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

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' JOINT MOTIONS FOR SUMMARY JUDGMENT, A PERMANENT INJUNCTION, AND A PRELIMINARY INJUNCTION, AND IN OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Providence has enacted two ordinances that suppress constitutionally protected speech, intrude on matters exclusively reserved for the federal government to decide, and ignore the limitations placed on municipalities by Rhode Island law.

The Promotion Ordinance bans tobacco retailers and manufacturers from promoting their products and communicating with adult consumers through coupons and certain price discounts. The federal Labeling Act expressly preempts "prohibitions, based on smoking and health," that are "with respect to the advertising or promotion of" cigarettes. The City makes no meaningful attempt to contest that coupons and price discounts are forms of "promotion" protected by the Act, as every court to consider the question has held. Moreover, a narrow exception to preemption, recently added by Congress, has no application here. *See* 15 U.S.C. § 1334(c). The exception makes absolutely clear that regulating the "content" of cigarette promotion is off limits to states and cities. But the content of cigarette promotion is exactly what the Promotion Ordinance restricts. Under the Promotion Ordinance, the City specifies that the content of Plaintiffs' promotions cannot include coupons and multi-pack discounts (e.g., "two-for-one" offers). The Promotion Ordinance thus is preempted by federal law.

At the same time, the Ordinance brazenly tramples the Plaintiffs' constitutional rights to communicate with adult tobacco consumers about the price of their products. The City claims that the Plaintiffs are free to describe the price of their products however they wish. But that is not true. If this Ordinance is enforced, Plaintiffs may not send a communication to an adult consumer inviting him or her to redeem it for a discounted price in Providence. Nor may Plaintiffs describe a $7 package of cigarettes in Providence as "discounted" from the normal price in a coupon or multi-pack discount promotion. In short, while the Ordinance does not

affect what price the Plaintiffs may charge for tobacco products in Providence, it restricts how Plaintiffs describe that price. Such a ban on communication is subject to First Amendment scrutiny, which the Ordinance clearly fails.

The Flavor Description Ordinance likewise prohibits products that are described to have certain flavors or characteristics.[1] Contrary to the City's claims, the only way to determine whether a tobacco product is banned under the Ordinance is by reference to how Plaintiffs describe it. For example, Plaintiffs are presumptively barred from using certain prohibited "concepts"—that is, ideas—to accurately describe their otherwise lawful products. Indeed, the Ordinance appears to ban accurately describing menthol products having a "cool" taste. *See Webster's Third New Int'l Dictionary* 1411 (1976) (defining "menthol" as "a secondary terpenoid alcohol . . . that has the odor and cooling properties of peppermint") [hereinafter *Webster's Third*]. Regulations limiting what Plaintiffs say about a product must satisfy the First Amendment. The City, however, barely even attempts to justify the Flavor Description Ordinance under the First Amendment, and for good reason: This overly broad ordinance prohibits far more speech than is necessary to advance any purported interest in reducing underage tobacco use.

In any event, existing federal law establishes exclusive federal authority over the regulation of flavors in tobacco products. The federal Family Smoking Prevention and Tobacco Control Act ("FSPTCA") expressly preempts state or local requirements that are "different from,

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[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. Accordingly, Plaintiff Lorillard has joined 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.

or in addition to" the FSPTCA's requirements relating to tobacco product standards and tobacco product labeling. *See* 21 U.S.C. § 387p(a)(2)(A). The FSPTCA establishes federal control over tobacco product standards, including a specific prohibition on cigarettes that contain a "characterizing flavor." *Id.* § 387g(a)(1). As described in detail below, the Flavor Description Ordinance regulates smokeless tobacco in a manner that is "different from" or "in addition to" the federal standards. The Ordinance thus is preempted and invalid for that reason as well.

On top of all these defects, the Ordinances are based on the City's attempt to license tobacco retailers, which is plainly invalid under Rhode Island law. The City's licensing scheme and the Ordinances cannot be disentangled because the Ordinances are enforced exclusively through the licensing system. The City's invasion of the Rhode Island General Assembly's authority did not stop with its effort to regulate tobacco retailers through a licensing scheme. The General Assembly has prohibited a series of promotional activities with regard to tobacco coupons and product discounts. Under Rhode Island law, the General Assembly's decision to prohibit and to punish certain coupon and discounting practices, but not others, must be honored. The Promotion Ordinance is preempted by Rhode Island law and invalid for this reason as well.

ARGUMENT

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

Defendants have raised no arguments that cannot be addressed by the Court applying well-established law to the Promotion and Flavor Description Ordinances. The federal preemption and Rhode Island state law challenges to the Ordinances require applying the law to a discrete set of undisputed facts. *See, e.g.*, *23-34 94th St. Grocery Corp. v. N.Y.C. Bd. of Health*, No. 11-91 (ECF No. 168-2) (2d Cir. July 10, 2012) (affirming invalidation on summary judgment of New York City tobacco regulations on federal preemption grounds).

With regard to the First Amendment challenges, the City has submitted three expert reports claiming to present evidence that the Ordinances will reduce various types of tobacco use. As explained below, the evidence in those declarations falls short of the showings necessary under applicable First Amendment legal standards. As the Supreme Court has explained, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986) (emphasis in original). "Broad conclusory statements offered by [experts] are not evidence and are not sufficient to establish a genuine issue of material fact." *Telemac Cell. Corp. v. Topp Telecom, Inc.*, 247 F.3d 1316, 1329 (Fed. Cir. 2001). The Court should grant summary judgment to the Plaintiffs.

Even if the Court found that the evidence presented in the City's expert reports were material to First Amendment legal standards, Dr. Cecil Reynolds has explained the likely ineffectiveness of the Ordinance in advancing any legitimate government interest, the numerous and obvious non-speech-restrictive alternatives that could advance that interest, and the

methodological and analytical defects in each of the studies relied on by the City's experts. *See* Reply Declaration of Dr. Cecil R. Reynolds ("Reynolds Reply Decl."); Declaration of Dr. Cecil R. Reynolds (ECF No. 33) ("Reynolds Decl."). At a minimum, Dr. Reynolds' testimony creates genuine issues of material fact that block any grant of summary judgment for the City on the First Amendment claims.

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

1. The Promotion Ordinance Violates The First Amendment.

The Promotion Ordinance violates the First Amendment because it bans protected commercial speech and fails to survive scrutiny under the four-part test for such regulations established by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980).[2]

a. The Promotion Ordinance Regulates Commercial Speech And Therefore Is Subject To Review Under *Central Hudson*.

The City argues that the Promotion Ordinance "has nothing to do with protected speech or expressive conduct," Defs. Br. at 30, and is therefore not subject to First Amendment scrutiny at all. That is simply untrue. The Ordinance bans promotional offers—specifically, coupons and multi-pack discounts (e.g., "buy-one-get-one-free")—that Plaintiffs use to advertise and promote their products to adult tobacco consumers. The City's ban of these offers is based on the notion that such promotions are too effective at persuading people to purchase tobacco products—and

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[2] Plaintiffs believe that the even more exacting strict scrutiny framework should apply to analyzing content-based commercial speech restrictions. *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); *accord Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011). Plaintiffs expressly preserve this issue for any later review.

that the City should shield the public from such offers as part of its efforts to reduce the number of adult and underage smokers. Because the Promotion Ordinance attempts to shield the public from promotional offers that the City deems to be too effective, it regulates commercial speech, and the City bears the burden of proving that the Ordinance satisfies *Central Hudson*.

Indeed, the types of coupons and multi-pack discounts banned by the Promotion Ordinance qualify as core commercial speech, as that term has been defined by the United States Supreme Court. As the Court has repeatedly held, the "core notion of commercial speech" is comprised of "speech which does 'no more than propose a commercial transaction.'" *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983) (quoting *Va. Pharmacy Bd. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (quoting *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 385 (1973))). It is difficult to understand how the types of communications prohibited by the Promotion Ordinance—for example, a coupon telling consumers that they can buy a pack of cigarettes for "$1 off" the listed price or a "buy-one-get-one-free" offer sent to age-verified, adult smokers who sign up for such promotional offers—could fail to satisfy that definition. Both coupons and multi-pack discounts propose commercial transactions to consumers. That is their purpose. They communicate an offer to sell a product at a specified discount and urge consumers to purchase the discounted product. As part of an effort to *persuade* consumers to make a purchase, they constitute core commercial speech and are thus subject to First Amendment protection under *Central Hudson*.

In addition to meeting the Supreme Court's test for core commercial speech, the promotions banned by the Promotion Ordinance also contain other indicia identified by the Supreme Court in *Bolger* that demonstrate that they are commercial speech. There, the Court found that unsolicited pamphlets about contraceptives qualified as commercial speech, even

though they did more than just "propose a commercial transaction," because they (a) made reference to specific products, (b) were sent to consumers "with an economic motivation," and (c) were referred to as advertisements. *Id.* The Court made clear that each of these characteristics need not be present in order for speech to be commercial, *id.* at 66 n. 14, but held that their presence "provide[d] strong support" for the conclusion that the speech at issue was commercial, *id.* at 66. The promotional offers banned by the City contain each of the characteristics identified by the Supreme Court in *Bolger*. They typically refer to specific tobacco products, are sent to consumers with an economic motivation, and are conceded to be "promotions" (if not in many instances advertisements) for tobacco products.[3] The City does not even cite *Bolger*, let alone attempt to address the test set forth in that case concerning what constitutes commercial speech.

Nor does the City address any of the long line of cases that have applied *Central Hudson* to challenges to similar promotional offers. In *Rockwood v. City of Burlington, Vt.*, 21 F. Supp. 2d 411, 422–23 (D. Vt. 1998), for example, the court struck down a city ordinance that prohibited, among other things, "coupons redeemable for tobacco products or promotional materials," holding that the law failed to satisfy prong four of the *Central Hudson* test. Likewise, in *Knapp v. Miller*, 843 F. Supp. 633, 640–41 (D. Nev. 1993), the court held that the Plaintiff's use of "flyers providing three-for-one coupons" and "newspaper advertisements" for legal brothels in Nevada both constituted commercial speech because they were "expression that is solely related to the economic interests of the speaker" and "speech proposing a commercial

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[3] *See, e.g.*, Providence Code of Ordinances § 14-300 (defining "Coupon" as "any card, paper, note, form, statement, ticket or other issue distributed *for commercial or promotional purposes* to be later surrendered by the bearer so as to receive an article, service or accommodation without charge or at a discount price" (emphasis added)).

transaction." Applying *Central Hudson*, the court concluded that the Plaintiff's First Amendment rights were violated when he was terminated from his job as a state employee for engaging in protected commercial speech. *Id.* In *Wild Wild West Gambling Hall & Brewery, Inc. v. City of Cripple Creek*, 853 F. Supp. 371, 373 (D. Colo. 1994), the court applied *Central Hudson* to strike down a local Ordinance forbidding "greeters" from standing outside of establishments and displaying or distributing "literature, coupons, signs, posters, coins, tokens, or other advertising products or services in or on the public right of way." In an attempt to promote its casino and brewery, the Plaintiff employed someone to stand in the street and offer passersby a free $1 token, a free beverage coupon, or both. *Id.* The court concluded that the greeter's actions constituted speech that was "commercial in nature," because they constituted "expression that 'propose[s] a commercial transaction.'" *Id.* at 374 (quoting *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473–74 (1989)). In *Bailey v. Morales*, 190 F.3d 320 (5th Cir. 1999), the Fifth Circuit invalidated under *Central Hudson* a marketing restriction aimed at chiropractors that criminalized the distribution of free "promotional gifts and items," *id.* at 321, holding that such promotional offers "constitute[] commercial speech," *id.* at 325, because they are made with "an intent to convey a particularized message: hire me, try my service," and because "those who receive the money or anything of value are likely to understand the message because rebates, free samples and risk-free trials of products are common marketing tools." *Id.* And in *Coldwell Banker Residential Real Estate Services of Illinois, Inc. v. Clayton*, 105 Ill. 2d 389, 396–97 (Ill. 1985), the court applied *Central Hudson* to strike down a statute prohibiting the use of "prizes, money, free gifts or other valuable consideration as inducements" to secure customers to buy, rent, or lease properties. The court concluded that, because the promotions at issue—which included the receipt of coupon booklets that could be used at stores owned by the

Plaintiff's parent corporation, *id*. at 393–94—were intended to induce sales, "[c]ommercial speech concerns [were], therefore, directly at issue" and *Central Hudson* was the applicable standard. *Id.* at 399.

Finally, in *Discount Tobacco City & Lottery v. United States*, 674 F.3d 509 (6th Cir. 2012), the Sixth Circuit rejected the argument that the City makes here about promotional speech constituting "conduct" as opposed to speech. In that case, the Government argued that a federal law restricting certain tobacco marketing practices—e.g., the distribution of free samples of tobacco products, free gifts in consideration for tobacco purchases, and non-tobacco items bearing the name or logo of a tobacco brand—did not implicate the First Amendment because it "regulate[d] conduct without a significant expressive element." *Id.* at 538. The court disagreed, holding that "sampling and continuity programs are protected speech because they are promotional methods that convey the twin messages of reinforcing brand loyalty and encouraging switching from competitors' brands." *Id.* (internal quotations omitted). Applying *Central Hudson*, the court struck down the ban on continuity programs but upheld the other marketing restrictions. *Id.* at 539–44. The rationale underlying all of these cases—that promotions are commercial speech when they are intended to communicate an offer to purchase goods—warrants application of the *Central Hudson* test to the Promotion Ordinance.

Given that the Promotion Ordinance regulates speech, it is not a regulation of "expressive conduct" under *United States v. O'Brien*, 391 U.S. 367 (1968). That is because, as the Supreme Court made clear in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 567 (2001), "[t]o qualify as a regulation of communicative action governed by the scrutiny outlined in *O'Brien*, the State's regulation must be unrelated to expression." In *Reilly*, the Court struck down a state law requiring tobacco advertisements to be placed higher than 5 feet from the floor of any retail

establishment located within a one-thousand-foot radius of any school or playground. The Court applied *Central Hudson* to that provision and concluded that the height restriction was "an attempt to regulate directly the communicative impact of indoor advertising." *Id.* The same is true here.

In support of its argument that the Promotion Ordinance regulates only conduct and not speech, the City points to a separate holding in *Reilly*, upholding under *O'Brien* a requirement that tobacco retailers place tobacco products behind counters to cause customers to have contact with the salesperson before they are able to handle a tobacco product. *Id.* at 568–70. The City's reliance on that holding is, however, unavailing. The *Reilly* Court upheld the access provisions at issue solely because the state sought "to regulate the placement of tobacco products for reasons unrelated to the communication of ideas," *id.* at 569, i.e., to limit underage persons' physical access to tobacco products. That, however, is simply not the case here. The City goes to great lengths to demonstrate that it has targeted the types of coupons and multi-pack discounts at issue in the Promotion Ordinance primarily because it believes that those promotions are effective at persuading consumers to buy tobacco products. Indeed, the City's expert, Professor Chaloupka, opines in great detail about the fact that tobacco consumers are price-sensitive and that, as a result, "price-reducing tobacco company marketing offers" are effective at persuading people to consume tobacco products. *See generally* Chaloupka Aff. ¶¶ 42–58 (ECF No. 44-3).

That the City is targeting the communicative impact of coupons and multi-pack discounts is also made clear by the fact that the City does not target the use of coupons and multi-pack discounts generally, *but rather only seeks to ban those promotional practices when applied to tobacco products*. As such, the Ordinance is not the kind of content-neutral regulation needed to trigger review under *O'Brien*. As the Sixth Circuit made clear in refusing to apply *O'Brien* to a

federal statute prohibiting free sampling and continuity programs (e.g., free gifts) in connection with tobacco products in *Discount Tobacco City & Lottery*:

> In this case . . . the Act's regulation of sampling and continuity programs is an attempt to regulate the "communicative impact" of the activity, not the activity itself. The government has not articulated an interest in generally regulating the distribution of T-shirts, baseball caps, bobble head dolls, or any other merchandise that may be available as part of a continuity program, or of regulating continuity programs themselves. Nor has it articulated an interest in regulating the act of providing free samples of products across consumer categories. Because the government has not advanced these, or similar, interests, the District Court erred in concluding that the Act's regulation of the expressive activity embodied in the tobacco industry's practices of sampling and maintaining continuity programs was an incidental consequence of the regulation of non-expressive conduct.

674 F.3d at 539.

The City nonetheless argues that the Promotion Ordinance is merely a "price control measure" that does not regulate speech or "expressive conduct" because it "in no way affects the ability of Plaintiffs . . . to continue to disseminate price reduction instruments and multi-pack offers in Providence. The Ordinance merely prohibits their redemption in the City." Defs. Br. at 31. In other words, the City claims that the Promotion Ordinance does not regulate speech because it still allows Plaintiffs to send customers in Providence coupons and multi-pack discount offers; it simply prohibits them from *redeeming* those offers in Providence.

This, of course, misses the point. The Ordinance does not regulate the prices that may be charged for tobacco products. Rather, the Ordinance regulates the manner in which a price may be described to adult tobacco consumers, for fear that such description may persuade consumers to buy a particular tobacco product. Indeed, the City's contention that a commercial business could advertise a pricing offer that is illegal to honor is hardly worth a response, as other laws would prohibit what would ultimately be a false advertisement. Allowing Plaintiffs to send

coupons and discount offers that cannot be redeemed in Providence does nothing to redress the First Amendment violation.[4]

The Promotion Ordinance regulates commercial speech and thus is subject to *Central Hudson*.

b. The Promotion Ordinance Does Not Satisfy *Central Hudson*.

Because the Promotion Ordinance regulates commercial speech, the City bears the burden of demonstrating that the Ordinance satisfies *Central Hudson*. Under this framework, when a regulation prohibits (1) truthful and non-misleading speech about a lawful product, any restrictions on that speech are invalid unless the government can affirmatively demonstrate that the law (2) serves a substantial governmental interest, (3) directly and materially advances that interest, and (4) is no more extensive than necessary to serve that interest. *Cent. Hudson*, 447 U.S. at 566. The Promotion Ordinance cannot withstand scrutiny under this test.

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[4] The First Circuit's decision in *Wine & Spirits Retailers, Inc. v. Rhode Island*, 418 F.3d 36 (1st Cir. 2005), which the City primarily relies on in support of its argument that the Ordinance regulates "commercial activity" and not speech, does not support the City's position. *Wine & Spirits* concerned a Rhode Island statute that prohibited the retail sale of alcoholic beverages by chain stores and/or franchise businesses. A franchisor moved to enjoin the enforcement of the statute, arguing that, among other things, the statute infringed upon the franchisor's First Amendment right to engage in commercial speech by providing "advertising services" and advice to franchisees concerning the best way to advertise a franchise liquor store. *Id.* at 49. Noting that "[t]he commercial speech doctrine protects the communication of truthful information to potential customers about a proposed commercial transaction," the court held that the franchisors' provision of advertising and licensing services did not constitute commercial speech because the franchisors were not communicating with "their potential customers . . . [to] propose[] a commercial transaction." *Id.* That distinguishes *Wine & Spirits* from this case. The coupons and offers prohibited by the Ordinance are made directly to consumers and therefore trigger the protections afforded to commercial speech. Had the speech in *Wine & Spirits* been commercial, the court strongly suggested that the outcome would have been different. *See id.* at 48–49 ("We strongly agree with W&S's underlying premise that commercial speech . . . is entitled to a measure of protection under the First Amendment. . . . We nonetheless reject W&S's suggestion because, in performing its role in the activities in question, it does not engage in commercial speech.").

There is no dispute that the first part of the *Central Hudson* test is satisfied here. The City does not even claim that the coupons and multi-pack discounts at issue are false or misleading. Nor could it.

As for the second part of the *Central Hudson* test, although the City certainly has a substantial interest in reducing underage tobacco use, the City has made clear that it also passed the Promotion Ordinance "to reduce the overall nicotine addiction rate in the City," Defs. Br. at 25—i.e., to reduce the number of adult smokers as well. *See also* Yurdin Aff. ¶ 13 (ECF No. 44-2). To the extent that the City attempts to ban promotions that appeal to adult smokers, it fails *Central Hudson*'s second requirement that the law advance a "substantial" "government interest." *Cent. Hudson*, 447 U.S. at 566; *see Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Worcester*, No. 11–40110, 2012 WL 1071804, at *6 (D. Mass. Mar. 31, 2012).

As the Supreme Court made clear in *Reilly*, "[s]o 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 consumers have an interest in receiving that information." *Reilly*, 533 U.S. at 571. Last term, the Supreme Court further explained its view that speech cannot be prohibited for fear of how adults will behave, holding that the state "may not seek to remove a popular but disfavored product from the marketplace by prohibiting truthful, nonmisleading advertisements" of that product. *Sorrell*, 131 S. Ct. at 2671. If the state is "displeased" by the effectiveness of commercial speech, the Court explained, it "can express that view through its own speech. But [the state's] failure to persuade does not allow it to hamstring the opposition . . . to tilt public debate in a preferred direction." *Id.*

Just two months ago, the United States District Court for the District of Massachusetts applied these Supreme Court precedents and concluded that a government cannot justify the

suppression of tobacco advertising because it might persuade adults to purchase more tobacco products. *Nat'l Ass'n of Tobacco Outlets*, 2012 WL 1071804, at *5–*6. As the court explained, the government "has no legitimate interest in prohibiting non-misleading advertising to adults to prevent them from making decisions of which [it] disapproves," and it "cannot meet the substantial interest prong of the *Central Hudson* test as applied to . . . protection of adults from tobacco advertising." *Id.* The Promotion Ordinance likewise violates the First Amendment to the extent that the City's interest is to prevent adults from choosing to purchase or use tobacco products simply because the City disapproves of that decision. It must therefore stand or fall on the City's interest in preventing underage tobacco use.

The Promotion Ordinance fails to satisfy prong three of *Central Hudson* as well. To satisfy prong three, the City must demonstrate that the Promotion Ordinance's ban of coupons and multi-pack discounts *directly* and *materially* advances its interest in reducing underage tobacco use. If the regulation "'provides only ineffective or remote support for the government's purpose,' or if there is 'little chance' that the restriction will advance the State's goal," it fails *Central Hudson*'s third prong. *Reilly*, 533 U.S. at 566 (quoting *Edenfield v. Fane*, 507 U.S. 761, 770 (1993)); *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 193 (1999)). Rather, the City must show that the "ban will *significantly* reduce" underage tobacco use. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996) (plurality op.) (emphasis in the original).

The City's expert affidavits do not create any genuine issue of material fact as to whether the Promotion Ordinance directly and materially advances the City's purported interest, as required by the First Amendment. The City's expert on promotion, Professor Chaloupka, spends much time establishing a point that is undisputed—namely, that as the price of tobacco products

increases, rates of tobacco use go down. *Compare* Chaloupka Aff. ¶¶ 12–25 *with* Reynolds Decl. ¶¶ 68, 80, 82. Professor Chaloupka's report might be relevant if the City had enacted a minimum price for tobacco products. But the City provides no evidence demonstrating that eliminating the promotions at issue will increase the price of tobacco products or otherwise linking Professor Chaloupka's conclusion to the Promotion Ordinance itself. *See* Reynolds Reply Decl. ¶¶ 3–5. Under the Promotion Ordinance, retailers would remain free to discount tobacco products as long as the products were sold at or above the minimum price fixed by Rhode Island law. Instead of offering a "$1 off coupon" to some consumers who signed up on a direct mailing list, retailers could comply with the Promotion Ordinance by lowering prices for *all* consumers by $1 across the board.

The City argues that Plaintiffs have failed to show that across-the-board discounts are economically feasible and argues that Plaintiffs should come forward with examples of such responses to similar laws. Defs. Br. at 45. The City's argument gets things backwards: under the law, it is *the City*, not Plaintiffs, that bears the burden of proof on this issue. *See Edenfield* v. *Fane*, 507 U.S. at 770–71 ("[A] governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."). In any event, the evidence in the record strongly suggests that across-the-board discounts *would* be economically feasible. The City itself suggests that Plaintiffs spend very large sums of money each year on price discount marketing practices. *See, e.g.*, Defs. Br. at 29 n.29 (citing Surgeon General's Report claiming that such efforts constitute approximately 84% of cigarette and 77% of smokeless tobacco marketing expenditures); Chaloupka Aff. ¶ 43 (same). In fact, the City's own expert emphasizes that the Manufacturer Plaintiffs' marketing efforts have shifted in recent years to focus on price-reducing

strategies, because it is economically effective for them to do so. Chaloupka Aff. ¶¶ 42–58. In light of the City's own expert's testimony, it is difficult to understand how the City can plausibly claim that across-the-board price cuts would not likely follow if the Promotion Ordinance were enforced.

The City never provides *any* evidence that the specific promotions at issue here—coupons and multi-pack discounts—have contributed in any significant way to underage tobacco use in Providence. There is no evidence, for example, that underage tobacco users are using coupons or multi-pack discounts to obtain tobacco products illegally. In fact, the undisputed evidence suggests that they are not, as the Manufacturer Plaintiffs all provide such coupons and discounts only to age-verified adult smokers in Providence. *See* Lindsley Decl. ¶¶ 12–14; Karrow Decl. ¶¶ 8–9; Begley Decl. ¶¶ 10–13 (attached to Pls. Br. as Exs. 13, 14 & 15). Because of this undisputed evidence, it is difficult to see any justification for the Ordinance. The Ordinance very likely will move price discounts targeted at age-verified adult tobacco consumers (like coupons or multi-pack discounts) to general across-the-board price discounts, available to all who manage to purchase tobacco products. If Professor Chaloupka is correct about the link between lower prices and underage tobacco use, the Ordinance could have the effect of *increasing* underage tobacco use. Reynolds Decl. ¶¶ 68–69. The First Amendment requires that a restriction of commercial speech directly and materially advance a substantial government interest; it certainly will not tolerate a speech restriction that regresses the government's interest.[5]

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[5] Indeed, Plaintiffs' expert, Dr. Cecil Reynolds, demonstrates that there is no credible and valid scientific evidence that the Promotion Ordinance will result in a significant reduction in underage tobacco use, and that the research supporting the Ordinance is based on speculation and numerous methodological flaws. Reynolds Decl. ¶¶ 60–70; Reynolds Reply Decl.¶¶ 3–5. At best, then, there are disputed issues of material fact that preclude summary judgment for the City.

The City also has failed to demonstrate that the Promotion Ordinance will *directly* advance a substantial interest. The City claims that the Promotion Ordinance will be effective because it will raise the price of tobacco products, which will cause fewer tobacco products to be sold to adults generally, which, in turn, will lead to fewer underage persons getting their tobacco products from adults. *See, e.g.*, Defs. Br. at 17 ("[r]egardless of how a young person obtains cigarettes, the lower the price the more of them he or she is likely to obtain" and because "coupons make cigarettes cheaper, . . . young people will obtain more cigarettes. . . . Coupons lower the effective price and the results flow naturally from that fact"). But, as noted above, the First Amendment does not permit the City to use speech restrictions to cause *adults* to purchase less tobacco. Even if there were proof that such an approach would reduce underage tobacco use—and there is not—such an approach would not provide the type of *direct* advancement of the government's stated interest in reducing underage tobacco use that is needed to satisfy prong three. *Cent. Hudson*, 447 U.S. at 566.

Finally, the Promotion Ordinance also fails to satisfy the fourth *Central Hudson* requirement—that the restriction on speech be narrowly tailored to the substantial government interest. The Ordinance is overbroad, and there are numerous less speech-restrictive alternatives available to the City to accomplish its stated goals without interfering with Plaintiffs' First Amendment rights.

The Promotion Ordinance is overbroad because it would preclude Plaintiffs from communicating core commercial speech to their adult consumers—i.e., consumers who may, consistent with federal and Rhode Island law, lawfully purchase tobacco products in Providence. That the City does not want adults to purchase tobacco products does not allow it to prohibit Plaintiffs from communicating truthful information to adults about those products. Indeed, 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."). More generally, the Court has continuously held that it is impermissible to silence otherwise lawful communications to adults because they may be unfit for children: "[T]he government may not 'reduce the adult population . . . to reading only what is fit for children.'" *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 (1983) (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957)). The Promotion Ordinance would do precisely what the First Amendment prohibits: the silencing of truthful speech to adult tobacco consumers because that speech may also reach minors.

The Promotion Ordinance also fails *Central Hudson*'s fourth prong because the City has failed to consider the numerous alternative measures that could allow it to reach its ends without squelching Plaintiffs' First Amendment rights. Under a long line of Supreme Court precedent, the City must, if it can, employ an alternative measure to achieve its interest if that measure does not restrict speech or restricts less speech. *W. States Medical Center*, 535 U.S. at 371.

In their opening brief, Plaintiffs identified numerous alternative measures that the City could implement that would not burden protected speech. Pls. Br. at 16–17. Those alternative means include, among others, more rigorously enforcing laws prohibiting sales of tobacco products to minors, including meaningful penalties for violations of laws prohibiting underage tobacco use in public (such as loss of a driver's license), prohibiting minors from possessing tobacco products in private residences (which is currently permitted under Rhode Island law),

instituting a counter-marketing campaign, or implementing one of the many programs identified by Dr. Reynolds as having been empirically proven to reduce underage tobacco use. *See* Reynolds Decl. ¶¶ 78–83. The City has failed to demonstrate that these proffered alternatives, either alone or when combined, would be less effective than the Promotion Ordinance at reducing underage tobacco use.

In response, the City asserts that "many of the supposed alternatives [offered by plaintiffs] have in fact been tried or are being implemented, with less than satisfactory results." Defs. Br. at 46. In support of this proposition, the City cites three paragraphs of City Council Member Seth Yurdin's affidavit. *Id.*; Yurdin Aff. ¶¶ 16–17, 20. None of those paragraphs supports the City's assertion that it in fact tried many of Plaintiffs' proffered alternatives. In fact, if anything, those (and other) paragraphs make clear that the State of Rhode Island has *chosen* to forego such alternatives because, despite having been given rights to $1.19 billion in tobacco settlement payments that primarily were designed to fund such anti-tobacco programs, the State elected to use the funds for other purposes. *See* Yurdin Aff. ¶ 23. The City then concedes that, because of that decision, the State is not adequately enforcing—and cannot afford to adequately enforce—its existing tobacco laws. *See id.* ¶ 20 ("The state lacks adequate resources to effectively enforce relevant state provisions."). But Plaintiffs should not be forced to surrender their First Amendment rights on account of the State's poor fiscal choices and failure to adequately enforce its own laws. Courts routinely have struck down laws regulating commercial speech when the State has failed to enforce existing laws that do not infringe on speech. *See, e.g.*, *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"); *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"); *44 Liquormart*, 517 U.S. at 507 (plurality op.) (alternatives existed to "increase[] taxation" and "educational campaigns").

The City's argument goes too far and would lead to absurd results. If the City announced publicly that, in these hard economic times, it could no longer afford to enforce laws limiting tobacco sales to minors at all, is there any doubt that the City would not then be able to use its decision to stop such enforcement as justification for restricting tobacco marketing? Of course not. And yet that is where the logic of the City's argument takes us. In any event, the City's argument ignores the fact that the City could institute many alternatives, like establishing a greater minimum price for tobacco products or imposing more meaningful penalties for illegal youth tobacco use (such as loss of a driver's license). The City may not resort to banning speech simply because it perceives that to be a more expedient or less expensive alternative. *W. States Med. Ctr.*, 535 U.S. at 373 ("If the First Amendment means anything, it means that regulating speech must be a last—not first—resort.").

c. The Promotion Ordinance Is Alternatively An Unconstitutional Restriction Of Expressive Conduct Under *United States v. O'Brien*.

The City claims that the Promotion Ordinance is, at most, subject to scrutiny under the Supreme Court's test, established in *United States v. O'Brien*, 391 U.S. 367, 377 (1968), for laws regulating expressive conduct. For the reasons discussed above, that is not so, because the Ordinance targets commercial speech and is therefore subject to scrutiny under *Central Hudson*. But even if *O'Brien* were to apply, the Promotion Ordinance would still fail to pass constitutional muster.

The City claims in its opposition brief, without citation to precedent, that "[i]n recent years, . . . as the *Central Hudson* test has grown somewhat more stringent, the leniency of the

O'Brien standard has remained unchanged. The two tests have become quite distinct." Defs. Br. at 40. This is not true. As noted in our opening brief, Pls. Br. at 17 n.8, the *O'Brien* test has long been understood to apply a type of intermediate scrutiny that is substantially similar to that applied under *Central Hudson*. *See, e.g.*, *United States v. Edge Broad. Co.*, 509 U.S. 418, 429 (1993) ("[T]he validity of restrictions on commercial speech should not be judged by standards more stringent than those applied to expressive conduct entitled to full First Amendment protection or to relevant time, place, or manner restrictions."); *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 537 (1987) ("Both this [commercial speech] test and the test for a time, place, or manner restriction under *O'Brien* require a balance between the governmental interest and the magnitude of the speech restriction. Because their application to these facts is substantially similar, they will be discussed together."); *see also 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). Both tests require the government to advance a "substantial" "governmental interest," *Cent. Hudson*, 447 U.S. at 566; *O'Brien*, 391 U.S. at 377, and require the regulations to be "no greater than is essential to further [the governmental] interest," *O'Brien*, 391 U.S. at 377; *Cent. Hudson*, 447 U.S. at 566. In addition, to satisfy *O'Brien*, the regulation must be "within the constitutional power of the Government" and the governmental interest must be "unrelated to the suppression of free expression." 391 U.S. at 377.

The Promotion Ordinance fails under *O'Brien*, and the City never demonstrates otherwise. First, the City's asserted interest in passing the Promotion Ordinance is related to the suppression of free expression because the City is attempting to keep consumers from hearing about certain types of promotions that the City fears will persuade them to buy tobacco products.

Second, the Ordinance restricts First Amendment freedoms more than is "essential to the furtherance of the [government's stated] interest," *O'Brien*, 391 U.S. at 377, for the same reasons that it fails to satisfy prongs three and four of *Central Hudson*.

2. The Federal Labeling Act Preempts The Promotion Ordinance.

Defendants do not contest that the Promotion Ordinance is a prohibition based on smoking and health. *See* Defs. Br. at 49–56; Defs. Statement of Undisputed Facts ¶ 3. Thus, the only argument remaining to Defendants is that the Promotion Ordinance is not a regulation "with respect to the advertising or promotion" of cigarettes. But under the plain text of Section 1334(b) of the Labeling Act and binding authority interpreting that provision, the Promotion Ordinance is what it says it is—a prohibition "with respect to . . . promotion" of cigarettes—and thus is preempted.

The City's brief skips any analysis of the Labeling Act's text in favor of an extended and selective account of its purported legislative history and purpose. Defs. Br. at 50–55. This is because the Defendants have no meaningful case to make on the text of the Labeling Act, which is the beginning and, in this matter, the end of the preemption inquiry. *See Reilly*, 533 U.S. at 543. The plain language of the Labeling Act is unmistakably clear: If a local ordinance is (1) a "requirement or prohibition," (2) "based on smoking and health," and (3) "with respect to the advertising or promotion" of cigarettes—as the Promotion Ordinance is—then it is preempted by the Labeling Act.

Price discounts and coupons are clearly "promotion" under the Labeling Act, which, under the relevant case law, is "'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.'" *23-34 94th St. Grocery Corp.*, No. 11-91, slip op. at 19–20 (2d Cir. July 10, 2012) (quoting Merriam Webster's Collegiate Dictionary 931 (10th ed. 2000))

(emphasis added); *see also Jones* v. *Vilsack*, 272 F.3d 1030, 1036 (8th Cir. 2001) (defining "promotion" under the Labeling Act to include any act, including "publicity or discounting," that "further[s] . . . the . . . sale of merchandise") (quoting Webster's Collegiate Dictionary (2001)). Indeed, the Second Circuit recently held that "[d]istribution of coupons and free samples . . . would *obviously* be classified as promotional activity [under the Labeling Act] as they further the sale of merchandise." *23-34 94th St. Grocery Corp.*, slip op. at 20 (emphasis added).

The language of the Promotion Ordinance itself confirms that it is intended to, and does, relate to cigarette promotions. *See* Providence Code of Ordinances § 14-300 (defining "Coupon" as "any card, paper, note, form, statement, ticket or other issue distributed *for commercial or promotional purposes* to be later surrendered by the bearer so as to receive an article, service or accommodation without charge or at a discount price" (emphasis added)). So does the City's own expert, Professor Chaloupka. *See* Chaloupka Aff. ¶ 48 (describing "buy-three-get-three free ('six pack') discounts" and "coupons" as "promotions"). Although the City half-heartedly argues in a footnote that the Promotion Ordinance "does not concern the communication of information related to promotions," Defs. Br. at 3 n.2, the City never even explains its basis for that argument or attempts to grapple with any of the authorities interpreting the term "promotion" under the Labeling Act.

Instead, the City asserts that the addition of Section 1334(c) somehow overturned every court's interpretation of the word "promotion," but never explains how that could be. *See* Defs. Br. at 54–56. That is because Section 1334(c) has nothing to do with the scope of the term "promotion"; rather, it provides a limited circumstance under which the "promotion" of cigarettes may be regulated. At the same time, Section 1334(c) makes clear that the "content" of cigarette promotion cannot be regulated. But the Promotion Ordinance endeavors to do precisely

that—regulate the content of cigarette promotion. The Ordinance prohibits the use of coupons or multi-pack purchase promotions, which by their nature suggest that a tobacco product is discounted below normal prices or, for example, is a "two products for the price of one" deal. The City never contests this.

The City also does not confront the narrow language of Section 1334(c), which permits localities to impose "specific bans or restrictions on the time, place, and manner" of cigarette promotion—a concept that is clearly borrowed from the First Amendment context. The United States Supreme Court has set stringent standards for what types of regulations qualify as "time, place, and manner" restrictions. *See, e.g.*, *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994) (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). A regulation seeking protection under Section 1334(c) must at least meet these detailed standards, yet the City does not even mention them. Valid "time, place, and manner" restrictions cannot be restrictions that single out a specific type of content, such as restrictions that target tobacco advertisements only. *Clark*, 468 U.S. at 293 (holding that time, place, and manner restrictions must be "justified without reference to the content of the regulated speech").

What remains of the City's argument is a construction of the Labeling Act's preemption provision that has been rejected by the Supreme Court. The argument starts with the legislative findings of the Labeling Act, which explains that a motivation for the preemption provision was to ensure that "commerce and the national economy may be . . . not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations." 15 U.S.C. § 1331(2). From that, and some references to the congressional record, the City infers that only those regulations that "pose [a] risk of impeding commerce with diverse, nonuniform and confusing

regulations" are preempted, notwithstanding the explicit text of Section 1334. Defs. Br. at 51. There are at least two problems with the City's argument.

First, the Promotion Ordinance does "pose [a] risk of impeding commerce with diverse, nonuniform and confusing regulations." The Plaintiffs send marketing materials to age-verified adult tobacco consumers, including coupons offering price discounts or advertising two-for-one offers, throughout the country. The Promotion Ordinance tries to make those promotional materials illegal in one part of the Nation. The result is plain: The Manufacturer Plaintiffs must tailor their offers and marketing to each political subdivision if cities may make some offers and marketing illegal. That is exactly the type of nonuniform and diverse regulation that the Labeling Act condemns. *See, e.g.*, *R.J. Reynolds Tobacco Co. v. McKenna*, 445 F. Supp. 2d 1252, 1258 (W.D. Wash. 2006) ("[A]llowing individual states to regulate sampling [i.e., the distribution of free samples to adults for promotional purposes,] could 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].").

Second, the limitation that the City attempts to engraft onto Section 1334's express preemption provision is contrary to Supreme Court precedent. Despite the narrative that Defendants have cobbled together regarding the Labeling Act's purpose and structure, it remains the case—as the Court has recognized—that Section 1334(b) applies broadly to any prohibition based on smoking and health with respect to cigarette promotion. The Plaintiffs need not demonstrate that the Promotion Ordinance "poses [a] risk of 'impeding commerce' with 'diverse, nonuniform, and confusing' regulations," Defs. Br. at 51; Plaintiffs must only show that the Promotion Ordinance is a prohibition based on smoking and health—which Defendants do not

contest—and that it is imposed with respect to cigarette promotion. Defendants have no satisfactory response when faced with the text of the statute.

In *Reilly*, 533 U.S. 525, the State of Massachusetts argued that regulations on the sale, promotion, and labeling of tobacco products were not preempted because they did not create diverse or nonuniform requirements on tobacco manufacturers: Manufacturers could continue to use the restricted forms of advertising elsewhere, just not in certain areas of Massachusetts. *Id.* at 546. The Court rejected this argument, explaining that "[t]he context in which Congress crafted the current pre-emption provision leads us to conclude that Congress prohibited state cigarette advertising regulations motivated by concerns about smoking and health," without further limitation. *Id.* at 548.[6]

As in *Reilly*, there is no doubt here that the Promotion Ordinance applies "with respect to" cigarette promotion. 533 U.S. at 547. A regulation that "targets" cigarette promotion falls within Section 1334(b)'s operative "with respect to . . . promotion" clause. *Id.* ("Here, however, there can be no question about an indirect relationship between the regulations and cigarette advertising because the regulations expressly target cigarette advertising."). The Promotion Ordinance expressly targets cigarette promotions. Under *Reilly*, it is a prohibition "with respect to . . . promotion" and thus is preempted.

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[6] Defendants claim—in a footnote without any support—that Congress "essentially overturned [*Reilly*] by adding § 1334(c) to the preemption provision in 2009." Defs. Br. at 54 n.56. That *Reilly* has been overturned would surely be surprising news to the nearly eighty federal courts that have cited the case since the passage of the FSPTCA in 2009. Section 1334(c) does no such thing; instead, it operates as a narrow exception to Section 1334(b)'s broad preemption language. This Court must reject Defendants' attempts to rewrite the law and turn this limited exception entirely on its head.

3. The Promotion Ordinance Violates The Rhode Island Constitution.

The Rhode Island General Assembly alone holds the authority to create business licensing laws within the state. This is a foundational state constitutional principle, reaffirmed by the Rhode Island Supreme Court at every turn for more than fifty years. *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 East Providence*, 238 A.2d 758, 762–63 (R.I. 1968); *State v. Krzak*, 196 A.2d 417, 420–21 (R.I. 1964); *Newport Amusement Co. v. Maher*, 166 A.2d 216, 218 (R.I. 1960).

The Promotion Ordinance flouts this settled constitutional principle. Absent an express or necessarily implied delegation of authority from the General Assembly, Rhode Island municipalities lack the power to impose licensing obligations on businesses. *See Newport Amusement Co.*, 166 A.2d at 218. Likewise, any ordinance imposed and enforced through an unauthorized local business licensing regime is invalid. *See Amico's Inc.*, 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 by the General Assembly"); *see also Nugent*, 238 A.2d at 762–63 (explaining that any and all municipal efforts "to regulate and control by licensing the conduct of business" is reserved to the General Assembly). The Promotion Ordinance plainly is based on Providence's tobacco retailer licensing scheme and enforced through it: The Providence Board of Licenses punishes violations of the Ordinances through civil fines on license-holders and suspension or revocation of tobacco retailer licenses. *See* Providence Code of Ordinances § 14-304. The Promotion Ordinance is invalid.

The City offers several flawed arguments designed to distract from this clear conclusion. Reflecting the inescapable result required by Rhode Island Supreme Court precedent, the City

asserts that the court's decision concerning municipal authority to require business licenses is somehow non-binding "dicta." Defs. Br. at 67. That is incorrect: 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. For example, in *Newport Amusement Co. v. Maher*, the Rhode Island Supreme Court struck down a municipal ordinance requiring the licensing of jukeboxes and mechanical amusement devices because the "power to regulate occupations and businesses by licensing" belongs exclusively to the General Assembly and "may not be exercised by municipalities except where it is lawfully delegated to them in particular instances expressly or by necessary implication." 166 A.2d at 218.[7] Similarly, in *Nugent v. City of East Providence*, the court struck down a municipal action granting a franchise to build and operate a community antenna television system because the Rhode Island Constitution entrusts "the power in the legislature to regulate and control by licensing the conduct of business within the state." 238 A.2d at 762–63.[8]

The City also invites this Court to contradict the Rhode Island Supreme Court by arguing that "there is no . . . exclusive constitutional delegation of power to the General Assembly with

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[7] The Defendants attempt to dismiss *Newport Amusement Co.* as a controlling precedent by arguing that it was decided before enactment of the Home Rule Amendment to the Rhode Island Constitution, a constitutional amendment that reallocated certain powers between the state and municipal governments. This is not accurate. The Home Rule Amendment was enacted in 1951. *See* Hon. Speaker Gordon D. Fox, *A History of the Laws of the State of Rhode Island and Providence Plantations*, State of Rhode Island General Assembly, http://www.rilin.state.ri.us/Lawrevision/lawsumry.htm (last visited July 15, 2012). *Newport Amusement Co.* was decided in 1960. Indeed, in *Newport Amusement Co.*, the Rhode Island Supreme Court carefully considered and rejected an argument that the Home Rule Amendment entrusted municipalities with authority to enact local licenses. *See Newport Amusement Co.*, 166 A.2d at 218–19.

[8] This Court recognized the ongoing validity of this principle in a case involving the City of Providence just last year. *See Rhode Island Hospitality Ass'n v. City of Providence*, 775 F. Supp. 2d 416, 437–39 (D.R.I. 2011) (Lisi, C.J.).

respect to any and all licensing." Defs. Br. at 67–68. The Court should not entertain such an argument. When considering questions of state law, the role of the federal district court is "not [to] apply independent judgment on the question" but to "ascertain the rule the state court would follow under the circumstances." *Wagenmaker v. Amica Mut. Ins. Co.*, 601 F. Supp. 2d 411, 418 n.8 (D.R.I. 2009) (citing *Norton v. McOsker*, 407 F.3d 501, 506 (1st Cir. 2005)). Thus, a Rhode Island district court "will not accept [an] invitation to place itself at odds with the Rhode Island Supreme Court" on a matter of Rhode Island law. *Id.* Moreover, the Defendants' line of reasoning is meritless as a basic matter of 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*, 238 A.2d at 762–63.

The Defendants also argue that the Promotion Ordinance is a valid exercise of municipal power because there is no actual conflict between the Ordinance and any law enacted by the General Assembly. Defs. Br. at 68. This argument is irrelevant and merely confuses the issue. The existence of municipal authority under the Rhode Island Constitution *in no way* depends on the existence or content of laws enacted by the state, apart from the question of whether the General Assembly delegated authority to a municipality. *See Town of E. Greenwich v. O'Neil*, 617 A.2d 104, 109 (R.I. 1992).

Finally, the Defendants argue that the Ordinance can and should be preserved even if this Court determines that the underlying licensing scheme is unconstitutional because "none of the substantive prohibitions" in the Ordinance "depend for their validity upon the municipal licensing of those selling tobacco products." *See* Defs. Br. at 69–72. This argument ignores Rhode Island Supreme Court precedent. The Promotion Ordinance itself is invalid because

municipalities do not have authority to enact regulations that are *enforced* through a business licensing scheme. In *Nugent v. City of East Providence*, the Rhode Island Supreme Court explained that all authority "to regulate and control by licensing the conduct of business" is reserved to the General Assembly. 238 A.2d at 762–63. Similarly, in *Amico's Inc. v. Mattos*, the Court explained 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 by the General Assembly." 789 A.2d at 904. In other words, if the General Assembly has not delegated the authority to *enforce* an ordinance as drafted, there is no authority to *enact* the ordinance either. *See id*. The Rhode Island Supreme Court has declined to disentangle licensing schemes from substantive restrictions on the conduct of business where the enforcement mechanism is invalid, and this Court should follow the Rhode Island Supreme Court's lead on this state law question. *See State v. Krzak*, 196 A.2d at 420–21 (explaining that an otherwise authorized and valid municipal business licensing ordinance was nonetheless unconstitutional because the enforcement provision overstepped the bounds of authority delegated by the General Assembly). The Promotion Ordinance is invalid under longstanding Rhode Island law.

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

State law preempts a municipal ordinance if (i) there is an express or implied conflict between the statute and the ordinance ("express" or "conflict" preemption) or (ii) there is evidence that the General Assembly "intended that its statutory scheme completely occupy the field of regulation on a particular subject" ("field" preemption). *See Town of Warren v. Thornton-Whitehouse*, 740 A.2d 1255, 1261 (R.I. 1999). The Rhode Island Supreme Court has further explained that the General Assembly shows its intention to preempt 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*, 98 A.2d 669, 670 (R.I. 1953); *see also O'Neil*, 617 A.2d at 109 (explaining that an ordinance is invalid under a field preemption theory "if it disrupts the state's overall scheme of regulation" in the area).

The Promotion Ordinance is invalid because the General Assembly has "regulat[ed]" the use of coupons and discounts in the marketing of tobacco products and "provided punishment for the failure to comply" with these regulations and thus has preempted local ordinances in this "field" of law. *Wood*, 98 A.2d at 670. Rhode Island law criminalizes and punishes selling tobacco products to persons under the age of eighteen, distributing free tobacco products or coupons to persons under the age of eighteen, and distributing free tobacco products or coupons in the proximity of schools. *See* R.I. Gen. Laws §§ 11-9-13.8, -13.10. Moreover, Rhode Island's unfair sales practices law makes provision 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.

The Defendants offer two attempts at a response. First, the Defendants use nearly two pages of their memorandum to fault the Plaintiffs for failing to demonstrate "express conflict" between the Promotion Ordinance and Rhode Island law. *See* Defs. Br. at 62–64. This argument misses the thrust of Plaintiffs' argument, which is not based on conflict preemption, but the occupation of the field that occurs under Rhode Island law when the General Assembly regulates a topic and sets penalties for crossing those regulations. Rhode Island law carefully 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 and does not permit municipalities to overturn the Assembly's line-drawing decisions. *Id.*

Second, the Defendants undertake an analysis of whether the Promotion Ordinance satisfies the Rhode Island Supreme Court's three-factor test for applying the Home Rule

Amendment to the Rhode Island Constitution. *See O'Neil*, 617 A.2d at 111. The Supreme Court developed the *O'Neil* test because the Rhode Island Constitution does not contain a complete set of "guidelines defining the parameters of 'local' . . . legislation." Accordingly, the Court developed this three-part test to resolve questions of municipal authority where no clear guidelines exist.[9] This test, however, is wholly irrelevant to a preemption analysis. The *O'Neil* Court was clear on this point. Courts should consider "the issues of pre-emption and home rule separately." *Id.* at 109.

In the end, the City never seeks to examine what the General Assembly has regulated in the field occupying tobacco coupons and price discounts. The Promotion Ordinance is preempted by Rhode Island law and invalid.

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 City's Flavor Description Ordinance is unconstitutional because it bans speech. As such, it must be justified under the Supreme Court's longstanding *Central Hudson* test. The City, however, makes virtually no attempt to do so. The Flavor Description Ordinance therefore runs afoul of the First Amendment and, in addition, is unconstitutionally vague.

a. The Flavor Description Ordinance Regulates Speech And Therefore Is Subject To Review Under *Central Hudson*.

The City's primary argument is that the Flavor Description Ordinance does not regulate speech at all and, therefore, is not subject to *any* First Amendment scrutiny. Defs. Br. at 32–34.

[9] As discussed above, *supra* Section I.A.3, the Rhode Island Supreme Court *has* articulated clear guidelines for municipal authority in the area of business licensing. Both the Rhode Island Supreme Court and this Court have explained that the limits of municipal authority to enact business licenses described in *Newport Amusement Co.*, 166 A.2d at 218, still control even after *O'Neil*, 617 A.2d at 111. *See Amico's*, 789 A.2d at 903; *Rhode Island Hospitality Ass'n*, 775 F. Supp. 2d at 437–39.

This is plainly wrong. The Ordinance regulates commercial speech in at least two critical respects; the City therefore bears the burden of proving that the Ordinance satisfies *Central Hudson*.

First, the Ordinance presumptively bans products based not on their ingredients, but on how they are *described*. Thus, under the plain terms of the Ordinance, "[a] *public statement*" referencing a prohibited "taste," "aroma," or "concept," constitutes "presumptive evidence" of a violation that subjects a retailer to an enforcement action, *even if that product does not possess a "characterizing flavor"* other than tobacco, menthol, mint, or wintergreen. Providence Code of Ordinances § 14-308 ¶ 3, 6 (emphasis added). The Supreme Court has held that conduct that is presumed illegal by communicative activity must satisfy First Amendment standards. *See Virginia v. Black*, 538 U.S. 343, 363–67 (2003) (applying First Amendment scrutiny to a statute deeming specific conduct to be "prima facie evidence" of a particular message). All the more so here, where *speech* about a tobacco product, rather than characteristics of the product itself, causes the product to be presumptively banned under the Ordinance.

A straightforward application of the Ordinance illustrates the point. If a manufacturer describes a product as being "mellow," that product is presumptively illegal in Providence, even though the term "mellow" does not describe a prohibited "taste" or "aroma." The term "mellow" is a perfectly accurate description of products having the "characterizing flavor" of tobacco, menthol, mint, or wintergreen. This flaw also infects the Ordinance's entire "concepts" ban. A "concept," after all, is not itself a flavor like "fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, herb or spice." Providence Code of Ordinances § 14-308 ¶ 3. Instead, it is an "idea." *See Webster's Third* at 469 (defining "concept" as "something conceived in the mind: THOUGHT, IDEA, NOTION"). Indeed, because no one tastes or smells "concepts,"

presumably no product will be banned because it "impart[s] . . . tastes or aromas relating to . . . concepts." Therefore the "concepts" ban will *only* be enforced based on *speech* about a product, not the product's actual flavor.[10]

Second, the Flavor Description Ordinance likewise appears to prohibit the use of certain "concepts" to describe even permissible products, such as those for which the "characterizing flavor" described is tobacco, menthol, mint, or wintergreen. On this interpretation, Plaintiffs would be barred from accurately describing a menthol-flavored product as having a "cool" taste. *See Webster's Third* at 1411 (defining "menthol" as "a secondary terpenoid alcohol . . . that has the odor and cooling properties of peppermint").

The City has refused to unequivocally disavow this interpretation. On January 10, 2012, Reynolds American, Inc. ("RAI"), the parent company of Plaintiffs RJRT and ASC, sent a letter to the Providence City Solicitor, specifically asking him to confirm that the Flavor Description Ordinance would not prohibit RJRT's products Camel Snus Frost and Camel Snus Winterchill, because those products are tobacco- and mint-flavored and tobacco- and wintergreen-flavored, respectively. ECF No. 35-1, Ex. 5 at 1. When a similar restriction was enacted in New York City, the administrative law judge, in an opinion adopted by the New York City Department of Consumer Affairs, held that the ordinance did *not* prohibit Camel Snus Frost and Camel Snus

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[10] No other jurisdiction that has attempted to ban flavored tobacco products has been so bold as to actually ban references to "concepts." *See* Me. Rev. Stat. Ann. tit. 22, § 1560-D (2008); N.J. Stat. Ann. §§ 2A:170-51.5–2A:170-51.6 (2008); N.Y.C. Administrative Code §§ 17-713–17-718.

Winterchill because those products were mint- and wintergreen-flavored. *See id.* at p. 3–4. To date, however, the City Solicitor has not responded to the letter from RAI.[11]

b. The Flavor Description Ordinance Does Not Satisfy *Central Hudson*.

Because the Flavor Description Ordinance regulates speech, the City bears the burden of proving that it satisfies *Central Hudson*. The City, however, barely makes any arguments in this regard. Instead, its *Central Hudson* arguments focus almost exclusively on the Promotion Ordinance. Defs. Br. at 42–47. Regardless, the Flavor Description Ordinance plainly fails *Central Hudson* scrutiny.

First, for the reasons described above, *see supra* Part I.A.1.b, the Flavor Description Ordinance violates the First Amendment to the extent that the City's interest in enacting it was to prevent adult tobacco use. Like the Promotion Ordinance, the Flavor Description Ordinance must therefore stand or fall on the City's interest in preventing underage tobacco use.

Second, as to the City's interest in protecting youth, "the government does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2741 n.9 (2011). Thus, the City "bears the burden of showing not merely that its regulation will advance its interest," but that its "ban will

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[11] *Whitaker v. Thompson*, 353 F.3d 947, 953 (D.C. Cir. 2004), cited by Amicus Tobacco Control Legal Consortium, is not to the contrary. There, the court held that it was "constitutionally permissible . . . to use speech . . . to infer intent for purposes of determining" whether a "proposed sale of saw palmetto extract would constitute the forbidden sale of an unapproved drug." *Id.* It was the *sale* of the unapproved drug that was prohibited; the *speech* was merely evidence of intent to engage in prohibited *conduct*. Here, in contrast, it is *speech* itself, not conduct, that gives rise to the violation. The *conduct* at issue—selling products with a "characterizing flavor" of tobacco, menthol, mint, or wintergreen—is perfectly lawful. The Ordinance, however, presumptively prohibits Plaintiffs from using certain "concepts"—i.e.*,* ideas—to describe that lawful conduct in an accurate and non-misleading way.

significantly reduce" youth use. *44 Liquormart*, 517 U.S. at 505 (plurality op.) (emphasis in original). Here, however, the City offers *no evidence at all* that the addition of the Flavor Description Ordinance to the many other restrictions of tobacco products and advertising will "significantly" reduce youth tobacco use. The only evidence is the declaration of Gregory Connolly, who asserts—without any support—that the Ordinance will cause some reduction in youth tobacco use that is greater than zero. Connolly Aff. ¶ 36 (ECF No. 44-4). But even if that were so, that is not even a claim that the Ordinance will reduce such use "'to a material degree.'" *44 Liquormart*, 517 U.S. at 505 (plurality op.) (quoting *Edenfield v. Fane*, 507 U.S. 761, 771 (1993)).

Moreover, Plaintiffs' expert, Dr. Reynolds, explains 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. *See* Reynolds Decl. ¶¶ 43–59, 77. They include the influence of family, peers, and school as well as the adolescent inclination for sensation seeking and risk taking. *Id.* Dr. Reynolds also explains that every study on the link between flavored tobacco products and underage use either is not based on data or suffers from numerous methodological flaws. Reynolds Decl. ¶¶ 71–77. Dr. Reynolds recognizes that "certain flavors in tobacco products may be attractive to underage tobacco users," *id.* ¶ 72, but the anecdotes provided by the City and its expert do not provide evidence to support the Ordinance's near-total ban on references to tastes, aromas, and concepts. The assertions of the City's expert, on the record here, do not raise a genuine issue of material fact under First Amendment legal standards. At a minimum, Dr. Reynolds's explanations of the flaws in the studies on which the City's expert relies bar summary judgment for the City.

Third, the Flavor Description Ordinance also fails the fourth prong of the *Central Hudson* test, requiring that regulations of speech be narrowly tailored to advance a substantial state interest. The Ordinance does not only ban references to tastes, aromas, or concepts that the City suggests are attractive to the underaged, it bans *all* such tastes, aromas, or concepts (with the narrow exceptions of tobacco, menthol, mint, and wintergreen). Thus, at the outset, the Flavor Description Ordinance sweeps too broadly and is not, on its face, narrowly tailored. *Reilly*, 533 U.S. at 561–66. The City says nothing about this argument.

The Flavor Description Ordinance also fails *Central Hudson*'s narrow tailoring requirement because the City did not even consider less speech-restrictive alternatives. The Supreme Court and other federal courts also repeatedly have made clear that, even in the commercial speech context, a speech restriction is not narrowly tailored when the government fails to consider numerous and obvious less restrictive alternatives. As the Court held in *W. States Medical Center*, "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*." 535 U.S. at 371 (emphasis added); *see 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, Plaintiffs have identified numerous and obvious less restrictive alternatives, including, for example, more vigorously enforcing age-of-purchase laws, enacting meaningful penalties for violations of youth tobacco use (such as loss of a drivers' license), or implementing one of the many programs that have proven effective at reducing youth tobacco use. Reynolds Decl. ¶¶ 78–83. The City, however, has made no effort at all to demonstrate that these alternatives, "alone or in combination," *W. States Med. Ctr.*, 535 U.S. at 373, would be less effective at reducing youth tobacco use, which is the least it must do before trampling on the free speech rights of private parties.

Indeed, the City primarily asserts that the Flavor Description Ordinance is needed because substantial numbers of Providence retailers are illegally selling tobacco products to youth. *See* Defs. Br. at 46. If that is true, the obvious less restrictive alternative is not to ban speech, but to more vigorously enforce the age-of-purchase laws. *See, e.g.*, *Pitt News v. Pappert*, 379 F.3d 96, 108 (3d Cir. 2004) (Alito, J.) (invalidating ban on alcohol advertising in college newspapers, because it ignored less speech-restrictive alternatives such as "the enforcement of the alcoholic beverage control laws on college campuses").

The City also asserts that the Flavor Description Ordinance is needed because "neither the state nor the City has the resources necessary to fund the costly," and less speech-restrictive, alternatives "offered by Plaintiffs." Defs. Br. at 46. This seems to be the real reason the City has resorted to restricting speech: "The City of Providence is simply unable to make up for this funding shortfall as it faces a financial crisis of monumental proportion." Yurdin Aff. ¶ 24. The City and state's fiscal policy priorities, however, do not give it license to trample Plaintiffs' free-speech rights. The First Amendment protects speech, not the public fisc. Courts consequently invalidate speech restrictions even when non-speech alternatives cost money. *E.g.*, *Pitt News*, 379 F.3d at 108 (more "aggressive enforcement" of alcohol laws on campus by "law enforcement officers"); *BellSouth Telecomms., Inc.*, 542 F.3d at 508–09 ("enforce[] existing state law" or make it "stronger"); *44 Liquormart*, 517 U.S. at 507 (plurality op.) ("increased taxation" and "educational campaigns"). For "[i]f the First Amendment means anything, it means that regulating speech must be a last—not first—resort." *W. States Med. Ctr.*, 535 U.S. at 373. Here, Rhode Island chose to sell its rights to future tobacco settlement payments under the Master Settlement Agreement ("MSA") in 2002. Yurdin Aff. ¶ 23. "The funds were used to address budget shortfalls and pay capital and operating expenses in FY2002-FY2004," even though the

central *purpose* of the settlement money was to institute anti-tobacco programs. *Id.* Plaintiffs should not pay for Rhode Island's short-sightedness with their constitutional rights. *See also Sorrell*, 131 S. Ct. at 2671 ("The State can express [its] views through its own speech. . . . But a State's failure to persuade does not allow it to hamstring the opposition."). In any event, the City makes no effort to respond to Plaintiffs' alternatives that do not cost more money, including making youth possession illegal in all settings, *see* R.I. Gen. Laws § 11-9-14, and punishable in a way that would be salient to teenagers—by, for example, suspending driver's licenses. *See* Reynolds Decl. ¶ 78. The City has not met its burden of proving that the Ordinance satisfies *Central Hudson*. The Ordinance is unconstitutional.

c. The Flavor Description Ordinance Would Likewise Be An Unconstitutional Restriction Of Expressive Conduct Under *United States v. O'Brien*.

The City argues that the Ordinance is, at most, subject to analysis under *United States v. O'Brien*, 391 U.S. 367, 377 (1968). For the reasons explained above, this is wrong. *O'Brien* applies only where the governmental restriction is "unrelated to expression." *Reilly*, 533 U.S. at 567. Here, however, the Flavor Description Ordinance specifically targets *speech.* Regardless, the Ordinance fails scrutiny under *O'Brien* as well.

As explained above, *O'Brien* has long been understood to adopt a test substantially similar to *Central Hudson*. The *O'Brien* test is not more lenient. *See supra* at Part I.A.1.c. Both tests require the government to advance a "substantial" "governmental interest," *Cent. Hudson*, 447 U.S. at 566, *O'Brien*, 391 U.S. at 377, and require regulations to be "not more extensive than is necessary to serve that interest," *Cent. Hudson*, 447 U.S. at 566, or "no greater than is essential to the furtherance of that interest," *O'Brien*, 391 U.S. at 377.

Regardless, the Flavor Description Ordinance fails the standard articulated in *O'Brien*, and the City never claims otherwise. *See* Defs. Br. at 42 (mentioning only "restrictions on the

use of coupons and multipack sales"). First, here, the government's asserted interest *is* related "to the suppression of free expression," *O'Brien*, 391 U.S. at 377—namely, it "is an attempt to regulate directly the communicative impact of [brand descriptors]," *Reilly*, 533 U.S. at 567. The City admits that this was part of its purpose: "the measures also were intended to reduce the overall nicotine addiction rate in the City," and not only "among the City's youth." Defs. Br. at 25. Second, this "restriction" on "First Amendment freedoms" is "greater than is essential to the furtherance of that interest," *O'Brien*, 391 U.S. at 377, for precisely the same reasons the Ordinance is not narrowly tailored under *Central Hudson*.

d. The Flavor Description Ordinance Is Unconstitutionally Vague.

The Flavor Description Ordinance is also unconstitutional because it is impermissibly vague. It presumptively bans products based on whether public statements made describing those products "relat[e] to" a non-exhaustive list of tastes and aromas. Providence Code of Ordinances § 14-308 ¶ 3. It also presumptively bans products if public statements describe them as having a taste or aroma that "impart[s]" a taste or aroma "relating to . . . [a] concept[]." *Id.* ¶¶ 3, 6. Indeed, just last month, the Supreme Court in *FCC v. Fox Television Stations, Inc.*, No. 10-1293, slip op. at 12 (U.S. June 21, 2012), emphasized "at least two connected but discrete due process concerns" to ensure that a statute is not impermissibly vague. First, "regulated parties should know what is required of them so they may act accordingly"; second, "precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *Id.* (citing *Grayned v. City of Rockford*, 408 U. S. 104, 108–109 (1972)). Both problems exist here.

For example, the City protests in its brief that it "should not be expected to anticipate the nearly limitless number of specific tastes, aromas and/or concepts" that Plaintiffs might use to

describe their products. Defs. Br. at 61. This is exactly backwards. It is Plaintiffs that will suffer the penalties of a civil sanction and that should thus not be expected to anticipate what interpretation of the Ordinance might be deployed against them. And it is Plaintiffs that "should know what is required of them so they may act accordingly." *Fox*, slip op. at 12. Indeed, as described above, Plaintiffs specifically sought clarification from the City because the Flavor Description Ordinance lacks "precision" and fails to provide the "guidance" that the Supreme Court emphasized in *Fox*. Rather than provide reassurance "that those enforcing the law" would not do so "in an arbitrary or discriminatory way," the City has refused to answer, either by letter or in its brief. *Id.* This underscores the patent vagueness of the Ordinance, which inevitably "chill[s] protected speech." *Id.*

Moreover, even if the City were to adopt the Plaintiffs' interpretation—and to provide a safe harbor for tobacco, menthol, mint, and wintergreen products—the Ordinance is still impermissibly vague. It would still be impossible to know exactly what concepts, tastes, or aromas other than tobacco, menthol, mint, or wintergreen might be banned. The Constitution does not permit open-ended regulations of speech. *See Reno v. ACLU*, 521 U.S. 844, 884–85 (1997);[12] *Fox*, slip op. at 12.

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

Defendants rest the entirety of their argument against FSPTCA preemption of the Flavor Description Ordinance on one flawed premise: That Congress intended to set standards limiting which tobacco products could be *manufactured* in the United States, but not which products could be *sold* here. For at least three reasons, this proposition makes no sense. First, in promulgating the FSPTCA, Congress was concerned with protecting the health of U.S.

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[12] Although the City is correct that *Reno v. ACLU* involved a criminal statute, Defs. Br. at 62, for the reasons described above the Flavor Description Ordinance prohibits speech.

consumers, not restricting U.S. manufacturers. That is why products manufactured outside the U.S. that do not comply with federal tobacco product standards may not be sold here, and why noncompliant products may be manufactured here so long as they are sold lawfully abroad. Second, allowing each state and locality to decide for itself whether to ban the sale of products that comply with federal tobacco product standards would permit the very patchwork quilt of differing standards that Congress expressly sought to avoid. Finally, this distinction effectively renders the FSPTCA's preemption provision a nullity, since any regulation of "manufacturing" can be recast as a regulation of the "sale" of products that are not manufactured in a particular way.

In support of their illogical distinction between manufacturing and sales, Defendants rely on the faulty reasoning advanced by Judge McMahon in her decision in *U.S. Smokeless Tobacco Mfg. Co. v. City of New York*, No. 09 Civ. 10511 (S.D.N.Y. Nov. 15, 2011)—a decision that presently is pending on appeal. According to Judge McMahon, under the FSPTCA "Congress and the FDA say what can be made, and how it must be made; and the States and their subdivisions decide what being made can be sold." Defs. Br. at 58 (quoting *U.S. Smokeless*, slip op. at 8). Judge McMahon therefore concludes, as Defendants do, that "what are preempted are locally-imposed manufacturing or fabrication requirements," and because the Flavor Description Ordinance regulates sales instead of manufacturing, it is preserved and not preempted. *Id.* (quoting *U.S. Smokeless*, slip op. at 4).[13]

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[13] Defendants make much of the FSPTCA's preservation clause, which preserves the traditional right of the states to regulate sales. Defs. Br. at 57–58. But the preservation clause is expressly constricted by the preemption clause: Where, as here, a local sales restriction imposes requirements that are "different from, or in addition to" federal tobacco product standards, then the preemption clause controls and the preservation clause has no force. 21 U.S.C. § 387p(a)(2)(A).

But nothing in the FSPTCA suggests that tobacco product standards, such as the Federal Flavor Standard, govern the content of product manufactured in the United States, rather than the content of product sold here. Section 907 of the Act, titled "Tobacco Product Standards," simply provides for federal "tobacco product standards" governing, among other things, "the construction, components, ingredients, additives, constituents, including smoke constituents, and properties of the tobacco product." And the Federal Flavor Standard itself merely provides that cigarettes "shall not contain" any "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), § 387g(a)(4)(B)(i). Neither of these provisions suggests in any way that federal standards governing tobacco product content are limited to what products may be made in the United States, as opposed to what products may be sold here.

Additionally, the distinction between manufacturing and sales contrived by Judge McMahon is wholly inconsistent with the broader structure and purpose of the FDCA, as amended by the FSPTCA. Under the FDCA, 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). But the Act does permit the *manufacture* of such products as long as they are to be sold abroad. *See id.* § 381(e)(1) (excluding from the definition of "adulterated" product 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, that are not sold or offered for sale in domestic commerce, and that are labeled as intended for export). As a practical matter, this makes sense: Congress sets health and safety standards for U.S. consumers, not for consumers in other countries. Indeed, as Defendants concede, a primary purpose of the FSPTCA

was to protect the public health of our Nation. Defs. Br. at 57. And that can be accomplished only by regulating what products may be sold and consumed here.

Finally, although Defendants attempt to distinguish the Supreme Court's decision in *National Meat Ass'n v. Harris*, 132 S. Ct. 965, 972–73 (2012), the distinction they draw rests entirely on their erroneous view that, while the statute at issue in *Harris* was subject to the statutory preemption clause, the Flavor Description Ordinance is not. *See* Defs. Br. at 59 ("Unlike the situation here, which involves the application of subsequent preservation clauses to conduct which was not within the scope of the relevant federal legislation, *Harris* was a straight-forward case of express federal preemption . . . ."). In fact, Defendants get it backwards: The statute at issue in *Harris* did *not* fall squarely within the plain language of the applicable preemption clause. *Id*. at 972 ("[T]he FMIA's preemption clause does not usually foreclose state regulation of the commercial sales activities of slaughterhouses." (citation and internal quotation marks omitted)). Nonetheless, because "the sales ban [] function[ed] as a command to slaughterhouses to structure their operations in the exact way [that California wanted, and that was precluded by the FMIA]," the Supreme Court declared it preempted. The Court explained:

> [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 (citing *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 255 (2004) ("[I]f 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.")).

The same reasoning applies here: If Providence can impose a standard governing the contents of tobacco products simply by framing that standard as a sales ban, then so too can another locality, and another, and another, and the "end result" of these various and sundry local

requirements would be to "undo Congress's carefully calibrated regulatory scheme." *Engine Mfrs.*, 541 U.S. at 255. Because Providence cannot be allowed to "make a mockery of the [FSPTCA's] preemption provision," *Harris*, 132 S. Ct. at 973, the Flavor Description Ordinance must be deemed unconstitutional.

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

The Flavor Description Ordinance is invalid under the Rhode Island Constitution for the same reasons discussed above in the context of the Promotion Ordinance. *See supra* Part I.A.3. The Rhode Island General Assembly alone holds the authority to create business licensing laws within the State. This foundational constitutional principle has been reaffirmed by the Rhode Island Supreme Court at every turn for more than fifty years, *see, e.g.*, *Newport Amusement Co.*, 166 A.2d at 218, but the City of Providence disregarded this rule of law when it enacted the Flavor Description Ordinance.

Plainly, the General Assembly has not entrusted the City of Providence with the authority to impose municipal tobacco vendor licenses. Accordingly, the City of Providence had no authority to enact such a scheme, and—as relevant here—no authority to enact the Flavor Description Ordinance, a further regulation on tobacco vendors enforced through that unauthorized licensing scheme. *See Nugent*, 238 A.2d at 762–63. The Defendants do not offer any compelling arguments refuting this clear conclusion. Accordingly, this Court should declare the Flavor Description Ordinance unconstitutional.[14]

[14] If this Court determines that a separability analysis is required here, the same arguments described above in the context of the Promotion Ordinance apply with equal force. *Supra* Part I.A.3. While the Flavor Description Ordinance invokes the role of the police in monitoring compliance with the Ordinance, it still relies on the licensing structure to enforce the terms of the Ordinance with fines. *See* Providence Code of Ordinances § 14-310.

[Footnote continued on next page]

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

Plaintiffs have established a high likelihood of success on the merits and clear irreparable harm that they will suffer if these Ordinances are allowed to go into effect. *See* Pls. Br. at 41-45. There is also little doubt that Plaintiffs are poised to suffer greater hardship than Defendants, and the public interest is best served by ensuring the legality and constitutionality of public enactments. *Id.* Defendants have not presented any legitimate reason why a preliminary injunction would not be appropriate while this Court resolves the merits of these issues.

For example, Defendants claim—citing dicta from a Massachusetts state case—that economic harms cannot be irreparable unless the loss threatens the existence of the business. Defs. Br. at 73–74 (citing *Tri-Nel Mgmt., Inc. v. Bd. of Health of Barnstable*, 433 Mass. 217, 227–28 (2001)). That case is completely inapposite. In that case, the court primarily held that the plaintiffs had failed to establish a likelihood of success on the merits and found that "sufficient to deny injunctive relief." *Tri-Nel Mgmt.*, 433 Mass. at 227. In a brief, conclusory paragraph, the court noted that the plaintiffs' claims of irreparable harm were too speculative, as plaintiffs had merely claimed that the restaurant and bar smoking ban at issue "would interfere with existing customer relationships and cause a loss of business income." *Id.* Plaintiffs' claims of irreparable harm in this case are not based on speculative claims of lost business in Providence due to the Ordinances; rather, Plaintiffs have made concrete allegations of significant compliance and implementation costs that likely cannot be recovered in the event the Ordinances are ultimately found invalid. Pls. Br. at 42–43. Moreover, the language cited by Defendants from *Tri-Nel Management* has been explicitly qualified by the Massachusetts Supreme Court. *See*

Accordingly, the point remains: The Flavor Description Ordinance would be rendered inert without the underlying licensing structure.

Loyal Order of Moose, Inc. v. Bd. of Health of Yarmouth, 439 Mass. 597, 602–03 (2003) (addressing the argument that economic harm must threaten the existence of a business and holding that this "principle . . . applies when a party claims '[e]conomic harm alone . . . '").[15]

In an attempt to brush aside Plaintiffs' claims of irreparable harm, Defendants mischaracterize Plaintiffs' allegations while citing no evidence to the contrary. For example, Plaintiffs have alleged that they "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." Pls. Br. at 42–43 (citing Karrow and Begley Declarations). Defendants disingenuously argue that "Plaintiffs remain perfectly free (under the Ordinances at least) to describe their products in whatever manner they choose." Defs. Br. at 74. The Flavor Description Ordinance clearly prohibits the sale of "any flavored tobacco product[s]" in the City (setting aside the very narrow smoking bar exception); thus, in order to continue selling certain products in the City, Plaintiffs would have to change packaging and advertising that refers to the "concepts," "tastes," or "aromas" that would render those products prohibited under the Ordinance. It is obvious that Plaintiffs do not "remain perfectly free" to use such prohibited descriptors if they wish to continue doing business in the City.

[15] The First Circuit authority cited by Defendants, *Gatley v. Commonwealth of Massachusetts*, 2 F.3d 1221 (1st Cir. 1993), is also inapposite. Defs. Br. at 74. In that case, state police employees subject to a new mandatory retirement age sought to preliminarily enjoin their termination, claiming that loss of income during forced retirement would constitute irreparable harm. 2 F.3d at 1230–31. The court's irreparable harm analysis focused on the higher standard applicable to claims of irreparable harm "in employee discharge cases." *Id.* at 1232. In any event, the court ultimately *affirmed* the district court's finding of irreparable harm. *Id.* at 1234.

Defendants also seek to discredit Plaintiffs' claims of irreparable harm by comparing the dollar amount of Plaintiffs' harm to the amount tobacco companies purportedly spend on marketing their products. Defs. Br. at 75. This argument is incomprehensible and unfounded in law. Plaintiffs are aware of no case in which a court has applied such a formula—comparing irreparable harm to other amounts spent by a plaintiff—to determine whether irreparable harm exists. Likewise, Plaintiffs need not provide a detailed or quantified estimate in order to establish the threat of irreparable harm. *See, e.g.*, *Am. Hosp. Supply Corp. v. Hosp. Prods. Ltd.*, 780 F.2d 589, 596 (7th Cir. 1986) (Posner, J.) ("We conclude that there was a threat of irreparable harm to the plaintiff; and although the dollar amount of that harm is not known with any precision and we hesitate to call it great, it seems substantial."). Defendants also misunderstand Plaintiffs' arguments regarding Plaintiffs' likely inability to recover damages from Defendants. *See* Defs. Br. at 75. Plaintiffs may ultimately be unable to recover damages from Defendants because of judicial doctrines—such as sovereign immunity—that may limit the ability of parties to recover from government entities or agents, not because the City may be unable to satisfy a significant judgment (which may also be the case, but is irrelevant for these purposes). *See* Defs. Br. at 75; Pls. Br. at 43–44 (collecting cases).

Finally, Defendants criticize what they call Plaintiffs' "classic bootstrap argument" that a constitutional violation causes irreparable harm. Defs. Br. at 74–75. But that "classic bootstrap argument" is one that has long been recognized by the Supreme Court, the First Circuit, and countless other federal courts. *See, e.g.*, *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *Asociacíon de Educación Privada de Puerto Rico v. Garcia-Padilla*, 490 F.3d 1, 21 (1st Cir. 2007). Indeed, this Court has held that "the violation of a constitutional right,

by itself, is deemed to cause irreparable harm." *Rhode Island v. United States*, 115 F. Supp. 2d 269, 279 (D.R.I. 2000); *see also Taylor v. Conn. Dep't of Corrections*, No. 05-118, 2005 WL 2644975, at *2 (D.R.I. Sept. 20, 2005) ("Constitutional violations, when properly demonstrated, are presumed to demonstrate 'irreparable harm.'"). For the same reason, leaving constitutional violations unrectified cannot serve the public interest. Pls. Br. at 45. These "bootstrap" arguments are well-established legal principles. Because the Ordinances violate Plaintiffs' First Amendment rights, as well as the U.S. and Rhode Island Constitutions, Plaintiffs suffer irreparable harm and the public interest requires that the Ordinances be enjoined.

CONCLUSION

For the foregoing reasons and for the reasons set forth in their opening brief, 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 October 15, 2012 to bring the case to final judgment, Plaintiffs respectfully request that the Court preliminarily enjoin enforcement of the Ordinances.

Dated: July 16, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 16th day of July, 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