1053

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NATIONAL ASSOCIATION OF TOBACCO OUTLETS, INC.; CIGAR ASSOCIATION OF AMERICA, INC.; LORILLARD TOBACCO COMPANY; R.J. REYNOLDS TOBACCO COMPANY; AMERICAN SNUFF COMPANY; PHILIP MORRIS USA INC.; U.S. SMOKELESS TOBACCO MANUFACTURING COMPANY LLC; U.S. SMOKELESS TOBACCO BRANDS INC.; and JOHN MIDDLETON COMPANY,

Plaintiffs-Appellants,

v.

CITY OF PROVIDENCE, RHODE ISLAND; PROVIDENCE BOARD OF LICENSES; PROVIDENCE POLICE DEPARTMENT; MICHAEL A. SOLOMON, Providence City Council President, in his official capacity; STEVEN M. PARÉ, Commissioner of Public Safety for the City of Providence, in his official capacity; and ANGEL TAVERAS, Mayor of Providence, in his official capacity,

Defendants-Appellees.

On Appeal From The United States District Court
For The District Of Rhode Island

REPLY BRIEF FOR APPELLANTS

Noel J. Francisco
Counsel of Record
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
Telephone: (202) 879-3939

Counsel for Appellants R.J. Reynolds Tobacco Company and American Snuff Company

Miguel A. Estrada
Counsel of Record
Michael J. Edney
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
Telephone: (202) 955-8500

Counsel for Appellants Philip Morris USA Inc.; U.S. Smokeless Tobacco Manufacturing Company LLC; U.S Smokeless Tobacco Brands Inc.; and John Middleton Company

Kenneth J. Parsigian
LATHAM & WATKINS LLP
John Hancock Tower, 20th Floor
200 Clarendon Street
Boston, MA 02116
Telephone: (617) 880-4510

Counsel for Appellants Philip Morris USA Inc.; U.S. Smokeless Tobacco Manufacturing Company, LLC; U.S. Smokeless Tobacco Brands, Inc.; and John Middleton Company

Floyd Abrams
Counsel of Record
Joel Kurtzberg
CAHILL GORDON & REINDEL LLP
80 Pine Street
New York, NY 10005
Telephone: (212) 701-3120

Counsel for Appellant Lorillard Tobacco Company

Gerald J. Petros
Counsel of Record
Adam M. Ramos
HINCKLEY ALLEN & SCHNYDER LLP
50 Kennedy Plaza, Ste. 1500
Providence, RI 02903
Telephone: (401) 457-5212

Counsel for Appellant Cigar Association of America, Inc.

James R. Oswald
Counsel of Record
Kyle Zambarano
ADLER POLLOCK & SHEEHAN P.C.
One Citizens Plaza, 8th Floor
Providence, RI 02903
Telephone: (401) 274-7200

Counsel of Record for Appellant National Association of Tobacco Outlets, Inc.; Counsel for Appellants Lorillard Tobacco Company; R.J. Reynolds Tobacco Company; American Snuff Company; Philip Morris USA Inc.; U.S. Smokeless Tobacco Manufacturing Company LLC; U.S. Smokeless Tobacco Brands Inc.; and John Middleton Company

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INTRODUCTION

The City of Providence's bans on (1) tobacco coupons and multi-pack discounts and (2) flavored tobacco products violate both the United States Constitution and Rhode Island law. The district court's judgment upholding the City's Ordinances should be reversed.

The Promotion Ordinance's ban of tobacco coupons and certain discounts is preempted by federal law. The Labeling Act plainly reserves to the federal Government the authority to regulate the advertising and promotion of cigarettes, and federal courts have long held that this includes the type of coupons and discounts at issue in this case. Those same activities have been held to be protected by the First Amendment, but the district court did not even analyze whether the Promotion Ordinance withstands First Amendment scrutiny. The Ordinance countermands the Supreme Court's recent instruction that governments may not prohibit commercial communication with adults because they might find it persuasive. *See Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2671 (2011). And the Ordinance is only about adults, because Rhode Island law already prohibits the distribution and sale of tobacco coupons to youth, with or without a coupon or discount. The City's effort to revise the lines drawn by the General Assembly thus also is preempted by Rhode Island law.

The Flavor Ordinance bans many types of flavored tobacco products. It is apparent that the City Council thinks Congress did not go far enough when it banned certain flavored cigarettes, but not other flavored tobacco products, in the Family Smoking Prevention and Tobacco Control Act (the "FSPTCA"). That same Act, however, protects Congress's and the Food and Drug Administration's decisions to establish national tobacco product standards, including federal standards regulating what flavored tobacco products may be sold in the United States. There is nothing new about the City's argument that it is not regulating the composition of tobacco products, just their sale in Providence. The Supreme Court has rejected every similar State and local effort to circumvent preemption and to revise a federal requirement regarding product content and manufacturing, by using those characteristics to ban the "sale" of a product. The same result should obtain here.

In any event, both Ordinances are integrated into and exclusively enforced through the City's licensing scheme for tobacco retailers. The Rhode Island Supreme Court, however, has held that cities lack the authority to require business licensing and has invalidated municipal regulations enforced through local licensing schemes. The City's remarkable request that this Court revise the Rhode Island Supreme Court's determination of Rhode Island law should be rejected.

ARGUMENT

I. The Federal Labeling Act Preempts The Promotion Ordinance.

The City concedes that, under the Labeling Act, 15 U.S.C. § 1334(b), the Promotion Ordinance is a "prohibition" "based on smoking and health." *See* Br. of Appellees ("Resp. Br.") 20. It therefore argues that the Ordinance (1) is not "with respect to . . . promotion" of cigarettes, 15 U.S.C. § 1334(b),[1] or (2) is a permissible "time, place, or manner" restriction under 15 U.S.C. § 1334(c). It is wrong.

1. The City's argument that the Promotion Ordinance is not "with respect to . . . promotion" is foreclosed by the Ordinance itself, the admissions of the City's own experts, and relevant case law. The Ordinance defines prohibited "coupons" to include "any card, paper, note, form, statement, ticket or other issue distributed *for commercial or promotional purposes*." Providence Code of Ordinances § 14-300 (Br. Add. 41) (emphasis added). Likewise, the City's own expert admits that both "buy-three-get-three free ('six pack') discounts" and "coupons" are "promotions," Affidavit of Frank J. Chaloupka ("Chaloupka Aff.")

[1] Amici contend that the Labeling Act must be "[r]ead in harmony with the FSPTCA's Preservation and Savings Clauses." Brief of *Amici Curiae* American Academy of Pediatrics, et al. ("Preemption Amicus Br.") 20. Those provisions, however, apply only to regulations "under this subchapter," 21 U.S.C. § 387p(a)(2)(A); *id.* § 387p(a)(1)—i.e., "[Subchapter] IX – Tobacco Products" of the Federal Food, Drug and Cosmetic Act, codified at Chapter 9 of Title 21. The Labeling Act appears in another title of the U.S. Code entirely.

¶ 48 (JA 553–54). Every federal court previously to consider the issue had reached the same result. *See 23-34 94th St. Grocery Corp. v. N.Y.C. Bd. of Health*, 685 F.3d 174, 182 (2d Cir. 2012) ("Distribution of coupons . . . would obviously be classified as promotional activity [under the Labeling Act] as they further the sale of merchandise."); *Jones v. Vilsack*, 272 F.3d 1030, 1036 (8th Cir. 2001) ("[P]romotion" under the Labeling Act includes any "publicity" or "discounting" that "further[s] . . . the . . . sale of merchandise"); *Rockwood v. City of Burlington*, 21 F. Supp. 2d 411, 420 (D. Vt. 1998) (local law that "prohibits the distribution of . . . coupons" preempted by the Labeling Act).

The City also argues that the Labeling Act's legislative history and purpose trump the plain meaning of its words, *see* Resp. Br. 20–21, asserting that only restrictions imposing "diverse, nonuniform, and confusing cigarette labeling and advertising regulations" are preempted. But when a "statutory command" is "straightforward . . . , there is no reason to resort to legislative history." *United States v. Gonzales*, 520 U.S. 1, 6 (1997). Moreover, as the Eighth Circuit held, the "scant legislative history" of the Labeling Act is "decidedly unhelpful," because "Congress's reports" fail to "address . . . the meaning of 'promotion' in § 1334(b)." *Jones*, 272 F.3d at 1037; *see also 23-34 94th St. Grocery Corp.*, 685 F.3d at 181 ("We assume that the ordinary meaning of that language [i.e., the "language of the statute"] accurately expresses the legislative purpose.").

In any event, the Promotion Ordinance *does* pose a risk of impeding commerce by creating diverse, nonuniform, and confusing regulations. Appellant tobacco manufacturers engage in national promotions. Allowing one city among thousands to prohibit one common type of promotion would "lead to diverse, nonuniform and confusing regulations governing the promotion of cigarettes in contradiction to the express purpose of the preemption provisions of the [Labeling Act]." *R.J. Reynolds Tobacco Co. v. McKenna*, 445 F. Supp. 2d 1252, 1258 (W.D. Wash. 2006) (holding that local ban on sampling was preempted). This, therefore, is precisely the type of nonuniform regulation the Labeling Act condemns.

The City also attempts to distinguish *Jones* and *Rockwood* on the basis that, unlike the Promotion Ordinance, the statutes in those cases prohibited coupons for "free samples." Resp. Br. 21–22. But the City cannot explain why coupons for free samples are "promotions" but coupons for lower prices are not. The City also stresses that *Jones* and *Rockwood* concerned "*distribution* of coupons" rather than "coupon redemption and/or sales." *Id.* at 21. But this distinction has no effect on whether the coupons themselves are "promotional," and therefore played no role in the reasoning of *Jones* or *Rockwood*. The practical effect of the Promotion Ordinance, moreover, is to ban *all distribution* of coupons by retailers, since no rational retailer would (or probably could) distribute coupons that they are not permitted to redeem. *See* Br. 24–25.

2. The only question, therefore, is whether the Promotion Ordinance is saved by Section 1334(c), which allows localities to "impos[e] specific bans or restrictions on the time, place, and manner, but not content, of the advertising or promotion of any cigarettes." Section 1334(c) codifies First Amendment jurisprudence, which creates a limited exception to the First Amendment's ban on *speech* restrictions, but only where such speech restrictions are content-neutral. *See* Br. 20–21. The Promotion Ordinance does not fall within this limited exception.

As a threshold matter, if, as the City argues, the Promotion Ordinance is not a speech restriction, Resp. Br. 24, then Section 1334(c) is inapplicable. *See* Br. 20–21, 24. The "time, place, or manner" doctrine permits "the government [to] impose reasonable restrictions on the time, place, or manner of *protected speech*." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (emphasis added). Consequently, Section 1334(c) only saves local ordinances that (1) restrict *speech* and (2) would otherwise have been preempted under Section 1334(b). If, as the City asserts, the Ordinance does not restrict speech at all, then Section 1334(c) is irrelevant: the only question is whether the Ordinance is affirmatively preempted by Section 1334(b), which it is. The City does not respond to this argument.

Instead, it argues that First Amendment jurisprudence is irrelevant to interpreting Section 1334(c). *See* Resp. Br. 24. But "where Congress uses terms

that have accumulated settled meaning under the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *Neder v. United States*, 527 U.S. 1, 21 (1999). Here, the phrase at issue—"time, place, and manner"—has no pre-existing meaning or application outside of First Amendment jurisprudence. Indeed, if Section 1334(c) is *not* tied to the First Amendment, then the meaning of that provision is a mystery, which is why the City offers no alternative interpretation.

The City also asserts that, even if First Amendment jurisprudence applies, the Promotion Ordinance is content-neutral. But the Ordinance is content-based on multiple levels: It (1) singles out pro-tobacco promotion alone for disfavored treatment; (2) singles out a specific message within that category of promotion, namely, "purchase this product because this coupon or discount is giving you a deal"; and (3) targets not the secondary effects of advertising, but its primary effects—*i.e.*, its ability to persuade customers to purchase a product. *See* Br. 21–23 (citing cases). Indeed, the City's amici *concede* that the purpose of the ban is to encourage consumers to "avoid tobacco." Preemption Amicus Br. 7. Nor has the City attempted to assert a content-neutral basis for the ban, because none exists. Thus, at every level, the City's objections are to the commercial message that the Promotion Ordinance targets, not to some other, unarticulated content-neutral

problem that flows from the "time, place, or manner" in which the message is delivered.

The cases that the City cites prove this point, as all involved restrictions unrelated to content. In *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981), the court upheld a state fair rule prohibiting vendors from "s[elling] or distributi[ng] . . . any merchandise, including printed or written material" except from "fixed locations," which applied "to all exhibitors alike." *Id.* at 643, 649 & n.12. Likewise, in *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 295 (1984), it was "not disputed" that a "prohibition on camping, and on sleeping specifically" was "content-neutral" and "not being applied because of disagreement with the message presented." Finally, *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984), upheld a general prohibition on posting signs on public property where "[t]here [wa]s no claim that the ordinance was designed to suppress certain ideas that the City f[ou]nd[] distasteful." Here, in contrast, the Ordinance targets promotions based on their disfavored content.

In sum, if the Promotion Ordinance is not a speech restriction, then Section 1334(c) is entirely inapplicable; and regardless, the Ordinance regulates cigarette promotions precisely because of their disfavored content. Section 1334(c) therefore does not save it from preemption under Section 1334(b).

3. The City argues that, even if the Labeling Act preempts portions of the Promotion Ordinance, this Court should sever those portions from the remainder of the Ordinance. Resp. Br. 27–28. But severability is impossible here. Sections 14-303(2) and 14-303(4) ban promotions related to "cigarettes" and so would clearly be invalidated. Sections 14-303(1) and 14-303(3) likewise ban promotions related to "tobacco products," which are defined in § 14-300 to include "cigarettes." The only way to save 14-303(1) and 14-303(3) would be to delete the word "cigarettes" from § 14-300's definition of "tobacco products." But that definition applies to numerous tobacco regulations in Providence. *See*, *e.g.*, Providence Code of Ordinances § 14-300 (Br. Add. 41) (defining "compliance check violation" as "any sale of tobacco products to a person who is less than eighteen"). Deleting the word "cigarettes" from that definition would render these other tobacco regulations inapplicable to cigarettes. Surely, the City Council would not have intended to render Providence's other regulations inapplicable to cigarettes in order to preserve its ability to ban coupons and multi-pack discounts for smokeless tobacco.

II. The Promotion Ordinance Violates The First Amendment.

Even if the Promotion Ordinance somehow were not barred by Section 1334(b), or were saved by Section 1334(c), it would still run headlong into the First Amendment. In analyzing the First Amendment, the City fails to confront

how the Ordinance restricts the dissemination of a particular message. As such, it is subject to, and fails, scrutiny under *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). It is also unconstitutional under *United States v. O'Brien*, 391 U.S. 367 (1968).[2]

1. The City's primary argument is that the Promotion Ordinance does not restrict speech at all but, instead, is only a "regulation of pricing." Resp. Br. 29. The Promotion Ordinance, however, does not set a price floor; Appellants are free to charge as much or as little as they like. Rather, the Ordinance restricts Appellants from using certain types of promotions to convey to consumers certain *messages* about pricing. For example, Appellants are perfectly free to reduce their prices by 10% either across the board or for select customers. They cannot, however, *tell* their customers that they are receiving a 10% discount by use of a coupon or multi-pack discount. The Ordinance, therefore, prohibits Appellants from communicating the message, "you are getting a deal." The City never addresses this fundamental point.

Social scientists and advertisers have long known that coupons and multi-product promotions work *because* they have a communicative impact that

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[2] The City wrongly asserts that "none" of the named Plaintiffs is a "tobacco retailer[ ] in the City." Resp. Br. 28. Members of Plaintiff-Appellant National Association of Tobacco Outlets, Inc. "operate retail stores in Providence, Rhode Island." Declaration of A. Kerstein (Feb. 15, 2012) ¶ 3 (JA 474); Compl. ¶ 19 (JA 19).

makes them markedly different from plain price adjustments. Thus, consumers typically prefer such promotions to everyday low prices ("EDLP"), even where EDLP results in the same or greater price reductions, because those promotions make consumers feel like they are getting a deal. *See*, *e.g.*, Judith A. Garretson & Scot Burton, *Highly Coupon and Sale Prone Consumers: Benefits Beyond Price Savings*, 43 J. Advert. Res. 162, 163 (2003) ("[M]any consumers attracted to sales promotion may seek benefits beyond price savings."). If the City merely wanted to regulate prices, it could have done so directly. But by choosing to restrict certain price-reduction promotions that both reduce prices *and* convey to consumers a message about pricing, the City has triggered the very First Amendment protections it seeks to avoid.

The City also attempts to draw an artificial distinction between bans on the *redemption* of coupons—which it describes as mere "conduct" restrictions—and bans on the *distribution* of coupons—which it concedes restrict speech. Resp. Br. 30–33. This distinction, however, is illusory. First, the Promotion Ordinance is not limited to the *redemption* of coupons; rather, it expressly prohibits anyone from "*offer[ing]* to accept or redeem any coupon." More importantly, there is no difference between a ban on *redeeming* coupons and a ban on *distributing* them; both equally burden the ability of manufacturers and retailers to *communicate* the marketing message, "buy these products because you're getting a deal." *See supra*

Part I.2. Indeed, since the Ordinance does not prohibit price reductions (either targeted or across-the-board), the only thing the Ordinance conceivably could be aimed at is preventing manufacturers and retailers from using common marketing tools to communicate this commercial message.[3] Consequently, the Ordinance is what it purports to be: A ban on using common marketing tools—coupons and multi-pack discounts—to disseminate a marketing message in Providence.

This is why the numerous courts that have squarely confronted the issue have subjected similar bans to *Central Hudson* scrutiny. For example, in *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509 (6th Cir. 2012), *cert. denied*, 133 S. Ct. 1996 (2013), the Sixth Circuit held that a ban on free gifts with tobacco purchases concerned "promotional methods that convey the twin messages of reinforcing brand loyalty and encouraging switching from competitors' brands," in the face of government arguments that the First Amendment did not apply. *Id.* at 538. Applying *Central Hudson*, the Sixth Circuit invalidated the ban. *Id.* at 539–44.

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[3] Contrary to the suggestion of the City's *amicus*, the Promotion Ordinance does not target "price discrimination" either. *See* Br. of *Amicus Curiae* Tobacco Control Legal Consortium ("1A Amicus Brief") 9–12. It does not "prohibit retailers from charging different prices to different customers." *Id.* at 9. It only prohibits retailers from *telling* its customers that that is what it is doing via coupons or multi-pack offers. The Ordinance, moreover, *would* prohibit a retailer from giving equal discounts to everyone, by, for example, attaching a 10%-off coupon to every pack of cigarettes in a store.

The City's only response to *Discount Tobacco* is to observe that "none of the banned activities" in that case would have been "covered" by the Promotion Ordinance. Resp. Br. 33. But the City cannot explain how giving away free gifts with a tobacco product purchase has any more of a "communicative impact" than giving coupons for discounted purchases of tobacco products. Resp. Br. 32–33. *Discount Tobacco*, therefore, is squarely contrary to the City's arguments. *See also* Br. 28 (citing *S. Ogden CVS Store, Inc. v. Ambach*, 493 F. Supp. 374, 379–80 (S.D.N.Y. 1980) (coupons constitute protected commercial speech); *Bailey v. Morales*, 190 F.3d 320, 321–25 (5th Cir. 1999) (free "promotional gifts" "convey" the "message: hire me, try my service"); *Rockwood*, 21 F. Supp. 2d at 415, 422–23 (invalidating ordinance prohibiting "coupons redeemable for tobacco products")); *Wild Wild West Gambling Hall & Brewery, Inc. v. City of Cripple Creek*, 853 F. Supp. 371, 373 (D. Colo. 1994) (invalidating ordinance forbidding distributing, among other things, "coupons" in front of a casino); *Knapp v. Miller*, 843 F. Supp. 633, 640–41 (D. Nev. 1993) ("flyers providing three-for-one coupons" are protected commercial speech).[4]

[4] This Court's decision in *Wine & Spirits Retailers, Inc. v. Rhode Island*, 418 F.3d 36 (1st Cir. 2005), is not remotely to the contrary. That case addressed a statute prohibiting the retail sale of alcoholic beverages by chain stores and franchisees. It merely held that such a *sales* ban had no impact on the First Amendment rights of a franchisor. Here, in contrast, the Ordinance applies to

[Footnote continued on next page]

2. The Promotion Ordinance fails *Central Hudson*. The City's only legitimate governmental interest is in reducing youth tobacco use. The City, however, cannot demonstrate (1) that the Ordinance will result in a "direct" and "material" reduction in youth tobacco use, or (2) that its broad ban on *all* coupons and multi-pack discounts is narrowly tailored to preventing *youth* tobacco use.[5]

a. The City "bears the burden of showing not merely that [the Ordinance] will advance its interest [in reducing youth tobacco use], but also that it will do so to a material degree." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996) (plurality op.). It therefore must show that the "ban will *significantly* reduce" underage tobacco use. *Id.* But it has not produced any evidence of this.

Instead, it points out that, notwithstanding Rhode Island's ban on the sale of tobacco products to youth, some youth still purchase tobacco products from stores and gas stations. Resp. Br. 39–41. These statistics, however, say nothing about

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communications made directly to customers and so plainly burdens protected commercial speech.

[5] Amicus Consortium's argument that the Promotion Ordinance only targets illegal conduct is circular and wrong. 1A Amicus Br. 12–14. Its examples involve underlying *products* that are illegal, and it is only that which makes an "offer" regarding that product unprotected. *See*, *e.g.*, 21 U.S.C. § 353(c)(2) (banning "coupons" used to buy prescription drugs without prescription); 16 U.S.C. § 1423a(a)(4) (banning offers to sell polar bear gall bladders). Here, the Ordinance targets the *means of communicating* about a *lawful product*.

whether youth are induced to do so through coupons and multi-pack discounts. Indeed, Appellants' expert persuasively explains why they would not, since it would draw undue attention to their illegal activity. Reynolds Decl. ¶¶ 62, 69 (JA 123, 127).

The City also criticizes Appellants for "speculat[ing]" that the Ordinance might cause manufacturers and retailers to engage in across-the-board price cuts and actually decrease prices. Resp. Br. 41–42. Appellants, however, do not bear the burden of proving that the Ordinance will *not* decrease underaged tobacco use. The City, rather, bears the burden of proving that it will.

Importantly, the City has not offered any material evidence that the Ordinance will reduce underaged tobacco use. *See* Br. 34–35.[6] In contrast, Appellants have offered voluminous evidence that the Ordinance would not result in any significant reduction in youth tobacco use and might well backfire. *See* Br. 34–35. The district court therefore erred in granting summary judgment to the City. *See Rossy v. Roche Prods., Inc.*, 880 F.2d 621, 624 (1st Cir. 1989).

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[6] Nor can the City fill this void by citing *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1 (D.D.C. 2006). *See* Resp. Br. 41 (citing *Philip Morris*, 449 F. Supp. 2d at 638–40). Those findings are not evidence in this case, are outdated, do not address Providence specifically or Rhode Island generally, and in any event, demonstrate only a link between lower prices and higher demand. The opinion cites no evidence in support of a causal link between coupons and multi-pack discounts and youth tobacco use.

The City further ignores Appellants' argument that, to the extent the Promotion Ordinance is an attempt to reduce tobacco use, it fails *Central Hudson* because it is, at best, an *indirect* way to do so. Br. 35. Rather than directly addressing pricing in a manner that has no communicative impact—*e.g.*, by setting a minimum price—the City banned promotions that both impact pricing *and* convey messages to consumers. *See supra* p. 10. It thus cannot satisfy *Central Hudson*'s requirement that it *directly* advance its interest. *See Cent. Hudson*, 477 U.S. at 566.

b. Nor can the City prove that its ban on coupons and multi-pack discounts for *adults* is "narrowly tailored" to reducing *youth* tobacco use. Rather, as in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 564 (2001), the Ordinance is far broader than necessary to reduce youth tobacco use, and as in *Thompson v. Western States Medical Center*, 535 U.S. 357, 371 (2002), the City ignores numerous less- and non-speech-restrictive alternatives that could advance its interest as well or better. *See* Br. 35–37.

The City asserts that "many of the supposed alternatives [raised by Appellants] have in fact been tried or are being implemented, with less than satisfactory results." Resp. Br. 43. Not so. The City, for example, complains that significant numbers of youth are able to illegally purchase tobacco products. *Id.* If so, then the City should increase enforcement of existing laws prohibiting such

purchases, as numerous other jurisdictions have done to good effect. *See*, *e.g.*, 60 Fed. Reg. 41,314, 41,322 (Aug. 11, 1995) (explaining how in one jurisdiction, "a comprehensive community intervention involving retailer licensing, regular compliance checks, and penalties for merchant violations . . . reduced illegal sales from 70 percent to less than 5 percent" in just 2 years). This readily available alternative is the basis upon which courts routinely strike down laws regulating commercial speech. *See*, *e.g.*, *BellSouth Telecomms., Inc. v. Farris*, 542 F.3d 499, 508–09 (6th Cir. 2008) (alternatives existed to "enforce existing state law" or make it "stronger"); *Pitt News v. Pappert*, 379 F.3d 96, 108 (3d Cir. 2004) (Alito, J.) (striking down law when less-speech-restrictive alternatives existed, including more "aggressive enforcement" of alcohol laws on campus by "law enforcement officers"). Nor has the City demonstrated that the myriad other alternatives Appellants have identified would be ineffective. *See* Br. 36–37.

Accordingly, the City has not carried its burden of demonstrating that it chose "regulating speech" as its "last—not first—resort," which is what it must do under the First Amendment. *W. States Med. Ctr.*, 535 U.S. at 373.

3. In any event, even if this Court were to (erroneously) apply *O'Brien*, the Ordinance would still be unconstitutional. The Ordinance is not "unrelated to the suppression of free expression," as *O'Brien* requires for constitutionality. In this regard, the Ordinance is like the Massachusetts regulation in *Lorillard*

requiring tobacco advertisements to be five feet above the floor, which was based on the disfavored content of the advertisements, but unlike the requirement to place tobacco products behind counters, which was done to limit youth's physical access to tobacco. 533 U.S. at 567, 569.

The City maintains, without citing authority, that the *Central Hudson* test and the *O'Brien* test "have grown apart." Resp. Br. 36–37. This is untrue. The tests are largely identical, and have been applied as such. *See* Br. 38–39; *Bench Billboard Co. v. City of Covington*, 465 F. App'x 395, 404 (6th Cir. 2012) ("[T]he validity of governmental restrictions on commercial speech should not be judged by standards more stringent than those applied to expressive conduct entitled to full First Amendment protection[.]"). But, even applying the *O'Brien* elements as articulated by the City, *see* Resp. Br. 36, the Promotion Ordinance is unconstitutional, *see* Br. at 39.

III. The Flavor Ordinance Is Preempted By The FSPTCA.

The City asserts that the Flavor Ordinance has "nothing to do" with federal tobacco product standards, even though it bans the sale of smokeless tobacco products that comply with federal content standards based solely on their constituents. The Ordinance thus creates the very risk of differing content standards from locality to locality that Congress sought to avoid by creating national tobacco product content standards and preempting local variations.

The City claims that the Ordinance is nonetheless saved from preemption as a requirement "relating to the sale" of tobacco products. Resp. Br. 16–17, 20; *see also* Preemption Amicus Br. 12–14. But that relies on the faulty premise that Congress intended the federal Government to control the ingredients of tobacco products *manufactured* in the United States, but left to local governments control of the ingredients *sold* here. The U.S. Supreme Court, however, has rejected this semantic distinction between regulating manufacturing and sales, instructing courts to look to the practical *effect* of a law in deciding preemption. *Nat'l Meat Ass'n v. Harris*, 132 S. Ct. 965, 972–73 (2012); *Wos v. E.M.A.*, 133 S. Ct. 1391, 1398 (2013) (local governments may not evade preemption "by resorting to creative . . . description at odds with the statute's intended operation and effect"). The effect of the Flavor Ordinance is to ban the sale of tobacco products, based on their ingredients, even though they comply with federal tobacco product standards. It therefore creates an ingredient standard "different from, or in addition to" the Federal Flavor Standard.

The City relies on the Second Circuit's decision in *U.S. Smokeless Manufacturing Co. v. City of New York*, 708 F.3d 428 (2d Cir. 2013), which found that the FSPTCA precluded state and local governments from "requir[ing] manufacturers to alter 'the . . . ingredients, additives, constituents . . . and properties,'" of tobacco products but otherwise allowed them to ban the sale of a

product based "on its characteristics as an end product." *Id.* at 434–35 (citation omitted) (second alteration in original). This distinction between manufacturing and sales is belied, however, by the text, structure, and purpose of the FSPTCA.

The FSPTCA does not authorize one set of tobacco product standards for products manufactured here and another for those sold here. There is, rather, one set of standards, which includes the Federal Flavor Standard. The federal standards generally are based on "the construction, components, ingredients, additives, constituents, including smoke constituents, and properties of the tobacco product," and the Federal Flavor Standard prohibits cigarettes containing a "constituent" or "additive" (other than "tobacco or menthol") that is a "characterizing flavor of the tobacco product." 21 U.S.C. § 387g(a)(l)(A), (a)(4)(B)(i). The purpose of these standards, moreover, is not to restrict how tobacco products are *made* in the United States, but what tobacco products are *sold* and *consumed* here. They are thus enforced through a *nationwide sales ban* of non-conforming products. *See id.* §§ 387b(5), 331(a), (c). Indeed, the Act *permits* the *manufacture* of such products here *as long as they are sold abroad*. *See id.* § 381(e)(1).

Once the FSPTCA is properly understood, it is clear that the Flavor Ordinance creates a flavor standard that is "different from, or in addition to" the Federal Flavor Standard and, therefore, is preempted. Under the Ordinance,

smokeless tobacco products and cigars containing "constituents" that "impart[] a characterizing flavor" may not be sold, although they may be sold under the Federal Flavor Standard. Providence Code of Ordinances § 14-308 ¶¶ 5, 6 (Br. Add. 51). And because the Ordinance bans products based on these "constituents"—*just like the Federal Flavor Standard*—its obvious effect is to "require [tobacco] manufacturers to alter 'the construction, components, ingredients, additives, constituents . . . and properties'" of their products. *U.S. Smokeless*, 708 F.3d at 434 (quoting 21 U.S.C. § 387g(a)(4)(B)); *see also* Providence Code of Ordinances § 14-308 ¶¶ 5, 6 (Br. Add. 51) (banning "any ingredient . . . *added by the manufacturer* . . . *during the processing, manufacture or packing of a tobacco product*" that imparts a characterizing flavor in the product) (emphasis added). Whether or not the City chooses to call the Flavor Ordinance a "sales" restriction in no way alters this result. *Wos*, 133 S. Ct. at 1398 ("Pre-emption is not a matter of semantics.").[7]

The City recognizes the importance of the Supreme Court's decisions in *Harris* and *Wos*, but claims that the statutory schemes in those cases are somehow materially different. But the federal statute at issue in *Harris*, like the FSPTCA,

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[7] The FSPTCA's preservation clause is irrelevant because it is expressly subject to the preemption clause. Resp. Br. 14, 19; Preemption Amicus Br. 10–11. If a local law imposes requirements that are "different from, or in addition to" federal tobacco product standards, the preemption clause is activated and the preservation clause has no force. 21 U.S.C. § 387p(a)(2)(A).

exempted local sales restrictions from preemption. 132 S. Ct. at 972 ("[T]he FMIA's preemption clause does not usually foreclose state regulation of the commercial sales activities of slaughterhouses."). Yet, that did not deter the Court from ruling that local governments could not use the sales exception to circumvent preemption if the *effect* of the restriction was within the statute's preemptive scope:

> [I]f the sales ban were to avoid the 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. So too here. If, for example, FDA promulgated a tobacco product standard expressly *permitting* menthol-flavored smokeless tobacco, the City could undermine that standard by prohibiting the *sale* of the very same product. And if Providence can do this, so can every other locality in America, until the multiplied and varied requirements "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 FSPTCA's preemption provision is designed to prevent this result.

IV. The Ordinances Violate The Rhode Island Constitution.

The Rhode Island Constitution prohibits cities from enforcing local ordinances through local licensing regimes. The district court erred in refusing to confront the merits of this argument.

1. The Rhode Island Supreme Court has reaffirmed for decades that the General Assembly alone may regulate business licensing. *See Amico's Inc. v. Mattos*, 789 A.2d 899, 903 (R.I. 2002); *Westerly Residents for Thoughtful Dev., Inc. v. Brancato*, 565 A.2d 1262, 1264 (R.I. 1989); *Bruckshaw v. Paolino*, 557 A.2d 1221, 1223 (R.I. 1989); *Nugent v. City of E. Providence*, 103 R.I. 518, 526, 238 A.2d 758, 762–63 (1968); *State v. Krzak*, 97 R.I. 156, 161, 196 A.2d 417, 420–21 (1964); *Newport Amusement Co. v. Maher*, 92 R.I. 51, 56, 166 A.2d 216, 218 (1960); *see also R.I. Hospitality Ass'n v. City of Providence ex rel. Lombardi*, 775 F. Supp. 2d 416, 437–39 (D.R.I. 2011) (Lisi, C.J.), *aff'd*, 667 F.3d 17 (1st Cir. 2011).

The Ordinances flout this settled constitutional principle. Absent an express or necessarily implied delegation of authority from the General Assembly, Rhode Island municipalities cannot impose licensing obligations on businesses. *See Newport Amusement Co.*, 92 R.I. at 56, 166 A.2d at 218. Any ordinance imposed and enforced through an unauthorized local business licensing regime is likewise invalid. *See Amico's*, 789 A.2d at 904 (explaining that where "licensing constitutes the sole enforcement mechanism of [an ordinance], it is our opinion that the authority to carry out that enforcement must flow from a delegation of power to do so from the General Assembly"). Here, the Ordinances are based on Providence's tobacco retailer licensing scheme and, contrary to the City's claim,

enforced solely through it: The Providence Board of Licenses alone may punish violations of the Ordinances, be it by fine, license suspension, or revocation. *See* Providence Code of Ordinances § 14-304; Resp. Br. 51 n.38.

The City attempts to avoid established law by asserting that decades of clear precedent are non-binding "dicta." Resp. Br. 55–56. Not so. The Rhode Island Supreme Court's repeated holdings that municipalities have no authority to require business licenses have been essential to the results in those cases. *See Newport Amusement Co.*, 92 R.I. at 56, 166 A.2d at 218 (striking down a municipal licensing ordinance *because* the "power to regulate occupations and businesses by licensing" "may not be exercised by municipalities except where it is lawfully delegated to them in particular instances expressly or by necessary implication."); *Nugent*, 103 R.I. at 526, 238 A.2d at 762–63. Nor are the non-Rhode Island authorities Appellees cite relevant to this question of Rhode Island law. Resp. Br. 56.

The City also invites this Court to contradict the Rhode Island Supreme Court by arguing that there is no exclusive delegation of authority to the General Assembly with respect to "any and all municipal licensing" and so questions regarding the validity of such licenses should be subject to a "traditional preemption analysis." Resp. Br. 56–57. But the role of this Court is not to "accept [an] invitation to place itself at odds with the Rhode Island Supreme Court" on a

matter of Rhode Island law. *Wagenmaker v. Amica Mut. Ins. Co.*, 601 F. Supp. 2d 411, 418 n.8 (D.R.I. 2009). Moreover, the City's reasoning contradicts a basic premise of Rhode Island constitutional interpretation: Where the Constitution is silent on the location of "the powers inhering in sovereignty," those powers belong to the General Assembly to the exclusion of the other state branches or political subdivisions. *Nugent*, 103 R.I. at 525, 238 A.2d at 762. Finally, "traditional preemption analysis" is inappropriate here because the question of municipal authority over business licenses depends on whether the General Assembly delegated that authority to a municipality, which it has not. *See Town of E. Greenwich v. O'Neil*, 617 A.2d 104, 110 (R.I. 1992).

2. The district court erred in refusing to address this issue. First, the Ordinances are enforced exclusively through an unconstitutional licensing scheme and impose penalties without the necessary delegated authority. Br. 52; *Amico's*, 789 A.2d at 904 (where "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"); *see Nugent*, 103 R.I. at 526, 238 A.2d at 762–63. If the General Assembly has not delegated the authority to *enforce* an ordinance, there is no authority to *enact* the ordinance either. *See id.* The Rhode Island Supreme Court has thus refused to disentangle licensing

schemes from substantive restrictions on businesses where the enforcement mechanism is invalid. *See Krzak*, 97 R.I. at 160, 196 A.2d at 420.

Second, the record demonstrates, and the district court never questioned, that Appellants have standing to challenge the Ordinances. Appellant NATO's members include tobacco retailers subject to the Ordinances; certain of those members' business practices fall under the Ordinances' restrictions; and the Ordinances would require those members to "change their policies and practices, resulting in reduced sales." Dkt. #35 at 43; *see also* Compl. ¶¶ 19, 20 (JA 19–20); Declaration of A. Kerstein (Feb. 15, 2012) ¶¶ 3–5 (JA 474–75); *Council of Ins. Agents & Brokers v. Juarbe-Jiménez*, 443 F.3d 103, 106–10 (1st Cir. 2006) (association "was not obliged to provide specific names [of members] absent some contest by the [opposing party] of the accuracy of the representation" and had identified "specific injuries suffered by its members").[8] The Ordinances likewise impact Appellant Manufacturers' ability to sell products in Providence.

Third, the City asserts that this question is not ripe because the Ordinances will impose no hardship on Appellants. Resp. Br. 53. The threat of real harm to businesses as the result of the enforcement of an unconstitutional law, however, is

[8] *United Seniors Ass'n v. Philip Morris USA*, 500 F.3d 19, 23–24 (1st Cir. 2007), is not to the contrary. There, unlike here, the plaintiff *failed* to allege it represented "any particular Medicare beneficiary who received unreimbursed Medicare payments."

enough. *See supra* pp. 25–26; *R.I. Ass'n of Realtors, Inc. v. Whitehouse*, 199 F.3d 26, 28–29, 33 (1st Cir. 1999) (finding hardship where plaintiffs challenged constitutionality of a state statute and where plaintiffs feared prosecution); *Aetna Cas. & Sur. Co. v. Gailey*, 753 F. Supp. 46, 48–49 (D. Mass. 1990). A business is not required to violate the law before it is entitled to challenge it.

Finally, although the issue "admittedly was not briefed or argued below," the City now claims that the district court should have abstained from addressing this state law question. Resp. Br. 53. The City has waived this abstention argument, however,[9] and it is wrong in any event. The City ignores this Court's frequent resolution of state law claims alongside other federal challenges. *See Walden v. City of Providence*, 596 F.3d 38, 58–60 (1st Cir. 2010) (interpreting Rhode Island wiretap act, where plaintiff also brought federal statutory and constitutional claims); *see also R.I. Hospitality Ass'n*, 775 F. Supp. 2d at 437–39 (considering municipal authority under state law pendent to federal preemption and constitutional claims).[10]

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[9] *See*, *e.g.*, *Guillemard-Ginorio v. Contreras-Gomez*, 585 F.3d 508, 517 (1st Cir. 2009) ("[A]bstention is a waivable defense."); *Kyricopoulos v. Town of Orleans*, 967 F.2d 14, 15–16 (1st Cir. 1992) (per curiam) (abstention argument waived when not raised below, regardless of merit of argument).

[10] The Rhode Island State agency amicus entered this case, presumably, to assert that the State does not mind that its exclusive powers are being appropriated by the City. First, it is not apparent that is true, as the brief is filed by an office of

[Footnote continued on next page]

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

According to the Rhode Island Supreme Court, the General Assembly preempts a "field" of law by making "provision for the regulation of conduct in a given situation and . . . provid[ing] punishment for the failure to comply therewith." *Wood v. Peckham*, 80 R.I. 479, 483, 98 A.2d 669, 670 (1953).

Rhode Island law criminalizes selling tobacco products to persons under eighteen, distributing free tobacco products or coupons to persons under eighteen, and distributing free tobacco products or coupons near schools. *See* R.I. Gen. Laws §§ 11-9-13.8, -13.10.[11] Rhode Island's unfair sales practices law provides for the lawful use of price discounts and punishes licensed tobacco vendors who do not comply with the law. *See id.* §§ 6-13-11, 44-20-8. Contrary to the City's claims, that Rhode Island cities may regulate where one may smoke is irrelevant to the State's regulation of the separate category of tobacco promotion, which the State *does* regulate. *See* R.I. Dep't of Health Amicus Br. 21–23; Preemption Amicus Br. 26.

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a Rhode Island State sub-department, not its Attorney General. Second, the State agency addressed only express preemption. Its silence on the State's exclusive authority to license businesses is deafening.

[11] These provisions also demonstrate that the City was incorrect to claim that the Rhode Island statutes relied on by Appellants did not mention coupons or discounts. Resp. Br. 47; Br. 57.

The City claims that it must be impossible to comply with both State law and an ordinance before the ordinance is preempted. *See* Resp. Br. 46–47; R.I. Dep't. of Health Amicus Br. 13–15. This assertion has no grounding in Rhode Island law, which jealously guards the authority of the General Assembly to determine the extent of prohibited conduct once it has made a decision to penalize certain activities in a category.

The City makes yet another legally irrelevant contention by arguing that the Promotion Ordinance is within its home-rule authority. But in Rhode Island, courts should consider "the issues of pre-emption and home rule separately." *O'Neil*, 617 A.2d at 109. In the end, the City's arguments reflect its displeasure with the constraints Rhode Island places on cities in areas the General Assembly has chosen to regulate. While understandable, this does not authorize the City to rewrite Rhode Island law. The Promotion Ordinance is preempted.

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellants respectfully request that this Court reverse the judgment of the district court below, except to the extent that it strikes certain language from the Flavor Ordinance, and direct judgment for Plaintiffs-Appellants.

Respectfully submitted,

JONES DAY

By: /s/ Noel. J. Francisco
Noel J. Francisco

51 Louisiana Avenue, N.W.
Washington, D.C. 20001
Telephone: (202) 879-3939
Facsimile: (202) 626-1700
njfrancisco@jonesday.com

Counsel for Appellants R.J. Reynolds Tobacco Co. and American Snuff Company

GIBSON, DUNN & CRUTCHER LLP

By: /s/ Michael J. Edney
Miguel A. Estrada
Michael J. Edney

1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
Telephone: (202) 955-8500
Facsimile: (202) 539-9547
mestrada@gibsondunn.com
medney@gibsondunn.com

Counsel for Appellants Philip Morris USA Inc.; U.S. Smokeless Tobacco Manufacturing Company, LLC; U.S. Smokeless Tobacco Brands, Inc.; and John Middleton Company

CAHILL GORDON & REINDEL LLP

By: /s/ Joel Kurtzberg
Floyd Abrams
Joel Kurtzberg

80 Pine Street
New York, NY 10005
Telephone: (212) 701-3120
Facsimile: (212) 378-2522
fabrams@cahill.com
jkurtzberg@cahill.com

Counsel for Appellant Lorillard Tobacco Company

LATHAM & WATKINS LLP

By: /s/ Kenneth J. Parsigian
Kenneth J. Parsigian

John Hancock Tower, 20th Floor
200 Clarendon Street
Boston, MA 02116
Telephone: (617) 880-4510
Facsimile: (617) 948-6001
kenneth.parsigian@lw.com

Counsel for Appellants Philip Morris USA Inc.; U.S. Smokeless Tobacco Manufacturing Company, LLC; U.S. Smokeless Tobacco Brands, Inc.; and John Middleton Company

ADLER, POLLOCK & SHEEHAN P.C.

By: /s/ James R. Oswald
James R. Oswald
Kyle Zambarano

One Citizens Plaza, 8th Floor
Providence, RI 02903
Telephone: (401) 274-7200
Facsimile: (401) 351-4607
joswald@apslaw.com
kzambarano@apslaw.com

Counsel for Appellant National Association of Tobacco Outlets, Inc.; Counsel for Appellants Lorillard Tobacco Company; R.J. Reynolds Tobacco Company; American Snuff Company; Philip Morris USA Inc.; U.S. Smokeless Tobacco Manufacturing Company LLC; U.S. Smokeless Tobacco Brands Inc.; and John Middleton Company

HINCKLEY, ALLEN & SNYDER LLP

By: /s/ Gerald J. Petros
Gerald J. Petros
Adam M. Ramos

50 Kennedy Plaza, Ste. 1500
Providence, RI 02903
Telephone: (401) 457-5212
Facsimile: (401) 277-9600
gpetros@haslaw.com
aramos@haslaw.com

Counsel for Appellant Cigar Association of America, Inc.

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,960 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

Dated: June 14, 2013

/s/ Michael J. Edney

Michael J. Edney
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
Telephone: (202) 955-8500
Facsimile: (202) 539-9547
medney@gibsondunn.com

Counsel for Appellants Philip Morris USA Inc.; U.S. Smokeless Tobacco Manufacturing Company, LLC; U.S. Smokeless Tobacco Brands, Inc.; and John Middleton Company

CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2013, I caused a true and accurate copy of the Reply Brief of Plaintiffs-Appellants to be filed with the Clerk of the Court and served in accordance with the Federal Rules of Appellate Procedure and the Local Rules of the United States Court of Appeals for the First Circuit, via the Court's CM/ECF system, on all counsel registered to receive electronic notices.

/s/ Michael J. Edney
Michael J. Edney