



MEMORANDUM

To: Geri A. Guardino, MPA, Tobacco Control Program
Rhode Island Dept. of Health

From: Ian McLaughlin, Program Director
Derek Carr, Legal Fellow

Date: July 8, 2016

Subject: Local Authority for Tobacco 21 Policy in Rhode Island

Introduction

Tobacco 21 is an emerging strategy aimed at reducing youth exposure to tobacco use. Informally, it is often understood to mean raising the minimum age for tobacco sales to 21 years. But there are various ways in which a Tobacco 21 policy may be drafted. For example, a Tobacco 21 policy can regulate the use, possession, purchase, and/or sale of tobacco products. This memorandum focuses specifically on a Tobacco 21 policy that regulates the sale of tobacco products, and does not address local authority for a Tobacco 21 policy that regulates the use, possession, or purchase of tobacco products.¹

Question Presented

Does Rhode Island state law preempt local authority to prohibit tobacco retailers from selling tobacco products to individuals under the age of 21?

Short Answer

Although this issue has not been tested in a Rhode Island court, Rhode Island state law likely does not preempt a local law prohibiting tobacco retailers from selling tobacco products to individuals under the age of 21.

¹ There are additional, legal reasons for a local Tobacco 21 law not to regulate the use or possession of tobacco products by individuals under the age of 21. Although there are policy reasons not to regulate the purchase of tobacco products by individuals under the age of 21, Rhode Island state law likely does not prohibit a local government from doing so.

Summary

To determine whether cities and towns (“local jurisdictions”) in Rhode Island have the authority to regulate tobacco sales and whether state law preempts a local jurisdiction’s ability to raise the tobacco minimum sales age to 21 years, this memorandum analyzes seven different state laws.

- 1. Home Rule and Delegated Authority.** These provisions outline a local jurisdiction’s general authority to enact ordinances.
- 2. State Cigarette Tax.** This statute imposes a tax on tobacco products² and requires licensing for “person[s] engaging in the business of selling cigarette and/or tobacco products in [Rhode Island], including any distributor or dealer.”³
- 3. Electronic Nicotine-delivery System (ENDS) Licenses.** This statute requires licensing for any “person engaging in the business of selling electronic nicotine-delivery system products in [Rhode Island], including any distributor or dealer.”⁴ The statute is relevant only if a local Tobacco 21 law includes ENDS.
- 4. Use of Tobacco by Minors.** This statute prohibits the public use and possession of tobacco and/or ENDS in any form by persons under 18 years of age.
- 5. An Act to Stop the Illegal Sale of Tobacco Products to Children.** This statute prohibits the purchase of tobacco products by and the sale or delivery of tobacco products to persons under 18 years of age; limits tobacco product sales in vending machines; imposes minimum cigarette package sizes; requires signage about the health effects of tobacco and the minimum age for tobacco purchases, sales, and deliveries; requires the Department of Behavioral Healthcare, Developmental Disabilities and Hospitals (“BHDDH”) to investigate and enforce the law, as well as coordinate with other state and local officials to enforce the law; prohibits the distribution of free tobacco products or vouchers redeemable for free tobacco products to minors and within 500 feet of any school; and authorizes BHDDH to promulgate rules and regulations “necessary to fulfill the intent” of the law.
- 6. Age of Majority.** This statute establishes that 18-year-olds are “deemed to be persons of full legal age”⁵ and that they “have all the duties and obligations, rights, and privileges” as “persons who have previously attained the age of twenty-one (21) years.”⁶
- 7. Section 45-6-6.** This statute prohibits local jurisdictions from imposing penalties for acts punishable under state law as a crime, misdemeanor, or offense.⁷ However, local jurisdictions may impose penalties for such acts when the General Assembly expressly authorizes the local jurisdiction to regulate the subject-matter. Moreover, Section 45-6-6 only prohibits local

² R.I. GEN. LAWS § 44-20-12 to -13.2.

³ *Id.* § 44-20-2.

⁴ *Id.* § 23-1-55 to -58.

⁵ *Id.* § 15-12-1(a).

⁶ *Id.* § 15-12-1(b).

⁷ *Id.* § 45-6-6.

jurisdictions from imposing penalties for the *exact same* act punishable under state law. For example, local jurisdictions may prohibit alcohol sales at nude adult entertainment venues even though state law regulates both alcohol sales and nude adult entertainment venues, but not the combination of the two.

Reviewing these seven laws, we find that a local jurisdiction likely has both home rule and delegated authority to enact a Tobacco 21 law. Moreover, Rhode Island state law likely does not preempt a local Tobacco 21 law because none of the reviewed laws conflict with a local Tobacco 21 law and there is no indication that the legislature intended to preempt the field relating to the minimum age for tobacco sales. However, there is uncertainty because no court has ruled on such a law.

ANALYSIS

Note: ChangeLab Solutions is a nonprofit organization that offers technical assistance on legal and policy matters related to public health. We do not enter into attorney-client relationships and cannot act as your legal counsel or provide legal advice. If you have specific legal questions relating to the subject of the memorandum, we advise that you consult with an attorney licensed to practice in Rhode Island.

An important consideration for any local tobacco control ordinance is how the regulations will be effectively implemented and enforced. Some jurisdictions that have enacted a Tobacco 21 policy have chosen to enforce the law through tobacco retailer licensing (TRL) schemes, and TRL is a very efficient enforcement mechanism for most tobacco control laws. The March 28, 2014 memorandum from Tobacco Control Legal Consortium to Geri A. Guardino, Policy Analyst, Tobacco Control Program, Rhode Island Department of Health contains additional information about local TRLs in Rhode Island.

1. Local Authority to Enact Tobacco 21

Cities and towns have the authority to enact ordinances regulating the purchase and sale of tobacco products within their respective jurisdiction pursuant to both their inherent home rule powers and authority explicitly delegated by state law. Note that a local government's authority to enact laws is limited to the powers granted in the local jurisdiction's charter, and thus the charter must provide some authority for enacting a local Tobacco 21 law. This memo does not independently analyze such charter requirements.

I. Home Rule Authority

The Rhode Island State Constitution grants "every city and town ... the right of self government in all local matters."⁸ This includes "the authority to legislate matters of public health and safety."⁹ However, a local jurisdiction generally may only legislate in "local matters", not "matters of statewide concern."¹⁰

⁸ R.I. CONST. art. XIII, § 1.

⁹ State ex rel. Town of Westerly v. Bradley, 877 A.2d 601 (R.I. 2005). See also State ex rel. City of Providence v. Auger, 44 A.3d 1218, 1231 (R.I. 2012) ("In our judgment, noise in residential areas can be the subject of local regulation because it is 'related directly to preserving the public peace, safety, comfort and welfare.'" (quoting *Bradley*).

¹⁰ Rhode Island Hospitality Ass'n v. City of Providence ex rel. Lombardi, 775 F.Supp.2d 416 (2011), affirmed 667 F.3d 17. Matters deemed of statewide concern include taxation, *Opinion to the House of Representatives*, 87 A.2d 693, 696 (R.I. 1952), and "the regulation of police affairs, the conduct of business, licensing, education, and elections." *Westerly Residents for Thoughtful Dev., Inc. v. Brancato*, 565 A.2d 1262 (R.I. 1989) (quoting *Bruckshaw v. Paolino*, 557 A.2d 1221, 1223 (R.I. 1989)).

A further limitation, as discussed in section 2 of this memo (preemption analysis), “the power of home rule is subordinate to the General Assembly’s unconditional power to legislate in the same areas.”¹¹

Rhode Island courts employ a three-part test (“O’Neil Test”) to determine whether a matter is of local or statewide concern for purposes of home rule analysis:

1. “First, when it appears that uniform regulation throughout the state is necessary or desirable, the matter is more likely to be within the state’s domain.”
2. “Second, whether a particular matter is traditionally within the historical dominion of one entity is a substantial consideration.”
3. “Third, and most critical, if the action of a municipality has a significant effect upon people outside the home rule town or city, the matter is apt to be deemed one of statewide concern.”¹²

A. The O’Neil Test favors a local jurisdiction’s home rule authority to enact a Tobacco 21 law.

A local jurisdiction in Rhode Island likely has the authority to adopt a local Tobacco 21 law because requiring that retailers not sell tobacco products to persons under a specified minimum age likely is a local matter related to the “public health and safety” of its inhabitants. Each prong of the O’Neil Test is discussed below; note that there is some overlap with the O’Neil Test and the general preemption analysis in sections 2 and 3.

i. Uniformity

A matter requires uniform regulation throughout the state when variation in local regulations would undermine the regulation’s effectiveness. For example, public utility regulations such as those governing power lines require statewide uniformity because varying local regulation would frustrate the state’s “comprehensive approach” to ensuring the safety, need, and efficiency of power distribution.¹³ The regulation of tidal wetlands also requires statewide uniformity because “a fragmented approach to managing and regulating the costal resources would be detrimental to the health, safety, and welfare of the general public.”¹⁴ Conversely, neither municipal contract selection¹⁵ nor a smoking ban require statewide uniformity.¹⁶

A local Tobacco 21 law (which imposes a local requirement that is stricter than state law) would not undermine the effectiveness of state regulations restricting tobacco product sales to minors and thus such regulations do not require statewide uniformity.¹⁷ Citing the harmful effects of tobacco use, the Rhode Island General Assembly’s expressed purpose is “to preserve and protect the health of children by: (1) stopping the illegal sale of tobacco to children and (2) by severely punishing those who disregard the laws relating to the illegal sale of tobacco products to children.”¹⁸ To these ends, state law

¹¹ *Amico’s Inc. v. Mattos*, 789 A.2d 899, 903 (R.I. 2002).

¹² *Town of East Greenwich v. O’Neil*, 617 A.2d 104 (R.I. 1992).

¹³ *Id.*

¹⁴ *Town of Warren v. Thornton-Whitehouse*, 740 A.2d 1255 (R.I. 1999) (internal quotations omitted).

¹⁵ *Costal Recycling, Inc. v. Connors*, 854 A.2d 711 (2004).

¹⁶ *Amico’s, Inc. v. Mattos* (*Mattos Unpublished*), No. CIV. A. KC 00-48, 2001 WL 1685597, at *4 (R.I. Mar. 9. 2001).

¹⁷ *Perfect Puppy, Inc. v. City of E. Providence*, 98 F. Supp. 3d 408, 422-23 (D.R.I.) aff’d in part, appeal dismissed in part sub nom. *Perfect Puppy, Inc. v. City of E. Providence*, R.I., 807 F.3d 415 (1st Cir. 2015) (“Increasing restrictions on the sale of a regulated good does not constitute a disruption of the state’s regulatory scheme.”).

¹⁸ R.I. GEN. LAWS § 11-9-13.3(a).

prohibits the sale of tobacco products to individuals under the age of 18 and punishes individuals who make such sales.¹⁹ Unlike regulations on public utilities or tidal wetlands where local regulation would disrupt the state’s “comprehensive plan,” a local Tobacco 21 law would not render the state law ineffective because tobacco product sales to individuals younger than 18 would continue to be prohibited. Indeed, a local Tobacco 21 law would further the legislative purpose of reducing tobacco’s harmful effects.

ii. *Historical Dominion*

The historical dominion factor looks at “the historical relationship between the state and its cities and towns,” including whether the matter has been traditionally regulated by the state, local government, both, or neither.²⁰ Areas are within the state’s historical dominion when the state constitution reserves such regulation to the state,²¹ and when courts identify a long-standing duty for the state to regulate a matter.²² Areas traditionally within the state’s historical dominion include police affairs,²³ the regulation of business conduct through licensing,²⁴ education,²⁵ elections,²⁶ and taxation.²⁷ Some matters, however, such as smoking, “[are] not traditionally within the historical domain of either [state or local government],” and “no line of decisions identify the state’s duty to regulate smoking.”²⁸

This prong does not weigh for or against a local Tobacco 21 law because regulating the minimum age for tobacco sales likely is not within the historical dominion of either state or local government. Beginning in 1896, Rhode Island state law prohibited furnishing tobacco products to persons under the age of 16.²⁹ In 1988, the state raised the minimum age to 18.³⁰ Notwithstanding that these state laws are more than 100 years old, Rhode Island courts have never held that the state has a duty to regulate the minimum age for tobacco sales³¹ and local laws also regulate the matter.³² Indeed, in the Rhode

¹⁹ *Id.* §§ 11-9-13, 13.8, 13.11, 13.12-13.15.

²⁰ *Marro v. General Treasurer of Cranston*, 273 A.2d 660, 662 (R.I. 1971).

²¹ *See, e.g.*, Opinion to the House of Representatives, 87 A.2d at 696 (power to tax “is expressly reserved to the general assembly under section 5 of said article XXVII.”).

²² *See, e.g.*, *Marro*, 273 A.2d at 662 (finding regulating police affairs as within the state’s historical dominion because of “a long line of decisions which tell us that it is the state’s duty to preserve the public peace and good order, to enforce the laws, to suppress crime and to protect liberty and property.”).

²³ *Marro*, 273 A.2d 660.

²⁴ *Newport Amusement Co. v. Maher*, 166 A.2d 216 (R.I. 1960). Rhode Island courts have historically considered business licensing a matter of statewide concern unfit for local regulation. However, numerous local jurisdictions in Rhode Island have local tobacco retail licensing requirements. For more information about local TRL licensing in Rhode Island, see the March 28, 2014 memorandum from Tobacco Control Legal Consortium to Geri A. Guardino, Policy Analyst, Tobacco Control Program, Rhode Island Department of Health.

²⁵ *Royal v. Barry*, 160 A.2d 572 (R.I. 1960).

²⁶ Opinion to the House of Representatives, 96 A.2d 627 (R.I. 1953).

²⁷ Opinion to the House of Representatives, 87 A.2d at 693. *See also* R.I. CONST. art. XIII, § 5 (“Nothing contained in this article shall be deemed to grant to any city or town the power to levy, assess and collect taxes or to borrow money, except as authorized by the general assembly”).

²⁸ *Mattos Unpublished*, at *5.

²⁹ R.I. G.L. 1896, ch. 281, § 28.

³⁰ *See* UNITED STATES DEP’T OF HEALTH & HUMAN SERVICES, SMOKING AND HEALTH: A NATIONAL STATUS REPORT at 108 (2nd ed.), *available at* <http://profiles.nlm.nih.gov/ps/access/NNBBVP.pdf>.

³¹ *See Marro*, 273 A.2d at 662.

³² *See, e.g.*, Warwick, RI § 40-31 (“It shall be unlawful for any person to deliver any tobacco product to a person under the age of eighteen years.”); Central Falls, RI § 26-68 (“Delivery of tobacco products to persons under the age of 18 is prohibited in accordance with R.I.G.L. 11-9-13 and 11-9-131. It shall be unlawful for any person to deliver any tobacco product or snuff to a person under the age of 18 years, nor shall any person under the age of 18 purchase any tobacco product snuff.”); Tiverton, RI § 50-9(a)(1) (“No person under 18 years of age shall purchase nor shall any person, firm or corporation sell, give, allow to be sold,

Island Supreme Court decisions identifying matters within the state’s historical dominion, none mention tobacco sales, product sales, or minimum age requirements more generally.³³

iii. Effect Outside Municipality

The “most critical” distinction between a statewide and local matter is whether the local regulation substantially affects people outside the jurisdiction enacting the regulation. Courts will not infer this effect from a locality’s “economic impact on the people of [the state]” (i.e., the importance of the city to the state’s economy), but rather requires more specific evidence about how the challenged regulation “itself would impact other communities within the state.”³⁴ For example, a city may require “a new hospitality employer to retain its predecessor’s employees for a minimum of three months” when the “hospitality business[] is purchased, sold, or leased or when a management contract or lease is terminated” because it does not affect other communities within the state.³⁵ Similarly, the regulation of a city employee pension plan is a local matter because only residents of the city “provide revenues needed to support the system and [] receive the benefits garnered from the plan.”³⁶ On the other hand, “[t]he actions of one town concerning the transmission of electric power throughout the state necessarily affect the residents of other localities” because differing local regulations would require the utilities company to reroute its electrical distribution network through other areas of the state.³⁷

This prong favors a local Tobacco 21 law because the law would have no impact on persons outside the locality enacting the law. A local Tobacco 21 law would apply only to tobacco sales within a specific locality. Outside that locality, retailers could continue to sell and persons could continue to purchase tobacco products as permitted by state and local law. Moreover, a local Tobacco 21 law’s potential economic effects (e.g. reducing a locality’s attractiveness for certain businesses, reducing the flow of money to/from the locality) are insufficient to find it a matter of statewide concern.³⁸ On the other hand, a local Tobacco 21 law could affect neighboring jurisdictions by increasing the number of 18, 19, and 20-year-olds traveling to purchase tobacco products. It is unclear how any particular court would resolve such an argument, but it seems unlikely that this would constitute a *direct* effect on other jurisdictions sufficient to make the minimum age for tobacco sales a matter of statewide concern.³⁹

II. Delegated Authority

In addition to general home rule authority, a local jurisdiction may regulate issues of statewide concern if the state General Assembly explicitly delegates such authority.⁴⁰ For example, taxation is a matter of statewide concern exclusively within the General Assembly’s power.⁴¹ Nonetheless, local

given or delivered to any person under 18 years of age, any tobacco in the form of cigarettes, cigars, pipe tobacco, chewing tobacco, or snuff...”).

³³ See, e.g., *Mattos*, 789 A.2d at 903.

³⁴ *Rhode Island Hospitality Ass’n*, 775 F.Supp.2d at 438-439.

³⁵ *Id.* at 438.

³⁶ *Bruckshaw*, 557 A.2d at 1223.

³⁷ *O’Neil*, 617 A.2d at 112.

³⁸ See *Rhode Island Hospitality Ass’n*, 775 F.Supp.2d at 438-439.

³⁹ See *Brancato*, 565 A.2d at 1264 (“Any changes in the sewer system *directly* affect only residents of Westerly.”) (emphasis added).

⁴⁰ *Mattos*, 789 A.2d at 903 (“And, as has long been the case, the Legislature continues to exclusively occupy the fields of education, elections, and taxation, thereby precluding any municipality’s foray into these areas, *absent specific legislative approval.*”) (emphasis added).

⁴¹ *Opinion to the House of Representatives*, 87 A.2d at 693.

governments may impose taxes when the General Assembly explicitly grants such authority.⁴² Likewise, in *Amico's Inc. v. Mattos*, the Rhode Island Supreme Court held that municipalities may regulate smoking within licensed Rhode Island restaurants. The *Mattos* Court reasoned that the state General Assembly specifically delegated to local jurisdictions the authority to impose conditions on food preparation and serving (“victualing”) licenses “to ensure the health, safety and welfare of restaurant patrons.”⁴³ Therefore, local jurisdictions could require such licensees to prohibit smoking.⁴⁴

Similarly, Rhode Island state law explicitly authorizes “[t]own and city councils” to enact “ordinances and regulations for their respective towns and cities, not repugnant to law, ... respecting the purchase and sale of merchandise or commodities within their respective towns and cities...”⁴⁵ In other words, local jurisdictions in Rhode Island may regulate the purchase and sale of goods within their borders so long as such regulations do not violate either state or federal law.

A Tobacco 21 law regulating only the sale of tobacco products (which should qualify as merchandise or commodities) likely falls within this explicitly delegated authority, so long as the local law does not violate state or federal law. This is true regardless of whether the minimum age for tobacco sales is deemed a matter of local or statewide concern and irrespective of whether a local jurisdiction has inherent home rule authority to take such action.

2. State preemption (generally)

The previous section discussed whether a local jurisdiction has the general authority to regulate the minimum age for tobacco sales. This section examines whether specific state laws preempt local authority to enact Tobacco 21. In Rhode Island, state preemption falls under two categories: (1) conflict preemption; and (2) field preemption. Under the first category, preemption occurs when a local law contradicts a state law. Under the second category, preemption occurs when the state intends to occupy an entire field exclusively. We explain below how a court analyzes each type of preemption.

I. Conflict Preemption

Local governments may not enact ordinances that “direct[ly] and material[ly] conflict with a state law of general character or statewide concern.”⁴⁶ In other words, a local law is preempted if the “language in the ordinance contradicts the language in the [state] statute,”⁴⁷ thereby making the ordinance “inconsistent with a state statute relating to the same subject.”⁴⁸ Whether such a conflict exists “depends on what the [state] legislature intended when it enacted the statute.”⁴⁹

⁴² See, e.g., *Newport Court Club Associates v. Town Council of the Town of Middletown*, 800 A.2d 405 (R.I. 2002); *Warwick Mall Trust v. State*, 684 A.2d 252 (R.I. 1996). See also R.I. CONST. art. XIII, § 5 (“Nothing contained in this article shall be deemed to grant to any city or town the power to levy, assess and collect taxes or to borrow money, except as authorized by the general assembly”) (emphasis added).

⁴³ *Mattos*, 789 A.2d at 905-906.

⁴⁴ *Id.*

⁴⁵ R.I. GEN. LAWS § 45-6-1.

⁴⁶ *Town of Glocester v. R. I. Solid Waste Mgmt. Corp.*, 390 A.2d 348, 349 (R.I. 1978).

⁴⁷ *Auger*, 44 A.3d at 1229 (quoting *Coastal Recycling, Inc.*, 854 A.2d at 715).

⁴⁸ *Berberian v. Hous. Auth. of City of Cranston*, 315 A.2d 747 (R.I. 1974).

⁴⁹ *Auger*, 44 A.3d at 1229 (quoting *Town of Glocester*, 390 A.2d at 349).

A conflict exists and a local law is preempted if it is impossible to simultaneously comply with both the state and local law.⁵⁰ However, absent specific legislative intent to the contrary, no conflict exists where a local law imposes stricter or more specific requirements and thereby allows simultaneous compliance with both state and local law.⁵¹ This is particularly true where the stricter local law furthers the state law's purpose. For example, a local law requiring separate seating for nonsmokers and smokers in all restaurants is not inconsistent with a state law requiring the same only for restaurants "with a seating capacity of fifty (50) or more persons."⁵² This is because "no restaurant ... will violate [the state law] if it is bound to comply with stricter regulations," and nothing in the state law indicates a legislative intent to set maximum standards.⁵³ Moreover, "the more stringent smoking regulations imposed by the town advance the stated purposes of [the state law] 'to protect the health and atmospheric environment of the non-smoker by regulating smoking.'"⁵⁴

II. Field Preemption

Regardless of any direct conflict, a local law is preempted if the state legislature "intended that its statutory scheme completely occupy the field of regulation on a particular subject."⁵⁵ In other words, field preemption depends on whether the General Assembly expressly or impliedly intended that "state control is to be exclusive or whether the control is to be exercised concurrently by the state and by the municipality."⁵⁶ Evidence of such intent includes whether: (1) the state statute expressly reserves power to the state; (2) local regulation would "disrupt[] the state's overall scheme of regulation;"⁵⁷ (3) the state statute evidences a "complex regulatory scheme;"⁵⁸ and (4) the General Assembly has "vest[ed] 'exclusive power and authority' in one body."⁵⁹

Express Preemption: A local law is preempted if the state law explicitly provides that the state law preempts local laws relating to the matter.

Disrupting State's Overall Regulatory Scheme: A local law is preempted if it undermines the state legislature's purpose in enacting a state law.⁶⁰ However, as with conflict preemption, a local law does not disrupt the state's overall regulatory scheme when it advances the purposes of a state law.⁶¹

Complex Regulatory Scheme: The more complex the state's regulatory scheme, the more likely a court will imply a preemptive intent. For example, the Rhode Island Supreme Court found an implied preemptive intent where state law "establish[ed] a qualified administrative body to evaluate technical evidence, address the myriad of complex problems associated with regulatory decisions, and render decisions," as well as "provide[d] sufficient avenues of redress for municipal concerns."⁶² However, a

⁵⁰ Vukic, 609 A.2d at 941-42.

⁵¹ See Auger, 44 A.3d 1218; Mattos, 789 A.2d 899; URI Student Senate v. Town of Narragansett, 631 F.3d 1, 9 (1st Cir. 2011) ("An awkward fit, without more, will not support a claim of conflict preemption.").

⁵² Mattos, 789 A.2d at 907.

⁵³ *Id.*

⁵⁴ *Id.* (internal citations omitted).

⁵⁵ Thornton-Whitehouse, 740 A.2d at 1261 (citing Town of East Greenwich v. Narragansett Electric Co., 651 A.2d 725, 729 (R.I.1994)).

⁵⁶ Auger, 44 A.3d at 1231 (quoting Wood v. Peckham, 98 A.2d 669, 671 (R.I. 1953)); Mattos, 789 A.2d at 907.

⁵⁷ Perfect Puppy, Inc., 98 F. Supp. 3d at 422-23.

⁵⁸ Auger, 44 A.3d at 1231; O'Neil, 617 A.2d at 110.

⁵⁹ *Id.* (emphasis in original).

⁶⁰ O'Neil, 617 A.2d at 109.

⁶¹ See Mattos, 789 A.2d at 907-908.

⁶² O'Neil, 617 A.2d at 110 (internal quotations omitted).

state law providing a general prohibition on excessive noise did not preempt the field of noise regulation because it lacked such complexities.⁶³

Vesting Exclusive Power: A local law is preempted if the state legislature has granted a body “exclusive jurisdiction to regulate” a matter.⁶⁴ For example, Rhode Island state law grants the public utilities commission “the exclusive power and authority to supervise, regulate, and make orders governing the conduct of companies offering ... energy, communication, and transportation services and water supplies....”⁶⁵ Merely granting a state administrative agency the power to issue “rules, regulations, and procedures” on a particular matter does not confer exclusive authority nor preempt local law.⁶⁶

3. Preemption Analysis of Rhode Island State Laws

The previous section explained how Rhode Island courts generally analyze conflict and field preemption. This section applies those rules to analyze the preemptive effect of seven Rhode Island state laws: the cigarette tax law, ENDS license law, use of tobacco by minors law, Stop the Illegal Sale of Tobacco Products to Children Act, age of majority law, and Rhode Island General Law § 45-6-6.

I. Cigarette Tax Law

The Rhode Island state cigarette tax law imposes several requirements related to tobacco sales and distribution. First, the law requires tobacco product vending machines,⁶⁷ importers, distributors, and dealers (i.e. retailers) to acquire and maintain a license.⁶⁸ Violators are subject to civil and administrative penalties.⁶⁹ The law also imposes a tax on cigarettes, smokeless tobacco, cigars, and pipe tobacco products sold or offered for sale, prohibits certain activities such as selling untaxed tobacco products, provides civil and criminal penalties for noncompliance, and provides an administrative process for resolving disputes.⁷⁰ The law does not apply to ENDS.

A. There is likely no conflict preemption.

Nothing in the cigarette tax law conflicts with a local Tobacco 21 law. The state law concerns taxation; licensing and other substantive requirements and prohibitions are designed to assist the state in tax collection. Notably, the law resides in Rhode Island General Laws Title 44, titled “Taxation.”⁷¹ Moreover, merely granting a license to retailers to sell tobacco products does not itself conflict with a local Tobacco 21 law that only raises the minimum age for tobacco sales.

⁶³ Auger, 44 A.3d at 1230-1231 (“The General Assembly chose to employ a rifle rather than a shotgun when it enacted the two statutes cited by defendant with respect to the subject matter of excessive noise from personal broadcasting devices; it certainly did not enact a ‘complex regulatory scheme,’ as occurred in the cases in which we have held that the General Assembly intended to occupy the field.”). The Rhode Island Supreme Court contrasted the excessive noise statutes with the public utilities statutes found to preempt the field of public utilities regulation in *O’Neil*. *Id.*

⁶⁴ *O’Neil*, 617 A.2d at 107.

⁶⁵ R.I. GEN. LAWS § 39-1-1(c).

⁶⁶ See Auger, 44 A.3d at FN10; Mattos, 789 A.2d at 907.

⁶⁷ R.I. GEN. LAWS § 44-20-7.

⁶⁸ *Id.* § 44-20-2.

⁶⁹ *Id.* §§ 44-20-3, -8

⁷⁰ *Id.* § 44-20-12 to -55.

⁷¹ *Id.*, tit. 44.

B. There is likely no field preemption of a local Tobacco 21 law.

i. There is no express preemption provision.

The cigarette tax law does not contain an express preemption provision.

ii. The remaining three factors favor field preemption, but the preempted field is limited to taxation.

Under the remaining three factors to assess field preemption, it is unlikely that a court would find that the cigarette tax law preempts a local Tobacco 21 law. A local Tobacco 21 law would not disrupt the overall regulatory scheme established by the cigarette tax law. Notwithstanding a local Tobacco 21 law, tobacco retailers would still be required to obtain a state license prior to selling tobacco products, and the other prohibitions on selling, distributing, acquiring, holding, owning, possessing, transporting, or importing untaxed tobacco products would remain in place. In short, nothing in a local Tobacco 21 law would impede the state's intent to tax tobacco products. The next factor looks at the complexity of the state regulatory scheme. Although a court likely would find the state regulatory scheme concerning cigarette and other tobacco product taxation sufficiently complex to warrant preemption, the preempted field likely does not include the minimum age for tobacco sales because the state regulatory scheme does not relate to minimum age requirements. The final factor asks whether the state has vested exclusive power in a body. The cigarette tax law does not explicitly vest exclusive authority in a body. Therefore, a local Tobacco 21 law that only raises the minimum age for tobacco sales should avoid preemption under the state cigarette tax law.

II. Electronic Nicotine-delivery System License Law

The electronic nicotine-delivery system license law requires distributors and dealers (i.e. retailers) of ENDS to have a license to sell such devices⁷² and imposes fines for noncompliance.⁷³ This license is distinct from the license required under the cigarette tax law, as Rhode Island currently does not tax ENDS.⁷⁴ Analysis of this state law is relevant only if a local Tobacco 21 law includes ENDS.

A. There is likely no conflict preemption.

Nothing contained in the ENDS license law conflicts with a local Tobacco 21 law that addresses ENDS. Merely granting a license to sell ENDS does not itself conflict with a local Tobacco 21 law that only raises the minimum age for tobacco sales.

B. There is likely no field preemption.

i. There is no express preemption provision.

The ENDS license law does not contain an express preemption provision.

ii. The remaining three factors likely weigh against field preemption.

If a court weighs the remaining three factors to assess field preemption, it is unlikely that it would find that the ENDS license law preempts a local Tobacco 21 law. First, a local Tobacco 21 law would not disrupt the overall regulatory scheme established by the ENDS license law. Notwithstanding a

⁷² R.I. GEN. LAWS § 23-1-56(a).

⁷³ *Id.* § 23-1-57 to -58.

⁷⁴ *SEE* PUB. HEALTH LAW CTR., E-CIGARETTE REGULATIONS - RHODE ISLAND (2016), <http://publichealthlawcenter.org/resources/e-cigarette-regulations-rhode-island>.

local Tobacco 21 law, ENDS retailers would be required to obtain a state license before selling ENDS, and thus the local Tobacco 21 law would not impede the state’s purpose in ensuring only licensed retailers sell ENDS. Second, a court is unlikely to find the state regulatory scheme concerning ENDS licensing sufficiently complex to warrant preemption because the ENDS license law consists of only four sections and, unlike the cigarette tax law, does not include its own administrative procedures. Finally, the ENDS law does not explicitly vest exclusive authority in a body. Therefore, a local Tobacco 21 law that only raises the minimum age for tobacco sales should avoid preemption under the state ENDS license law.

III. Use of Tobacco by Minors Law

The use of tobacco by minors law (“UTML”) prohibits individuals younger than 18 years of age from publicly using or possessing tobacco.⁷⁵ Tobacco products include “any product containing tobacco ... that can be used for, but whose use is not limited to, smoking, sniffing, chewing, or spitting of the product.”⁷⁶

A. There is no conflict preemption.

Nothing contained in the UTML conflicts with a local Tobacco 21 law aimed at tobacco *sales*. The UTML imposes a minimum age to *possess* or *use* tobacco products in public and does not regulate purchase and sale. A local Tobacco 21 law that addresses only sales would not conflict with the UTML because it is not impossible to simultaneously comply with both the UTML and the local Tobacco 21 law and thus the local Tobacco 21 law is not “inconsistent” with the state statute.

B. There is likely no field preemption.

i. There is no express preemption provision.

The UTML does not contain an express preemption provision.

ii. The remaining three factors likely weigh against field preemption

Weighing the three remaining factors, a court would likely conclude there is no field preemption with respect to the UTML. A local Tobacco 21 law would not disrupt the overall regulatory scheme established by the UTML. Regardless of a local Tobacco 21 law, individuals under 18 years of age would still be prohibited from possessing or using tobacco products in public. Indeed, the law would advance the state’s regulatory scheme by making it less likely that minors will have access to tobacco products and thus less likely they would possess or use tobacco products. Moreover, a court is unlikely to find the UTML complex enough to warrant preemption because the law consists of only two sentences within a single statutory section. Finally, the UTML does not address enforcement and thus cannot be read as vesting exclusive power in a body.

IV. An Act to Stop the Illegal Sale of Tobacco Products to Children

An Act to Stop the Illegal Sale of Tobacco Products to Children (ASISTPC) prohibits the sale, offer for sale, giving, or delivering of tobacco products to persons younger than 18, as well as the purchase of tobacco products by individuals younger than 18.⁷⁷ Tobacco products include “any product containing

⁷⁵ R.I. GEN. LAWS § 11-9-14.

⁷⁶ *Id.* § 11-9-13.4(12).

⁷⁷ *Id.* § 11-9-13.

tobacco ... that can be used for, but whose use is not limited to, smoking, sniffing, chewing, or spitting of the product.”⁷⁸

The law explicitly states a legislative intent to “preserve and protect the health of children by: (1) stopping the illegal sale of tobacco to children, and (2) by severely punishing those who disregard the laws relating to the illegal sale of tobacco products to children.”⁷⁹ To those ends, the ASISTPC empowers the Department of Behavioral Healthcare, Developmental Disabilities and Hospitals (BHDDH) to “develop, monitor, and aggressively enforce health rules and regulations pertaining to stopping the illegal sale of tobacco products to children.”⁸⁰ It also requires BHDDH to conduct investigations and coordinate enforcement with other state and local agencies,⁸¹ provide appropriate signage to tobacco product retailers,⁸² and promulgate rules and regulations to implement the act.⁸³

The ASISTPC also (1) prohibits the distribution of free tobacco products to minors and within 500 feet of schools;⁸⁴ (2) provides rules on the sale and distribution of tobacco products through the mail;⁸⁵ (3) prohibits licensed tobacco importers, distributors, and dealers from selling, distributing, or delivering tobacco products to individuals younger than 18;⁸⁶ (4) restricts the location of tobacco vending machines and sets a minimum cigarette package size;⁸⁷ and (5) provides several penalty and enforcement provisions.⁸⁸

A. There is likely no conflict preemption.

Although the ASISTPC regulates similar behavior as a local Tobacco 21 law, a carefully drafted local law should not conflict with the state statute. The statute prohibits tobacco sales to and purchases by individuals under the age of 18. A local Tobacco 21 law that prohibits tobacco sales to individuals under the age of 21 is not “inconsistent with [the] state statute relating to the same subject,”⁸⁹ because it is not impossible to simultaneously comply with both the state and local law.⁹⁰ Indeed, compliance with the local Tobacco 21 law necessarily requires compliance with the ASISTPC.

Similarly, a local Tobacco 21 law would not conflict with the ASISTPC simply because it imposes *stricter* requirements. The ASISTPC intends to reduce the harmful health and economic effects of tobacco use by children.⁹¹ A local Tobacco 21 law furthers this goal by making it less likely that children will have access to tobacco products. Further, the ASISTPC does not *expressly permit* individuals 18 and over to purchase tobacco products nor does it *expressly permit* tobacco retailers to sell to such individuals. Therefore, nothing in the ASISTPC indicates a legislative intent to impose maximum

⁷⁸ *Id.* § 11-9-13.4(12).

⁷⁹ *Id.* § 11-9-13.3.

⁸⁰ *Id.* § 11-9-13.5.

⁸¹ *Id.* § 11-9-13.6.

⁸² *Id.* §§ 11-9-13.7, 13.8.1.

⁸³ *Id.* § 11-9-13.16.

⁸⁴ *Id.* § 11-9-13.10.

⁸⁵ *Id.* § 11-9-13.11.

⁸⁶ *Id.* § 11-9-13.8.

⁸⁷ *Id.* § 11-9-13.1.

⁸⁸ *Id.* §§ 11-9-13.10 to 13.13, 13.15.

⁸⁹ See *Berberian v. Hous. Auth. of City of Cranston*, 315 A.2d at 747.

⁹⁰ See *Vukic*, 609 A.2d at 941-42.

⁹¹ R.I. GEN. LAWS § 11-9-13.3.

standards, and “the statute [likely] sets a floor rather than a ceiling in regulating” the minimum age for tobacco sales.⁹²

There is one important caveat. The ASISTPC contains a provision requiring that signage “be prominently displayed for public view, wherever tobacco products are sold at each cash register, each tobacco and/or electronic nicotine-delivery systems vending machine, or any other place from which tobacco products and/or electronic nicotine delivery systems are sold.”⁹³ The signs must use a specified typeface and coloring, contain the phone number for and any other information required by BHDDH, and contain the following wording in both English and Spanish:

“THE SALE OF CIGARETTES, TOBACCO AND ELECTRONIC NICOTINE-DELIVERY SYSTEM PRODUCTS TO PERSONS UNDER THE AGE OF 18 IS AGAINST RHODE ISLAND LAW (§ 11-9-13.8(1), Rhode Island Statutes) PHOTO ID FOR PROOF OF AGE IS REQUIRED FOR PURCHASE.”⁹⁴

A local Tobacco 21 law may not modify this requirement, and even in jurisdictions adopting a local Tobacco 21 law, tobacco retailers must comply with state law by posting this sign. To avoid confusion, a local Tobacco 21 law should, at minimum, require a second sign explaining that local law prohibits the sale of tobacco products to persons under 21 years of age in the city, county or town where the local law applies.

B. There is likely no field preemption.

i. There is no express preemption provision.

The ASISTPC does not contain an express preemption provision.

ii. The remaining three factors likely weigh against field preemption

Under the remaining three factors to assess field preemption, a court should not find that the ASISTPC preempts a carefully crafted local Tobacco 21 law.

A local Tobacco 21 law would not disrupt the overall regulatory scheme established by the ASISTPC. The ASISTPC aims to reduce the negative health and economic effects of minors using tobacco, by, among other things, prohibiting the sale of tobacco products to persons under the age of 18. A local Tobacco 21 law furthers, rather than undermines, this purpose by reducing the likelihood that retailers will sell to minors. Moreover, a federal district court interpreting Rhode Island law found that “[i]ncreasing restrictions on the sale of a regulated good does not constitute a disruption of the state’s regulatory scheme.”⁹⁵ This is because the state regulatory scheme does not “demonstrate an intention

⁹² See *Mattos*, 789 A.2d at 907.

⁹³ R.I. GEN. LAWS § 11-9-13.7(3).

⁹⁴ *Id.* § 11-9-13.7(2).

⁹⁵ *Perfect Puppy, Inc.*, 98 F.Supp.3d at 423. This case involved an East Providence ordinance making it unlawful to sell dogs and cats in commercial establishments, with an exception for “providing space and appropriate care for animals owned by a city animal shelter or animal control agency, humane society, or non-profit rescue organization ... for the purpose of public adoption.” *Id.* at 413. The plaintiff, a pet store owner with a valid Rhode Island state pet store license challenged the ordinance on a number of grounds, including that it was preempted by state laws “governing the conditions in pet stores, the health of dogs sold from breeders and pet stores, and pet store licensing.” *Id.* at 422-423. The court held that the state law did not preempt the local ordinance because the ordinance “mirrored and extended” the state law’s purpose to ensure “the ‘humane care and treatment’ of animals, and the restriction of the sale of diseased animals,” and because these goals “do not demonstrate an intention to guarantee the availability of dogs and cats for purchase from retail establishments.” *Id.* at 423.

to guarantee the availability of [the regulated good] for purchase from retail establishments.”⁹⁶ This reasoning applies equally to the ASISTPC, which does not indicate any legislative intent to guarantee that retailers can sell tobacco products to individuals between the ages of 18 and 21.

Further, a court is unlikely to find the ASISTPC sufficiently complex to preempt the field of tobacco sales regulations. Unlike the preemptive public utility laws in *O’Neil*, the ASISTPC does not establish an administrative body to consider the regulatory complexities and render decisions, nor does it provide any avenue to address municipal concerns. Rather, the ASISTPC simply prohibits certain conduct, authorizes BHDDH to enforce these prohibitions, and provides penalties for noncompliance. In *State ex rel. City of Providence v. Auger*, 44 A.3d 1218, the Rhode Island Supreme Court found that state statutes prohibiting excessive noise from “personal broadcasting devices” do not preempt the field of noise regulation, which can be regulated through local ordinances. This is because the excessive noise statutes lack the complexities, such as establishing an administrative body and providing avenues to redress municipal concerns, found in state statutes that preempt their respective regulatory field.⁹⁷ A similar analysis should apply here.

The final factor asks whether the state law has vested exclusive authority for one body to regulate a subject matter. The ASISTPC mandates that BHDDH “develop, monitor, and aggressively enforce health rules and regulations pertaining to the illegal sale of tobacco products to children,”⁹⁸ and “promulgate the rules and regulations necessary to fulfill the intent of [the ASISTPC].”⁹⁹ While this is fairly comprehensive authority vested in BHDDH, the ASISTPC does not vest “exclusive” authority in BHDDH or any other body. To the contrary, the ASISTPC explicitly contemplates local involvement in implementing and enforcing the law.¹⁰⁰ Moreover, BHDDH’s rulemaking authority does not in itself confer exclusive authority or preempt local law.¹⁰¹

Although the ASISTPC regulates subject matter that is similar to a local Tobacco 21 law, it likely does not preempt the entire field of minimum age requirements for tobacco sales.

V. Age of Majority Law

The Rhode Island Age of Majority law (“AML”) defines an adult (otherwise referred to as “majority”) for specific purposes and states, in relevant part:

“Notwithstanding any general or public law or provision of the common law to the contrary, all persons who have attained the age of eighteen (18) years shall be deemed to be persons of full legal age.”¹⁰² These persons shall have all the duties and obligations, rights, and privileges imposed or granted by law upon

⁹⁶ *Id.*

⁹⁷ *Auger*, 44 A.3d at 1230.

⁹⁸ R.I. GEN. LAWS § 11-9-13.5.

⁹⁹ *Id.* § 11-9-13.16.

¹⁰⁰ *Id.* §§ 11-9-13.6 (“The [BHDDH] shall: (1) Coordinate and promote enforcement of the provisions of this chapter and serve as the primary liaison from this department to *other state and local agencies, departments, or divisions* on issues pertaining to stopping children’s access to tobacco and electronic nicotine-delivery systems. ... (3) Investigate *concurrently with other state and local officials* violations of this chapter. ... (5) Seek enforcement, *concurrently with other state and local officials*, of the penalties as detailed in this chapter.”), 11-9-13.12(a) (“Any *local or state* of Rhode Island police department or the attorney general, their officers or agents, shall issue a citation for any violation of the requirements or prohibitions of this chapter.”) (emphasis added).

¹⁰¹ See *Auger*, 44 A.3d at FN10; *Mattos*, 789 A.2d at 907.

¹⁰² R.I. GEN. LAWS § 15-12-1(a).

*those persons who have previously attained the age of twenty-one (21) years.*¹⁰³

As discussed below, we believe that more likely than not there is no conflict preemption with respect to the AML, but there is uncertainty because few legal sources have interpreted the law. Similarly, a court would unlikely find field preemption with respect to the AML, though we have not discovered any cases that have undertaken a field preemption analysis of the law. Importantly, the few legal sources that have interpreted the AML are not directly relevant to a Tobacco 21 law, but they do provide limited insight as to how Rhode Island courts interpret the law.

There are good arguments in favor of local authority to adopt Tobacco 21 notwithstanding the AML. Notably, the few authoritative sources that have interpreted the AML have declined an expansive interpretation. We do not believe that a narrow local restriction *on tobacco retailers* (thus, having no *direct* impact on 18-year-olds) infringes upon the “duties and obligations, rights, and privileges” of individuals under the age of 21.¹⁰⁴ Likewise, a preemption ruling striking down a local Tobacco 21 law based on the AML may have a considerably broad effect in other areas of the law. For example, minimum age requirements may be advisable, for public health or welfare reasons, for a number of different fields and industries. These include, but are not limited to, existing minimum age requirements for alcohol sales and purchases (minimum age of 21)¹⁰⁵ and handgun sales (minimum age of 21).¹⁰⁶

A. There is likely no conflict preemption.

As stated above, the few legal sources interpreting the AML do not bear direct relevance to a Tobacco 21 law, but they are instructive in how Rhode Island courts construe the AML more generally.

Majority and minority are “status[es] created by law and subject to change by legislative enactment.”¹⁰⁷ In other words, the AML is not by itself a right; rather, the AML is a decision by the state to remove age-based barriers for specific purposes. As one court put it in explaining this principle, the state may very well give an 18-year-old the right to vote and the right to enter into a binding contract but hold back the right to sit on a jury.¹⁰⁸ This is an important distinction because there is likely a limit to how broadly a court would construe the AML. Arguing that 18-year-olds must be treated like 21-year-olds for all purposes whatsoever is likely an overly expansive interpretation of the AML.

The counter-argument to this distinction is that that the AML explicitly states that it applies “[n]otwithstanding any general or public law or provision of the common law to the contrary.” Read in isolation, this provision seemingly indicates that the AML supersedes *any* existing or future law imposing a minimum age requirement greater than 18. However, in the few existing opinions on this issue, Rhode Island courts have declined such an interpretation. Rhode Island courts have upheld state laws imposing a minimum age requirement of 21 for serving on juries,¹⁰⁹ preserving Family Court jurisdiction over

¹⁰³ *Id.* § 15-12-1(b).

¹⁰⁴ *Id.* § 15-12-1(b).

¹⁰⁵ *Id.* §§ 3-8-1, -6(a)(1)-(2).

¹⁰⁶ *Id.* § 11-47-37.

¹⁰⁷ *Calcagno v. Calcagno*, 391 A.2d 79, 84 (R.I. 1978).

¹⁰⁸ *State v. Spivey*, 328 A.2d 414, 419 (R.I. 1974).

¹⁰⁹ *Id.*

individuals between 18 and 21,¹¹⁰ and requiring parental support past age 18 for individuals unable to take care of themselves.¹¹¹

In one case analyzing whether the AML required a Family Court to relinquish jurisdiction over an individual when he or she turned 18, the Rhode Island Supreme Court discussed the state legislature's decision to raise the "drinking age to nineteen as of July 1, 1980, and to twenty as of July 1, 1981."¹¹² The court commented that, "[t]his action clearly indicates that the Legislature, like many parents, recognizes that a legislative fiat classifying one as a person of full age does not ipso facto bestow on eighteen-year-olds the maturity of mind and soundness of judgment looked for in an adult."¹¹³ Indeed, Rhode Island state law contains numerous provisions imposing minimum age requirements.

State laws imposing a minimum age requirement of 21 include, but are not limited to: (1) admission to the state legal bar;¹¹⁴ (2) practicing as a hearing aid dealer and fitter,¹¹⁵ architect,¹¹⁶ or clinical social worker;¹¹⁷ (3) receiving a certification as a constable,¹¹⁸ a DMV instructor's license,¹¹⁹ or a commercial driver's license;¹²⁰ (4) driving a school bus or any motor vehicle in use for transporting persons or property for compensation;¹²¹ (5) obtaining a permit to possess explosives¹²² or to carry a concealed pistol or revolver;¹²³ (6) purchasing a pistol or revolver;¹²⁴ (7) selling or offering for sale blank cartridges;¹²⁵ and (8) operating a motorcycle, motor scooter, or motor-driven cycle without a helmet.¹²⁶ Several local laws also impose minimum age requirements greater than 18, although we do not know whether any of these provisions have withstood legal challenge.¹²⁷

If a court rules that a local Tobacco 21 law conflicts with the AML, it could open the door to additional challenges under the AML that would potentially jeopardize other laws imposing similar minimum age requirements greater than 18. Moreover, the existence of the numerous state laws cited above significantly undermines any preemption argument by indicating that the Rhode Island state legislature never intended the AML to prohibit all minimum age requirements greater than 18 years of

¹¹⁰ In re Richard P., 451 A.2d 274, 277 (R.I. 1982).

¹¹¹ Siravo v. Siravo, 424 A.2d 1047 (1981).

¹¹² In re Richard P., 451 A.2d at 277.

¹¹³ *Id.*

¹¹⁴ Rules RI R S CT ART II ADMIS Rule 1(b).

¹¹⁵ R.I. GEN. LAWS § 5-49-7(a)(1).

¹¹⁶ *Id.* § 5-1-8(a).

¹¹⁷ *Id.* § 5-39.1-8(d)(1).

¹¹⁸ *Id.* § 9-5-10.1(a).

¹¹⁹ *Id.* § 31-10-41(3).

¹²⁰ *Id.* §§ 31-10.3-14(c)(1), -15(a)(1).

¹²¹ *Id.* § 31-10-5(a).

¹²² *Id.* § 23-28.28-5(b).

¹²³ *Id.* § 11-47-11(a).

¹²⁴ *Id.* § 11-47-37.

¹²⁵ *Id.* § 11-13-5.

¹²⁶ *Id.* § 31-10.1-4.

¹²⁷ See, e.g., Burrillville, RI § 8-234(4) (prohibiting pistol and revolver sales to individuals under 21); Central Falls, RI § 4-702 (prohibiting individuals under 21 from being appointed a member of the fire division); Cranston, RI § 5.64.063 (entertainment permit applicants must be 21); Narragansett, RI § 46-10 (prohibiting the purchase, possession, and consumption of alcohol by individuals under 21); Providence, RI § 16-9 (prohibiting the sale, delivery, and possession of airplane glue to/by individuals under 21); Providence, RI § 24-57 (individuals must be 21 to obtain a chauffeur's license); North Kingstown, RI § 21-22(3) (group family day care home must be occupied by an individual at least 21 years old).

age.¹²⁸ However, we do not know whether a court would be more willing to strike down a local minimum age requirement under the AML, compared to a state minimum age requirement.

B. There is likely no field preemption.

i. There is no express preemption provision.

The AML does not contain an express preemption provision.

ii. The remaining three factors weigh against field preemption.

Weighing the remaining three factors, a court would likely conclude that there is no field preemption with respect to the AML. The field itself is arguably very broad and somewhat amorphous – minimum age requirements. The second factor relates to whether a local law will disrupt the state’s overall regulatory scheme. Considering the state’s own imposition of varying minimum age requirements – for certain professions, the purchase of certain products, etc. – it seems unlikely that a court would find that a local Tobacco 21 law would impede the state’s purpose in granting 18 year olds legal *status* as an adult. The third factor looks at the complexity of the state regulatory scheme. The AML consists of a single statutory section containing two subsections and a total of two sentences. It does not establish any sort of administrative body, set forth any prohibited acts, nor provide penalties for noncompliance. In short, the AML lacks the level of detail found in other preempted fields. The fourth factor asks whether the law vests exclusive authority in a body. The AML does not vest *any* authority in *any* body.

VI. Rhode Island General Law § 45-6-6

Rhode Island state law generally provides that local jurisdictions may not “impose or at any time be construed to continue to impose, any penalty for the commission or omission of any act punishable as a crime, misdemeanor, or offense, by the statute law of the state.”¹²⁹ Although this statute clearly applies to criminal acts or omissions, it does not indicate whether “offense” refers to criminal offenses only or more broadly to any proscribed act, whether civil or criminal. However, this distinction does not affect the statute’s application to a local Tobacco 21 law because preemption under this law is limited in two ways.

First, the statute does not apply when the General Assembly expressly grants local jurisdictions the authority to regulate.¹³⁰ For example, the statute did not preempt a local law prohibiting the obstruction of public walkways despite a state law criminalizing the same behavior because the General Assembly expressly authorized local jurisdictions to regulate such obstructions.¹³¹ Second, the statute only preempts local laws applicable to the *exact* same behavior. For example, the statute did not preempt a local law imposing penalties for selling alcohol at nude adult entertainment venues when state law

¹²⁸ See Auger, 44 A.3d at 1229 (“The presence or absence of such a conflict ‘depends on what the Legislature intended when it enacted the statute.’”) (internal citations omitted).

¹²⁹ R.I. GEN. LAWS § 45-6-6 (“No ordinance or regulation, made by a town council, shall impose or at any time be construed to continue to impose, any penalty for the commission or omission of any act punishable as a crime, misdemeanor, or offense, by the statute law of the state.”).

¹³⁰ See *State v. Berberian*, 214 A.2d 465 (R.I. 1965); *Anabell's Ice Cream Corp. v. Town of Glocester*, 925 F. Supp. 920, 924-26 (D.R.I. 1996).

¹³¹ *State ex rel. Providence v. Manning*, No. NO. P3-92-1541, 1992 WL 813656, at *4 (R.I. Super. Nov. 13, 1992) (unpublished opinion). The court noted that the General Assembly had the opportunity to “specifically legislate that [45-6-6] overrides the authority granted [to] local [jurisdictions] through [45-6-1],” but had declined to take such action. *Id.* This is the same statutory section authorizing local jurisdictions to regulate the purchase and sale of commodities and merchandise within their jurisdiction.

regulates both “the circulation of obscene publications and shows” and alcohol sales, but “not the combination of the two.”¹³²

With the exception of conduct prohibited by the ASISTPC, a local Tobacco 21 law aimed only at sales would not impose penalties for the exact same act “punishable as a crime, misdemeanor, or offense” under Rhode Island state law. It would not penalize selling tobacco products without a valid state license (cigarette tax law), selling or distributing untaxed tobacco products (cigarette tax law), selling ENDS without a valid state license (ENDS license law), a minor publicly possessing or using tobacco products (UTML), or most of the conduct proscribed by the ASISTPC.¹³³ Moreover, even though both a local Tobacco 21 law and ASISTPC would penalize selling tobacco products to individuals under 18-years-old, a local jurisdiction’s delegated authority to regulate the purchase and sale of goods likely prevents § 45-6-6 from preempting a local Tobacco 21 law. Therefore, because a local Tobacco 21 law would either not punish the exact same act (e.g. prohibiting sales to individuals ages 18-20) or do so under authority expressly delegated by the General Assembly, § 45-6-6 likely would not preempt a local Tobacco 21 law.

4. Conclusion

This memorandum analyzes home rule and delegated authority, and six state statutes, to assess whether local governments have the authority to enact and enforce a Tobacco 21 law and whether state law preempts such authority. While this issue has not been tested in Rhode Island courts, we believe there is a legally viable path forward should a local jurisdiction choose to adopt a Tobacco 21 policy, and a local ordinance should be carefully crafted to avoid preemption.

¹³² State v. Chiello, No. NO. K3-95-82A, 1995 WL 941448, at *7 (R.I. Super. July 10, 1995) (unpublished opinion).

¹³³ The ASISTPC imposes penalties for (1) noncompliance with signage requirements, R.I. GEN. LAWS § 11-9-13.13(a); (2) selling tobacco products in “any form other than an original, factory-wrapped package,” *Id.* § 11-9-13.13(b)-(c); (3) selling single cigarettes, *Id.* § 11-9-13.13(c); (4) distributing or selling tobacco products through the mail to individuals under the age of 18, *Id.* § 11-9-13.11(c); (5) selling tobacco products without a retail tobacco products dealer license, *Id.* § 11-9-13.15; and (6) selling tobacco products to individuals under the age of 18, *Id.* § 11-9-13.13(b). The AML does not proscribe any conduct. *See Id.* § 15-12-1.