

EXHIBIT 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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 NATIONAL ASSOCIATION OF TOBACCO :
 OUTLETS, INC., ET AL., :
 :
 Plaintiffs, : Civil No. 14-CV-0577 (TPG)
 :
 v. :
 :
 CITY OF NEW YORK, ET AL., :
 :
 Defendants. :
 -----X

**BRIEF OF AMICI CURIAE IN OPPOSITION TO
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

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The organizations listed in the Appendix submitted herewith (“Amici”)¹ submit this Brief *amicus curiae* in opposition to plaintiffs’ motion for a preliminary injunction against enforcement of the provisions of New York City’s Local Law 1021-A-2013 barring the redemption of discount coupons for tobacco products, multi-pack discounts and other means of discounting the price of tobacco products (the “price ordinance”).

INTRODUCTION AND STATEMENT OF INTEREST OF AMICI

Amici submit this Brief to inform the Court of the importance of New York City’s policy of maintaining high retail prices for cigarettes to discourage adolescents from becoming smokers and the pernicious role coupon redemption and other price discounts have played in undercutting the effects of this policy. The provisions at issue in this case are essential components of the City’s policy; without them, that policy would be far less effective at protecting the City’s youth against becoming addicted to smoking and vastly increasing their risk of premature death and disease.

Amici include various national non-profit public health organizations that have worked for decades to protect the public from the epidemic of tobacco-related disease and death. Each of these Amici has significant expertise in the health hazards from tobacco; the nature and scope of the tobacco disease epidemic; the strategies employed by the tobacco industry to promote consumption of its deadly products, particularly by young people; the susceptibility of young people to the industry’s strategies and to tobacco addiction; and the effectiveness of various policies in reducing consumption of

¹ The *amicus* organizations include: American Cancer Society Cancer Action Network; American Legacy Foundation; American Heart Association; American Lung Association; American Lung Association in New York; Bronx Health REACH; Campaign for Tobacco-Free Kids; Lesbian, Gay, Bisexual & Transgender Community Center in New York City; NYC Coalition for a Smoke-Free City; NYS American Academy of Pediatrics, District II; Public Health Association of New York City; and Tobacco Control Legal Consortium. Each organization is described in the Appendix attached as Exhibit 1 to the Memorandum of Law in Support of *Amici Curiae*’s Consent Motion for Leave to File, submitted herewith.

tobacco products, particularly among young people. Amici also include various New York organizations who are on the front lines of the battle against tobacco in this District, giving them a special understanding of the toll of tobacco-related disease on New Yorkers and first-hand experience in implementing local strategies to prevent it. All the Amici have a strong interest in protecting the price ordinance against the tobacco industry's legal attack.

Amici believe that this Court's review of the price ordinance is best informed by a thorough understanding of the devastating nature and scope of the tobacco epidemic and of the empirical and policy justification for the price ordinance, particularly its impact on reducing smoking by young people. That empirical and policy justification is the focus of this Brief. As set forth in the attached motion, all parties have consented to the filing of this Brief.

ARGUMENT

I. TOBACCO-RELATED DEATH AND DISEASE REMAIN A PERSISTENT PUBLIC HEALTH CRISIS.

The price ordinance seeks to address the epidemic of tobacco-related death and disease, which the recent report of the U.S. Surgeon General called "among the greatest public health catastrophes" of the twentieth century.² Despite substantial progress against the tobacco epidemic over the last 50 years, smoking remains our nation's leading cause of preventable death,³ killing approximately 480,000 Americans every year.⁴ Tobacco use causes more annual deaths than the total deaths combined from HIV, illegal drug use,

² U.S. Department of Health and Human Services, *The Health Consequences of Smoking – 50 Years of Progress: A Report of the Surgeon General* (2014) (hereafter the "2014 SG Report"), Executive Summary at 1.

³ 2014 SG Report at 678.

⁴ *Id.*

alcohol use, motor vehicle injuries, suicides and murders.⁵ Since the Surgeon General's landmark 1964 report first established a causal link between cigarette smoking and lung cancer, approximately 20 million Americans have suffered premature death from smoking – 2.5 million of them from secondhand smoke.⁶ Long-term smoking now reduces average life expectancy by 14 years.⁷

Smoking impacts nearly every organ of the body.⁸ Whereas in 1964 smoking was causally linked to a single kind of cancer – lung cancer – further research has established that smoking causes thirteen different cancers, including cancer of the stomach, liver and pancreas.⁹ Smoking also contributes to a host of other chronic diseases, including coronary heart disease, aortic aneurysm, chronic obstructive pulmonary disease (“COPD”), tuberculosis, pneumonia, stroke, diabetes, reduced fertility in women and erectile dysfunction in men.¹⁰ More than 87% of lung cancer deaths, 61% of pulmonary disease deaths, and 32% of coronary heart disease deaths are attributable to smoking and exposure to secondhand smoke.¹¹ It is estimated that over 8.6 million Americans suffer from smoking-related diseases.¹²

Smoking also has a staggering economic impact, particularly on our health care system. The annual costs attributable to smoking in the United States are between \$289 billion and \$333 billion, including at least \$130 billion for direct medical care of adults,

⁵ Committee Report of the Human Services Division, Committee on Health, The Council of the City of New York on Intros No. 250-A, 1020, 1021 (May 2, 2013) (hereafter the “Committee Report”), at 4 (citing Centers for Disease Control and Prevention, *Health Effects of Cigarette Smoking* fact sheet).

⁶ 2014 SG Report, Executive Summary at 1.

⁷ National Cancer Institute, *Smoking and Tobacco Control Monograph No. 19* (June 2008), at 4.

⁸ 2014 SG Report, Executive Summary at 1.

⁹ *Id.* at 2.

¹⁰ *Id.*

¹¹ *Id.*

¹² 2014 SG Report at 670.

and over \$155 billion for lost productivity due to premature death, including \$5 billion related to death from exposure to secondhand smoke.¹³

Tobacco remains a public health crisis in New York City as well. Smoking is a leading cause of preventable death in New York, with 7,000 City residents dying each year from tobacco-related illnesses.¹⁴ One in seven New Yorkers' deaths is smoking-related.¹⁵

There is no question that much progress has been made in reducing the incidence of smoking, both nationally and in New York City. Due to a variety of tobacco control measures and increased public awareness of the dangers of smoking, the adult smoking rate dropped nationally from 42% in 1965 to 18% in 2012.¹⁶ Aggressive tobacco control policies in New York City have reduced the City's smoking rate among adults by 33% and among teens by 50% since 2002.¹⁷ However, the rate of decline in smoking prevalence has slowed in recent years. According to the Surgeon General's recent report, nationally "the prevalence of daily smoking among adults 18 years of age or older declined slowly but steadily over time for both genders, but by 2007, this trend flattened out."¹⁸ That report also noted that although the prevalence of current smoking among high school-aged youth has declined, the prevalence of current smoking among youth is only slowly declining and the actual number of youth and young adults starting to smoke

¹³ 2014 SG Report, Executive Summary at 11.

¹⁴ Testimony of Thomas A. Farley, Commissioner, New York City Dept. of Health and Mental Hygiene, before New York City Council Committee on Health on Intros 1020, 1021 and 250A (May 2, 2013) (hereafter the "Farley testimony") at 1 (citing New York City Dept. of Health and Mental Hygiene, *Preventing Non-Communicable Diseases and Injuries: Innovative Solutions from New York City* (2011)).

¹⁵ *Id.* (citing New York City Dept. of Health and Mental Hygiene, Bureau of Vital Statistics, *Summary of Vital Statistics 2010* (2010)).

¹⁶ 2014 SG report at 720.

¹⁷ Farley testimony at 1 (citing New York City Dept. of Health and Mental Hygiene, *Youth Risk Behavior Survey* (2001 and 2011)).

¹⁸ 2014 SG report at 720.

has increased since 2002.¹⁹ The fact is that, despite considerable progress during the last five decades, 42 million adults, and 3.5 million middle and high school students, continue to smoke cigarettes.²⁰ The Surgeon General's report warned that due to the slowing of the decline in smoking prevalence, it is projected that 5.6 million kids under 18 eventually will suffer premature death from a smoking-related illness.²¹

Despite the success of New York City's tobacco control programs in recent years, local progress against the tobacco epidemic also has slowed. As then-Health Commissioner Farley told the City Council, 930,000 adults and 20,000 high school students in New York City still smoke.²² The Commissioner expressed particular concern about the teenage smoking rate, which had been declining but has stalled at 8.5% since 2007.²³

The nature of cigarettes themselves makes the struggle to curb smoking particularly difficult. Cigarettes are both toxic *and* highly addictive. An expert witness called by plaintiff Lorillard Tobacco Company in another lawsuit has acknowledged that the nicotine in cigarettes is "among the most addictive substances known" and asserted that "there's a greater likelihood that a person who starts smoking will become dependent than a person who starts using heroin" ²⁴ U.S. District Court Judge Gladys Kessler, in her landmark 1600-page opinion finding that the tobacco companies had defrauded the American public

¹⁹ 2014 SG report, Executive Summary at 13-14. The Centers for Disease Control and Prevention's Youth Risk Behavior Survey shows that while high school smoking prevalence declined by nearly 40% between 1997 and 2003 (from 36.4% to 21.9%), it fell by just 17% between 2003 and 2011 (from 21.9% to 18.1%). See CDC, "Cigarette Use Among High School Students – United States, 1991-2009," *Morbidity and Mortality Weekly Report*, Vol. 59, No.26 (July 9, 2010); CDC, "Youth Risk Behavior Surveillance – United States, 2011," *Morbidity and Mortality Weekly Report*, Vol. 61, No. 4 (June 8, 2012) (hereafter the "2011 YRBS").

²⁰ 2014 SG report, Executive Summary at 13.

²¹ 2014 SG report at 679.

²² Farley testimony at 1 (citing New York City Dept. of Health and Mental Hygiene, *Community Health Survey 2011* and *Youth Risk Behavior Survey 2011*).

²³ *Id.* (citing *Youth Risk Behavior Survey 2007-2011*).

²⁴ *Evans v. Lorillard Tobacco Co.*, 990 N.E.2d 997, 1009 (Mass. 2013).

on such a massive scale as to constitute racketeering under federal law,²⁵ found that “cigarette company Defendants researched, developed, and implemented many different methods and processes to control the delivery and absorption of the optimum amount of nicotine which would create and sustain smokers’ addiction.”²⁶ Given cigarettes’ highly addictive nature and tobacco company efforts to engineer their product to maximize addiction, further progress in curbing smoking will require the use of every available strategy at every level of government, including those reflected in the price ordinance.

II. CURBING YOUTH SMOKING IS ESSENTIAL TO FURTHER PROGRESS AGAINST TOBACCO-RELATED DISEASE AND DEATH.

The key battleground in the fight against the tobacco disease epidemic is American youth. A startling 87% of smokers try their first cigarette before age 18 and 98% do so by age 26.²⁷ If young people can avoid tobacco when they are underage, it is highly likely that they will never become regular tobacco users. However, young people are particularly vulnerable to smoking because, as then-Health Commissioner Farley explained to the City Council, they are simply unable to foresee, or protect themselves against, the risk of addiction:

Young people often are simply unaware of how likely they are to become addicted to cigarettes. Only 3 percent of high school seniors who smoke daily think they will still be smoking in five years, but the reality is that about 8 years later, nearly two-thirds of them will still be regular daily smokers. Adolescents tend to believe they are less likely to develop smoking-related diseases than others, and that they will be able to quit whenever they wish. However, studies show that symptoms of nicotine dependence can start soon after an adolescent first tries smoking. If

²⁵ *U.S. v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1 (D.D.C. 2006), *aff’d in relevant part*, 566 F.3d 1095 (D.C. Cir. 2009), *cert. denied*, 130 S.Ct. 3501 (2010).

²⁶ *Id.* at 383.

²⁷ 2014 SG Report, Executive Summary at 17.

children experiment with smoking, there is a substantial risk of them becoming long-term users.²⁸

Every day, more than 3,800 young people under 18 across the nation smoke their first cigarette.²⁹ Of every three young smokers, only one will quit, and one of those remaining smokers will die from tobacco-related causes.³⁰

The tobacco companies, of course, are well aware that if they are not successful in addicting young people, there is little prospect that they will become long-term consumers. Thus, the industry has implemented a host of strategies to target young people to ensure that the pipeline of long-term tobacco users will be filled with new smokers to replace those lost prematurely to tobacco-related disease. Based upon the introduction into evidence of thousands of internal tobacco industry documents during a lengthy trial, Judge Kessler found that “Defendants used their knowledge of young people, gained through tracking youth behavior and preferences, in order to create marketing campaigns (including advertising, promotion, and couponing) that would appeal to youth, in order to stimulate youth smoking initiation and ensure that young smokers would select their brands.”³¹ As the Surgeon General has determined, “[e]ach year, for every adult who dies prematurely from a smoking-related cause, more than two youth or young adults become replacement smokers.”³² It is imperative that effective policies be implemented to counter the industry’s continuing efforts to addict our youth to lethal cigarettes. As demonstrated in more detail below, New York City’s price ordinance is such a policy.

²⁸ Farley testimony at 2.

²⁹ Testimony of Terry Pechacek, Deputy Director for Research Translation, Office on Smoking and Health, U.S. Centers for Disease Control and Prevention, Testimony on the Scientific Evidence on Impacts of Tobacco Pricing on Tobacco Use, Retail Promotion on Youth Smoking Initiation, and Illegal Sales on Tobacco Use, New York City Council Health Committee (May 1, 2013) at 2.

³⁰ U.S. Dept. of Health and Human Services, *Preventing Tobacco Use Among Youth and Young Adults, A Report of the Surgeon General* (2012) (hereafter the “2012 SG Report”), Preface at iii.

³¹ *Philip Morris*, 449 F. Supp. 2d at 571.

³² 2014 SG Report, Executive Summary at 13.

III. BY PREVENTING REDEMPTION OF DISCOUNT COUPONS AND OTHER TOBACCO DISCOUNTS, THE PRICE ORDINANCE WILL REDUCE THE INCIDENCE OF SMOKING AMONG THE YOUNG.

A. There Is A Clear Inverse Relationship Between the Effective Retail Price for Cigarettes and the Incidence of Smoking.

The consumption of cigarettes clearly is inversely related to their retail price. This relationship is consistent with the basic law of economics: price increases reduce consumption, and vice versa. The existence of this relationship is recognized in numerous economic studies,³³ authoritative reports by the Surgeon General,³⁴ international treaties,³⁵ reports by the World Health Organization and the International Agency for Research on Cancer,³⁶ federal court decisions,³⁷ and internal tobacco company documents.³⁸ The inverse relationship between U.S. cigarette sales and prices is illustrated in the following graph.³⁹

³³ See Frank J. Chaloupka, *Macro-Social Influences: The Effects of Prices and Tobacco Control Policies on the Demand for Tobacco Products*, 1 *Nicotine Tob. Res.* S105 (1999), and other studies at <http://tigger.uic.edu/~fjc/>; John A. Tauras, *Public Policy and Smoking Cessation Among Young Adults in the United States*, 6 *Health Policy* 321 (2004); John A. Tauras, et al., *Effects of Price and Access Laws on Teenage Smoking Initiation: A National Longitudinal Analysis*, Bridging the Gap Research, ImpacTeen (April 24, 2001), and others at <http://www.impactteen.org/researchproducts.html>; Frank J. Chaloupka & Rosalie L. Pacula, *An Examination of Gender and Race Differences in Youth Smoking Responsiveness to Price and Tobacco Control Policies*, National Bureau of Economic Research, Working Paper 6541 (April 1998); Sherry Emery, et al., *Does Cigarette Price Influence Adolescent Experimentation?*, 20 *J. Health Econ.* 261 (2001); Jeffery E. Harris & Sandra W. Chan, *The Continuum-of-Addiction: Cigarette Smoking in Relation to Price Among Americans Aged 15-29*, 2 *Health Econ.* 3 (1998), <http://www.mit.edu/people/jeffrey/HarrisChanHEL98.pdf>.

³⁴ See U.S. Dept. of Health and Human Services, *Preventing Tobacco Use Among Young People: A Report of the Surgeon General* (1994) (hereafter the “1994 SG Report”), at 175-178; U.S. Dept of Health and Human Services, *Reducing Tobacco Use: A Report of the Surgeon General* (2000), at 322-359; 2012 SG Report at 699-707; 2014 SG Report at 788-792, 869.

³⁵ World Health Organization (WHO), WHO Framework Convention on Tobacco Control (2003), at 6-7.

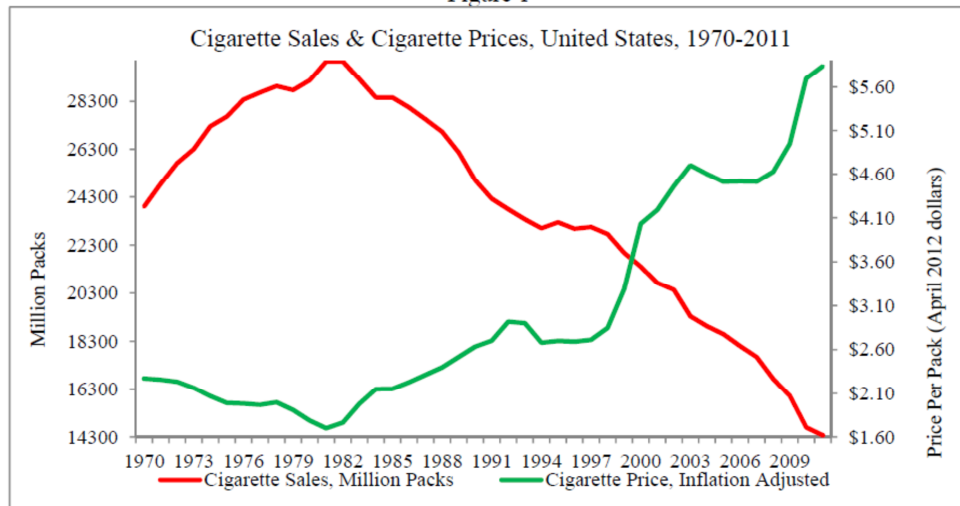
³⁶ See International Agency for Research on Cancer, IARC Handbooks of Cancer Prevention, *Tobacco Control*, Vol. 14: Effectiveness of Tax and Price Policies in Tobacco Control (2011).

³⁷ See *Philip Morris*, 449 F. Supp. 2d at 639-645.

³⁸ See Testimony of Frank J. Chaloupka, Ph.D., Distinguished Professor of Economics, University of Illinois at Chicago, before New York City Council Committee on Health on Intros 1021 and 250A (May 1, 2013) (hereafter the “Chaloupka testimony”) at 14-17. See also Frank J. Chaloupka, et al., *Tax, price and cigarette smoking: evidence from the tobacco documents and implications for tobacco company marketing strategies*, 11 *Tob. Control* 62 (2002).

³⁹ Chaloupka testimony at 4.

Figure 1



Sources: Orzechowski and Walker (2012). *Tax Burden on Tobacco*. Arlington: Orzechowski and Walker; Consumer Price Index, Bureau of Labor Statistics, www.bls.gov/cpi; and author's calculations.

A similar inverse relationship exists between cigarette prices and smoking prevalence (*i.e.*, the percentage of the population that are smokers) and between cigarette prices and smoking cessation.⁴⁰

Cigarette price increases have a particularly strong impact on youth smoking. Smoking among teenagers is three times more responsive to price than is smoking among adults.⁴¹ This is true for several reasons:

- Young people have lower disposable income and thus price changes have a greater impact on their consumption;
- Peer behavior is a more important determinant of conduct among youth, and price-induced changes by some youth will lead to changes in tobacco use among others;

⁴⁰ *Id.* at 5-6, Figures 2 and 3.

⁴¹ *Id.* at 7.

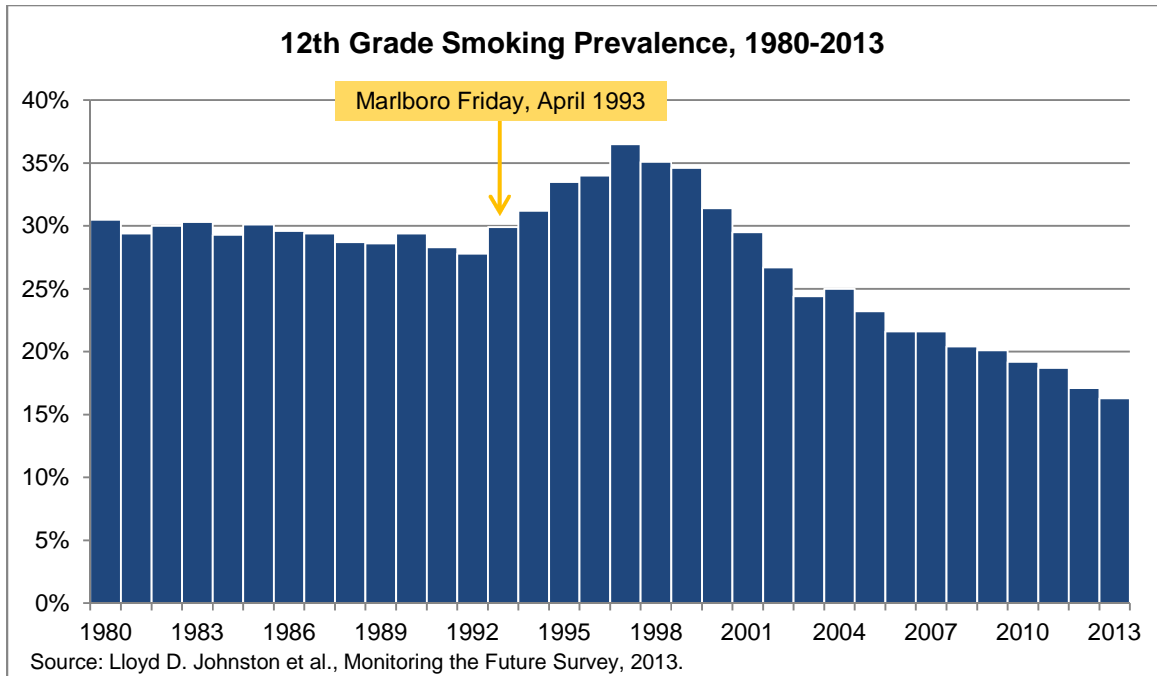
- Because they have not been smoking for as long as adults, young people are less likely to be addicted to cigarettes and thus more responsive to price increases; and
- Because young people accord greater importance to short-term costs (*i.e.*, price) versus long-term costs (*e.g.*, health consequences) than adults, price changes will more directly affect their consumption.⁴²

The disproportionate impact of price on adolescent smoking was demonstrated vividly and tragically in the 1990s.⁴³ On April 2, 1993, the industry market leader, Philip Morris, announced a sharp reduction in the price of the leading brand, Marlboro.⁴⁴ This event, known as “Marlboro Friday,” forced Philip Morris’s competitors to follow suit, resulting in a substantial and prolonged reduction in the price of premium cigarettes. Marlboro Friday substantially contributed to a reversal of the prevailing decline in cigarette consumption nationally, but its effect on youth prevalence was far more pronounced. Youth smoking prevalence, which had been falling until 1993, took a marked upswing—a trend that prevailed until it was reversed in the second half of the 1990s by price increases prompted by increases in state taxes and litigation settlement payments. The following chart illustrates the effect of Marlboro Friday price reductions on twelfth-grade smoking rates:

⁴² *Id.* at 6-7.

⁴³ *Id.* at 8, Figure 4.

⁴⁴ *Id.* at 13.



The effect of Marlboro Friday on adolescent health was profound and permanent. Hundreds of thousands of underage individuals became smokers as a result of the Marlboro Friday price reductions.⁴⁵ As noted above, half of those who became regular smokers will die prematurely from smoking-related disease. The effects of the tobacco industry's price-reduction strategies thus can only imperfectly be represented as lines on a graph.

B. Imposition of High Excise Taxes on Cigarettes and Prohibitions of Discounting in Order to Increase the Retail Price of Cigarettes Has Been an Effective Tobacco Control Policy.

Since the late 1990s, both the federal government and virtually all state governments have substantially increased excise taxes on cigarettes. Between 1997 and 2009, the federal excise tax on cigarettes increased from \$0.24 per pack to \$1.01 per

⁴⁵ *Id.* at 13; see also Jonathan Gruber & Jonathan Zinman, *Youth Smoking in the United States: Evidence and Implications*, in *Risky Behavior Among Youths: An Economic Analysis*, 69-120 (National Bureau of Economic Research, Inc., 2001).

pack. During that same period, the average state excise tax on cigarettes increased from \$0.38 per pack to \$1.53 per pack. Since 2002, 47 states, the District of Columbia, and several U.S. territories have increased their cigarette tax rates multiple times.⁴⁶ Although one function of these tax increases is to raise revenues, another principal function is to increase cigarette prices in order to reduce smoking, particularly youth smoking. Federal, state and local policies designed to keep the price of cigarettes high were important contributors to the decline in youth smoking since the late-1990s. Although not as frequently used as tax increases, other policies, such as prohibitions on discounting, can also be used to increase cigarette prices to discourage youth consumption.⁴⁷ Such policies are often combined with high excise taxes.⁴⁸

C. Tobacco Companies Have Developed Sophisticated Marketing Techniques Specifically Designed to Counter the Effect of Higher Cigarette Prices on Their Sales.

Tobacco companies have sought to counter the effects of governmental policies that raise the price of cigarettes by concentrating their marketing efforts on targeted price reduction strategies. These policies include price discounts to retailers and wholesalers to reduce retail prices of cigarettes; discount programs such as “two packs-for-the-price-of one;” discount coupons sent by direct mail to targeted populations; and giveaways of other products with the sale of cigarettes.⁴⁹ The tobacco companies have deliberately

⁴⁶ Orzechowski and Walker, *The Tax Burden on Tobacco* (2012), at 11-17.

⁴⁷ See, e.g. *National Association of Tobacco Outlets, Inc. (NATO) v. City of Providence*, 731 F.3d 71 (1st Cir. 2013) (upholding local ordinance designed to reduce youth tobacco use by preventing tobacco retailers from reducing prices on tobacco products through discount coupons and multi-pack discounts).

⁴⁸ For example, the anti-discounting ordinance at issue in *NATO v. City of Providence* works in conjunction with Rhode Island’s state excise tax of \$3.50, one of the nation’s highest.

⁴⁹ Chaloupka testimony at 11.

targeted their discount programs to frustrate the effects of state and local tax and pricing policies.⁵⁰

For the past 25 years—and increasingly in recent years in response to the increased prevalence of state and local cigarette pricing policies—the major tobacco companies have adopted as one of their chief marketing strategies price discounts strategically targeted to sub-populations in which they are most likely to be effective. In 1989, the major tobacco companies spent about \$4 billion on the promotion of cigarettes, about half of which was for price discounts. By 2010, the major tobacco companies were spending \$8 billion on promotion of cigarettes, of which 83.9% was spent on price-reducing marketing tactics, including coupon redemption.⁵¹ Exactly because tobacco product price increases effectively combat adolescent smoking, sales strategies that counter the effect of these price increases disproportionately increase smoking by adolescents. In virtually all cases, the strategies that affect the retail price of cigarettes, such as coupon redemption and discounting, are initiated, controlled, and conducted by the tobacco product manufacturers.⁵²

The major tobacco companies are highly effective marketers with a sophisticated understanding of how to motivate potential customers. They have discovered that, just as consumers respond to higher prices by cutting back or eliminating the use of cigarettes, they respond to price discounts and similar programs by increasing their use of

⁵⁰ Philip Morris acknowledged the strategic use of coupons to nullify the effect of increases in cigarette excise taxes in an email to its customers following the 2009 increase in federal excise taxes. See Chaloupka testimony at 16 and sources cited therein.

⁵¹ Chaloupka testimony at 11. See also Federal Trade Commission, *Cigarette Report for 2011* (2013) at Table 2E (\$8.3 billion was spent in 2011 on promotion of cigarettes, of which 85.7% was spent on price-reducing marketing tactics).

⁵² Agreements between major tobacco companies and wholesalers or retailers provide that price reductions will be passed on to consumers. The major tobacco companies also distribute coupons direct to consumers by mail or through other means of distribution.

cigarettes.⁵³ A 2011 study of more than 1700 smokers found that 78% used at least one price-minimizing strategy to save money on cigarettes and concluded that “use of price minimizing strategies appears to hinder smokers from attempting to quit and reducing cigarette consumption.”⁵⁴

D. The Redemption of Coupons Lowers the Effective Retail Price of Cigarettes.

The function of coupon redemption is to lower the effective retail price of cigarettes. A coupon entitles the holder to obtain cigarettes while spending less money. Accordingly, redemption of coupons undercuts governmental policies that seek to use price as a means of discouraging smoking and ordinances that prohibit the redemption of coupons are part and parcel of making such policies effective.

Price reduction marketing strategies—including couponing—have disproportionately targeted young people. This is true for several reasons. First, youth smokers overwhelmingly smoke the three most heavily promoted brands; at least 85% of young smokers smoke Marlboro, Camel, or Newport cigarettes, compared to about 35% of adults.⁵⁵ The major tobacco companies heavily concentrate their marketing efforts—including couponing—on brands favored by young smokers. Young smokers are much more likely to smoke brands for which price-reducing marketing, including couponing, is used.⁵⁶

⁵³ See Victoria M. White, et al., *How do smokers control their cigarette expenditures*, 7 *Nicotine Tob. Res.* 625 (2005); Victoria M. White, et al., *Cigarette promotional offers: Who takes advantage?*, 30 *Amer. J. Prev. Med.* 225 (2006); Andrew Hyland, et al., *Higher cigarette prices influence cigarette purchasing patterns*, 14 *Tob. Control* 86 (2006).

⁵⁴ Kelvin Choi, et al., *Use of price-minimizing strategies by smokers and their effects on subsequent smoking behaviors*, 14 *Nicotine Tob. Res.* 864 (2011).

⁵⁵ Chaloupka testimony at 17.

⁵⁶ *Id.* at 18.

A 2006 study using data from the 2002 California Tobacco Survey concluded that price-reducing marketing offers were disproportionately used by young adults, women, African-Americans, heavier smokers and those expressing concern about cigarette costs.⁵⁷ Studies using data from the Tobacco Use Supplements to the Current Population Survey conclude that the industry's price-reducing strategies had halted or reversed the decline in smoking initiation among 14-to-17 year-olds in the 1980s.⁵⁸ An exhaustive study published in 2007 found a significant association between price-reducing marketing tactics and the later stages of the movement from experimentation to regular smoking among adolescents.⁵⁹ These findings are consistent with conclusions based on fundamental economic theory: price reductions increase consumption and they increase it disproportionately among younger smokers.

If an adolescent who is experimenting with cigarettes and is not yet addicted is able to take advantage of price reductions, the consequence of that price reduction may well be the difference between his becoming addicted or not. The Surgeon General's 2012 report recognized this problem, concluding that "the industry's extensive use of price-reducing promotions has led to higher rates of tobacco use among young people than would have occurred in the absence of those promotions."⁶⁰ In *U.S. v. Philip Morris*, Judge Kessler reached the same conclusion, finding that the major tobacco companies "*could significantly reduce adolescent smoking by . . . stopping all price-related marketing . . .*"⁶¹

⁵⁷ *Id.* at 19 and sources cited therein.

⁵⁸ *Id.* at 19 and sources cited therein.

⁵⁹ *Id.* at 19 and sources cited therein.

⁶⁰ 2012 SG Report at 350.

⁶¹ *Philip Morris*, 449 F. Supp. 2d at 639-40 (emphasis added).

Coupons and multi-pack discounts are two effective ways to implement targeted price reductions. Both of them cause reductions in cigarette prices. Young people obtain cigarettes in numerous ways—sometimes buying them illegally at convenience stores; sometimes asking an older friend or a sibling to buy them for their use; sometimes getting them from parents or friends. Regardless of how a young person obtains cigarettes, the lower the price, the more cigarettes he or she is likely to obtain.⁶² Plaintiffs' expert speculates that young people are less likely to present coupons to a seller because doing so would call attention to themselves.⁶³ Whether or not this is true (and there is no reason to believe that it is), it is immaterial. If the assertion is true, then young people will simply find an older person to obtain the cigarettes – with the coupon – for them. If coupons make cigarettes cheaper, then young people will obtain more cigarettes—regardless of who presents the coupon. The key is the effective price of the cigarettes. Coupons lower the effective price and the results flow inexorably from that fact.

Similarly, multi-pack discounts lower the effective price of cigarettes and have the same effect. A two-for-one discount obviously cuts the price of cigarettes in half. At an individual level, a young person can get twice as many cigarettes for the same price. One does not have to be a research scientist to know that doubling the number of cigarettes in a kid's pocket is more likely to make him addicted.

⁶² Cf. Frank J. Chaloupka, et al., *Why Is Tobacco Price Manipulation a Problem?*, in Tobacco Retail Price Manipulation Policy Strategy Summit Proceedings (Cal. Dept. of Pub. Health, Cal. Tobacco Control Program 2008), at 3 (concluding that a 10% increase in price reduces the average cigarette consumption among young smokers by over 6%).

⁶³ Declaration of Cecil R. Reynolds (Plaintiffs' Exhibit F) at 7, 40.

E. Plaintiffs' Arguments That Coupon Redemption Has Little Effect On Youth Smoking Lack Merit.

Plaintiffs argue that coupon redemption—despite its effect on price—has little or no effect on youth smoking. First, they claim that they carefully screen the recipients of coupons they send by direct mail to ensure that the recipients are over 21.⁶⁴ However, data from the authoritative National Youth Tobacco Survey (“NYTS”) for 2012, with a sample size of 20,000 adolescents, reveals that 14% of the adolescents surveyed stated that they had received a tobacco coupon *within the last 30 days*.⁶⁵ Moreover, there was a strong association between adolescents who smoked and those receiving a coupon in the last 30 days. Forty-one percent of the adolescents surveyed who had smoked a cigarette in the last 30 days reported that they had received a tobacco coupon within that period.⁶⁶

Moreover, data from the NYTS demonstrates that the receipt of tobacco coupons by an adolescent is correlated with a higher likelihood that a non-smoking adolescent will become a smoker.⁶⁷ Furthermore, the survey data demonstrate that adolescents who have smoked in the last 30 days and who have received a tobacco coupon within that period are substantially less likely to have confidence that they will eventually quit smoking than adolescent smokers who have not received such a coupon.⁶⁸ Tobacco companies are highly effective at choosing the targets of their marketing campaigns and coupons do in fact increase the likelihood that an adolescent receiving them will become a regular smoker.

⁶⁴ Declaration of Peter J. Diatelevi (Altria) (Plaintiffs’ Exhibit L) at 4; Declaration of Floyd Cook (RJ Reynolds) (Plaintiffs’ Exhibit M) at 4; Declaration of Victor D. Lindsley, III (Lorillard) (Plaintiffs’ Exhibit N) at 4.

⁶⁵ Declaration of Mary T. Bassett (hereafter the “Bassett Decl.”) at 24, ¶55. The Bassett Decl. was filed today with Defendants’ papers in opposition to Plaintiffs’ motion for preliminary injunction.

⁶⁶ *Id.*

⁶⁷ *Id.* at 25, ¶56.

⁶⁸ *Id.*

Plaintiffs also argue that adolescents are unlikely to use coupons because it is illegal for a retailer to sell cigarettes to a minor.⁶⁹ Despite the best efforts at enforcement of restrictions on sales to minors, in New York City 25% of public high school students under 18 who smoke reported purchasing cigarettes in stores.⁷⁰ Moreover, an adolescent possessing a coupon need not personally redeem the coupon in order to receive cheap cigarettes. Just as he or she could give cash to an older friend or sibling for such a purchase, he or she could as easily provide the coupon. Indeed, the proportion of underage smokers in New York who obtained their cigarettes from someone else rather than buying them at retail has increased from 40% in 1997 to 52% in 2011.⁷¹ While this increase may indicate an improved effectiveness in the enforcement of minimum-age sale provisions, it does not indicate that the availability of coupons and other forms of discounts is any less important a factor in promoting underage smoking. Quite the contrary is true: the higher the price of cigarettes, the more important price-reduction strategies are to the tobacco companies' efforts to mitigate the effect of higher prices on the most price-sensitive segments of their market.

The assertions by tobacco companies that they do not target their price-reducing promotions to adolescents must be read in the context of the long history of marketing to children that has characterized their actual *behavior*. For decades, tobacco companies steadfastly denied marketing their products to children. However, after examining a voluminous record, Judge Kessler concluded that:

Defendants have continually represented to the public. . .that they do not market to youth, that their marketing is only aimed at adult smokers, and that their marketing has no impact on youth smoking. These public

⁶⁹ Plaintiffs' Joint Memorandum in Support of Motion for a Preliminary Injunction (Dkt. No. 23) at 13-14.

⁷⁰ Bassett Decl. at 9, ¶20.

⁷¹ Committee Report at 8.

statements are false and misleading and have been made to further [their] overall objectives of maximizing [their] profits from the sale of cigarettes . . . Defendants' fraudulent statements stem from a recognition, contained in internal documents written for decades, that new teenage smokers were essential to their continued profitability. These statements continue to the present day. . . At the same time Defendants were studying why youth start smoking, they were designing the marketing campaigns to appeal to the psychological needs of adolescents.⁷²

The Plaintiffs' claims regarding the purposes and effects of their marketing strategies and methods should – indeed must – be evaluated in light of this history.

⁷² *Philip Morris*, 449 F. Supp. 2d at 862-863.

CONCLUSION

The New York City price ordinance will protect countless New Yorkers from tobacco-related disease and death. The Court should deny plaintiffs' motion for a preliminary injunction.

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Respectfully submitted,

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