UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATIONAL ASSOCIATION OF TOBACCO OUTLETS, INC., *et al.*,	:	
Plaintiffs,	:	14 CV 577 (TPG)(JCF)
-against-	:	
CITY OF NEW YORK, *et al.*,	:	
Defendants.	:	

BRIEF OF WASHINGTON LEGAL FOUNDATION
AS *AMICUS CURIAE*
IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND
IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed.R.Civ.P. 7.1, the Washington Legal Foundation (WLF) states that it is a corporation organized under § 501(c)(3) of the Internal Revenue Code. WLF has no parent corporation, and no publicly-held company has a 10% or greater ownership interest.

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INTERESTS OF *AMICUS CURIAE*

The interests of the Washington Legal Foundation (WLF) are set out more fully in the accompanying motion for leave to file this brief.[1] In brief, WLF is a public interest law firm, and policy center with supporters in all 50 states. WLF regularly appears before federal and state courts to promote economic liberty, free enterprise, the rule of law, and a limited and accountable government.

In particular, WLF has devoted substantial resources to promoting free speech rights of the business community, appearing before numerous federal courts in cases raising First Amendment issues. *See, e.g., Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011); *Nike v. Kasky*, 539 U.S. 654 (2003). WLF has successfully challenged the constitutionality of FDA restrictions on speech by pharmaceutical manufacturers. *Washington Legal Found. v. Friedman*, 13 F. Supp. 2d 51 (D.D.C. 1998), *appeal dism'd*, 202 F.3d 331 (D.C. Cir. 2000).

WLF is concerned that Section 6 of Local Law 97 (the "Ordinance"), if allowed to stand, sets a dangerous precedent that all but eliminates First Amendment restrictions on government efforts to suppress truthful speech for the purpose of "protecting" consumers from actions they might take in response to the speech. WLF believes that such speech-suppression measures are particularly unwarranted when, as here, the government can attain its objectives by adopting measures that do not suppress speech.

This brief addresses First Amendment issues only. While WLF agrees with Plaintiffs

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[1] WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief.

that the Federal Cigarette Labeling and Advertising Act (the "Labeling Act"), 15 U.S.C. § 1331, as well as New York state law preempt § 6(b) of the Ordinance, this brief does not address those issues.

INTRODUCTION AND STATEMENT OF THE CASE

It is universally accepted that widespread use of tobacco products creates serious public health issues. For that reason, governments at all levels have adopted a variety of measures over the past 50 years to reduce smoking rates among adults as well as adolescents. Those measures have led to substantial reductions in smoking rates for all age groups. Within New York City, the decline has been particularly dramatic among high-school age youth; the smoking rate for that group dropped from 17.6% in 2001 to 8.5% in 2011, a 52% reduction.

Government regulators have determined that one effective means of reducing tobacco consumption is to raise the price of cigarettes and other tobacco products by repeatedly raising taxes on those products. For example, between 1997 and 2009, the federal excise tax on cigarettes increased from $0.24 per pack to $1.01 per pack, and the average state excise tax on cigarettes increased from $0.38 to $1.53 per pack. In New York City, the combined state and city excise tax on cigarettes is now $5.85 per pack. Defendants (collectively, "the City") assert that manufacturer discount programs thwart their price-raising efforts, but Plaintiffs self-evidently could not prevent prices from rising substantially in the face of rising excise taxes, even if they were to give away their product.[2]

Local Law 97 (the "Ordinance"), adopted in 2013, is an effort by the City to effect

[2] Fifty years ago, cigarettes sold for about $1.90 per pack in 2014 dollars (about $0.25 in 1964 dollars). Increased city, state, and federal excise taxes account for the lion's share of price increases.

further reductions in smoking rates. Unlike prior smoking-reduction measures, the Ordinance takes direct aim at expressive activities routinely engaged in by manufacturers and retailers. This lawsuit challenges the constitutionality of portions of § 6 of the Ordinance, which provides in pertinent part:

> b. Prohibition on the sale of cigarettes for less than the listed price. No person shall:
>
> (1) honor or accept a price reduction instrument in any transaction related to the sale of cigarettes to a consumer;
>
> (2) sell or offer for sale cigarettes to a consumer through any multi-package discount or otherwise provide to a consumer any cigarette for less than the listed price in exchange for the purchase of any other cigarettes by the consumer;
>
> (3) sell, offer for sale, or otherwise provide any product other than cigarettes to a consumer for less than the listed price in exchange for the purchase of cigarettes by the consumer; or
>
> (4) sell, offer for sale, or otherwise provide cigarettes to a consumer for less than the listed price.[3]

Plaintiffs do not challenge § 6(d), which establishes a "price floor" for cigarettes of $10.50 per pack. Importantly, the price floor bears no direct relationship to the listed price. The "price floor" is the minimum sales price for a pack of cigarettes and is mandated by the City. The "listed price" is established by each retailer; it can be any amount equal to or greater than the $10.50 price floor and can be changed by the retailer.

The City asserts that the restrictions imposed by §§ 6(b) and (c)—principally, a ban on

[3] The quoted provision is codified as § 17-176.1(b) of the administrative code of New York City. Section 6(c) contains identical provisions regarding the sale of tobacco products other than cigarettes. For purposes of §§ 6(b) and 6(c), the Ordinance defines the "listed price" as "the price listed for cigarettes or tobacco products on their packages or on any related shelving, posting, advertising, or display at the place where the cigarettes or tobacco products are sold or offered for sale, including all applicable taxes."

"price reduction instruments" (such as coupons), discounts for buying multiple packs at the same time, and sales at prices below the listed price—will lead to an increase in the average price paid for cigarettes and other tobacco products and, ultimately, to a reduction in tobacco sales. In apparent response to Plaintiffs' claims that §§ 6(b) and (c) infringe their commercial speech rights, the City recently released proposed regulations stating that the Ordinance does not prohibit retailers from changing the listed price at any time and then "informing customers that the listed price has changed."[4]

Plaintiffs contend, *inter alia*, that the Ordinance's "restrictions on the use of coupons, discounts, and other promotions for cigarettes and other tobacco products limits communications to adult tobacco consumers regarding tobacco product deal and discount information, and cannot be justified under the Supreme Court's commercial speech jurisprudence"—and thus violates Plaintiffs' First Amendment rights. Complaint, ¶ 68. The parties have filed cross-motions for summary judgment.

SUMMARY OF ARGUMENT

The City's interpretation of "listed price" has been a moving target; in an apparent effort

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[4] Considerable uncertainty remains regarding the meaning of §§ 6(b) and (c), even after release of the proposed regulations. For example, if a retailer lists its "normal" cigarette price as $12 per pack but tells a customer that it is offering a $11 "sale price" for this week only, has it violated § 6(b)(4)? The plain language of the Ordinance would suggest that the offer to sell at $11 violates the Ordinance because it constitutes an offer to sell at below the listed price of $12. In the City's memorandum of law in support of its summary judgment motion ("Defts' Brief"), however, the City asserts (without explanation) that such an offer does not violate the Ordinance and adds, "The Discount Redemption Ban does not place any restrictions on how a retailer characterizes a transaction." Defts' Brief at 5. Elsewhere in its brief, however, the City asserts (at least implicitly) that its interpretation does not apply to discount coupons. Thus, under the City's current reading of the Ordinance, a retailer is not permitted, after being presented with a $1.00 discount coupon, to post a sign stating, "My old list price was $12; but since you have presented me with a coupon, I am changing my list price to $11 just for you."

to forestall arguments that the Ordinance restricts speech, it has repeatedly revised its views regarding the scope of §§ 6(b)(4) and 6(c)(4), which bars selling, or offering to sell, cigarettes and other tobacco products for less than the listed price. Its most recent interpretation, set forth in its summary judgment motion, is that a retailer may change its listed price' at will and that the manner in which a retailer characterizes a transaction (*e.g.*, as an offer to sell at a discount off the "regular price") has no bearing on whether the retailer is in compliance with the listed-price requirement. In light of uncertainty regarding how the City intends to enforce §§ 6(b)(4) and 6(c)(4), WLF will not address the constitutionality of those provisions.[5]

WLF instead focuses on the ban on coupons (§§ 6(b)(1) and 6(c)(1)) and on multi-package discounts (§§ 6(b)(2) and 6(c)(2)). In its summary judgment motion, the City has attempted to re-write those provisions to make it seem as though those bans are designed merely as adjuncts to § 6(d)'s $10.50 price floor. According to the City, the provisions prevent retailers from "circumventing" the price floor through "the acceptance of coupons" whose use might reduce the effective price paid by consumers to an amount less than $10.50. Thus, according to the City, the provisions are mere economic regulations that do "nothing more than regulate tobacco prices" and cannot be viewed as speech restrictions. Defts' Brief at 4.

The City's narrative badly distorts the statutory language and conflates the terms listed price and price floor. Nothing in §§ 6(b) and 6(c) suggests that they were enacted as a means of ensuring compliance with § 6(d)'s $10.50 price floor. Indeed, they apply much more broadly.

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[5] The City may take the position that in addition to being banned under §§ 6(b)(1) and 6(c)(1), coupons are also banned under § 6(b)(4) and § 6(c)(4) because their use constitutes the provision of cigarettes to a consumer "for less than the listed price." If so, then § 6(b)(4) and § 6(c)(4) violate the First Amendment, for all the reasons set forth herein with respect to § 6(b)(1) and § 6(c)(1).

For example, the statute bans use of all discount coupons, without regard to whether use of the coupon would lower the "effective" price of a pack of cigarettes below the $10.50 price floor. Moreover, the evidence submitted by the City makes clear that its objection to coupons extends well beyond their tendency to lower prices; it cited studies indicating that coupons can cause recipients to feel more positively about smoking as well as the company that provided the coupons. *See, e.g.*, Declaration of Mary T. Bassett at 27. In light of that evidence, the City cannot plausibly deny that it is restricting Plaintiffs' expressive activities. And such restrictions are subject to First Amendment strictures.

Courts have repeatedly recognized that coupon and discount programs are expressive in nature. *See, e.g.*, *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 537-39 (6th Cir. 2012); *Bailey v. Morales*, 190 F.3d 320, 325 (5th Cir. 1999). Businesses engage in such programs for the same reason they engage in other forms of promotional activity: they are making a statement designed to call attention to themselves and to encourage consumers to try their services or products. Businesses could, of course, forgo issuing coupons and instead simply lower their regular retail prices by an amount equal to the face value of the coupons. Experience has shown, however, that the "try me" and "we value our customers" statements conveyed by coupons are more effective than a simple price reduction in prompting customers to purchase the coupon-issuer's product (versus choosing to purchase a competitor's product). The City objects to tobacco coupons because it fears that their use will lead to increased tobacco sales. But a ban on coupons stifles a frequently employed mode of commercial speech and thus implicates First Amendment concerns.

The City's ban cannot pass First Amendment muster unless, at the very least, the City can

demonstrate that the ban meets the test for commercial speech restrictions established by *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980).[6] That test imposes on the government the burden of demonstrating that its speech restriction directly advances a substantial government interest and is narrowly tailored so as to avoid unnecessary speech restrictions. *Id.* at 566.

WLF focuses exclusively on the narrow tailoring requirement because the Ordinance so clearly flunks that test. The City contends that it has a substantial interest in reducing smoking rates among both adults and youth and that the coupon and multi-pack discount bans directly advance that interest by driving up tobacco prices and thus (the City predicts) reducing tobacco consumption. But if the City seeks to achieve its goal by driving up prices, it may do so by means that do not restrict speech. It can do so directly by mandating a higher minimum price than the current $10.50 floor price established by § 6(d) of the Ordinance. Or it can do so by raising the city excise tax on tobacco sales, as governments at all levels have done repeatedly over the past several decades. The ready availability of alternative methods to achieve the City's goal that do not involve speech restrictions requires a finding that the Ordinance does not meet *Central Hudson*'s narrow- tailoring requirement. As the Supreme Court has repeatedly explained, "If the First Amendment means anything, it means that regulating speech must be a

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[6] The City argues half-heartedly that any First Amendment scrutiny of the Ordinance should employ the intermediate standard of review employed in *United States v. O'Brien*, 391 U.S. 367 (1968). Defts' Brief at 9. But in the next breath it concedes that its contention is "immaterial" because both *O'Brien* and *Central Hudson* mandate use of "intermediate scrutiny" that is unlikely to lead to conflicting results in a First Amendment challenge. *Ibid.* WLF notes, however, that *O'Brien* is wholly inapplicable in cases, as here, in which the government imposes restrictions on expressive conduct precisely because it objects to the expressive component of the conduct. *See O'Brien*, 391 U.S. at 377.

last—not first—resort." *Thompson v. Western States Medical Ctr.*, 535 U.S. 357, 373 (2002).

Moreover, Plaintiffs have described numerous other measures, not currently being employed by the City, that would assist in reducing smoking rates and that do not entail restricting speech. The City responds that the proposed measures are not feasible, but it fails to provide evidence supporting the alleged infeasibility. For example, the City rejects as infeasible the alternative of banning the underage possession of tobacco products—even though the City has successfully employed a ban on underage possession of alcoholic beverages as a tool in reducing underage drinking. The City contends that the coupon and multi-pack discount bans are necessary in order to prevent evasion of the $10.50 price floor, but it fails to explain why a law only barring use of coupons and discounts when their use would lower the effective price of the product below the price floor (as an alternative to the current law, which bans *all* coupons and multi-pack discounts) would not adequately prevent the evasion that the City fears.

ARGUMENT

I. THE ORDINANCE IS NOT A MERE ECONOMIC REGULATION BUT RATHER A RESTRICTION ON COMMERCIAL SPEECH

Defendants contend that the First Amendment is not even implicated by § 6 of the Ordinance because the coupon and multi-pack discount bans do not restrict retailers and manufacturers from communicating any information about cigarettes and other tobacco products to consumers. Defts' Brief at 3. Rather, they contend, § 6 merely regulates economic activity: it "prohibits retailers from selling tobacco products below the listed price." *Ibid.* That contention is without merit; it both misreads § 6 and misapplies established case law.

First, the bans on coupons and multi-pack discounts are *not* limited to those instances in which their use would result in products being sold "below the listed price"; rather, §§ 6(b)(1)

and (2) establish categorical bans on all use of coupons and multi-pack discounts.[7] Defendants suggest that listed price is synonymous with the price floor (the $10.50 minimum price per pack established by § 6(d) of the Ordinance), *ibid.*, and that the bans on coupons and multi-pack discounts are intended to ensure that retailers do not use coupons and multi-pack discounts as a means of "circumventing" the price floor. *Id.* at 4. That suggestion is a clear misreading of the statute; the two terms have entirely separate meanings. The "price floor" is the City's statutorily mandated minimum sales price. The "listed price" is established by each retailer; it can be any amount equal to or greater than $10.50, and can be changed by the retailer. Given the City's gyrations regarding the meaning of "listed price," it is difficult to predict when an offer to sell at a discounted price would be deemed a violation of § 6(b)(4)'s ban on offers for sale "for less than the listed price." One fact is clear, however: any acceptance of a coupon or the offer of a multi-pack discount violates the Ordinance, regardless whether the net sales price is less than either the listed price or the price floor. The bans on all coupons and multi-pack discounts cannot be said to work in "tandem" with the price floor when they operate independently of the product's price.[8]

Second, the City's assertion that offering consumers coupons and multi-pack discounts does not constitute speech cuts against established case law and 130 years of marketing history.

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[7] Indeed, as noted above, the City still has been unable to make up its mind regarding how to determine whether a retailer has offered to sell cigarettes or other tobacco products "for less than the listed price." *See supra* at 4 n.4.

[8] To the extent that the City is concerned that retailers might permit coupons and product discounts to lower a product's effective price below the price floor, there is a simple fix: clarify the definition to make clear that compliance with the "price floor" is determined based on the sales price *after* taking into account all coupons and discounts.

For example, the Sixth Circuit recently rejected the federal government's arguments that the marketing restrictions imposed by the 2009 federal tobacco marketing control act—including a ban on "continuity programs" whereby a company seeks to reward consumers who remain loyal to the company's brands—did not implicate First Amendment rights. *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 537-39 (6th Cir. 2012). The court said that it agreed with the plaintiffs' argument that "continuity programs are protected speech because they are promotional methods that convey the twin messages of reinforced brand loyalty and encouraging switching from competitors' brands." *Id.* at 528. Similarly, the Fifth Circuit said that promotional activities by chiropractors, including advancing money to prospective patients to convince the patients to make use of the chiropractors' services, were expressive activities protected by the First Amendment. *Bailey v. Morales*, 190 F.3d 320, 325 (5th Cir. 1999). The court explained that commercial practices constitute speech whenever "a particularized message was present and . . . the likelihood was great that the message would be understood by those who viewed it." *Ibid.* It held that when chiropractors give money to obtain patients, they do so "with an intent to convey a particularized message: hire me, try my services," a message that recipients will surely understand "because rebates, free samples and risk-free trials are common marketing tools."[9] *Ibid.*

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[9] The City's efforts to distinguish *Discount Tobacco City* and *Bailey* are unavailing. Defts' Brief at 6-8. Coupon programs are a type of continuity program (the program at issue in *Discount Tobacco City*); they are often offered to those consumers who previously have purchased the brand designated on the coupon, in the hope that the coupon will induce the consumers to again purchase the product. The City argues that the two decisions are distinguishable because they "implicate" only some, not all, of the provisions of §§ 6(b) and 6(c). *Id.* at 7-8. That argument misses the point; *Discount Tobacco City* and *Bailey* are directly applicable because they determined that promotional activities similar to the activities at issue in this case implicate the First Amendment, not because they answer the question of

The provision of coupons to consumers is likewise a common marketing tool and is well understood to convey a "try me" message. Indeed, during 2013, American consumers were offered 315 *billion* coupons from manufacturers and service providers, and they redeemed coupons worth more than $2.8 billion in savings on their purchases. *See* NCH, *NCH 2013 Year-End Topline Coupon Facts* (Feb. 2014) (available at http://www2.nchmarketing.com/ResourceCenter/CouponKnowledgeStream4a.aspx?id=8565#). Companies did not offer these discount coupons out of the goodness of their hearts. Rather, they did so because they recognized that coupons convey a powerful "try me" message (similar to the message conveyed by advertisements appearing in broadcast and print media) to which many consumers are likely to respond by purchasing the coupon-issuer's product (as opposed to purchasing a competing product).

Coupons have been successfully employed as a marketing technique since being pioneered by Coca-Cola in the 1880s. Indeed, use of coupons is widely credited with having transformed Coca-Cola from an obscure beverage to a nationwide behemoth in less than a decade:

> The key to this growth was [Asa] Candler's ingenious marketing including having the company's employees and sales representatives distribute complimentary coupons for Coca-Cola. Coupons were mailed to potential customers and placed in magazines. The company gave soda fountains free syrup to cover the costs of the free drinks. It is estimated that between 1894 and 1913 one in nine Americans had received a free Coca-Cola, for a total of 8,500,000 free drinks.

Brad Tuttle, "The History of Coupons," *Time* (April 6, 2010) (available at http://business.time.com/ 2010/04/06/the-history-of-coupons/). Businesses could, of course,

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whether each of the provisions of §§ 6(b) and 6(c) can pass constitutional muster.

forgo issuing coupons and instead simply lower their regular retail prices by an amount equal to the face value of the coupons. Experience such as Coca-Cola's has shown, however, that the "try me" and "we value our customers" statements conveyed by coupons are more effective than a simple price reduction in prompting customers to purchase the coupon-issuer's product. Companies use coupons regardless of whether there is any prospect of overall growth in their product field because they realize that coupons are effective means of retaining one's existing customers as well as attracting the customers of one's competitors.

Indeed, the evidence indicates that the City opposes coupons and multi-pack discounts precisely because it recognizes that these marketing techniques drive sales more effectively than mere price reductions. *See, e.g.*, Declaration of Mary T. Bassett at 27 (alleging that recipients of coupons "are less likely to quit than other smokers" and "perceive tobacco companies as caring about their health, working to make cigarettes safe, and being honest"). The City may contend that Plaintiffs should not be permitted to convey a message through their coupon programs that they are attempting to be honest with their customers, but any effort to suppress that message unquestionably is subject to First Amendment scrutiny.

The City's "the First Amendment does not apply to our regulation" contention is a common refrain among governments charged with violating First Amendment rights. Recent Second Circuit decisions have regularly rejected such assertions. *See, e.g. IMS Health Inc. v. Sorrell*, 630 F.3d 263, 271-73 (2d Cir. 2010) (rejecting Vermont's claim that raw data regarding doctors' prescribing practices was not entitled to First Amendment protection), *aff'd*, 131 S. Ct. 2653 (2011); *United States v. Caronia*, 703 F.3d 149, 160-62 (2d Cir. 2012) (holding that prosecution of drug salesman for promoting off-label sales of FDA-approved drugs implicated

his First Amendment rights, rejecting federal government's contention that the defendant was being prosecuted for his commercial activities, not his speech). In support of its no-speech-is-involved argument, the City can point to only a single decision, *Nat'l Assoc. of Tobacco Outlets v. City of Providence*, 731 F.3d 71 (1st Cir. 2013). But the First Circuit decision is a slender reed, given that court's failure either to distinguish *Bailey* and *Discount Tobacco City* meaningfully or to explain why it believed that the Fifth and Sixth Circuits erred in arriving at those decisions.

WLF also notes that *Nat'l Assoc of Tobacco Outlets* does not mark the first occasion on which the First Circuit has adopted an overly narrow interpretation of the First Amendment's application to commercial activities. In *IMS Health Inc. v. Ayotte*, 550 F.3d 42 (1st Cir. 2008), the court heard a First Amendment challenge to a New Hampshire statute that was identical to the Vermont statute at issue in *Sorrell*. The Second Circuit struck down the Vermont statute as an impermissible infringement on commercial free speech rights, while the First Circuit held that the challenge to the New Hampshire statute did not even raise a cognizable First Amendment issue. *Id*. at 52-53 (characterizing the information being conveyed in that case as a mere "commodity" with no greater entitlement to First Amendment protection than "beef jerky."). The Supreme Court ultimately repudiated the First Circuit's reasoning in the course of affirming the Second Circuit's First Amendment analysis. *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2666-67 (2011).

Finally, the City asserts that the Ordinance does not restrict speech because it prevents only the redemption of coupons, not their distribution. Defts' Brief at 8. That argument is frivolous. A coupon is not capable of conveying its intended "try me" message if the recipient of

the coupon is not permitted to use the coupon to obtain the advertised product. Indeed, a manufacturer that sends out unredeemable coupons is likely to be understood to convey a message that no company would intend: we cannot be trusted to deal with you honestly because we have enticed you into a store under the false premise that you would be able to obtain our product for a discounted price.

In sum, § 6 of the Ordinance significantly restricts Plaintiffs' rights to communicate with consumers, and that restriction is subject to exacting First Amendment scrutiny.

II. THE ORDINANCE CANNOT WITHSTAND SCRUTINY UNDER THE *CENTRAL HUDSON* TEST

By unduly impinging on Plaintiffs' rights to communicate with consumers, the Ordinance violates the First Amendment and should be enjoined. Plaintiffs have established several grounds for concluding that the Ordinance fails the *Central Hudson* test, the First Amendment test generally applied to restrictions on commercial speech. WLF focuses on one of those grounds: the City has failed to demonstrate that its speech restrictions are narrowly tailored to the interests it seeks to advance by means of the Ordinance.

Distribution of coupons and price discounts for purchasers of multiple items are well-established means by which merchants market their products and therefore are "commercial speech." The *Central Hudson* test imposes a rigorous burden of proof on government speech regulators who seek to justify restrictions on commercial free speech rights. *Central Hudson* imposes on the government the burden of demonstrating that its speech restriction directly advances a substantial government interest and is narrowly tailored so as to avoid unnecessary

speech restrictions. *Central Hudson*, 447 U.S. at 566.[10]

A. Coupon Programs and Multi-Pack Discounts Are Not Inherently False and Do Not Concern Illegal Activity

Coupon programs and multi-pack discounts easily survive the first prong of the four-part *Central Hudson* test, and WLF does not understand the City to be disputing that point. There is, of course, no constitutional protection for commercial speech that proposes the purchase of tobacco products by individuals (such as adolescents) legally prohibited from purchasing them. But there is no evidence that plaintiffs have ever used their coupon programs or multi-pack discounts for the purpose of marketing tobacco products to those not permitted to purchase them. Nor does the statutory ban on coupons warrant the conclusion that the Plaintiffs' claims are blocked at *Central Hudson's* first prong because they concern an illegal activity; the government may not prevent a First Amendment challenge to a restriction on speech rights by declaring those speech rights illegal.

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[10] Under the four-part *Central Hudson* test, courts consider as a threshold matter whether the commercial speech concerns unlawful activity or is inherently misleading. If so, then the speech is not protected by the First Amendment. If the speech concerns lawful activity and is not misleading, then the challenged speech regulation violates the First Amendment unless government regulators can establish that: (1) they have identified a substantial government interest; (2) the regulation "directly advances" the asserted interest; and (3) the regulation "is no more extensive than is necessary to serve that interest." *Central Hudson*, 447 U.S. at 566. The government's evidentiary burden is not light; for example, its burden of showing that a commercial speech regulation advances a substantial government interest "in a direct and material way . . . 'is not satisfied by mere speculation or conjecture; rather, a government body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restrictions will alleviate them to a material degree.'" *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995) (quoting *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993)).

B. The Ordinance's Blanket Prohibition on Protected Speech Cannot Survive *Central Hudson* Scrutiny Because the City Could Achieve Its Goals Without Burdening Free Speech Rights

The City contends that it has a substantial interest in reducing smoking rates among both adults and youth and that the coupon and multi-pack discount bans directly advance that interest by driving up tobacco prices and thus (the City predicts) reducing tobacco consumption. WLF agrees that the City possesses a substantial interest in reducing smoking rates among youth and will accept for the sake of argument that the City possesses a similar substantial argument in reducing adult smoking rates. WLF has serious doubts that the City can meet its burden of establishing that the Ordinance will reduce smoking rates to "a material degree."

But even if the City could meet that burden of proof, the Ordinance cannot survive *Central Hudson* scrutiny because it so clearly fails the final prong of the *Central Hudson* test: it is not narrowly tailored to achieve its smoking-rate-reduction goals. The City posits that its speech restrictions will reduce smoking rates by driving up prices. But there is no reason why the City needs to restrict speech in order to drive up prices; it can achieve that same goal by means that do not suppress speech.

The most direct means by which the City could drive up prices would be to order a price increase: it could simply mandate an increase in the current minimum price for a pack of cigarettes ($10.50). Indeed, § 6(d)(3) authorizes the Department of Health and Mental Hygiene to adopt increases in the minimum price without need for additional legislative authorization. The City contends that the ban on coupons and multi-pack discounts is a "more measured" approach than "selecting a substantially higher price floor." Supplemental Declaration of Mary T. Bassett at 8. But it never explains what it means by "more measured" or why an increased

minimum price would not adequately achieve the City's goal of increasing cigarette prices.

Alternatively, the City could raise prices by increasing its current $1.50-per-pack excise tax on cigarettes. Governments at all levels have done precisely that throughout the past two decades. For example, between 1997 and 2009, the federal excise tax on cigarettes increased from $0.24 per pack to $1.01 per pack, and the average state excise tax on cigarettes increased from $0.38 to $1.53 per pack. New York State's excise tax is among the highest in the nation: $4.35 per pack. An increase in the City's excise tax would have the double advantage of raising cigarette prices while at the same time generating revenue for the City.

The ready availability of alternative methods for achieving the City's price increase goal that do not involve speech restrictions requires a finding that the Ordinance does not meet *Central Hudson*'s narrow-tailoring requirement. As the Supreme Court has repeatedly explained, "If the First Amendment means anything, it means that regulating speech must be a last—not first—resort." *Thompson v. Western States Medical Ctr.*, 535 U.S. 357, 373 (2002).

The City asserts that some adolescents are able to gain access to coupons and to use them to purchase cigarettes, and thus that coupons facilitate adolescents' access to lower-priced cigarettes. Putting aside the flimsiness of the evidence upon which the City bases these claims, the alleged tendency of coupons to reduce tobacco prices becomes irrelevant if the City counteracts that tendency by raising prices—either by increasing the price floor or by increasing its excise tax. Moreover, the inevitability of *some* coupons falling into the hands of adolescents cannot justify suppressing an entire avenue of communication between the Plaintiffs and adult smokers. The Supreme Court rejected just such a speech suppression rationale in striking down a Massachusetts ban on most (but not all) outdoor tobacco advertising. *Lorillard Tobacco Co. v.*

Reilly, 533 U.S. 525 (2001). The Court determined that the advertising ban could not survive the final *Central Hudson* prong: it was insufficiently narrowly tailored because it "unduly impinged" on outdoor advertising directed at adult consumers. 533 U.S. at 565. It explained:

> [T]obacco retailers and manufacturers have an interest in conveying truthful information about their products to adults, and adults have a corresponding interest in receiving truthful information about tobacco products. In a case involving indecent speech on the Internet we explained that "the governmental interest in protecting children from harmful materials . . . does not justify an unnecessarily broad suppression of speech to adults." *Reno v. ACLU*, 521 U.S. 844, 875 (1997) (citations omitted). *See, e.g.*, *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 74 (1983) ("The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox"); *Butler v. Michigan*, 352 U.S. 380, 383 (1957) ("The incidence of this enactment is to reduce the adult population . . . to reading only what is fit for children"). As the State protects children from tobacco advertisements, tobacco manufacturers and retailers and their adult consumers still have a protected interest in communication.

Lorillard, 533 U.S. at 564.

Moreover, Plaintiffs have described numerous other measures, not currently being employed by the City, that would assist in reducing smoking rates and that do not entail restricting speech. The City responds that the proposed measures are not feasible, but it fails to provide evidence supporting the alleged infeasibility. For example, the City rejects as infeasible the alternative of adopting a law banning the underage possession of tobacco products—even though the City has successfully employed a ban on underage possession of alcoholic beverages as a tool in reducing underage drinking. The City contends that the coupon and multi-pack discount bans are necessary in order to prevent evasion of the $10.50 price floor, but it fails to explain why a law only barring use of coupons and discounts when their use would lower the effective price of the product below the price floor (as an alternative to the current law, which bans *all* coupons and multi-pack discounts) would not adequately prevent the evasion that the

City fears.

C. The City May Not Prohibit Truthful Speech Based on a Fear That It Will Prove To Be Too Persuasive

The City's principal objection to coupons is its fear that their use will persuade more people to smoke and thereby undermine public health policy. But the Supreme Court has unequivocally rejected all efforts to suppress truthful speech based on its persuasiveness, no matter how strongly the government opposes the message being conveyed. *See, e.g., Sorrell v. IMS Health, Inc.*, 131 S. Ct. at 2671 ("That the State finds expression too persuasive does not permit it to quiet the speech or to burden its messengers.")

The City can be proud of its success to date in achieving reductions in smoking rates. The smoking rate among high-school-age youth in the City is estimated to have declined from 17.6% in 2001 to 8.5% in 2011 (a 52% reduction); among adults, the decline in smoking has been almost as large: 21.5% in 2002 to 15.5% in 2012 (a 28% reduction). But the City should recognize that it inevitably will encounter diminishing returns as smoking rates become progressively lower. It needs to avoid the urge to overcome those diminishing returns by seeking additional restrictions on truthful speech; smoking rates will never approach zero as long as smoking cigarettes remains a legal activity. Health concerns caused by smoking are a serious concern, but wholesale government suppression of truthful speech is an even more serious concern:

> Those who seek to censor or burden free expression often assert that disfavored speech has adverse effects. But the fear that people would make bad decisions if given truthful information cannot justify content-based burdens on speech. . . . 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.

Sorrell, 131 S. Ct. at 2670-71 (citations omitted).

The theory underlying the City's regulatory efforts appears to be that no rational person would choose to use tobacco products and those who do are either misinformed about health risks or hopelessly addicted. That theory is belied by human experience, which demonstrates that individuals routinely choose to engage in a wide range of activities that others would consider overly dangerous—from mountain climbing, to hang-gliding, to smoking. As a good friend of Chief Justice William Rehnquist recently recounted:

> I often speculated as to why a man who was smart, disciplined, intellectually focused and strong-willed could not break the tobacco habit. Whenever I brought up the subject, he explained that he knew he could quit. As a matter of fact, he said that he had gone cold turkey for extended periods several times in his life. But he greatly enjoyed cigarettes. And he knowingly accepted the trade-offs. Several times he explained his addiction in an idiom he particularly liked: "Let's just say that I am an informed bettor."

Herman Obermayer, *The William Rehnquist You Didn't Know,* ABA JOURNAL (Mar. 2010).

The government has an interest in ensuring that consumers are well informed, but it does not have an interest in censoring others' truthful speech for the purpose of browbeating consumers into behaving in a government-approved manner. And so long as the marketing of tobacco products remains lawful, the First Amendment does not permit the government to control speech about tobacco products as an alternative form of regulation.

CONCLUSION

Amicus curiae Washington Legal Foundation respectfully requests that the Court grant Plaintiffs' motion for summary judgment and deny Defendants' motion for summary judgment.

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Respectfully submitted,

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