

NOT FOR SALE: STATE AUTHORITY TO END CIGARETTE SALES

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I.	INTRODUCTION.....	68
II.	GENERAL PREEMPTION PRINCIPLES.....	74
III.	TOBACCO CONTROL STATUTES.....	76
	A. <i>Family Smoking Prevention and Tobacco Control Act</i>	76
	1. <i>Tobacco Product Standards</i>	79
	2. <i>Eliminating Certain Tobacco Products</i>	83
	3. <i>Laws that Prohibit versus Laws that Restrict</i>	84
	B. <i>Federal Cigarette Labeling and Advertising Act</i>	87
IV.	OTHER FEDERAL LAWS.....	89
V.	ADDITIONAL PREEMPTION THREATS ON THE HORIZON.....	92
VI.	LOCAL AUTHORITY TO RESTRICT SALES IN MINNESOTA	93
VII.	CONCLUSION	96

I. INTRODUCTION

Cigarette smoking continues to be a public health problem of staggering dimensions, killing more than 480,000 Americans each year and leaving millions more to suffer from chronic disease.¹ Through multiple biochemical mechanisms, tobacco smoke damages every organ in the body and causes a wide array of devastating illnesses, including cardiovascular disease, multiple

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1. See *Health Effects of Cigarette Smoking*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/effects_cig_smoking/index.htm [https://perma.cc/7NRE-GEAB] (last updated May 15, 2017).

forms of cancer, and reproductive issues.² Additionally, the economic impact of smoking is enormous, approaching \$300 billion annually.³ Smoking causes \$150 billion per year in lost productivity and at least \$130 billion per year in healthcare costs.⁴ While policy interventions such as smoke-free laws and cigarette taxes have reduced the prevalence of smoking, the risk of dying from cigarette smoking has increased over the last fifty years in the United States.⁵

One concern is the continuing problem of underage and young adult smoking. Each day 3,200 adolescents try smoking for the first time.⁶ An additional 2,100 adolescents will become daily smokers.⁷ While adolescent smoking rates declined from 1997–2003, the decline has subsequently slowed, stalling among certain sub-populations.⁸

Also alarming is the phenomenon of disproportionate tobacco-related health effects among minority subpopulations.⁹ While overall smoking rates have declined in recent years, health disparities related to tobacco use have increased.¹⁰ Racial and ethnic minorities, particularly African Americans and certain Native American populations, bear a disproportionate burden of tobacco-related disease.¹¹ For example, African American men have higher rates of

2. *See id.*

3. *See The Health Consequences of Smoking—50 Years of Progress: A Report of the Surgeon General*, U.S. DEP'T OF HEALTH & HUMAN SERVS., <https://www.surgeongeneral.gov/library/reports/50-years-of-progress/fact-sheet.html> [<https://perma.cc/M A7K-GHBT>] (last visited June 21, 2018).

4. *See id.*

5. *See id.*

6. *See Youth and Tobacco Use*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/tobacco/data_statistics/fact_sheets/youth_data/tobacco_use/index.htm [<https://perma.cc/3V2Y-2G5E>] (last updated Sept. 20, 2017).

7. *See id.*

8. *See Cigarette Use Among High School Students—United States 1991–2009*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm5926a1.htm> [<https://perma.cc/3DQ9-9MNR>] (last updated July 9, 2010) (noting that after declines from the late 1990s to 2003, current cigarette use remained stable from 2003–2009 among male students overall, white students overall, white male students, Hispanic female students, Hispanic male students, and eleventh and twelfth grade students).

9. *See Tobacco-Related Disparities*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/tobacco/disparities/index.htm> [<https://perma.cc/S38R-B3CK>] (last updated Dec. 1, 2016).

10. *See id.*

11. *See Wendy Max et al., The Disproportionate Cost of Smoking for African Americans in California*, AM. J. PUB. HEALTH, Jan. 2010, at 152–58.

smoking-attributable lung cancer than any other group.¹² In addition, multiple studies have found that lesbian, gay, bisexual, and transgender (LGBT) individuals are 1.5 to 2.5 times more likely to smoke than their non-LGBT counterparts.¹³ Such statistics are especially disturbing given that racial and sexual minorities are generally less likely to access tobacco cessation treatments and health care services.¹⁴

Strikingly, this death and disease along with the associated economic costs are preventable. In fact, the U.S. Centers for Disease Control and Prevention has characterized the reduction of tobacco use as a public health priority, or “Winnable Battle.”¹⁵ In other words, a significant progress can be made in a relatively short time, thus meriting continued investment in innovative policy interventions by national, state, and local governments.¹⁶ While the federal government has enacted legislation in recent years,¹⁷ most of the regulation of tobacco products occurs at the state and local levels.¹⁸ With congressional paralysis and recent executive actions,¹⁹ it seems likely that state and local governments will continue to drive most tobacco control policy.²⁰

12. *See id.*

13. *See* TRUTH INITIATIVE ET AL., ACHIEVING HEALTH EQUITY IN TOBACCO CONTROL 1, 12 (2015), <https://truthinitiative.org/sites/default/files/Achieving%20Health%20Equity%20in%20Tobacco%20Control%20-%20Version%201.pdf> [https://perma.cc/9NYA-GDMR].

14. *See id.* at 5.

15. *See Winnable Battles*, CTNS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/winnablebattles/report/tobacco.html> [https://perma.cc/A9L-HH6B] (last updated Dec. 14, 2017).

16. *See id.*

17. *See, e.g.*, Family Smoking Prevention and Tobacco Control Act of 2009, Pub. L. No. 111-31, 123 Stat. 1776 (2009) (codified at 21 U.S.C. § 387a (2012)).

18. *See, e.g.*, Sam Schaust, *Plymouth Becomes Fourth MN City to Raise Tobacco Sales Age to 21*, TWIN CITIES BUS. (Nov. 30, 2017), <http://tcbmag.com/news/articles/2017/november/plymouth-becomes-fourth-mn-city-to-raise-tobacco-s> [https://perma.cc/GYF5-D8KJ].

19. *See, e.g.*, Exec. Order No. 13,771, 82 Fed. Reg. 9,339 (Jan. 30, 2017) (establishing a federal policy requiring that two regulations be identified for elimination for each new regulation issued).

20. *See* Scott Gottlieb, *Remarks by Dr. Gottlieb on New Strategies for Tobacco Policy and Therapeutic Nicotine Replacement*, U.S. FOOD & DRUG ADMIN. (Dec. 12, 2017), <https://www.fda.gov/NewsEvents/Speeches/ucm588661.htm> [https://perma.cc/JV7U-LGC7].

Given the overwhelming evidence of harm to individual health caused by tobacco use, as well as the impact on health care costs and the economy, public health advocates are looking for additional policy interventions to further reduce the toll of disease and death from smoking.²¹ The biggest public health gains may be realized by focusing policy interventions on reducing access to the most harmful tobacco products.²²

Cigarettes are the most harmful tobacco product.²³ The 2014 Surgeon General's report, *The Health Consequences of Smoking—50 Years of Progress*,²⁴ includes two key conclusions related to combusted tobacco products, their role in the tobacco epidemic, and the potential for greater restrictions on the sale of these products on improving public health. First, “[t]he burden of death and disease from tobacco use in the United States is overwhelmingly caused by cigarettes and other combusted tobacco products; rapid elimination of their use will dramatically reduce this burden.”²⁵ Second, “[n]ew ‘end game’ strategies have been proposed with the goal of eliminating tobacco smoking. Some of these strategies may prove useful for the United States, particularly reduction of the nicotine content of tobacco products and greater restrictions on sales (including bans on entire categories of tobacco products).”²⁶

Preventing youth from smoking is critical to reducing tobacco-related death and disease, given the vast majority of smokers start before the age of eighteen,²⁷ and the lifetime risk of many tobacco-related diseases is linked to the duration of smoking.²⁸ Policies to

21. See, e.g., OFFICE OF THE SURGEON GEN., U.S. DEP'T OF HEALTH & HUMAN SERVS., *THE HEALTH CONSEQUENCES OF SMOKING—50 YEARS OF PROGRESS: A REPORT OF THE SURGEON GENERAL* (2014), <https://www.surgeongeneral.gov/library/reports/50-years-of-progress/full-report.pdf> [<https://perma.cc/2JXG-JSGC>]; *Institute for Global Tobacco Control*, JOHNS HOPKINS UNIV., <https://www.jhsph.edu/research/centers-and-institutes/institute-for-global-tobacco-control/index.html> [<https://perma.cc/7BSB-CKT3>] (last visited June 21, 2018).

22. See, e.g., Gottlieb, *supra* note 20.

23. See Scott Gottlieb, *Remarks by Dr. Gottlieb*, U.S. FOOD & DRUG ADMIN. (July 28, 2017), <https://www.fda.gov/NewsEvents/Speeches/ucm569024.htm> [<https://perma.cc/D8Y6-ALGY>].

24. OFFICE OF THE SURGEON GEN., *supra* note 21.

25. *Id.* at 7.

26. *Id.* at 13.

27. See *Youth and Tobacco Use*, *supra* note 6.

28. See Niloofer Taghizadeh, *Lifetime Smoking History and Cause-Specific Mortality in a Cohort Study with 43 Years of Follow-Up*, PLOS (Apr. 7, 2016), <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0153310>

reduce youth access to tobacco products, especially cigarettes, may be one of the most effective means to decrease the long-term health effects of tobacco use.²⁹

There are many existing policy interventions from all levels of government focused on reducing youth access to tobacco products.³⁰ These efforts include establishing a minimum legal age to purchase tobacco products, restricting sales locations, increasing the minimum price, and confining the sale of certain product classes by location or type of retailer.³¹

To date, however, no jurisdiction in the United States has taken the next step and prohibited the sale of an entire class of tobacco products. This inaction is mainly due to the political challenges of adopting, implementing, and enforcing such a bold policy option.³² Any jurisdiction pursuing such bold sales restrictions on tobacco products will need to marshal significant community education and advocacy resources, conduct careful drafting to address the legal issues laid out in this Article, and should expect vocal opposition to their efforts.³³

A prohibition against the sale of the most harmful tobacco products would have the greatest potential for a significant public health impact.³⁴ This is due to the fact that cigarettes and other combustible tobacco products cause the vast majority of illness and

[<https://perma.cc/BJ5R-KT4P>].

29. See OFFICE OF THE SURGEON GEN., *supra* note 21.

30. See, e.g., Paula M. Lantz, *Youth Smoking Prevention Policy: Lessons Learned and Continuing Challenges*, NCBI (2004), <https://www.ncbi.nlm.nih.gov/books/NBK37608/> [<https://perma.cc/AGL5-7HDQ>].

31. See *id.*

32. See, e.g., Lisa Kroon, *Characterization of Public Opinion on the Ban of Tobacco Sales in San Francisco Pharmacies*, UCSF CTR. FOR TOBACCO CONTROL RES. & EDUC., <https://tobacco.ucsf.edu/research/characterization-public-opinion-ban-tobacco-sales-san-francisco-pharmacies> [<https://perma.cc/83V5-TS94>] (last visited June 21, 2018).

33. An example of the need for community education and outreach as well as vocal opposition to prohibiting the sale of all tobacco products can be found in the story of Westminister, Massachusetts. See Katharine Q. Seelye, *Massachusetts Town Votes to End Bid for Tobacco Ban*, N.Y. TIMES (Nov. 19, 2014), <https://www.nytimes.com/2014/11/20/us/westminster-votes-to-end-bid-for-tobacco-ban.html> [<https://perma.cc/3HKA-R4AB>].

34. See OFFICE OF THE SURGEON GEN., note 21, at 853 (citing ROBERT N. PROCTOR, *GOLDEN HOLOCAUST: ORIGINS OF THE CIGARETTE CATASTROPHE AND THE CASE FOR ABOLITION* 556 (2012)); then citing Richard A. Daynard, *Doing the Unthinkable (and Saving Millions of Lives)*, 18 TOBACCO CONTROL 1, 2-3 (2009)).

death associated with tobacco products.³⁵ A less dramatic variation on this policy would be to prohibit the sale of all flavored tobacco products, including menthol flavored products.³⁶ This approach would address the youth appeal of flavors,³⁷ especially with regard to electronic cigarettes,³⁸ and the disproportionate harm that menthol cigarettes inflict on African Americans,³⁹ women, youth, and the LGBT community.⁴⁰ San Francisco, California, is moving in this direction: the Board of Supervisors for the city adopted a ban on the sale of flavored tobacco products that will be subject to a voter referendum in June 2018.⁴¹ Either approach could face a legal challenge, most likely under the theory that such a policy is preempted by federal law.⁴² However, we conclude that a well-drafted policy prohibiting the sale of a class of tobacco products would probably survive a federal preemption challenge in court.

This Article begins with an overview of general preemption principles.⁴³ The focus of this Article is on the scope, and limitations, of federal preemption of state and local tobacco control laws

35. See OFFICE OF THE SURGEON GEN., *supra* note 21, at 7.

36. See Family Smoking Prevention and Tobacco Control Act of 2009, Pub. L. No. 111-31, 123 Stat. 1799 (2009) (codified at 21 U.S.C. § 387g (2012)) (banning certain flavors from cigarettes).

37. See Charles Courtemanche et al., *Influence of the Flavored Cigarette Ban on Adolescent Tobacco Use*, 52 AM. J. OF PREVENTIVE MEDICINE 139 (2017).

38. See GINNA KOSTYGINA ET AL., UCSF CTR. FOR TOBACCO CONTROL RES. & EDUC., FDA SHOULD PROHIBIT FLAVORS IN ALL TOBACCO PRODUCTS IN THE CURRENT RULE MAKING (2014), <https://tobacco.ucsf.edu/sites/tobacco.ucsf.edu/files/u9/FDA-comment-deeming%20rule%20flavor%20comment%20June3AAA-ljy-8chl-vs81.pdf> [<https://perma.cc/U74R-UQCD>].

39. See LaTrisha Vetaw, *Why We Have to Curb the Targeting of Menthol Tobacco Products to African-Americans*, MINNPOST (Aug. 14, 2015), <https://www.minnpost.com/community-voices/2015/08/why-we-have-curb-targeting-menthol-tobacco-products-african-americans> [<https://perma.cc/QH4A-FDPP>].

40. See TOBACCO CONTROL LEGAL CONSORTIUM, CHICAGO'S REGULATION OF MENTHOL FLAVORED TOBACCO PRODUCTS: A CASE STUDY I (2016), <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-fs-Chicago-Regulation-of-Menthhol-Case-Study-Update-2016.pdf> [<https://perma.cc/W9X8-2T6E>].

41. See, e.g., Angelica LaVito, *San Francisco, Big Tobacco Set for a Showdown over Flavored Products*, CNBC (Sept. 6, 2017), <https://www.cnbc.com/2017/09/06/san-francisco-big-tobacco-set-for-a-showdown-over-flavored-products.html> [<https://perma.cc/TN8S-47S4>].

42. See, e.g., *U.S. Smokeless Tobacco Mfg. Co. v. City of New York*, 708 F.3d 428, 430 (2d Cir. 2013) (holding the local ordinance governing flavored tobacco products is not preempted by federal law).

43. See *infra* Part II.

through a review of existing federal law.⁴⁴ Specifically, the analysis reviews arguments for preemption that the tobacco industry is likely to use against state and local efforts to restrict or prohibit the sale of a class of tobacco products.⁴⁵ The analysis also surveys the federal case law to assess the relative strength of any arguments the tobacco industry may advance.⁴⁶ Next, this Article considers other federal laws and legislation that could add to the preemption threat.⁴⁷ Lastly, this Article considers some additional obstacles local governments may face when attempting to restrict the sale of tobacco products.⁴⁸

II. GENERAL PREEMPTION PRINCIPLES

Preemption is a legal principle in which a higher level of government can restrict or eliminate the authority of a lower level of government to regulate a certain issue.⁴⁹ Article VI of the U.S. Constitution provides that the laws of the United States “shall be the supreme Law of the Land.”⁵⁰ Thus, federal law prevails if there is a conflict with a state or local law.⁵¹ Preempted laws have no force or effect.⁵² Because local control is so integral to tobacco control, the tobacco industry and its allies have long used preemptive strategies to thwart local smoke-free laws, youth access restrictions, tobacco retailer licensing systems, advertising and promotion regulations, and similar policies.⁵³

For decades, the strongest and most innovative tobacco control policies have emerged at the local level—often after long and hard-fought grassroots community efforts—before ultimately being adopted at the state or federal level.⁵⁴ These grassroots campaigns

44. See *infra* Part III.

45. See *id.*

46. See *id.*

47. See *infra* Parts IV, V.

48. See *infra* Part VI.

49. See *Cipollone v. Liggett Grp.*, 505 U.S. 504, 516 (1992) (“[I]t has been settled that state law that conflicts with federal law is ‘without effect.’”); NAT’L POLICY AND LEGAL ANALYSIS NETWORK TO PREVENT CHILDHOOD OBESITY (NPLAN) & PUB. HEALTH LAW CTR., THE CONSEQUENCES OF PREEMPTION FOR PUBLIC HEALTH ADVOCACY, (2010), <http://www.publichealthlawcenter.org/sites/default/files/resources/nplan-fs-consequences-2010.pdf> [<https://perma.cc/FS9A-W62N>].

50. U.S. CONST. art. VI, cl. 2.

51. See *Cipollone*, 505 U.S. at 516.

52. See *id.*

53. See NPLAN & PUB. HEALTH LAW CTR., *supra* note 49, at 2–3.

54. See, e.g., Andrew Hyland et al., *Smoke-free Air Policies: Past, Present and Future*,

increase local awareness of tobacco control issues, build community readiness and support, and foster public debate about the need for policy change and healthy social norms.⁵⁵ A preemptive state or federal law can invalidate many local tobacco control policies that represent years of efforts at the local level.⁵⁶

When determining whether a federal law preempts a state or local law, courts examine a variety of factors, including the plain language of the law and Congressional intent.⁵⁷ As the United States Supreme Court explained, “the purpose of Congress is the ultimate touchstone’ in every pre-emption analysis.”⁵⁸

The Supreme Court has held that an analysis to determine the scope of federal preemption begins with “the assumption that the historic police powers of the States were not to be superseded by the Federal [law] unless that was the clear and manifest purpose of Congress.”⁵⁹ Indeed, this presumption against preemption is heightened when a state or locality seeks to exercise its police powers to protect the health and safety of its citizens, as is the case with laws restricting access to tobacco products.⁶⁰

Analyzing the scope of a preemptive statute begins with the text of the law.⁶¹ When Congress includes a legislative provision explicitly addressing preemption, there is no need to infer congressional intent.⁶² With no explicit statement of preemptive intent, courts must consider the statute as a whole to determine whether Congress intended the federal law “to occupy the legislative field, or if there is an actual conflict between state and federal law.”⁶³ “[I]f there is any ambiguity as to whether the local and federal laws can coexist, [a court] must uphold the ordinance.”⁶⁴

TOBACCO CONTROL 154, 154–61 (2012).

55. See NPLAN & PUB. HEALTH LAW CTR., *supra* note 49.

56. See *id.*

57. See *id.* at 521.

58. *Id.* at 542 (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)).

59. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

60. See *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

61. See *Cipollone v. Liggett Grp.*, 505 U.S. 504, 517 (1992).

62. See *id.*

63. *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76–77 (2008).

64. *U.S. Smokeless Tobacco Mfg. Co. v. City of New York*, 708 F.3d 428, 433 (2d Cir. 2013) (citing *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)); *N.Y. St. Rest. Ass’n v. N.Y. City Bd. of Health*, 556 F.3d 114, 123 (2d Cir. 2009)).

Similar principles apply with respect to state preemption of local laws, although in some states there may be different presumptions based on the type of locality involved or how the state delegates policy power authority.⁶⁵ This Article will not review the scope of local authority, which varies significantly from state to state. It will also not consider state preemption of local tobacco control laws. Instead, the focus is whether federal law preempts state or local governments from prohibiting the sale of classes of tobacco products.

III. TOBACCO CONTROL STATUTES

The Family Smoking Prevention and Tobacco Control Act (Tobacco Control Act)⁶⁶ and the Federal Cigarette Labeling and Advertising Act⁶⁷ are the two main federal tobacco laws relevant to this Article's analysis. Understanding the reach of each of these federal statutes is an essential starting point for determining the scope of state and local regulatory authority.

A. *Family Smoking Prevention and Tobacco Control Act*

The Tobacco Control Act provides the primary federal regulatory system for tobacco products.⁶⁸ It explicitly delineates the regulatory roles of federal, state, and local governments.⁶⁹ The Tobacco Control Act contains requirements related to the distribution, manufacturing, and marketing of tobacco products.⁷⁰ Some of the restrictions include requiring the buyer to show identification prior to the sale of tobacco products,⁷¹ limiting tobacco sponsorship of events,⁷² prohibiting the use of flavors other

65. See, e.g., *Mangold Midwest Co. v. Richfield*, 274 Minn. 347, 356, 143 N.W.2d 813, 819 (1966) (“[A] state law may fully occupy a particular field of legislation so that there is no room for local regulation”).

66. Family Smoking Prevention and Tobacco Control Act of 2009, Pub. L. No. 111-31, 123 Stat. 1776 (2009) (codified as amended in scattered sections of 21 U.S.C. § 387 (2012)).

67. Federal Cigarette Labeling and Advertising Act of 1965, Pub. L. No. 89-92, 79 Stat. 282 (1965) (codified as amended at 15 U.S.C. §§ 1331–1340 (2012)).

68. See 21 U.S.C. § 387 (2012).

69. *Id.* §§ 387c, e, f-1, h, p.

70. *Id.* § 387.

71. *Id.* § 387e(e).

72. *Id.* § 387a-1.

than menthol or tobacco in cigarettes,⁷³ and requiring larger and more graphic warning labels.⁷⁴ The law also grants the United States Food and Drug Administration (FDA) authority to regulate tobacco products, including the power to set product standards, such as tar and nicotine levels, as deemed appropriate to protect the public health.⁷⁵

However, the FDA's power is not limitless. The law's tobacco product standards section notes that the FDA is prohibited from banning certain classes of tobacco products, such as all cigarettes; all smokeless tobacco products; all cigars, excepting little cigars; all pipe tobacco; and all roll-your-own tobacco products.⁷⁶ Furthermore, the FDA may neither prohibit face-to-face sales of any tobacco products in a specific category of retail outlets nor establish a minimum age over eighteen for the sale of these products.⁷⁷

Although the FDA's authority may be limited in some respects, state and local governments do not have the same restrictions. The Tobacco Control Act contains a specific section relating to the authority of state and local governments,⁷⁸ which is divided into three provisions: the preservation clause,⁷⁹ a preemption provision,⁸⁰ and a saving clause.⁸¹

The preservation clause explicitly preserves state and local authority for laws and regulations that are "in addition to, or more stringent than, requirements under this subchapter."⁸² Examples include laws and regulations "*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.*"⁸³ The preemption provision reserves power to the federal government for state and local requirements "relating to tobacco product standards, premarket

73. *Id.* § 387g(a)(1)(A).

74. *Id.* § 387c(a); Federal Food, Drug, and Cosmetics Act, 21 U.S.C. § 301 (2012).

75. 21 U.S.C. § 387g (2012).

76. *Id.*

77. *Id.* § 387f(d)(3)(A).

78. *Id.* § 387p(a).

79. *Id.* § 387p(a)(1).

80. *Id.* § 387p(a)(2).

81. *Id.* § 387p(a)(2)(B).

82. *Id.* § 387p(a)(1).

83. *Id.* § 387p(a)(1) (emphasis added).

review, adulteration, misbranding, labeling, registration, good manufacturing standards, or modified risk tobacco products.”⁸⁴ Lastly, the saving clause explicitly allows state and local governments to establish 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.*”⁸⁵ Collectively, these three provisions of the Tobacco Control Act give state and local governments broad authority to enact a wide range of tobacco product sales restrictions, including prohibiting the sale of a class of tobacco products.⁸⁶

The tobacco industry is likely to use three main arguments to support its assertion that the Tobacco Control Act preempts a state or local law prohibiting the sale of a class of tobacco products. First, banning a class of tobacco products “constitutes a ‘tobacco product standard,’ authority expressly reserved to the FDA.”⁸⁷ Second, states and local governments cannot ban classes of tobacco products with sales regulations because the FDA is prohibited from banning classes of products.⁸⁸ Third, even if states and local governments have the power to *restrict* the sale of a certain class of tobacco products, they are barred from completely *prohibiting* the sale of such products.⁸⁹

Based on two recent court decisions upholding local laws that restrict the sale of flavored tobacco products,⁹⁰ the first two arguments can be overcome with little difficulty. Both cases support the conclusion that a state or local government sales restriction prohibiting the sale of a class of tobacco products is *not* a regulation of “tobacco product standards” under the Tobacco Control Act.⁹¹

84. *Id.* § 387p(a)(2)(A).

85. *Id.* § 387p(a)(2)(B) (emphasis added).

86. This issue was also discussed in two law review articles by Michael Freiberg. See Michael Freiberg, *The Minty Taste of Death: State and Local Options to Regulate Menthol in Tobacco Products*, 64 CATH. U. L. REV. 949 (2015); see also Michael Freiberg, *Options for State and Local Governments to Regulate Non-Cigarette Tobacco Products*, 21 ANNALS HEALTH L. 407 (2012).

87. Joelle M. Lester & Stacey Younger Gagosian, *Finished With Menthol: An Evidence-Based Policy Option That Will Save Lives*, 45 J. L. MED. & ETHICS 41, 43 (2017).

88. *See id.*

89. *See id.*

90. *U.S. Smokeless Tobacco Mfg. Co. v. City of New York*, 708 F.3d 428, 428 (2d Cir. 2013); *Nat’l Ass’n of Tobacco Outlets v. City of Providence*, C.A. No. 12–96–ML, 2012 WL 6128707, at *13 (D.R.I. Dec. 10, 2012).

91. *See U.S. Smokeless Tobacco*, 708 F.3d at 428; *Nat’l Ass’n of Tobacco Outlets*, 2012

The third argument will be the most challenging. Nevertheless, there is a strong argument that the Tobacco Control Act allows a state or local law to completely prohibit the sale of a class of tobacco products.

1. *Tobacco Product Standards*

In *U.S. Smokeless Tobacco Manufacturing Co. v. City of New York*, the United States Court of Appeals for the Second Circuit found that the Tobacco Control Act does not preempt New York City's ordinance prohibiting the sale of any flavored, non-cigarette tobacco product (except in tobacco bars).⁹² The court reasoned that the ordinance regulated the sale of a finished product rather than establishing a product standard.⁹³ The ordinance governed tobacco products based only on their characteristics as an end product,⁹⁴ not on whether the product was manufactured in a particular way or with particular ingredients.⁹⁵ The court of appeals further found that even if the ordinance was construed as establishing a tobacco product standard under the Tobacco Control Act, "it would not be preempted, because it also falls within that section's saving clause. The saving clause excepts from preemption local laws that establish 'requirements relating to the sale . . . of . . . tobacco products.'"⁹⁶ The district court opinion in this case also stated that the tobacco companies' "theory—that a sales ban amounts to a manufacturing standard—is specious. How a thing is made and whether and where it can be sold are entirely different issues, in theory and as a matter of fact."⁹⁷

Similarly, in *National Ass'n of Tobacco Outlets v. City of Providence*,⁹⁸ a Rhode Island federal district court upheld the Providence ordinance prohibiting the sale of flavored non-cigarette tobacco products (except in smoking bars).⁹⁹ The court held that the Tobacco Control Act's preemption provision "relates to tobacco

WL 6128707, at *13.

92. See 708 F.3d 428,428.

93. See *id.*

94. N.Y.C., N.Y., ADMIN. CODE § 17-715 (2013).

95. *U.S. Smokeless Tobacco*, 708 F.3d at 434-35.

96. *Id.* at 435.

97. *U.S. Smokeless Tobacco Mfg. Co. v. City of New York*, No. 09 Civ. 10511(CM), 2011 WL 5569431, at *5 (S.D.N.Y. Nov. 15, 2011).

98. See No. 12-96-ML, 2012 WL 6128707, at *1 (D.R.I. Dec. 10, 2012).

99. See *id.*

product standards, not the sale and/or distribution of tobacco products.”¹⁰⁰ The court also noted that the additional saving clause of the Tobacco Control Act “reaffirms that state or local regulations related to the sale and/or distribution of tobacco products are not preempted” by the Tobacco Control Act.¹⁰¹ On appeal, the First Circuit Court of Appeals ultimately ruled that neither federal nor state law preempted the ordinance.¹⁰²

Both the New York City and Providence decisions support the conclusion that restricting, and even prohibiting, the sale of tobacco products does not implicate tobacco product standards and therefore should not be preempted by the Tobacco Control Act. The tobacco industry, however, is likely to rely on a recent Supreme Court case to assert that a sales prohibition is an impermissible evasion of the Tobacco Control Act’s preemption provisions. Even so, the facts in that case are distinguishable from the question at hand.

In *National Meat Association v. Harris*,¹⁰³ the Supreme Court held the Federal Meat Inspection Act (“FMIA”)¹⁰⁴ expressly preempted a California law prohibiting slaughterhouses from buying or selling meat from a “nonambulatory” animal.¹⁰⁵ The FMIA contains a broad preemption clause prohibiting states from imposing any “additional or different—even if non-conflicting—requirements that fall within the scope of the Act and concern a slaughterhouse’s facilities or operations.”¹⁰⁶ The Court found that the California law was preempted because it imposed “additional or different requirements on swine slaughterhouses” “at every turn.”¹⁰⁷

The tobacco industry relied on *National Meat Association* in *U.S. Smokeless Tobacco*. There, the Second Circuit distinguished *National Meat Association* by stating that “to constitute a product standard subject to preemption, a local sales regulation must be ‘something more than an incentive or motivator,’ it must require manufacturers

100. *Id.* at *13.

101. *See id.*

102. *Nat’l Ass’n of Tobacco Outlets, Inc. v. City of Providence*, 731 F.3d 71, 85 (1st Cir. 2013).

103. 565 U.S. 452 (2012).

104. Federal Meat Inspection Act, 21 U.S.C. § 601 (2012).

105. *Nat’l Meat Ass’n*, 565 U.S. at 468. A “nonambulatory” animal is unable to walk on its own. *Id.* at 457.

106. 21 U.S.C. § 678 (2012); *Nat’l Meat Ass’n*, 565 U.S. at 459–60.

107. *National Meat Ass’n*, 565 U.S. at 460.

to alter ‘the construction, components, ingredients, additives, constituents . . . and properties’ of their products.”¹⁰⁸ In contrast, the New York City ordinance restricting the sale of flavored tobacco products regulated only the sale of finished products based on characteristics such as flavor.¹⁰⁹ The court further distinguished the *National Meat Association* decision:

The City’s regulation is therefore easily distinguishable from the California statute invalidated as a manufacturing standard in *National Meat Association*. That law expressly prohibited the sale of meat that was not produced in accordance with specific rules to be applied at the slaughterhouse with respect to the kinds of animals that were, according to the state, fit for butchering—rules that were in conflict with more forgiving federal standards. To be sold in the state, meat would have to be processed in a particular way. The ordinance at issue here does not concern itself with the mode of manufacturing, or with the ingredients that may be included in tobacco products. Rather, it prohibits the sale of a recognized category of tobacco products, characterized by their flavor and marketed as a distinct product. Plaintiffs’ effort to characterize the ordinance as a manufacturing standard is tantamount to describing a ban on cigarettes as a manufacturing standard mandating that cigars be manufactured in minimum sizes and with tobacco-leaf rather than paper wrappings.¹¹⁰

Despite this holding, tobacco companies will likely argue that the *National Meat Association* decision supports their view—a state or local tobacco sales restriction is merely a way to undermine the Tobacco Control Act’s preemption provision. As the Court noted in *National Meat Association*: “[I]f the sales ban were to avoid the FMIA’s preemption clause, then any State could impose any regulation on slaughterhouses just by framing it as a ban on the sale of meat produced in whatever way the State disapproved. That would make a mockery of the FMIA’s preemption provision.”¹¹¹

However, the *National Meat Association* decision is distinguishable from a regulation of a class of tobacco products for

108. *U.S. Smokeless Tobacco Mfg. Co. v. City of New York*, 708 F.3d 428, 434 (2d Cir. 2013) (internal citations omitted).

109. *See id.*

110. *Id.* at 435 n.2 (citation omitted).

111. *National Meat Ass’n*, 565 U.S. at 464.

several reasons. Foremost, the FMIA's preemption provision prohibits the imposition of an "additional or different requirement," which is a far broader restriction than the language of the Tobacco Control Act.¹¹² In contrast, the Tobacco Control Act's preservation clause explicitly allows for state or local laws that are "in addition to, or more stringent than, requirements under this subchapter," including laws and regulations "relating to or prohibiting the sale" of tobacco products.¹¹³ While the preemption provision in 21 U.S.C. § 387p(a)(2)(A) limits this clause, a prohibition on the sale of a type of tobacco product should not be considered a tobacco product standard. Further, the Tobacco Control Act contains the additional saving clause that explicitly allows state and local requirements "relating to the sale" of tobacco products.¹¹⁴

In sum, the decisions in *U.S. Smokeless Tobacco* and *National Meat Ass'n* support the argument that a state or local law prohibiting the sale of a class of tobacco products should not be deemed a "tobacco product standard" preempted by the Tobacco Control Act. Rather, like the flavored tobacco ordinances in New York and Providence, such a law regulates the sale of a particular *type* of tobacco product, rather than the manner in which the product is manufactured. To make it more likely that courts will reach this conclusion, laws regulating a class of tobacco products should prohibit only the products' end sale rather than specifying how such products are created.

While the New York City and Providence decisions are not binding outside of their federal circuits, they serve as persuasive authority to other courts ruling on related issues.¹¹⁵

112. 21 U.S.C. § 678 (2012).

113. *Id.* § 387p(a)(1).

114. *Id.* § 387p(a)(2)(B).

115. Although the courts in *U.S. Smokeless Tobacco* and *National Association of Tobacco Outlets* were unpersuaded by the tobacco companies' preemption arguments, these arguments are likely to recur if a state or local government restricts the sale of a class of tobacco products. These arguments include:

- (1) Preemption of tobacco product standards in the Tobacco Control Act is designed to create uniformity. Brief & Special Appendix of Plaintiffs-Appellants at 1, *U.S. Smokeless Tobacco Mfg. Co.*, 708 F.3d 428 (2d Cir. 2013) (No. 11-5167-cv). Characterizing an ordinance as a sales ban is just a way to undermine this uniformity and a clever drafting technique to hide the regulation of tobacco product standards. *Id.* at 2-3.
- (2) The distinction between sales and manufacturing is inconsistent with the language and structure of the Tobacco Control Act. *Id.* at 19.

2. *Eliminating Certain Tobacco Products*

The industry will likely raise a second argument to challenge a state or local sales prohibition: the Tobacco Control Act provision prohibiting the FDA from eliminating the sale of certain tobacco products also applies to state and local governments attempting to do the same.

As noted above, the Tobacco Control Act explicitly prohibits the FDA from “banning all cigarettes, all smokeless tobacco products, all little cigars, all cigars other than little cigars, all pipe tobacco, or all roll-your-own tobacco products.”¹¹⁶ Furthermore, one of the Tobacco Control Act’s stated purposes is “to continue to permit the sale of tobacco products to adults in conjunction with measures to ensure that they are not sold or accessible to underage purchasers.”¹¹⁷

In *U.S. Smokeless Tobacco*, tobacco companies claimed that under the Tobacco Control Act “local governments ‘may not make it impossible or impracticable for adults to purchase tobacco products whose contents comply with the federal standards.’”¹¹⁸ They further argued that such action “would undermine another express purpose of the Act—namely, ‘to continue to permit the sale of tobacco products to adults.’”¹¹⁹ The Second Circuit disagreed, finding that while the Tobacco Control Act prohibits an FDA ban against entire categories of tobacco products, the law “nowhere extend[ed] that prohibition to state and local governments.”¹²⁰ The court noted instead that the preservation clause of the Tobacco Control Act:

expressly *preserves* localities’ traditional power to adopt any “measure relating to or prohibiting the sale” of tobacco products. That authority is limited only to the extent that a state or local regulation contravenes one of the specific

(3) Under the saving clause, state and local governments may regulate when, where, how, and to whom tobacco products may be sold, but they may not make it impossible or impracticable for adults to purchase tobacco products whose contents comply with the federal standards. *Id.* at 37.

116. 21 U.S.C. § 387g(d)(3)(A).

117. Family Smoking Prevention and Tobacco Control and Federal Retirement Reform, Pub. L. No. 111-31, § 3(7), 123 Stat. 1776, 1782 (2009).

118. *U.S. Smokeless Tobacco Mfg. Co.*, 708 F.3d 428 at 433 (2d Cir. 2013) (citing Brief & Special Appendix of Plaintiffs-Appellants at 37).

119. Brief and Special Appendix of Plaintiffs-Appellants at 27, *U.S. Smokeless Tobacco Mfg. Co.*, 708 F.3d 428 (2d Cir. 2013) (No. 11-5167-cv) (citing 21 U.S.C. § 387 (2009)).

120. *U.S. Smokeless Tobacco*, 708 F.3d at 433.

prohibitions of the preemption clause. The only prohibition relevant here forbids local governments to impose “any requirement . . . relating to tobacco product standards.” Even then, pursuant to the saving clause, local laws that would otherwise fall within the preemption clause are exempted if they constitute “requirements relating to the sale . . . of . . . tobacco products.” In other words, [the preservation clause] . . . reserves regulation at the manufacturing stage exclusively to the federal government, but allows states and localities to continue to regulate sales and other consumer-related aspects of the industry in the absence of conflicting federal regulation.¹²¹

Similarly, the district court in *U.S. Smokeless Tobacco* held that because the preemption clause is “silent regarding sales prohibitions, it seems far more likely that prohibitions are preserved and never preempted, and therefore need never be saved.”¹²² Based on the decision in *U.S. Smokeless Tobacco* and the language of the Tobacco Control Act, while the FDA is statutorily barred from banning a class of tobacco products, the limitation likely does not extend to a state or local government prohibiting the sale of cigarettes or flavored tobacco products.

3. *Laws that Prohibit versus Laws that Restrict*

If a court holds that a tobacco product prohibition is a restriction on the *sale* of tobacco products rather than a regulation of their *standards*, tobacco companies will still likely assert that a complete prohibition on a class of tobacco products is preempted. This distinction arises because the preservation clause of the Tobacco Control Act applies to laws and regulations “relating to or prohibiting the sale” of tobacco products.¹²³ However, the saving clause refers only to laws “relating to the sale” of tobacco products—the word “prohibiting” is not used again.¹²⁴

The tobacco industry raised this argument in *U.S. Smokeless Tobacco*, but the appellate court did not resolve the issue for purposes

121. *Id.* at 433–34 (citations omitted) (citing 21 U.S.C. §§ 387p(a)(1), p(a)(2)(A)–(B) (2009)).

122. *U.S. Smokeless Tobacco Mfg. Co. v. City of New York*, No. 09 Civ. 10511 (CM), 2011 WL 5569431, at *7 (S.D.N.Y. Nov. 15, 2011).

123. 21 U.S.C. § 387p(a)(1) (2012).

124. *Id.* § 387p(a)(2)(B).

of its decision.¹²⁵ This is in part because the New York City ordinance allows the sale of flavored tobacco products in “a tobacco bar.”¹²⁶ At the time of the lawsuit, there were only eight tobacco bars in New York City, none of which sold flavored smokeless tobacco products.¹²⁷ Tobacco companies claimed that the ordinance constituted an “outright ban on the sale of flavored tobacco products”¹²⁸ and could not be rescued by the Tobacco Control Act’s saving clause.

The appellate court refused to consider whether the tobacco companies’ interpretation of the saving clause was correct, stating that “[w]hile the sales restriction imposed by the City’s ordinance is severe, it does not constitute a complete ban, as it permits the limited sale of flavored tobacco products within New York City.”¹²⁹ Further, the tobacco bar owners made a commercial decision not to sell flavored tobacco on their own.¹³⁰

However, the appellate court also stated that the flavored tobacco ordinance “regulates a niche product, not a broad category of products such as cigarettes or smokeless tobacco, and it allows that product to be sold within New York City, although to a limited extent.”¹³¹ The court thus found New York City’s ordinance advances the Tobacco Control Act’s goal of reducing the use of harmful tobacco products, especially among young people, without impeding Congress’ competing goal of keeping tobacco products generally available to adults.¹³²

The district court’s decision to deny the tobacco companies’ request for a preliminary injunction presents a more favorable analysis. The Southern District of New York held that the preservation clause “plainly contemplates local regulations restricting and/or banning the sale of subclasses of tobacco products (such as flavored tobacco products)—it explicitly refers broadly to all ‘tobacco products.’”¹³³ The court found that the preservation

125. *U.S. Smokeless Tobacco*, 708 F.3d at 435.

126. *See* N.Y.C., N.Y., ADMIN. CODE § 17-715 (2013).

127. *U.S. Smokeless Tobacco*, 708 F.3d at 432.

128. *Id.* at 435.

129. *U.S. Smokeless Tobacco*, 708 F.3d at 435–36 (internal citation omitted).

130. *Id.* at 436 n.3.

131. *Id.* at 436; *see also* Freiberg, *The Minty Taste of Death*, *supra* note 86 (noting courts distinguish niche product regulation from category-wide regulation).

132. *U.S. Smokeless Tobacco*, 708 F.3d at 436.

133. *U.S. Smokeless Tobacco Mfg. Co. v. City of New York*, 703 F. Supp. 2d 329, 343–44 (S.D.N.Y. 2010) (internal citation omitted).

clause barred any interpretation of the Act's provisions "as preventing a city from 'prohibiting' (or otherwise restricting) the 'sale' of tobacco products."¹³⁴

This distinction between laws "relating to" tobacco products and laws "relating to or prohibiting" the sale of tobacco products is likely to be raised again if jurisdictions prohibit the sale of a class of tobacco products.¹³⁵ In response, the jurisdiction can assert that

134. *Id.* at 344 (internal citation omitted).

135. In appealing the district court's decision, the parties each provided their own interpretation of the language of the saving clause. These arguments may be instructive in a future case. For example, the tobacco companies made the following arguments:

- (1) A saving clause should not be interpreted broadly. *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 870 (2000) (stating courts may *not* "give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law"); Brief and Special Appendix of Plaintiffs-Appellants at 25, *U.S. Smokeless Tobacco*, 780 F.3d 428 (No. 11-5167-cv).
- (2) The saving clause makes clear that state or local requirements "relating to," but *not prohibiting*, sales of tobacco products are saved. The saving clause thus comes into play where a state or locality establishes a requirement that does not prohibit altogether the sale of a tobacco product complying with federal standards, but merely regulates where, when, or to whom such products may be sold. Reply Brief and Addendum of Plaintiffs-Appellants at 3-5, *U.S. Smokeless Tobacco*, 780 F.3d 428 (No. 11-5167-cv), 2012 WL 2953441, at *3-5.
- (3) "[U]nder *noscitur a sociis* [a rule of statutory construction under which the questionable meaning of a doubtful word can be derived from its association with other words], the word 'sale' should be construed consistently with the rest of the series to refer to where, when, and to whom finished tobacco products may be sold, not whether they may be sold at all." *Id.* at 19.

In contrast, the City of New York dissected the language of the saving clause and argued that Congress intended the phrase "related to" to include a prohibition on the sale thereof. Appellee's Brief at 28, *U.S. Smokeless Tobacco*, 780 F.3d 428 (No. 11-5167-cv), 2012 WL 2366520, at *28. The city further argued that:

- (1) Failing to give meaning to the word "prohibiting" in the preservation clause would violate the canons of statutory construction to give effect to every clause and word of a statute. *Id.* at 25-26.
- (2) The entire preemption clause relates to tobacco product standards and the saving clause specifies the exceptions to the preemption clause. *See id.* at 26-27. Thus, the exceptions in the saving clause relate only to tobacco product standards. *Id.* Any law that does not relate to tobacco product standards is not preempted to begin with and is expressly authorized by the preservation clause. *Id.*
- (3) Congress understood that a "requirement relating to the sale" of tobacco

there is a general presumption against preemption, particularly if the police powers to protect health and safety are implicated.¹³⁶ The state or locality can also avail itself to the sweeping Tobacco Control Act provision that explicitly preserves state and local governments' authority to regulate tobacco sales.¹³⁷ Although the Tobacco Control Act provides some limits on the FDA's authority, this limitation does not extend to state or local governments.

Finally, state or local governments could parse both the structure and wording of the preservation and saving clauses to argue that the saving clause refers only to tobacco product *standards*, whereas the preservation clause applies more broadly to any state or local law "relating to or prohibiting the *sale*" of tobacco products.¹³⁸ Under this reading, state or local laws prohibiting the sale of a type of tobacco product are not preempted because they do not relate to tobacco product standards, and the laws are expressly authorized by the preservation clause.

B. *Federal Cigarette Labeling and Advertising Act*

The second key federal law that relates to tobacco control is the Federal Cigarette Labeling and Advertising Act (FCLAA), which requires warning labels on tobacco products and advertising.¹³⁹ The FCLAA should not present a barrier to a state or local law prohibiting the sale of cigarettes or flavored tobacco products. The law, however, contains a preemption provision that historically has been problematic for certain state and local activities, and therefore, it

products could potentially include a total ban. As evidence of this, the city points to the limitations on FDA authority (e.g., that the FDA may not prohibit the sale of tobacco products in face-to-face transactions in a specific category of retail outlet). 21 U.S.C.A. 387f(d)); *id.* at 35.

- (4) These limitations on FDA authority demonstrate that "Congress considered and understood the ramifications of unqualified authority to restrict the sale and distribution of tobacco products, yet intentionally chose not to limit the powers of states and localities in those very same areas." *Id.*

136. See *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475, 485 (1996) ("In all preemption cases . . . we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" (internal quotations and citations omitted)).

137. 21 U.S.C. § 387p(a)(1) (2012).

138. *Id.* § 387p(a)(1) (emphasis added).

139. See Federal Cigarette Labeling and Advertising Act of 1965, Pub. L. No. 89-92, § 4, 79 Stat. 282, 283 (codified as amended at 15 U.S.C. § 1331-41 (2012)).

warrants a review of potential legal implications.¹⁴⁰ While the FCLAA regulates the advertising and marketing of tobacco products, it is relevant in this context because the tobacco industry could argue that a sales prohibition is a de facto restriction on its ability to market its products. Thus far, courts have consistently distinguished allowable sales restrictions from preempted advertising and marketing restrictions.¹⁴¹

The FCLAA's preemption language, which was amended by the Tobacco Control Act, prohibits state and local governments from imposing any "requirement or prohibition based on smoking and health . . . with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of [the] chapter."¹⁴² But in 2009, after the passage in Tobacco Control Act, the restrictions were amended to allow state and local governments to impose "specific bans or restrictions on the time, place, and manner, but not the content, of the advertising or promotion of any cigarettes."¹⁴³

The amended preemption provision of the FCLAA¹⁴⁴ was analyzed in two recent cases. While the decisions reinforce the distinction between advertising and marketing restrictions versus sales restrictions, the industry may still argue that a sales restriction impacts its promotional activities.

In *23–34 94th St. Grocery Corp. v. New York City Board of Health*,¹⁴⁵ the court found that New York City's resolution that requires graphic images at the point of sale to show the adverse effects of smoking was "preempted by the Labeling Act because it is a requirement 'with respect to the advertising or promotion' of cigarettes."¹⁴⁶ Due to the narrow scope of this decision, which reviewed local warning

140. See 15 U.S.C. § 1334. See generally TOBACCO CONTROL LEGAL CONSORTIUM, PREEMPTION: THE BIGGEST CHALLENGE TO TOBACCO CONTROL, <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-fs-preemption-tobacco-control-challenge-2014.pdf> [<https://perma.cc/EQA5-2JGN>] (last visited June 21, 2018).

141. See, e.g., *23–34 94th St. Grocery Corp. v. N.Y.C. Bd. of Health*, 685 F.3d 174 (2d Cir. 2012) (distinguishing advertising and marketing restrictions versus sales restrictions).

142. 15 U.S.C. § 1334(b).

143. *Id.* § 1334(c).

144. *Id.*

145. 685 F.3d 174 (2d Cir. 2012).

146. *Id.* at 182.

requirements in light of the federal warning requirements, it seems unlikely to pose a barrier.

*National Association of Tobacco Outlets v. City of Providence*¹⁴⁷ involved a Providence ordinance that prohibited the redemption of tobacco coupons and multi-pack discounts.¹⁴⁸ The federal district court in Rhode Island found that Providence's pricing ordinance was not preempted by FCLAA because it regulates the "time, place, and manner" of how cigarettes may be purchased in the City of Providence, rather than controlling the content of promotional or advertising materials.¹⁴⁹ The court did focus on the time, place, and manner of how products may be purchased, versus the time, place, and manner of how products are advertised or promoted (the actual focus of the FCLAA).¹⁵⁰ Nevertheless, this decision makes clear that the FCLAA does not pose a barrier to sales restrictions.¹⁵¹

IV. OTHER FEDERAL LAWS

A state or local law prohibiting the sale of a class of tobacco products is designed to regulate the distribution of such products but has no effect on the communicative impact. Nevertheless, tobacco companies may attempt to argue that such a law violates their First Amendment rights. A handful of cases decided after the adoption of the Tobacco Control Act have addressed whether various tobacco control laws violate the First Amendment.¹⁵² Although none of these cases specifically addressed preemption arguments, they are included here for reference.

In *R.J. Reynolds Tobacco Co. v. Food & Drug Administration*,¹⁵³ the United States Court of Appeals for the District of Columbia Circuit struck down the FDA's proposed graphic warning labels (as required

147. C.A. No. 12-96-ML, 2012 WL 6128707, at *1 (D.R.I. Dec. 10, 2012).

148. *Id.* at *4.

149. *Id.* at *11.

150. *Id.*

151. The First Circuit agreed that a price regulation concerns the manner of promotion and is not preempted. *Nat'l Ass'n of Tobacco Outlets v. Providence*, 731 F.3d 71, 81 (1st Cir. 2013).

152. This Article does not address tobacco cases decided prior to the adoption of the 2009 Tobacco Control Act, such as *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) or *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

153. 696 F.3d 1205 (D.C. Cir. 2012).

by the Tobacco Control Act).¹⁵⁴ The court held that the warnings violate the First Amendment because the FDA could not prove that the labels directly advanced the government's goal of reducing smoking rates under the standards in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.¹⁵⁵ Although the industry successfully argued that its speech rights were violated, this case involved requirements concerning packaging, not requirements related to the sale of products.¹⁵⁶

In *Discount Tobacco City & Lottery, Inc. v. United States*,¹⁵⁷ tobacco companies and retailers challenged the constitutionality of numerous Tobacco Control Act provisions.¹⁵⁸ The United States Court of Appeals for the Sixth Circuit upheld most elements of the Tobacco Control Act.¹⁵⁹ The court also found a few elements of the Tobacco Control Act unconstitutionally overbroad, such as the requirement for black and white textual advertising.¹⁶⁰ The opinion did not discuss a state or local government's authority to adopt laws that supplement or complement the Tobacco Control Act, and the opinion therefore should not have any bearing on a state or local tobacco product sales restriction.¹⁶¹

In addition to the FCLAA challenge, the plaintiffs in *National Association of Tobacco Outlets v. City of Providence*¹⁶² also argued that Providence's ordinance prohibiting the redemption of tobacco coupons and multi-pack discounts impermissibly restricted its ability to communicate with customers.¹⁶³ The court found that this "pricing" ordinance did not violate the First Amendment because it did not prohibit the *distribution* of coupons nor the *dissemination* of

154. *Id.* at 1221–22; Family Smoking Prevention and Tobacco Control Act of 2009, Pub. L. No. 111-31, 123 Stat. 1776 (2009) (codified as amended in scattered sections of 21 U.S.C.).

155. *See R.J. Reynolds*, 696 F.3d at 1222 (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980)).

156. *See id.* at 1208.

157. 674 F.3d 509 (6th Cir. 2012).

158. *See id.* at 518.

159. *See id.* (affirming "the district court's decision to uphold the constitutionality of the color graphic and non-graphic warning label requirement, with Judge Clay dissenting on this issue").

160. *See id.* at 548.

161. *See id.* at 509.

162. C.A. No. 12-96-ML, 2012 WL 6128707, at *1 (D.R.I. Dec. 10, 2012).

163. *See id.* at *1–2.

pricing information.¹⁶⁴ Instead, the ordinance prohibits the “*redemption* of such coupons and the sale of cigarettes or tobacco products through multi-pack discounts. Therefore, the prohibited activity constitutes neither commercial speech nor expressive conduct and is not subject to First Amendment protection. . . .”¹⁶⁵ Like a restriction on the sale of products at a discounted rate, a restriction on the sale of a class of tobacco products should not be subject to First Amendment protections.¹⁶⁶

The tobacco industry might argue a tobacco product sales restriction imposed by state or local law violates the First Amendment because it limits information conveyed through product packaging. This type of argument was unsuccessful in a lawsuit challenging a prohibition on the sale of tobacco products at pharmacies in San Francisco.¹⁶⁷ The United States Court of Appeals for the Ninth Circuit stated that selling cigarettes “doesn’t involve conduct with a significant expressive element. It doesn’t even have an expressive component.”¹⁶⁸ However, it is possible that the tobacco industry will raise it again. Such an argument was raised in *National Association of Tobacco Outlets*, where the tobacco industry argued that laws prohibiting the sale of flavored tobacco products will by necessity limit the companies’ First Amendment rights to communicate the information normally conveyed on product packaging.¹⁶⁹ Like the San Francisco case, the Rhode Island court was not persuaded and found that the economic conduct regulated was neither commercial speech nor expressive conduct.¹⁷⁰

164. *Id.* at *5.

165. *Id.* at *6.

166. *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 499 (1996) (“[T]he State retains less regulatory authority when its commercial speech restrictions strike at ‘the substance of the information communicated’ rather than the ‘commercial aspect of [it]—with offerors communicating offers to offerees.’” (quoting Linmark Assocs. v. Twp. of Willingboro, 431 U.S. 85, 96–97 (1977))).

167. Philip Morris USA, Inc. v. City & Cty. of S.F., 345 F. App’x 276, 277 (9th Cir. 2009) (upholding a city ordinance that limited where cigarettes may be sold but did not prevent the tobacco company from advertising in the city).

168. *Id.* (internal quotations and citations omitted). In *National Association of Tobacco Outlets*, the court found that “the prohibited activity [coupon redemption] constitutes neither commercial speech nor expressive conduct and is not subject to First Amendment protection under either the *Central Hudson* or the *O’Brien* standard.” 2012 WL 6128707, at *6.

169. *Nat’l Ass’n of Tobacco Outlets*, 2012 WL 6128707, at *4.

170. *Id.* at *7.

Though other federal laws also regulate tobacco products, none of those laws should preempt a state or local law from prohibiting the sale of a class of tobacco products because those laws primarily address different aspects of tobacco control. Examples of such statutes include: the federal tobacco tax;¹⁷¹ federal laws requiring smoke-free areas, such as airplanes and federally funded daycare;¹⁷² federal laws requiring the carrier to confirm the age and identity of the buyer upon delivery of cigarettes or smokeless tobacco, and requiring the recipient to be of the minimum legal age;¹⁷³ and the Affordable Care Act requirements regarding cessation coverage.¹⁷⁴

V. ADDITIONAL PREEMPTION THREATS ON THE HORIZON

Existing federal law should not prevent a state from prohibiting the sale of a class of tobacco products, but new preemption threats loom. There has been a proliferation of recent state laws preempting local activity in a wide variety of policy areas.¹⁷⁵ While many focus on issues like employment and gun control, other state laws restrict local authority to regulate the sales of consumer goods, which could affect tobacco sales restrictions.¹⁷⁶

In addition to the efforts to preempt local tobacco control policy in statehouses around the country, threats also appear at the federal level on occasion. For example, in 2016, federal legislation was introduced that would have preempted local regulation of e-cigarettes.¹⁷⁷ New preemptive legislation at the state and federal level

171. 26 U.S.C. §§ 5701–04 (2012).

172. 49 U.S.C. § 41706 (2012); 20 U.S.C. § 6083 (2012).

173. 15 U.S.C. §§ 375, 376a (2012).

174. 42 U.S.C. §§ 300gg-13, 1396d (2012).

175. See, e.g., *Fighting Preemption: The Movement for Higher Wages Must Oppose State Efforts to Block Local Minimum Wage Laws*, NAT'L EMP. L. PROJECT (July 6, 2017), <http://www.nelp.org/publication/fighting-preemption-local-minimum-wage-laws/> [<https://perma.cc/GJ8P-9S2Y>] (discussing state preemption of minimum wage laws); Kriston Capps, *The Cities That Are Fighting Back Against State Intervention*, CITYLAB.COM (Oct. 3, 2016), <https://www.citylab.com/equity/2016/10/cities-fighting-back-against-state-intervention/502232/> [<https://perma.cc/T9PG-Q49P>] (discussing the issue of state preemption laws for guns and employment); *Preemption of Local Laws*, GIFFORDS L. CTR., <http://lawcenter.giffords.org/gun-laws/policy-areas/other-laws-policies/preemption-of-local-laws/> (last visited June 21, 2018) [<https://perma.cc/9AVS-WF4W>] (discussing state preemption of gun laws).

176. See, e.g., IOWA CODE § 331.301(6)(a) (2018) (preventing counties from enacting less stringent regulations than those already imposed by state law).

177. See 21 C.F.R. §§ 1100, 1140, 1143 (2012); see also PUB. HEALTH LAW CTR.,

may be a threat to any jurisdiction that is considering a prohibition on the sale of a class of tobacco products.

VI. LOCAL AUTHORITY TO RESTRICT SALES IN MINNESOTA

Local authority to regulate tobacco products varies from state to state.¹⁷⁸ In some states, local jurisdictions have extensive authority to regulate and restrict the sale and use of tobacco products.¹⁷⁹ In others, state law prevents local jurisdictions from adopting smoke free laws,¹⁸⁰ youth access restrictions,¹⁸¹ or local retail licensure.¹⁸²

As demonstrated above, federal law does not preempt a sales restriction on a class of tobacco products.¹⁸³ However, any local jurisdiction pursuing such a prohibition must consider authority issues arising under state law. This Article does not address what, if any, authority issues may present themselves in each state. But interested jurisdictions can generally expect the challenge to appear in one of two ways: (1) authority may be an issue where a local body has insufficient power to adopt a sales restriction on a class of

TOBACCO CONTROL LEGAL CONSORTIUM, REGULATING ELECTRONIC CIGARETTES & SIMILAR DEVICES 1–2 (2017), <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-guide-reg-ecigarettes-2016.pdf> [<https://perma.cc/X2H2-GESL>].

178. *See State Preemption of Local Tobacco Control Policies Restricting Smoking, Advertising, and Youth Access—United States, 2000–2010*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 26, 2011), <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6033a2.htm> [<https://perma.cc/K4P5-WRCY>].

179. *See id.*

180. As of September 30, 2017, twelve states have laws in effect that explicitly preempt local ordinances from restricting smoking in government worksites, private worksites, restaurants, and/or bars. *STATE System Preemption Fact Sheet*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 21, 2017), <https://chronicdata.cdc.gov/Legislation/STATE-System-Preemption-Fact-Sheet/uu8y-j6ga> [<https://perma.cc/694H-C2C9>].

181. As of September 30, 2017, twenty-two states have laws preempting local ordinances related to youth access to tobacco. *See id.* Twenty states preempt local restrictions on selling tobacco products to young people, and nineteen states preempt local restriction on distributing tobacco products to youth. *See id.*

182. As of September 30, 2017, ten states have laws preempting localities from passing ordinances related to licensure of tobacco products—including both over-the-counter and vending machine sales of tobacco, while eight states preempt local restrictions on retail licenses for the over-the-counter sale of tobacco products only. *See id.*

183. *Supra* Parts III, IV.

tobacco products,¹⁸⁴ or (2) a state has prohibited a municipal body from regulating tobacco sales or from regulating certain types of tobacco products, and has reserved that power to the state.¹⁸⁵

The first scenario can arise if a body, such as a city council or local board of health, has insufficient authority to adopt a law or regulation prohibiting the sale of a particular type of product. For example, some local legislative bodies only have the power to address issues expressly provided for in a state statute under what is known as “Dillon’s Rule.”¹⁸⁶ In many states, local legislative bodies have broad authority, whereas administrative bodies, such as a local board of health, may have limited authority. As a recent example, the New York City Board of Health adopted a rule restricting the sale of large sugary sodas, known as the “Sugary Drinks Portion Cap Rule.”¹⁸⁷ A recent appellate decision held that the Board of Health exceeded its authority to regulate public health and usurped the policy-making role of the New York City Council.¹⁸⁸ A local body considering a sales restriction on a class of tobacco products should ensure that it has the authority to adopt such a restriction and should be prepared to defend legal challenges to its authority.

In the second scenario, a preemption issue may arise if a state law or regulation prohibits a municipal body from regulating tobacco sales or types of tobacco products.¹⁸⁹ This preemption may

184. See *State Preemption of Local Tobacco Control Policies Restricting Smoking, Advertising, and Youth Access—United States, 2000–2010*, *supra* note 178 (recognizing the states that restrict local authority).

185. See *id.*

186. Dillon’s Rule is the doctrine that a unit of local government may exercise only those powers that the state expressly grants to it, the powers necessarily and fairly implied from that grant, and the powers that are indispensable to the existence of the unit of local government. *Dillon’s Rule*, BLACK’S LAW DICTIONARY (10th ed. 2014); see also NICOLE DUPUIS ET AL., NAT’L LEAGUE OF CITIES, CITY RIGHTS IN AN ERA OF PREEMPTION: A STATE-BY-STATE ANALYSIS 5 (2017), <https://www.nlc.org/sites/default/files/2017-03/NLC-SML%20Preemption%20Report%202017-pages.pdf> [<https://perma.cc/KGR2-ULBQ>] (“Dillon’s Rule, which is derived from an 1868 court ruling, states that if there is a reasonable doubt whether a power has been conferred to a local government, then the power has not been conferred.”).

187. N.Y.C. DEP’T OF HEALTH & MENTAL HYGIENE, NOTICE OF ADOPTION OF AN AMENDMENT (§81.53) TO ARTICLE 81 OF THE NEW YORK CITY HEALTH CODE, <https://www1.nyc.gov/assets/doh/downloads/pdf/notice/2012/notice-adoption-amend-article81.pdf> [<https://perma.cc/27AN-SFEH>] (last visited June 21, 2018).

188. N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep’t of Health & Mental Hygiene, 970 N.Y.S.2d 200, 213 (N.Y. App. Div. 2013).

189. Cf. Freiberg, *Options for State and Local Governments*, *supra* note 86, at

be express or implied.¹⁹⁰ An expressly preemptive state law may specifically reserve the authority to regulate tobacco sales or products to the state.¹⁹¹ An impliedly preemptive state law may fully regulate the topic, leaving no room for local regulation.¹⁹²

In Minnesota, there is currently no preemption of local authority to regulate the sale of tobacco products. Many communities in Minnesota have enacted a wide range of tobacco control sales restrictions, including increasing the minimum legal sale age to twenty-one,¹⁹³ restricting the sale of flavored tobacco products to adult-only retail stores,¹⁹⁴ and implementing minimum pricing policies.¹⁹⁵ Like many other states, however, legislators have introduced preemption bills in recent sessions.¹⁹⁶ In 2017, the Minnesota legislature passed a bill that would have preempted local governments from establishing certain worker protections.¹⁹⁷ However, Governor Mark Dayton vetoed this bill.¹⁹⁸ While this particular law would not have preempted local tobacco sales restrictions, it seems likely that the Minnesota legislature will consider more preemptive laws in the future given the increase in broader preemptive laws around the country.¹⁹⁹ Currently, however, as long as a Minnesota community has sufficient statutory or home

424–26 (discussing various state-level efforts to regulate non-cigarette tobacco products and the role of local governments in these efforts).

190. See *Am. Fin. Servs. Ass'n v. City of Oakland*, 104 P.3d 813, 820 (Cal. 2005).

191. See *id.*

192. For example, state law preempted an anti-predatory lending ordinance in Oakland, CA, because the state legislature “impliedly fully occupied the field of regulation of predatory practices in home mortgage lending.” See *id.*

193. See, e.g., EDINA, MINN., MUN. CODE § 12–247 (2017).

194. See Jessie Van Berkel, *St. Paul Prohibits Flavored Tobacco at Most Stores*, STAR TRIB. (Jan. 6, 2016, 10:05 PM), <http://www.startribune.com/st-paul-prohibits-flavored-tobacco-at-most-stores/364455011/> [<https://perma.cc/8KKJ-8V4P>].

195. See, e.g., MINNEAPOLIS, MINN., MUN. CODE § 281.45(g) (2017).

196. See generally Michael Freiberg, (*Don't*) See More Butts: Preemption and Local Regulation of Cigarette Litter, 37 HAMLINE L. REV. 205, 206–08 (2014) (giving an overview of various states' efforts to regulate various tobacco products).

197. See HF 180, 90th Leg., Reg. Sess. (Minn. 2017).

198. See *Veto Details, Minnesota Legislature*, MINN. LEGIS. REFERENCE LIBR., <https://www.leg.state.mn.us/lrl/vetoes/vetodetails?years=all> [<https://perma.cc/9BJK-97T8>] (last visited June 21, 2018).

199. Cf. Lynn M. Mueller, *MN's E-Cigarette Ban a Reminder to Review Smoking/Tobacco Policies*, MINN. EMP. L. LETTER, Sept. 2014, at 1 (discussing the Minnesota Legislature's recent efforts to regulate a new form of tobacco products: e-cigarettes).

rule authority to prohibit the sale of a class of tobacco products, such laws are not preempted by state or federal law.²⁰⁰

VII. CONCLUSION

A state law that prohibits the sale of a class of tobacco products would likely survive a litigation challenge on federal preemption grounds.²⁰¹ A local law of this nature would likely face federal, and possibly state, preemption challenges.²⁰² In addition, local laws often face challenges based on whether or not the jurisdiction has adequate authority.²⁰³ Should such a challenge turn on federal law, the sales prohibition likely will be upheld. Challenges based on state law will have varying results depending on the relevant language in each state's constitution and statutes.²⁰⁴

The Tobacco Control Act is the most relevant federal statute, and its preservation, preemption, and saving provisions clearly allow state and local governments to adopt laws "relating to the sale of tobacco products."²⁰⁵ The tobacco industry may argue that such a prohibition is actually a regulation of tobacco product standards. This argument relies on the Tobacco Control Act's language that preempts state and local laws relating to tobacco product standards.²⁰⁶ However, *U.S. Smokeless Tobacco*²⁰⁷ and *National Association of Tobacco Outlets*²⁰⁸ support a finding that a restriction on the sale of a tobacco product is *not* a regulation of tobacco product standards. Opponents may also argue that state and local governments are barred from eliminating a particular class of tobacco products.²⁰⁹ Again, public health advocates can rely on *U.S. Smokeless Tobacco* to support the conclusion that the Tobacco Control

200. See Freiberg, *Options for State and Local Governments*, *supra* note 86, at 443.

201. See discussion *supra* Parts II, III.

202. See *supra* Parts I, II.

203. See *Dillon's Rule*, BLACK'S LAW DICTIONARY (10th ed. 2014).

204. See discussion *supra* Part II.

205. 21 U.S.C. § 387p(a)(1) (2012).

206. *Id.* § 387p(a)(2)(A).

207. *U.S. Smokeless Tobacco Mfg. Co. v. City of New York*, 708 F.3d 428, 433 (2d Cir. 2013).

208. *Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence*, No. C.A. No. 12-96-ML, 2012 WL 6128707 (D.R.I. Dec. 10, 2012).

209. See Freiberg, *Options for State and Local Governments*, *supra* note 86, at 444.

Act's limits on the FDA's power to eliminate tobacco products does not extend to state and local governments.²¹⁰

The most challenging argument in favor of tobacco product restrictions will likely be that, although state and local governments are free to limit the sale of certain tobacco products, the restrictions are barred from completely prohibiting the sale of those products. This reasoning relies on the Tobacco Control Act's conflicting language in its preemption provision and saving clause.²¹¹ State and local governments can support a sales restriction via the general presumption against preemption, and the broad language of the preservation clause that explicitly allows laws "prohibiting" the sale of tobacco products. Proponents can make a strong case that failure to give effect to the word "prohibiting"²¹² would violate congressional intent, but an absence of precedent makes it unclear whether this would convince a court to rule in favor of a sales restriction on these grounds.

In sum, the tobacco industry will likely level preemption challenges against any jurisdiction that proposes to restrict the sale of a class of tobacco products. Although federal preemption claims would probably fail, public health advocates will have to investigate potential state preemption or general authority issues for a sales restriction at the local level.

210. *U.S. Smokeless Tobacco*, 708 F.3d at 433.

211. *See* 21 U.S.C. §§ 387p(a)(2), p(a)(2)(B) (2012).

212. Brief for Appellee at 26, *U.S. Smokeless Tobacco*, 780 F.3d 428 (No. 11-5167-cv).