UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

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

v.

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

C.A. No. 12-96 M

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

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

(1) in opposition to the Joint Motions for Summary Judgment, a Permanent Injunction, and a Preliminary Injunction of plaintiffs (the "Joint Motions"), NATIONAL ASSOCIATION OF TOBACCO OUTLETS, INC., 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 (collectively, the "Plaintiffs"); and

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

II. ARGUMENT

A. There is No Genuine Issue as to Any Material Fact and Defendants are Entitled to Summary Judgment as a Matter of Law

The parties apparently agree on at least one thing—that no *relevant* arguments have been raised "that cannot be addressed by the Court applying well-established law" to the Ordinances being challenged. *See* Plaintiffs' Reply Memorandum (the "Reply Mem.") at 4. That there are no genuine issues of material fact with respect to Plaintiffs' federal and state preemption challenges appears beyond dispute. Whether the same can be said with respect to Plaintiffs' First Amendment challenge may be slightly less clear, depending upon the Court's reasoning.

The task before the Court would be substantially simplified if it finds, as it should, that the Ordinances are economic legislation enacted pursuant to a municipality's well-recognized police powers which must be reviewed under the lenient rational basis test. In that case, the affidavits from the three nationally prominent experts submitted by the Defendants in support of their motion for summary judgment would be all that the Court would require to properly conclude that the Ordinances are rationally related to preventing underage tobacco use, a governmental purpose which the Supreme Court has characterized as "substantial, and even compelling." *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 564 (2001).

Indeed, even if this Court were somehow to conclude that the Ordinances proscribed conduct protected under the First Amendment and then reviewed the Ordinances under *United States v. O'Brien*, 391 U.S. 367 (1968), the Court's task would only be slightly more difficult. As noted by Amicus Tobacco Control Legal Consortium (the "TCLC"), the Ordinances:

> (1) fall squarely within the constitutional power of the City government; (2) promote the important governmental interest of reducing tobacco use, especially among youth; (3) are targeted not at the suppression of free expression but rather at discounts that endanger health; and (4) do not incidentally restrict substantially more expression than necessary to accomplish the City's goals.

TCLC Mem. at 28, citing *O'Brien*, 391 U.S. at 376.[1]

Admittedly, the Court's task would be made more difficult in the event that, despite the plain language of the Ordinances, it somehow found that they impinged protected commercial speech, and thus were reviewable under *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980). Yet even then, the Court should readily deny Plaintiffs' Joint Motions while granting Defendants' Cross-Motion for Summary Judgment. Although Plaintiffs'

[1] As will be discussed, the TCLC has made clear that the test under *O'Brien* is not stringent, and has noted that "the Supreme Court has not found a law unconstitutional under the *O'Brien* standard for more than twenty years," and the "[t]he First Circuit has been equally unequivocal." TCLC Mem. at 27 (citations omitted).

expert has taken issue with the statistical methodology of one study or another cited by the Defendants and has second guessed the Providence City Council as to its choice of anti-smoking policies, *see* Reply Mem. at 16, 36, citing Dr. Reynolds Declaration (the "Reynolds Dec."), ¶¶ 43-59, 68-69, 77, Plaintiffs have failed to raise a genuine issue of material fact with respect to the mountain of evidence and expert opinion submitted by the Defendants supporting the fact that the Ordinances "directly and materially advance" an admittedly compelling governmental interest. *See Central Hudson*, 447 U.S. at 566.

There is no point in repeating the mountain of evidence already presented by the Defendants. Suffice it to say that the evidence presents a detailed explication of the manner by which tobacco companies have targeted, and continue to target youth through the use of free samples of tobacco products, coupons redeemable for price-discounted tobacco products, and the sale of flavored tobacco products, *see, e.g.*, Defendants' Mem. at 9-21,[2] and that Defendants' experts have presented a cogent analysis of why the Ordinances are narrowly tailored and will be effective.

B. Plaintiffs Continue to Ignore the Fact that the Ordinances Do Not Restrict Lawful Communication and Thus Do Not Implicate the First Amendment

As the Supreme Court noted in *Central Hudson*, "[a]t the outset we must determine whether the expression is protected by the First Amendment. . ." 447 U.S. at 589.

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[2] Citing, *inter alia*, *United States v. Philip Morris USA, Inc.*, 499 F.Supp.2d 1, 691 (D.D.C. 2006), *aff'd. in part, vacated in impertinent part, and remanded*, 566 F.3d 1095, (D.C. Cir. 2009), *petitions for cert. filed* (2010) and U.S. Federal Trade Commission ("FTC") *Cigarette Report for 2007 and 2008* (2011), http://www.ftc.gov/os/2011/07/110729cigarettereport.pdf.; *see also*, FTC *Smokeless Tobacco Report for 2007 and 2008* (2011), http://www.ftc.gov/os/2011/07/110729 smokelesstobaccoreport.pdf (data for top 6 manufacturers only).

Here, Plaintiffs have failed to identify a protected expression that is prohibited, by either the Price or Flavored Tobacco Ordinance. They simply ignore the fact that the Ordinances do not concern the type of expressive conduct contemplated by the First Amendment and attempt to bring the Ordinances within the ambit of the Amendment by employing a novel, and nearly all-inclusive, definition of protected commercial speech. According to Plaintiffs, the requirement that a protected activity be speech should be read out of the First Amendment, to be replaced by a meaningless standard encompassing any conduct or activity which could conceivably be said to involve a commercial transaction. *See e.g.*, Reply Mem. at 6.

Of course, such a wildly expansive definition would subject nearly all legislation regulating any economic activity to First Amendment scrutiny, contrary to the Supreme Court's repeated admonition that "regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless . . . it is of such a character as to preclude the assumption that it rests upon some rational basis." *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938). *See* TCLC Mem. at 6-7. Plaintiffs have not addressed the contradiction. Yet if the courts were to adopt Plaintiffs' proposed definition of protected commercial speech, the minimum price law for cigarettes adopted by Rhode Island and twenty-four other states would be subject to First Amendment scrutiny,[3] as would countless other labor, consumer protection and regulatory statutes which touch on commercial transactions. Indeed, it is not hyperbolic to suggest that Plaintiffs are advocating what then-Justice Rehnquist described as a

> Return to the bygone era of *Lochner v. New York*, 198 U.S. 45 (1905), in which it was common practice for [the] Court to strike down economic regulations

[3] As has been noted, seven of the state minimum cigarette price laws prohibit price discounting. *See* TCLC Mem. at 8 n. 5, citing Ctrs. for Disease Control & Prevention ("CDC"), *State Cigarette Minimum Price Laws - United States*, 2009 (2010), at http://www.cdc.gov/mmwr/preview/ mmwrhtml/mm5913a2.htm.

> adopted by a State based on the Court's own notions of the most appropriate means for the State to implement its considered policies.

Central Hudson, 447 U.S. at 589 (dissenting).

Again, it should be emphasized that neither the Price Ordinance nor the Flavored Protection Ordinance concerns the type of expressive conduct contemplated by the First Amendment. Neither Ordinance prevents Plaintiffs from communicating whatever they want about their products. Instead, the Ordinances prohibit specific commercial transactions within the confines of the City of Providence, i.e., actually redeeming (or offering to redeem) certain coupons, or actually selling (or offering to sell) certain discounted or flavored tobacco products. *See* Price Ordinance §§ 14-303 (1), (2); Flavored Tobacco Ordinance, § 14-309. Judge Selya's admonition in *Wine and Spirits Retailers, Inc. v. Rhode Island*, 418 F.3d 36 (1st Cir. 2005) bears repeating: "the First Amendment's core concern is with the free transmission of a message or idea from speaker to listener, not with the speaker's ability to turn a profit or with the listener's ability to act upon the communication." *Id.* at 48.[4]

Moreover, Plaintiffs essentially ignore the fact that offers to engage in illegal activity do not constitute protected speech. *See* TCLC Mem. at 12, 15-17, citing, *inter alia*, *United States v. Williams*, 553 U.S. 285, 297 (2008) and *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 388 (1973).[5] Thus, the incidental place and manner restriction on communication

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[4] Plaintiffs attempt to distinguish *Wine and Spirits Retailers* by noting that the regulation at issue did not involve actual communication between franchisors and potential customers, *see* Reply Mem. at 12 n. 4, ignores the fact that the Ordinances here similarly do not involve such communication.

[5] And as the TCLC has noted, the analysis does not change simply because the same ordinance that outlaws the activity also outlaws advertising about that activity. *See id.* at 16-17, citing *Bd. of Pharmacy Decision to Prohibit the Use of Advertisements Containing Coupons for Prescription Drugs*, 465 A.2d 522, 523 (N.J. Super Ct. App. Div. 1983); *Coldwell Banker Residential Real Estate Servs. v. N.J. Real Estate Comm'n.*, 576 A.2d 938, 942 (N.J. Super.Ct.

arguably contained within the Ordinances' prohibition of "offers" in no way constitutes a violation of the First Amendment.

1. Contrary to Plaintiffs' Claim, There is No "Long Line of Cases" Subjecting Promotional Discount Pricing to Review Under the First Amendment

In their Reply Memorandum, Plaintiffs spend much time arguing that the Price Ordinance is akin to the categorical prohibition of unsolicited advertisements for contraceptives struck down by the Court in *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983). *See* Reply Mem. at 5-7. Yet, the federal statute at issue in *Bolger* bears slight resemblance to the Price Ordinance. As the *Bolger* Court noted, 39 U.S.C. § 3001(e)(2) banned "'[a]ny unsolicited *advertisement* of matter which is designed, adapted, or intended for preventing conception. . . .'" 463 U.S. at 61 at 61 (quoting statute) (emphasis added). The focus of the statute in *Bolger* was upon the *content* of information communicated by the plaintiffs. By contrast, as noted, the plain language of the Price Ordinance does not regulate content, but instead focuses upon specific commercial activity—the local sale and distribution of a particular consumer product.

Unlike the plaintiffs in *Bolger*, who were prevented from mailing flyers which both promoted specific products and provided information about prophylactics in general, *see id.* at 62, the Plaintiffs here remain perfectly free under the Ordinances to communicate whatever information they want to whomever they want about their products, short of actually offering to engage in illegal conduct.

Contrary to Plaintiffs' claim in their Reply Memorandum, there is no "long line of cases" holding that the furnishing of coupons and price discounts must be subject to review under *Central Hudson*. *See* Reply Mem. at 7. Indeed, the Price Ordinance bears no resemblance to the

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App. Div. 1990) and *Ralph Rosenberg Court Reporters, Inc. v. Fazio*, 811 F.Supp. 1432, 1442 (D. Haw. 1993).

statutes, all restricting advertsing or other speech, cited by Plaintiffs. *See Rockwood v. City of Burlington, Vt.*, 21 F.Supp.2d. 411, 415-416 (D. Vt. 1998) (advertising ban of tobacco products); *Knapp v. Miller*, 843 F.Supp. 633, 640-41 (D. Nev. 1993) (discharge of a public employee based upon involvement in operation of legal brothel); *Wild Wild West Gambling Hall & Brewery, Inc. v. City of Cripple Creek*, 853 F.Supp. 371, 373 (D. Colo. 1994) (solicitations ban applied to casino operators); *Bailey v. Mora*les, 190 F.3d 320, 322 (5th Cir. 1999) (solicitations ban applied to chiropractors).

Plaintiffs' suggestion that *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), or more recently, *Nat'l. Assoc. of Tobacco Outlets, Inc. v. City of Worcester*, 2012 WL 1071804 (D.Mass. 2012), support the notion that the City does not have a substantial interest in stemming nicotine addiction rates in the City is nonsensical. As Plaintiffs' admit, in both *Lorillard* and *City of Worcester*, the courts considered measures which expressly prohibited "non-misleading advertising," and were designed to "protect adults from tobacco advertising." *See* Reply Mem. at 14, quoting *City of Worcester*. Here, as noted, the Ordinances contain no such advertising prohibitions. *See* Defendants' Mem. at 43-44.

Of no greater avail is Plaintiffs' citation to *Coldwell Banker Residential Real Estate Services of Illinois, Inc. v. Clayto*n, 105 Ill.2d 389, 475 N.E. 2d 536 (Ill. 1985), which held (with scant analysis) that a statute prohibiting real estate brokers from offering financial inducements to prospective clients payable from the proceeds of real estate closings violated the plaintiffs' First Amendment rights. *See* Plaintiffs' Reply Mem. at 8-9. Notably, Plaintiffs fail to address two subsequent cases cited in the TCLC's Memorandum involving the very same Coldwell Banker practices. *See* TCLC Mem. at 14-15 n. 7. After extensive analysis, both subsequent decisions upheld similar state provisions based upon the very distinction between expressive and

routine commercial conduct Plaintiffs have consistently ignored. *See Coldwell Banker Residential Real Estate Servs. v. Missouri Real Estate Comm'n.*, 712 S.W.2d 666 (Mo. 1986); *Coldwell Banker Residential Real Estate Servs. v. N.J. Real Estate Comm'n.*, 576 A.2d 938 (N.J. Super.Ct. App. Div. 1990).

Finally, Plaintiffs' reliance upon *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509 (6th Cir. 2012) (*see* Reply Mem. at 9, 11) is misplaced. The case does not support Plaintiffs' argument that the Ordinances impinge upon protected commercial speech and must be subject to the *Central Hudson* test. Unlike the Plaintiffs here, the Sixth Circuit recognized the need to focus upon whether a challenged regulation actually impinges upon the "communicative aspects" of an activity. *See id.* at 538-39, citing *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 502 (1981). Indeed, only one of the banned activities considered in *Discount Tobacco City & Lottery*, i.e., the distribution of free samples of tobacco products, would even be covered by either the Price or Flavored Tobacco Ordinance, and the Sixth Circuit disposed of the First Amendment challenge with respect to that one activity in summary fashion. *See id.* at 541.[6] As TCLC has noted, if anything is to be gleaned from *Discount Tobacco City & Lottery*, it is the ease by which the Ordinances would pass muster under *Central Hudson* were it applicable. *See* TCLC Mem. at 26 n. 9.

[6] The Sixth Circuit also rejected a facial challenge to the constitutionality of the FSPTCA, concluding that various requirements of the Act—including: (a) new mandated warnings labels on cigarette packs consisting of graphic, color images of the negative health effects of smoking, and (b) various prohibitions relating to the labeling and advertising of so-called modified risk tobacco products, i.e., products which will allegedly reduce the risk of tobacco-related disease—passed muster under *Central Hudson*. *See Discount Tobacco City & Lottery*, 674 F.3d at 522-537.

2. Plaintiffs' Claim that the Flavored Tobacco Ordinance Prohibits Protected Speech is Not Supported by Either the Cited Cases or the Plain Language of the Ordinance

Plaintiffs' conclusion that the Flavored Tobacco Ordinance somehow impedes constitutionally protected speech is based upon two spurious arguments. First, Plaintiffs, citing one sentence in the Ordinance's definition of "flavored tobacco product," claim that the Ordinance "bans products based not upon their ingredients, but on how they are described." *See* Reply Mem. at 33. The relevant sentence actually 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.

Flavored Tobacco Ordinance, ¶ 6.

The sole case cited by Plaintiffs in support of their argument is not on point. *See* Reply Mem. at 33, citing *Virginia v. Black*, 538 U.S. 343, 363-67 (2003). In *Black*, the Court held that a portion of a Virginia statute providing that "any . . . burning of a cross shall be *prima facie* evidence of an intent to intimidate a person or group of persons" was unconstitutional. *Id.* at 636, citing Va. Code Ann. § 18.2-423. Obviously, however, the potential to chill core political speech posed by the Virginia statute challenged in *Black* bears slight resemblance to the challenged portion of the Flavored Tobacco Ordinance here, which, as noted, does not even impinge protected commercial speech, never mind core political speech. Moreover, Plaintiffs have simply ignored the fact that, as noted by the TCLC, the argument "flies in the face of precedent flatly rejecting precisely that sort of hyperbolic extension of the First Amendment."

See TCLC Mem. at 5 note 3, citing *Whitaker v. Thompson*, 353 F.3d 947 (D.C. Cir. 2004) and *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993).[7]

Plaintiff's second argument is based upon their claim that the use of the term "concepts" in the definitional section of the Ordinance opens the door to the inclusion of "tobacco, menthol, mint or wintergreen" products, which admittedly would be federally preempted under the FSPTCA. *See* Reply Mem. at 34. Plaintiffs base this fear largely upon what they characterize as the City's refusal to "unequivocally disavow this interpretation." *Id.* In fact, as Defendants clearly stated, "the plain language of the Ordinance prohibits only the sale of 'flavored tobacco products,' *see* Flavored Tobacco Ordinance, § 14-309, which are clearly limited to products that impart a 'characterizing flavor,' *see id.*, § 14-308 at ¶ 3, which in turn are defined so as to clearly and expressly exclude 'the taste or aroma of tobacco, menthol, mint or wintergreen.'" Defendants' Mem. at 62, citing *id.*

C. Both Ordinances Would Satisfy Either the *O'Brien* or *Central Hudson* Tests, Were Either Applicable

If one were to assume for argument's sake that the conduct prohibited by the Ordinances was protected by the First Amendment, the constitutionality of the Ordinances would be determined not with reference to *Central Hudson*, which applies to commercial speech, but under the four-part test applicable to protected conduct set forth in *United States v. O'Brien*, 391

[7] Plaintiff's attempt to distinguish *Whitaker* by continuing to blatantly misrepresent what the Flavored Tobacco Ordinance prohibits. Like the statute interpreted by the FDA in *Whitaker*, the Flavored Tobacco Ordinance prohibits sales, and actual offers of sale, of a particular product, not speech associated with the product, Plaintiffs' mantra to the contrary notwithstanding. In any event, if this Court for any reason concludes that the one sentence is constitutionally infirm, the sentence should be severed and the remainder of the Ordinance upheld for the same reasons discussed by Defendants with respect to the legality of the City's Licensing Ordinance and its relationship to the Price Ordinance. *See* Defenedants' Mem. at 69-72, citing, *inter alia, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, __ U.S. __, 130 S. Ct. 3138, 3161 (2010).

U.S. 367, 377 (1968). *See* Defendants' Memorandum at 39-40. As has been discussed (*see id.* at 40-41), Plaintiffs' claim that the tests under *Central Hudson* and *O'Brien* are "substantially similar" (*see* Reply Mem. at 21) is belied by the Court's application of the *O'Brien* test in *Lorillard*, which was decided almost a decade *after* the most recent case relied upon by Plaintiffs. *See* Reply Mem. at 21, citing *United States v. Edge Broad. Co.*, 509 U.S. 418, 429 (1993). Yet, Plaintiffs have spent little time attempting to argue that the Ordinances would not pass muster under *O'Brien*. Perhaps this is because, as noted by the TCLC, the *O'Brien* test is not stringent and laws evaluated under O'Brien are rarely overturned. *See* TCLC Mem. at 27.[8]

Defendants have already expended considerable time discussing the evidence which satisfies *Central Hudson*. *See, e.g.*, Defendants' Mem. at 42-45. Yet, in their Reply Memorandum, Plaintiffs highlight their expert's speculation that the Price Ordinance might not be effective since, in his opinion, it might not prevent tobacco retailers from discounting their products, consistent with the state's minimum price law. *See* Reply Mem. at 15-16, citing the Reynolds' Dec. at ¶¶ 68-69. And Dr. Reynolds also speculated that "the Flavor Description Ordinance may have no effect on youth tobacco use because it does not address the documented risk behaviors for such use." *Id.* at 36, citing Reynolds Decl., ¶¶ 45-59, 77. The speculation—nothing more than an attempt to second-guess legitimate policy choices made by a local legislative body —has been squarely refuted by three nationally prominent experts. *See* supporting affidavits of Dr. Chaloupka, ¶ 65 at 38; Dr. Connolly, ¶ 36 at 18; and Professor Eriksen, ¶ 15 at 5.

Incredibly, Plaintiffs also claim that the City "offers no evidence" that either the Price or Flavored Tobacco Ordinance, would be effective. *See* Reply Mem. at 16, 36. In fact, contrary to

[8] *See supra*, note 1 at 2.

Plaintiffs' curious assertion, Defendants have presented an overwhelming amount of evidence from a variety of sources establishing that:

(1) couponing and multi-pack discounts are two effective ways that the tobacco companies have implemented targeted price discounts that are especially effective with respect to young smokers. *See* Defendants' Mem. at 12-18 and authorities cited therein;

(2) the tobacco companies also encourage the use of their products by young people by aggressively promoting flavored cigarettes, smokeless tobacco products, and products characterized as cigars. *See id.* at 19-21 and authorities cited therein; and

(3) both Ordinances would be effective and a substantial benefit to public health. *See id.* at 38, quoting supporting affidavits of Professor Chaloupka, Dr. Connolly, and Professor Eriksen.

D. Plaintiffs' Federal and State Preemption Arguments are No More Convincing than their First Amendment Claim

1. Plaintiffs Have Essentially Ignored the 2009 Amendment to the FCLAA and Continue with their Erroneous Claim that the Price Ordinance Somehow Regulates *Content*

As Defendants have detailed at some length, Congress amended the Federal Cigarette Labeling and Advertising Act of 1965 (the "FCLAA"), 79 Stat. 282 (1965), in 2009, *see* Defendants' Mem. at 54-56, to expressly provide that:

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

15 U.S.C. § 1334(c) (emphasis added). By focusing on provisions which regulate *content*, the 2009 amendment highlights the original, and primary, purpose of the preemption provision, i.e., to avoid the proliferation of state and local laws that would impose varying labeling and disclosure obligations upon tobacco companies. *See* Defendants' Mem. at 50, citing 15 U.S.C. § 1331. This was made clear by the actual holding in *23-34 94th St. Grocery Corp. v. N.Y.C. Bd.*

of Health, No. 11-91, 2012 U.S. App. Lexis 14086, (2d Cir. July 10, 2012), the only post-2009 amendment case cited by Plaintiffs, where the Second Circuit stated:

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

Id. at 8.[9]

Thus, since the Price Ordinance does not concern itself with content, it is not preempted. Moreover, Plaintiffs' suggestion that the Ordinance is not a valid "time, place and manner" restriction is not supported by either the plain language of the Ordinance or the two cases cited by the Plaintiffs, neither of which even involved commercial speech and both of which involved provisions which, unlike the Ordinances here, contained explicit and broad restrictions upon the content of clearly protected speech.[10]

Finally, Plaintiffs' claim that the Price Ordinance would lead to the sort of problem that the FLCAA preemption provision was designed to avoid, i.e., varying labeling and disclosure

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[9] Plaintiffs' claim that Defendants asserted that *Lorillard* was reversed in its entirety as a result of the 2009 amendments, *see* Reply Mem. at 26 n. 6, is disingenuous. Read in context, it is clear that Defendants were not suggesting that *Lorillard* was not binding on any number of points. Defendants were simply making the point that the portion of the decision which relied upon the FLCAA would likely be decided differently in light of the 2009 amendments, which were directly on point.

[10] In *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), the Court struck down a municipal ordinance which prohibited homeowners from displaying any signs on their property except residence identification signs, signs advertising the sale or rental of the property, and signs warning of safety hazards. *See* 512 U.S. at 46-47. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984), on the other hand, involved a National Park Service regulation prohibiting camping in certain national parks, as applied to prohibit demonstrators from sleeping in Lafayette Park and the Mall in connection with a demonstration intended to call attention to the plight of the homeless. *See* 468 U.S. at 290-91.

obligations from jurisdiction to jurisdiction, is overblown. As Defendants have noted repeatedly, the Ordinance simply does not concern itself with the content of advertisements or of promotional material, and there is no evidence that Congress intended to interfere with the traditional police power of state and local governments to regulate the sale and/or distribution of tobacco products, so long as those efforts did not regulate the *content* used by cigarette companies in their labeling and advertising.

2. Plaintiffs' Conjecture is Not a Proper Substitute for the Plain Language of the FSPTCA's Savings Clause

Judge McMahon's careful explication of the plain language of the relevant preservation, preemption and savings clauses contained within the Family Smoking Prevention and Tobacco Control Act (the "FSPTCA"), 123 Stat. 1776 (2009), is the best refutation of Plaintiffs' argument that the Act preempts the Flavored Tobacco Ordinance. *See* Defendants' Mem. at 56-58, discussing *U.S. Smokeless Tobacco Manufacturing Co., LLC v. City of New York*, 703 F.Supp.2d 329 (S.D.N.Y. 2010) ("Smokeless Tobacco I"). Indeed, although Plaintiffs characterize the decision as "illogical" and "faulty," *see* Reply Mem. at 42, and provide their own policy-related arguments, *see id.* at 41-42, Plaintiffs only cite one case—*Nat'l. Meat Ass'n. v. Harris*, __ U.S. __, 132 S.Ct. 965 (2012) —in support of their argument that the FSPTCA does not mean what it says.

The problem with relying solely upon *Harris*, however, aside from the already-noted distinguishable facts, *see* Defendants' Mem. at 58-59, is that the plain language of the Federal Meat Inspection Act, 21 U.S.C. § 601, *et seq.* and its single preemption provision bears slight resemblance to the text of the three provisions of the FSPTCA. Yet, as Judge McMahon noted:

> [t]he preeminent canon of statutory interpretation requires us to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there." *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183, 1 (2004) (citing

> *Connecticut Nat. Bank v. Germaine*, 503 U.S. 249, 253-54, 1 (1992)). The plain language of the FSPTCA evidences no intent to preempt a local ordinance restricting the sale of flavored tobacco. Indeed, the language of the FSPTCA supports New York's authority to enact such a law.

U.S. Smokeless Tobacco I, 703 F.Supp.2d at 343.

3. Plaintiffs' Argument Relative to the Constitutionality of the Licensing Ordinance Does Not Support their Claims of State Preemption with Respect to the Price and Flavored Tobacco Ordinances

Plaintiffs concede that there is no actual conflict between either the Price or Flavored Tobacco Ordinance and state law, yet claim that the state has entirely occupied the field of tobacco regulation. *See* Reply Mem. at 31. The argument, however, has been expressly rejected by the Rhode Island Supreme Court. As the Court concluded in *Amico's, Inc. v. Mattos*, 789 A.2d 899 (R.I. 2002), "the General Assembly at no time disclosed, by implication or otherwise, its intent to occupy exclusively the field of regulating smoking. . ." *Id.* at 20-21.

Plaintiffs attempt to avoid this conclusion (a conclusion which is dictated not only by the court's reasoning in *Amico's, Inc.*, but also by any fair evaluation of the factors to be used when attempting to identify areas of field preemption, *see* Defendants' Mem. at 64-66, applying factors set forth in *Town of E. Greenwich v. O'Neil*, 617 A.2d 104, 111 (R.I. 1992)), by arguing that *O'Neil* is inapplicable. According to Plaintiffs, the General Assembly has exclusive authority over business licensing, and therefore reference to the *O'Neil* factors would be in error, as there are "clear guidelines defining the parameter of 'local' legislation." *See* Reply Mem. at 32. The argument is not tenable for a number of reasons.

First, instead of actually challenging the validity of the Licensing Ordinance, Plaintiffs use its presumed invalidity as a means to attack the Price and Flavored Tobacco Ordinances, which they erroneously claim are enforceable exclusively through the City's allegedly illegal licensing provisions. *See id.* at 27. In fact, contrary to Plaintiffs' claim, the Ordinances are

enforceable by fines of up to $500 prior to any penalty relating to licensure. *See* Flavored Protection Ordinance, § 14-310. Indeed, the General Assembly has specifically empowered city councils to impose monetary penalties for the violation of ordinances not exceeding five hundred dollars ($500). *See* RIGL § 45-6-2.

Second, Defendants have addressed Plaintiffs' argument concerning the City's power to license tobacco retailers. *See* Defendants' Mem. at 66-69. However, if, as Plaintiffs suggest, licensing tobacco retailers is beyond the City's power, this Court should simply sever the language in the Ordinances which refer to local licensing, while upholding their remaining substantive prohibitions. *See* Defendants' Mem. at 69-72. Rather than address Defendants' substantive argument regarding severance, Plaintiffs instead misstate the holding in *State v. Krzak*, 196 A.2d 417 (R.I. 1964). Contrary to Plaintiffs claim, *Krzak* does not support the notion that this Court should ignore the substantive law relative to severance. In *Krzak*, the court struck down the relevant ordinance in its entirety simply because, unlike the Price and Flavored Protection Ordinances, its penalty provision directly contravened enabling state law, which expressly prohibited fines in excess of $500. *See id.* at 419-420.

Finally, Plaintiffs' suggestion that the state Constitution's silence on the issue of licensing and/or tobacco product regulation means that the relevant powers "belong to the General Assembly to the exclusion of the other state branches or political subdivisions," Reply Mem. at 29, ignores the fact that:

(a) the Rhode Island Supreme Court has made clear that "'absent a direct conflict between a statute and ordinance, or some other clear indication, either express or implied, that the General Assembly intended to occupy the field . . . to the exclusion of local . . . authorities, state law will not be held to preempt local ordinances in the area.'" *See* Defendants' Mem. at 63, citing *El Marocco Club, Inc. v. Richardson*, 746 A.2d 1228, 1232 (R.I. 2000);

(b) the General Assembly has expressly empowered city councils to enact ordinances "for the well ordering, managaing, and directing of the prudential affairs and police of their respective towns and cities. . . " *See* RIGL § 45-6-1; and

(c) "Section 401 of the Providence Home Rule Charter empowers the City Council to enact ordinances 'for the welfare and good order of the City,' as long as they do not conflict with existing state law." *See* Defendants' Mem. at 63.

III. CONCLUSION

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

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CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2012, a true copy of the within Reply Memorandum was filed electronically via the Court's CM/ECF System, where it is available for viewing and downloading, with true and accurate copies also provided to the following counsel by electronic mail:

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