UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

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

AMICI CURIAE BRIEF AGAINST PREEMPTION

CORPORATE DISCLOSURE STATEMENT

No party to this filing has a parent corporation, and no publicly held corporation owns 10% or more of the stock of any of the parties to this filing.

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INTEREST OF *AMICI CURIAE*

Amici[1] are non-profit public health organizations and advocacy groups who have worked for decades to protect the public from the devastating dangers of tobacco use—the leading cause of preventable death in America.[2]

As Providence's Flavored Tobacco Ordinance and Price Ordinance regulating sales of tobacco products will help prevent children from beginning to use these products as well as help adults quit, *Amici* have a strong interest in ensuring that these traditional health-and-safety regulations are not defeated by the

[1] These *Amici* are AMERICAN ACADEMY OF PEDIATRICS-RI CHAPTERS; AMERICAN CANCER SOCIETY CANCER ACTION NETWORK; AMERICAN CANCER SOCIETY, NEW ENGLAND DIVISION, INC.; AMERICAN LUNG ASSOCIATION; AMERICAN LUNG ASSOCIATION IN RHODE ISLAND; CAMPAIGN FOR TOBACCO-FREE KIDS; CENTER FOR HISPANIC POLICY AND ADVOCACY (CHISPA); CHARIHO TRI-TOWN TASK FORCE ON SUBSTANCE ABUSE PREVENTION; CODAC BEHAVIORAL HEALTHCARE; DISCOVERY HOUSE; FAMILY SERVICE OF RHODE ISLAND; INITIATIVES FOR HUMAN DEVELOPMENT; INTERNATIONAL INSTITUTE OF RHODE ISLAND; JOHN HOPE SETTLEMENT HOUSE; MEETING STREET; NATIONAL ASSOCIATION OF COUNTY AND CITY HEALTH OFFICIALS; NATIONAL ASSOCIATION OF LOCAL BOARDS OF HEALTH; RHODE ISLAND COLLEGE SCHOOL OF NURSING; RHODE ISLAND MEDICAL SOCIETY; RHODE ISLAND PUBLIC HEALTH INSTITUTE; RHODE ISLAND STATE NURSES ASSOCIATION; SOCIOECONOMIC DEVELOPMENT CENTER FOR SOUTHEAST ASIANS; THE PROVIDENCE CENTER; UNIFIED INSIGHT CONSULTING; URBAN LEAGUE OF RHODE ISLAND; and YOUTH PRIDE INC.

[2] "Cigarette smoking causes about 1 out of every 5 deaths in the United States each year. . . . 443,000 deaths annually (including deaths from secondhand smoke)." http://www.cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/tobacco_related_mortality. Not including deaths from secondhand smoke, cigarette smoking is estimated to be responsible for 1,695 deaths per year in the state of Rhode Island alone. Source: Centers for Disease Control and Prevention. State-Specific Smoking-Attributable Mortality and Years of Potential Life Lost - United States, 2000-2004. *MMWR* 2009; 58(2):29-33.

Tobacco-Company Plaintiffs' preemption arguments to gut reasonable restrictions on the sale of tobacco. Hence, *Amici* respectfully file this brief against preemption.

INTRODUCTION

In deciding the Tobacco-Company Plaintiffs' preemption arguments, the Court is presented with two straightforward issues:

- The Tobacco-Company Plaintiffs argue that Providence's ordinances regulating sales of flavored tobacco products and prohibiting sales of tobacco products at a coupon discount are preempted by the Family Smoking Prevention and Tobacco Control Act (FSPTCA) and the Federal Cigarette Labeling and Advertising Act (FCLAA). But the FSPTCA's Preservation and Savings Clauses, and the FLCAA's new Savings Clause at Section 1334(c), authorize Providence to do exactly what it did through these ordinances—regulate sales of tobacco products. Do the FSPTCA and FCLAA preempt these local sales ordinances?

- The Tobacco-Company Plaintiffs argue that because the General Assembly "considered but declined" to enact sales regulations like Providence's Flavored Tobacco and Price Ordinances, the General Assembly by *in*action silently preempted the entire field regulating sales of tobacco products. But the few Rhode Island statutes that Plaintiffs raise do *not* regulate sales of flavored tobacco to all people (like the Flavored Tobacco Ordinance does) and do not prohibit retailers from selling tobacco products at a coupon discount (like the Price Ordinance does). Does Rhode Island law impliedly preempt this field?

ARGUMENT

1. There is a strong presumption against federal preemption of these Providence Ordinances protecting health and safety.

Because the states are independent sovereigns in our federalist system who traditionally regulate health and safety, there is a strong presumption against federal preemption of state or local health and safety regulations that is not overcome unless preemption is "the clear and manifest purpose of Congress." *Altria Grp. v. Good*, 555 U.S. 70, 77-78 (2008); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541-42 (2001); ("the historic police powers of the States are not to be superseded by the Federal Act unless that is the clear and manifest purpose of Congress"); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)(same); *Desiano v. Warner-Lambert & Co.,* 467 F.3d 85, 94 (2d Cir. 2007) (regulation of "matters of health and safety . . . is a sphere in which the presumption against preemption applies, indeed, stands at its strongest").

Throughout the history of our Republic, "[s]tates traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." *Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 756 (1985). Indeed, the "regulation of health and safety matters is primarily, and historically, a matter of *local* concern." *Hillsborough County, Fla. v. Automated Med. Labs., Inc.,* 471 U.S. 707, 719 (1985) (emphasis added); *Packer Corp. v. Utah*, 285 U.S. 105, 108 (1932) ("It is

not denied that the State may, under police power, regulate the business of selling tobacco products"); *Austin v. Tennessee*, 179 U.S. 343, 348-49 (1900) ("[W]e think it within the province of the [state] legislature to say how far [cigarettes] may be sold or to prohibit their sale entirely. . . ."); *see also U.S. Smokeless Tobacco Mfg. Co. v. City of New York,* 703 F. Supp.2d 329, 333 (S.D.N.Y. 2010) ("[t]he regulation of health and safety matters is primarily, and historically, a matter of local concern'") ("*U.S. Smokeless Tobacco I*"). One way that strong presumption against federal preemption of local health and safety regulations works in practice is that courts strictly construe and narrowly read preemption clauses. *Building & Constr. Trades Council v. Associated Builders & Contractors of Mass./R. I., Inc.*, 507 U.S. 218, 224, (1993) (Court is "reluctant to infer preemption"); *Cipollone v. Liggett Group Inc*., 505 U.S. 504, 518 (1992) ("presumption against the preemption of state police power regulations . . . reinforces the appropriateness of a narrow reading" of preemption clauses).

To be sure, the key question in federal preemption analysis is: "Did Congress, in enacting the Federal Statute, intend to exercise its constitutionally delegated authority to set aside the laws of a State?" *Barnett Bank v. Nelson,* 517 U.S. 25, 30 (1996). And the best way to see if Congress intended to preempt local law is through express preemption clauses in federal law. *Jones v. Rath Packing Co.,* 430 U.S. 519, 525 (1977). While express preemption clauses are not the *only*

way for Congress to articulate the meaning and scope of its preemptive intent, *Int'l Paper Co. v. Ouellette,* 479 U.S. 481, 492, (1987*)*, if Congress does use explicit preemption clauses then the court's task in interpreting that preemptive intent is "an easy one." *English v. General Elec. Co.,* 496 U.S. 72, 79 (1990).

And that task is relatively easy here, because the two federal laws that the Tobacco-Company Plaintiffs rely on, the Family Smoking Prevention and Tobacco Control Act (the "FSPTCA"), 123 Stat. 1776, as amended 21 U.S.C. § 387 *et seq.* and the Federal Cigarette Labeling and Advertising Act (the "FCLAA"), 79 Stat. 282, as amended, 15 U.S.C. § 1331 *et seq.—do* contain express preemption clauses. Those express preemption clauses resolve the issue *against* preemption here because neither one of the clauses comes close to showing "clear and manifest intent" to preempt regulations on sales of tobacco products like Providence's Flavored Tobacco Ordinance and Price Ordinance. Indeed, as explained below, those clauses authorize the City to do exactly what it did through these ordinances—regulate the sales of tobacco products in Providence.

Assuming *arguendo* that the Court finds that the express preemption language in the FSPTCA and FCLAA "does not directly answer the question [then] courts must consider whether the federal statute's 'structure and purpose,' or nonspecific statutory language, nonetheless reveal a clear, but implicit, pre-emptive intent." *Barnett Bank,* 517 U.S. at 31 quoting *Jones,* 430 U.S. at 525).

Thus, state law may be impliedly preempted to the extent it "actually conflicts" with federal law. *Verizon New England Inc. v. Rhode Island Pub. Utils.*, 822 A.2d 187, 192-94 (R.I. 2003); *Cipollone,* 505 U.S. at 516. Actual conflict occurs when compliance with both state and federal law is a "physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 143 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941). Here, there is no conflict because (a) the FSPTCA and FCLAA *authorize* local regulation over tobacco product sales and (b) Providence's Ordinances *provide* local regulation over tobacco product sales. In other words, Providence's Ordinances do exactly what the FSPTCA and FCLAA allow. Hence, there is no implied conflict preemption here.

Another way that federal law may preempt state and local laws is when the pervasiveness of a federal scheme implies that Congress intended federal law to "occupy a field" exclusively, disallowing concurrent state operation or supplementation even where the state law does not otherwise "conflict" with federal law. *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947). Here, given that FSPTCA and FCLAA expressly preserve and save to local authorities the power to regulate the sales of tobacco products, any argument that Congress

intended federal law to regulate this field exclusively fails. Hence, there is no implied field preemption here either.

And given that "[t]he 'health and safety' presumption [against preemption] applies in both express and implied preemption analyses," *Philip Morris Inc. v. Harshbarger*, 122 F.3d 58, 68 (1st Cir. 1997), the overarching principle remains that explicit or implicit preemption cannot be found here unless it was the "clear and manifest purpose of Congress" to preempt local regulations, like the Flavored Tobacco Ordinance and Price Ordinance, over the sales of tobacco products in Providence to protect the health and safety of her citizens.

Applying that strong presumption against federal preemption of these local health and safety regulations is straightforward: as the FSPTCA and FCLAA do not show Congress's "clear and manifest purpose" to preempt local regulations over sales of tobacco products like Providence's Flavored Tobacco Ordinance and Price Ordinance, Plaintiffs' preemption arguments collapse.

2. The FSPTCA does not preempt Providence's Flavored Tobacco Ordinance.

The Flavored Tobacco Ordinance is a local regulation within Providence of the sale of certain tobacco products, specifically making it "unlawful for any person to sell or offer for sale any flavored tobacco product to a consumer, except in a smoking bar." Providence Code of Ordinances at § 14-309.

While the Tobacco-Company Plaintiffs insist that the FSPTCA preempts

Providence's Flavored Tobacco Ordinance, Pl. Br. at 30-40, the opposite is true. Congress in the FSPTCA clearly stated its intent *not* to preempt local regulation of the sale of tobacco products through the following tripartite clauses of the FSPTCA:

A. First, the **Preservation Clause** provides that State and local governments retain their historical power to regulate, among other things, the sale of tobacco products within their jurisdictions:

> Except as provided in [the Preemption Clause], nothing in this subchapter, or rules promulgated under this subchapter, shall be construed to limit the authority of . . . a State or political subdivision of a State . . . to enact, adopt, promulgate, and enforce any law, rule, regulation, or other measure with respect to tobacco products that is in addition to, or more stringent than, requirements established under this subchapter, *including a law, rule, regulation, or other measure relating to or prohibiting the sale, distribution, possession, exposure to, access to, advertising and promotion of, or use of tobacco products by individuals of any age*, information reporting to the State, or measures relating to fire safety standards for tobacco products . . . .

21 U.S.C. § 387p(a)(1*)* (emphasis added).

As recently construed by S.D.N.Y. District Judge McMahon, this Preservation Clause means that "with respect to regulations relating to, or even prohibiting, sales of tobacco products, local governments are free to go above any federal floor set either by the FSPTCA or by the FDA acting pursuant to it." *U.S. Smokeless Tobacco Mfg. Co. v. City of New York,* 09 Civ. 10511 (CM), 2011 U.S.

Dist. LEXIS 133018, *4 (S.D.N.Y. 2011) ("*U.S. Smokeless Tobacco II*") (currently on appeal).

B. Second, the **Preemption Clause** provides that notwithstanding the preservation of local authority to restrict or prohibit the sales or distribution of tobacco, the federal government has exclusive control over, among other things, "tobacco product standards":

> No State or political subdivision of a State may establish or continue in effect with respect to a tobacco product any requirement which is different from, or in addition to, any requirement under the provisions of this subchapter *relating to tobacco product standards*, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards, or modified risk tobacco products.

21 U.S.C. § 387p(a)(2)(A) (emphasis added).

Hence, "whenever the FSPTCA, or the FDA acting pursuant thereto, promulgates a 'tobacco product standard,' any State law requirement that differs from or conflicts with that standard is preempted." *U.S. Smokeless Tobacco II*, 2011 U.S. Dist. LEXIS, at *5.

C. Third, the **Savings Clause** clarifies that the Preemption Clause does not reach local sales or distribution regulations of the kind referenced in the Preservation Clause:

> [The Preemption Clause] *does not apply* to requirements relating to the sale, distribution, possession, information reporting to the State, exposure to, access *to, the advertising and promotion of, or use of, tobacco products by individuals of*

any age, or relating to fire safety standards for tobacco products . . . .

21 U.S.C. § 387p(a)(2)(B) (emphasis added).

As S.D.N.Y. District Judge McMahon recently found in rejecting an almost identical preemption argument by the tobacco industry that the FSPTCA preempts a New York regulation banning the sale of flavored smokeless tobacco products, reading those three clauses of the FSPTCA together shows that "the statute gives the federal government the exclusive power to regulate the manufacture and/or fabrication of tobacco products, *while reserving to the States their historical power to regulate the sale and distribution of such products above any federal floor*." *U.S. Smokeless Tobacco II*, 2011 U.S. Dist. LEXIS, at *5-6 (emphasis added). In other words, "local sales restrictions, including prohibitions of subclasses of tobacco products, are not within the scope of the Preemption Clause at all." *U.S. Smokeless Tobacco II*, 2011 U.S. Dist. LEXIS, at *7.

And a local sales restriction, prohibiting the sale of flavored tobacco products anywhere in Providence other than at a tobacco bar, is precisely what the Flavored Tobacco Ordinance *is*. Such local sales restrictions are specifically preserved (by the Preservation Clause) for state and local regulation and saved (by the Savings Clause) from any reading of the Preemption Clause that might otherwise seem to reach them. The Preemption Clause itself does not apply to Providence's Flavored Tobacco Ordinance because the ordinance has no impact on

manufacturing or fabrication requirements. Hence, the Tobacco-Company Plaintiffs' argument that the FSPTCA expressly preempts the Flavored Tobacco Ordinance is moot.

Because the FSPTCA expressly *preserves* the power of local governments to regulate the sale of tobacco products—exactly what Providence's Flavored Tobacco Ordinance does—the FSPTCA does not show a "clear and manifest purpose" to preempt this local sales regulation.

The FSPTCA does not preempt the Flavored Tobacco Ordinance by implication, either. Any argument that there is an "actual conflict" between the Flavored Tobacco Ordinance and the FSPTCA is specious because the Ordinance does exactly what the FSPTCA *allows* the City to do: prohibit the sale or distribution of a subclass of tobacco product, except at certain locations. *See* Preservation Clause *supra*. Therefore, no conflict exists.[3]

Likewise, any federal "field preemption" argument over the regulation of sales of flavored tobacco products fails because the plain text of the Preservation Clause makes clear that Congress did *not* intend to occupy the field of regulation of sales of tobacco products—*which it preserves and saves for State and local authorities*. Moreover, the absence of FDA regulations over sales of flavored

[3] The only restriction the FSPTCA affirmatively places on flavored tobacco products relates to flavored cigarettes, *see* 21 U.S.C. § 387g(a)(1)(A*)*, and Providence's Flavored Tobacco Ordinance City Ordinance explicitly states that it does *not* apply to cigarettes. Again, there is no conflict.

smokeless tobacco products is additional evidence that the federal government has not occupied this field. As well put by S.D.N.Y. District Judge McMahon:

> That the FDA may someday choose to regulate smokeless tobacco products in a manner inconsistent with the Ordinance does not mean that the City is deprived of its power to regulate *in the absence of such action.* To the contrary, all of the evidence indicated that Congress specifically intended a *continued role for State and local regulation*, as long as that regulation did not intrude into tobacco product standards aimed at manufacturing.

U.S. Smokeless Tobacco II, 2011 U.S. Dist. LEXIS, at * 8 (emphasis added) ; *see also U.S. Smokeless Tobacco I*, 703 F. Supp. 2d at 340 (reasoning that the language of the Preservation Clause "suggests that the purpose of the clause is to establish a presumption against field (or implied) preemption" and that the FSPTCA was intended to "have a *limited* preemptive scope.") (emphasis in original).

Although the Tobacco-Company Plaintiffs argue that the reasoning of S.D.N.Y. District Judge McMahon in *U.S. Smokeless Tobacco I & II* is undercut by the recent decision of the U.S. Supreme Court in *Nat'l Meat Ass'n. v. Harris*, __ U.S. __, 132 S.Ct. 965 (2012), *see* Pl. Br. at 36-37, that argument fails. The Federal Meat Inspection Act (the "FMIA") at issue in *Harris* regulating slaughterhouses' butchering of non-ambulatory pigs for human consumption had *no* Preservation and Savings Clause like the FSPTCA does here authorizing the Providence to do exactly what it did through the local regulation: prohibit the sale of certain tobacco products. To the contrary, the *Harris* Court explained that

"FMIA regulates slaughterhouses handling and treatment of nonambulatory pigs from the moment of their delivery through the end of the meant production process," and California's law impermissibly "*endeavor[ed] to regulate the same thing, at the same time, in the same place except by imposing different requirements. The FMIA expressly preempts such a state law*." *Harris*, 132 S. Ct. at 975 (emphasis added). Not so here, where the FSPTCA expressly does *not* regulate the "same thing" because it expressly *preserves and saves* regulation over sales of tobacco products to state and local governments. Hence, *Harris* is distinguishable.

3. The FLCAA does not preempt Providence's Flavored Tobacco Ordinance.

The U.S. Supreme Court has categorically ruled that the "[t]he FCLAA's preemption provision does not cover smokeless tobacco or cigars." *Lorillard,* 533 U.S. at 451. Yet Providence's Flavored Tobacco Ordinance covers smokeless tobacco and cigars. Flavored Tobacco Ordinance at § 14-308. Hence, the FCLAA applies to different product categories and does not preempt the Flavored Tobacco Ordinance. *See* Pl. Br. at 1-45 (never arguing that the FCLAA preempts the Flavored Tobacco Ordinance).

4. The FSPTCA does not preempt Providence's Price Ordinance.

The Price Ordinance is local regulation within Providence of the sale of tobacco products, specifically forbidding "any tobacco license holder to 'accept or

redeem, offer to accept or redeem, or cause or hire any person to accept or redeem or offer to accept or redeem any coupon that provides any tobacco products without charge or for less than the listed or non-discounted price'." Providence Code of Ordinances, § 14-303, ¶ 1. Simply put, the Price Ordinance tells retailers that when you sell tobacco products in Providence, you cannot accept coupons slashing the price. That is quintessentially a local regulation on the sale of tobacco products, specifically imposing restrictions on the time, place, and manner of sale.

Similar to the Flavored Promotion Ordinance, the FSPTCA's Preservation and Savings Clauses, 21 U.S.C. §§ 387p(a)(1) & (a)(2)(B), explicitly preserve to state and local authorities the power to regulate sale of tobacco products. These clauses defeat any argument that the FSPTCA preempts the Price Ordinance either expressly or by implication. The Tobacco-Company Plaintiffs' brief cannot and does not suggest otherwise. *See* Pl. Br. at 1-45 (never arguing that the FSPTCA preempts the Price Ordinance).

When Congress in 2009 enacted the FSPTCA, it not only made clear its intent to leave state and local authority to regulate the sale, advertising and promotion of tobacco products intact through the Preservation and Savings Clauses discussed above, but *also simultaneously* narrowed the scope of the *FLCAA*'s preemption provision. Specifically, while the FSPTCA left unchanged the FLCAA's preemption provision in 15 U.S.C. § 1334(b) (as amended in 1970),

providing—

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act—

the FSPTCA of 2009 *added* a new subsection (c) to 15 U.S.C. § 1334, providing:

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

15 U.S.C. § 1334(c) (emphasis added).

Read in harmony with the FSPTCA's Preservation and Savings Clauses, the plain language of this new Section 1334(c) establishes that Congress intended to preempt only a very narrow category of regulations—those that regulate the "*content*" of cigarette advertising and promotion—and otherwise provided broad authority to state and local governments to regulate sales of tobacco products, including time-place-manner restrictions at the point of sale.

Hence, by enacting the FSPTCA in 2009, Congress demonstrated its intent through its Preservation Clause and Savings Clause, *and* by adding the new savings provision at FLCAA's § 1334(c), to *permit* local regulations over tobacco products at the point of sale. At the very least, those provisions vitiate any argument that it is "the clear and manifest purpose of Congress" to preempt local regulations over the sale of tobacco products such as the Price Ordinance, which

says nothing whatever about the "content" of advertisements but rather only restricts retailers from accepting coupons to slash the price of tobacco products at the point of sale.

While Plaintiffs retort that the Price Ordinance is "directed at the *content* of the price information communicated to adult customers," Pl. Br. at 20 (emphasis in original), that argument fails because the plain text of the Price Ordinance says *nothing* about the content of what tobacco companies can advertise to "adult customers" about prices or anything else; rather the Price Ordinance restricts "tobacco license holders" in Providence from redeeming discount coupons for tobacco at the point of sale. Price Ordinance, § 14-303, ¶ 1. It *is* a sales restriction—exactly what the Preservation Clause, the Savings Clause, and new Section 1334(c) permit the City to do.

Accordingly, the FSPTCA does not preempt the Price Ordinance.

5. The FLCAA does not preempt Providence's Price Ordinance.

Given that "[t]he FCLAA's pre-emption provision does not cover smokeless tobacco or cigars" at all, *Lorillard,* 533 U.S. at 451, the Tobacco-Company Plaintiffs' sole remaining argument is the Price Ordinance, in so far as it restricts retailers from accepting discount coupons for cigarettes at the point of sale, is preempted by FCLAA Section 1334(b), which forbids States from regulating "with respect to the advertising or promotion of any cigarettes. . . ." 15 U.S.C. § 1334(b)

(as amended in 1970); *see* Pl. Br. 17-22. Not surprisingly, the Tobacco-Company Plaintiffs lean heavily on pre-2009 cases such as *Jones v. Vilsack*, 272 F.3d 1030, 1036 (8th Cir. 2001) and *Rockword v. City of Burlington*, 21 F. Supp. 2d 411, 419-20 (D. Vt. 1998) (discussed at Pl. Br. 19-20) to argue that pricing discounts are "promotion" preempted from State and local regulation under Section 1334(b). Pl. Br. at 19-20. Yet Plaintiffs' argument falls apart in light of the addition in 2009 of FCLAA Section 1334(c), by which Congress specifically indicated that:

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

15 U.S.C. § 1334(c) (emphasis added).

So even if the Price Ordinance were somehow determined to fall within the scope of the preemption provision of Section 1334(b) relating to "promotion," the Price Ordinance would still avoid preemption because it would come within the explicit savings clause of new Section 1334(c). If coupons that are redeemed only at the time and location of sale are promotional activity, then the Price Ordinance's regulation of those coupons at the *time* and *location* of sale is within the savings clause. And the Price Ordinance's regulation on the *manner* of promoting cigarettes—retailers shall not sell them at a coupon discount—falls within that new savings clause of Section 1334(c) as well.

In summary, the Price Ordinance is a sales restriction that restricts only retailers from accepting discount coupons. The Price Ordinance says nothing about the *content* of advertisements or promotions by the Tobacco-Company Plaintiffs to customers; so far as the Price Ordinance is concerned, Plaintiffs can say whatever they want to customers to advertise or promote cigarettes. But at the *time, place, and manner* of sale of cigarettes, the Price Ordinance simply regulates such "promotion" by restricting retailers from selling cigarettes at a coupon discount in Providence—exactly what Section 1334(c) allows the City to do.

Moreover, Congress's *intent*—the "touchstone" of any preemption inquiry, *Cipollone v. Liggett Group*, 505 U.S. 504, 516 (1992)—in adding FLCAA Section 1334(c) was to reaffirm the authority of states and localities to regulate the sale and marketing of cigarettes. *See Commonwealth Brands, Inc. v. United States,* 678 F.Supp.2d 512, 520 (W.D. Ky. 2010) (explaining that Section 1334(c) "authorizes . . . state and local governments . . . to enact more stringent regulations pertaining to the marketing and sale of tobacco products"). And Congress's intent to permit such state and local regulation was underscored by 21 U.S.C. § 387p, providing that the FSPTCA's new provisions should not "be construed to limit the authority" of states or localities to adopt "more stringent measure[s] with respect to tobacco products," *including* restrictions on "promotion and advertising." FSPTCA § 916(a)(1) (codified at 21 U.S.C. § 387p). Hence, Congress recently has *twice*

expressly authorized local regulation of cigarette sales, promotion, and advertising—exactly what Providence's Price Ordinance does as authorized by new FLCAA Section 1334(c).

6. Rhode Island law does not preempt Providence's Price Ordinance.

The Tobacco-Company Plaintiffs' last-ditch preemption argument is that Providence's Price Ordinance is impliedly preempted by *Rhode Island* laws that supposedly "occupy the field" of regulating the sale of tobacco products. Pl. Br. at 24-26. But that argument fails because the Supreme Court of Rhode Island has already addressed and rejected a similar field preemption argument in the tobacco-regulation context, holding: "there is no indication that the General Assembly even impliedly intended to occupy the field of regulating smoking." *Amico's Inc. v. Mattos*, 789 A.2d 899, 907 (R.I. 2002).

Although the Tobacco-Company Plaintiffs quickly mention a few Rhode Island statutes prohibiting selling tobacco to minors or giving free tobacco products to minors, or within 500 feet of a school, Pl. Br. at 24-25, Plaintiffs fail to even *attempt* to show how the General Assembly through those few statutes intended to occupy exclusively the field of regulating sales of tobacco products. As those statutes do *not* regulate the sale of flavored tobacco to any person or restrict retailers from selling tobacco at a coupon discount for any person, the General Assembly clearly did not intend to occupy the entire field of traditional

local regulations over the sale of tobacco products such as Providence's Flavored Tobacco Ordinance and Price Ordinance.

The Tobacco-Company Plaintiffs also argue that because the General Assembly in the past "has considered and *declined* to enact measures" like the Price Ordinance and Flavored Tobacco Ordinance, "therefore" the General Assembly has occupied this field by *in*action. Pl. Br. at 25. (emphasis added). But declining to occupy a field of local regulation does not equal occupying a field of local regulation—and Plaintiffs do not cite a single case holding otherwise. None exists. For as explained by the U.S. Supreme Court, in preemption analysis, "congressional silence lacks persuasive significance." *Camps Newfound/Owatonna, Inc. v. Town of Harrison,* 520 U.S. 564, 616 (1997) (preemption jurisprudence "explicitly rejects the notion that mere congressional silence on a particular issue may be read as pre-empting state law.") (Thomas, J., Scalia, J., Rehnquist, C.J., dissenting) (citing *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr. N. A., Inc.,* 519 U.S. 316, 325 (1997); *Brown v. Gardner*, 513 U.S. 115, 121, (1994); *see also O'Melveny & Myers v. FDIC,* 512 U.S. 79, 85 (1994) ("matters left unaddressed in [a comprehensive and detailed federal] scheme" are presumed to have been left "to the disposition provided by state law"); *Schafer v. American Cyanamid Co.*, 20 F.3d 1, 6 (1994)("Pre-emption law, for example, cautions us against finding that a congressional act pre-empts a

state law through silence."); *Jones v. Rath Packing Co.,* 430 U.S. 519 (1977); *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218 (1947); *U.S. Smokeless Tobacco II*, 2011 U.S. Dist. LEXIS, at * 8 ("That the FDA may someday choose to regulate smokeless tobacco products in a manner inconsistent with the Ordinance does not mean that the City is deprived of its power to regulate *in the absence of such action.*") (emphasis added). Hence, the Tobacco-Company Plaintiffs final preemption argument that the Rhode Island General Assembly silently preempted the field of local sales regulations fails because silence plus inaction does not equal field preemption.

Indeed, in rejecting a field preemption argument in the tobacco-regulation context, the Rhode Island Supreme Court made clear that when the General Assembly intends to occupy a field of regulation, it knows how to do so:

> In its enactment of statutes regulating smoking, the General Assembly at no time disclosed, by implication or otherwise, its intent to occupy exclusively the field of regulating smoking as the Legislature explicitly did in G.L. 1956 § 39-1-1(c*)*, when it preempted local regulation of utilities. See *Town of E. Greenwich v. Narragansett Electric Co.,* 651 A.2d 725, 729 (R. I. 1994).

Amico's Inc. v. Mattos, 789 A.2d at 908. Likewise here, the General Assembly has never expressly or implicitly occupied the field of regulating the sales of tobacco products.

CONCLUSION

The Preservation and Savings Clauses of the FSPTCA, as well as the new Savings Clause at Section 1334(c) of the FLCAA, authorize Providence to do exactly what it did through the Flavored Tobacco Ordinance and Price Ordinance—regulate the sales of tobacco products. Particularly in light of the strong presumption against federal preemption of these local health and safety regulations, neither the FSPTCA nor the FCLAA show Congress's "clear and manifest purpose" to preempt local regulations such as those at issue in Providence. Likewise, the Rhode Island General Assembly *by silence and inaction* never intended to preempt the entire field of local regulation of tobacco product sales. Hence, *Amici* respectfully request that this Court reject all of the Tobacco-Company Plaintiffs' preemption arguments and uphold the Providence Ordinances.

Respectfully submitted by *Amici*,

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CERTIFICATE OF SERVICE

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