THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM CHARLESTON COUNTY

COURT OF COMMON PLEAS

HON. DEADRA L. JEFFERSON, CIRCUIT COURT JUDGE

CIVIL ACTION NO. : 2006-CP-10-3501

Beachfront Entertainment, Inc., d/b/a
Bert's Bar, John Elder, Mary Lynn Sheppard
and Cole Charles, Appellants,

vs.

Town of Sullivan's Island, Respondent.

AMICUS CURIAE BRIEF OF THE TOBACCO CONTROL LEGAL CONSORTIUM, JOINED BY AMERICAN CANCER SOCIETY, AMERICAN HEART ASSOCIATION, AMERICAN LUNG ASSOCIATION, AMERICAN LUNG ASSOCIATION-SOUTHEAST REGION, AMERICAN MEDICAL ASSOCIATION, AMERICANS FOR NONSMOKERS' RIGHTS, CAMPAIGN FOR TOBACCO-FREE KIDS, LEAGUE OF WOMEN VOTERS OF THE CHARLESTON AREA, NATIONAL ASSOCIATION OF LOCAL BOARDS OF HEALTH, SOUTH CAROLINA AFRICAN AMERICAN TOBACCO CONTROL NETWORK, SOUTH CAROLINA MEDICAL ASSOCIATION, AND TRIDENT UNITED WAY.

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In this Brief, *Amici* will address the following issues:

STATEMENT OF THE ISSUES

1. Does South Carolina's law that regulates sales of tobacco products to minors expressly preempt the Town of Sullivan's Island's ("Town") home rule authority to enact a secondhand smoke ordinance where, by its history, context, and terms, this law applies only to sales of tobacco products to minors?
2. Is the Town's home rule authority to enact this ordinance impliedly preempted by or otherwise inconsistent with South Carolina's Clean Indoor Air Act, which applies only to a limited number of public places, invites local variation, and does not expressly authorize or require that smoking be permitted in all other unspecified public places?
3. Does either the state or federal Occupational Safety and Health ("OSH") acts preempt the Town's home rule authority to enact this ordinance where no state or federal OSH standard regulating secondhand smoke in the workplace has been promulgated?

STATEMENT OF THE CASE

Amici adopt the Town's Statement of the Case.

STATEMENT OF THE FACTS

Amici adopt the Town's Statement of the Facts. In addition, *Amici* note that the Town made several findings relating to secondhand smoke which incorporate findings and conclusions by the U.S. Surgeon General and other governmental and *quasi*-governmental agencies about the harmful effects of secondhand smoke. Town of Sullivan's Island, S.C., Code of Ordinances § 14-29 (SIC 30) (A)(1)-(15) (R. at 357-58)

(hereinafter "Town Code"). Further, as referred to by Appellants,[1] at least ten other South Carolina communities have enacted smoke-free ordinances since June of 2006, including: Aiken County, Beaufort County, Town of Bluffton, City of Charleston, City of Columbia, City of Greenville, Town of Hilton Head Island, Town of Liberty, Town of Mt. Pleasant, and Town of Surfside Beach.

SUMMARY OF ARGUMENT

South Carolina has long recognized the unique and important role that local governments serve in protecting public health and safety, as shown by its implementation of home rule authority for local governments. In serving this role, local governments in South Carolina and elsewhere have historically been leaders in protecting public health, including protecting their constituents from the harmful and deadly effects of secondhand smoke exposure. Thus, for example, pursuant to their home rule authority, the Town and at least ten other South Carolina communities have adopted smoke-free work and/or public places ordinances. These communities include Charleston and Columbia, two of South Carolina's largest cities.

Home rule requires that laws relating to local governments be construed so as to respect and preserve their authority as much as possible. Applying this principle, and the rules of statutory construction, to the state law provisions that Appellants claim preempt local government authority to enact secondhand smoke ordinances, it is evident that the Town's ordinance is not preempted. Thus, the trial court correctly held that the Town's ordinance is not only within the scope of the Town's home rule authority, but is also consistent with other state law and is not preempted by state or federal law.

[1] Appellants' Br. 4, n.2; and 30, n. 69; and Appellants' Reply Br. 2, n. 3.

ARGUMENT

I. SULLIVAN'S ISLAND AND OTHER LOCAL GOVERNMENTS ARE WELL WITHIN THEIR POWERS AND TRADITIONAL ROLES IN PROHIBITING SECONDHAND SMOKE IN WORKPLACES.

Local control over public health decision making is a well-established principle of democratic government, in South Carolina and elsewhere. Public health protection is a core attribute of the police power commonly delegated to municipalities. *See* 6A McQuillin, Municipal Corporations § 24 (3rd ed. 1997). As this Court has noted, the home rule concept is founded in part on the principle that local authorities are presumed to be familiar with local conditions and should have autonomy to tailor regulations to meet community needs and mores. *See Hospitality Ass'n of South Carolina, Inc. v. County of Charleston*, 320 S.C. 219, 230, 464 S.E.2d 113, 120 (1995) (noting that Home Rule Act was meant to give local governments the power to deal with problems at the local level because "different local governments have different problems that require different solutions"). There is no question that local authorities everywhere have a compelling basis for regulating secondhand smoke exposure because tobacco smoke is poisonous to everyone who breathes it. There is also no question that, as reflected in its adoption of home rule, South Carolina's public policy favors local government autonomy to address the problem of secondhand smoke more comprehensively or in different (but not conflicting) ways from state law, absent a clear manifestation of legislative intent to preempt this local authority.

A. There Is No Risk-Free Level of Exposure to Secondhand Smoke.

Secondhand smoke is a combination of smoke from the burning end of a tobacco product and smoke exhaled by the smoker. Town Code § 14-29 (SIC 30) (A)(1) (R. at 357).[2] The U.S. Environmental Protection Agency, the National Toxicology Program, the International Agency for Research on Cancer, and the U.S. Surgeon General have all designated secondhand smoke as a known human carcinogen, or cancer causing agent. Town Code § 14-29 (SIC 30) (A)(4)-(5) (R. at 357). *See also* U.S. Dept. of Health and Human Services, THE HEALTH CONSEQUENCES OF INVOLUNTARY EXPOSURE TO TOBACCO SMOKE: A REPORT OF THE SURGEON GENERAL, 6, 29-33, 576 (2006), *available at* http://www.surgeongeneral.gov/library/secondhandsmoke/report/ (hereinafter "2006 SURGEON GENERAL'S REPORT").

The "massive and conclusive scientific evidence" of the adverse health effects of secondhand smoke is reviewed and summarized in the 2006 SURGEON GENERAL'S REPORT.[3] Because the 2006 SURGEON GENERAL'S REPORT is the most recent comprehensive discussion of the scientific research on secondhand smoke exposure and many of its conclusions are included in the secondhand smoke ordinances adopted by the Town and other South Carolina communities, it will be relied upon extensively herein.

Secondhand smoke is estimated to contain at least 250 chemicals known to be toxic or carcinogenic. 2006 SURGEON GENERAL'S REPORT, *supra*, at 29.[4] The 2006

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[2] *See also* U.S. Dept. of Health and Human Services, THE HEALTH CONSEQUENCES OF INVOLUNTARY EXPOSURE TO TOBACCO SMOKE: A REPORT OF THE SURGEON GENERAL, at 3 (2006) (hereinafter "2006 SURGEON GENERAL'S REPORT"), *available at* http://www.surgeongeneral.gov/library/secondhandsmoke/report/.

[3] Richard Carmona, Preface to 2006 SURGEON GENERAL'S REPORT, *supra* note 2, at iii.

[4] For specific information regarding the toxicity of secondhand smoke, see 2006 SURGEON GENERAL'S REPORT, *supra* note 2, at 27-82 (Chapter 2).

SURGEON GENERAL'S REPORT estimates that secondhand smoke is responsible for over 50,000 deaths annually from heart disease, cancer, SIDS, and other causes. *Id.* at 8. *See also* Town Code §14-29 (SIC 30) (A)(10) (R. at 357).[5] The REPORT'S major conclusions include the following:

> 1. Secondhand smoke causes premature death and disease in children and in adults who do not smoke.
> 2. Children exposed to secondhand smoke are at an increased risk for sudden infant death syndrome (SIDS), acute respiratory infections, ear problems, and more severe asthma. . . .
> 3. Exposure of adults to secondhand smoke has *immediate adverse effects* on the cardiovascular system and causes coronary heart disease and lung cancer.

2006 SURGEON GENERAL'S REPORT, *supra,* at 11 (emphasis added). *See also* Town Code §14-29 (SIC 30) (A)(7)-(9) (R. at 357).

The 2006 SURGEON GENERAL'S REPORT finds that secondhand smoke is specifically harmful to children and youth, and notes that a child's exposure "of even a short duration may be relevant to acute effects, such as inducing or exacerbating an asthma attack." 2006 SURGEON GENERAL'S REPORT, *supra,* at 145.[6] These harmful effects have prompted the Surgeon General to warn parents against taking children to restaurants or other indoor public places that allow smoking. U.S. Dept. of Health and Human Services, SECONDHAND SMOKE, WHAT IT MEANS TO YOU 9 (2006) *available at* http://www.surgeongeneral.gov/library/secondhandsmoke/secondhandsmoke.pdf (consumer summary of 2006 SURGEON GENERAL'S REPORT). For children from non-smoking homes, such locations are likely the "principal point" of exposure to secondhand

[5] The harmful effects of secondhand smoke exposure have been documented for over twenty years. *See id.* at 4-7 and Tables 1.1, 1.2, and 1.3 for lists of previous Surgeon General Reports and reports from other sources that have addressed the adverse health effects of secondhand smoke exposure.

[6] For a comprehensive discussion of the harmful effects of secondhand smoke exposure on children, see *id.* at 257-420.

smoke. 2006 SURGEON GENERAL'S REPORT, *supra*, at 145. Youth are also more likely to be employed in industries such as food preparation and service jobs, which are less likely to have smoke-free workplace policies. *Id.* at 605. Thus, comprehensive secondhand smoke restrictions play a critical role in protecting children's health. *See id.* at 158.

Secondhand smoke exposure also has severe health consequences for pregnant women and other adults. For pregnant women, the evidence reviewed by the 2006 SURGEON GENERAL'S REPORT indicates that exposure to secondhand smoke may result in pre-term deliveries, as well as causing low birth weights. *Id.* at 194-205. *See also* Town Code §14-29 (SIC 30) (A)(7) (R. at 357) (finding that exposure to secondhand smoke can increase a pregnant woman's risk of delivering a low birth weight baby). For adult nonsmokers in general, exposure to secondhand smoke increases the risk of coronary heart disease by 25 to 30 percent, the risk of lung cancer by 20 to 30 percent (depending on the level and duration of exposure), as well as likely increases the risk of stroke. 2006 SURGEON GENERAL'S REPORT, *supra*, at 423-45, 509-32. *See also* Town Code §14-29 (SIC 30) (A)(9) (R. at 357) (finding that secondhand smoke exposure nearly doubles the risk of heart attack). Officials at the Centers for Disease Control and Prevention ("CDC") note that even exposures as short as thirty minutes to a typical dose of secondhand smoke can affect the arterial function of non-smokers. Terry Pechacek and Stephen Babb, *How Acute and Reversible are the Cardiovascular Risks of Secondhand Smoke?*, 328 BMJ 980, 981 (2004). Because of the harmful effects of secondhand smoke, CDC officials have urged doctors to advise patients with heart disease, or who are simply at risk for heart disease, to avoid all indoor spaces that permit smoking. *Id.* at 982. For adult non-smokers, a workplace where smoking is permitted is "typically the

major contributor to their total secondhand smoke exposure." 2006 SURGEON GENERAL'S REPORT, *supra*, at 136 (emphasis added). *See also* Town Code §14-29 (SIC 30) (A)(11) (R. at 358).

In short, it is a matter of accepted scientific fact that secondhand smoke exposure is not a mere annoyance – it is one of the leading causes of death and disease. It is also a matter of accepted scientific fact that the only way to effectively limit secondhand smoke exposure, at least in enclosed areas, is to eliminate tobacco smoke from those areas. *See* Town Code §14-29 (SIC 30) (A)(3) and (14) (R. at 357, 358).[7] As the U.S. Surgeon General has concluded, "The scientific evidence indicates that there is no risk-free level of exposure to secondhand smoke." 2006 SURGEON GENERAL'S REPORT, *supra*, at 11. *See also* Town Code §14-29 (SIC 30) (A)(12) (R. at 358).

B. Local Governments Historically Have Exercised Their Broad Police Powers to Protect Public Health and Safety From Health Hazards Like Secondhand Smoke.

The Town enacted the ordinance at issue here "to preserve and improve the health, comfort and environment of the people in this Town." Town Code §14-29 (SIC 30) (B) (R. at 358). The Town's exercise of its police powers here is consistent with how municipalities across the U.S. exercise their police powers every day to protect public health in their communities from the harmful effects of secondhand smoke exposure. *See, e.g., Lexington Fayette County Food & Beverage Ass'n v. Lexington-Fayette Urban*

[7] *See also* 2006 SURGEON GENERAL'S REPORT, *supra* note 2, at 16 (regarding smoke-free workplaces in particular), and 635-649 (reviewing studies of effectiveness of various strategies to reduce secondhand smoke exposure). The REPORT also cites studies showing that smoke-free workplace policies, as a side benefit, have a significant beneficial impact on people trying to quit smoking and contribute to decreases in smoking among youth. *Id.* at 611-613. *See also* Town Code §14-29 (SIC 30) (A)(14) (R. at 358).

County Gov't, 131 S.W.3d 745, 749 (Ky. 2004) ("Among the police powers of government, the authority to promote and safeguard public health is a high priority. …Accordingly, a prohibition on smoking and the accompanying result of second-hand smoke, is well within the traditionally recognized authority of local government as a health matter.") (citations omitted); *City of Tucson v. Grezaffi*, 23 P.3d 675, 680 (Ariz. Ct. App. 2001) ("Regulation of smoking in restaurants is a matter of local concern."); and *Tri-Nel Mgmt., Inc. v. Bd. of Health of Barnstable*, 741 N.E.2d 37, 42-43 (Mass. 2001) ("ill effects of tobacco use, particularly when it involves minors, [is] a legitimate municipal health concern justifying municipal regulation").

As the 2006 SURGEON GENERAL'S REPORT points out, "The strongest, most comprehensive smoke-free laws have typically originated at the local level." 2006 SURGEON GENERAL'S REPORT, *supra*, at 578 (citations omitted). Indeed, this phenomenon is reflected in South Carolina, as demonstrated by the fact that the Town and several other communities have enacted ordinances that protect workers and the public from secondhand smoke in areas not addressed by South Carolina's Clean Indoor Air Act (CIAA). *Compare* Town Code §14-29 (SIC 30) (D) and (H) (R. at 359, 360), and S.C. Code Ann. §§ 44-95-10 to -60 (2002).[8]

Furthermore, as exemplified by these local ordinances, public support for smoke-free ordinances has increased significantly in recent years. The 2006 SURGEON GENERAL'S REPORT explains,

[8] The Town's ordinance, for example, prohibits smoking in all enclosed, indoor work spaces and workplaces (with some exceptions), and in any spaces outside an area where smoking is permitted if the secondhand smoke could enter the enclosed area. Town Code §14-29 (SIC 30) (D) and (H) (R. at 359, 360).

> [L]ocal governmental bodies tend to be relatively responsive to public sentiment, which increasingly favors comprehensive smoke-free legislation. Local smoke-free policy initiatives also typically engage communities in an intensive process of public education and debate. This process raises public awareness regarding the health risks that secondhand smoke exposure poses to nonsmokers, increases public support for policy measures that provide protections from these risks, and changes public attitudes and norms regarding the social acceptability of smoking.

2006 SURGEON GENERAL'S REPORT, *supra,* at 578. *See also* Town Code §14-29 (SIC 30) (A) (14) (R. at 358). This process clearly has been effective in South Carolina, as shown by the growing support for smoke-free ordinances even within the local business community. *See, e.g.*, Charleston Metro Chamber of Commerce, *Smoking in the Workplace Poll from Business Community Speaks Loud* (August 10, 2006) (reporting poll results indicating that 75% of Chamber members support governmental smoke-free workplace regulations, and 83% support smoke-free workplace policies in general) (R. at 169).

Smoke-free workplace ordinances enjoy widespread and growing public support not only in South Carolina, but also throughout the nation. For example, in a national survey taken in 2002, nearly 75 percent of surveyed respondents supported having smoke-free workplaces. 2006 SURGEON GENERAL'S REPORT, *supra,* at 594. Indeed, data collected after secondhand smoke ordinances were enacted indicate that support for these ordinances actually *increased* after implementation, including among bar patrons and owners. *Id*.

Finally, it is worth noting that, inconsistent with Appellants' suggestion otherwise,[9] smoke-free ordinances generally do not have negative economic effects on local businesses. The 2006 SURGEON GENERAL'S REPORT cites to numerous studies

[9] Appellants' Br. 8-9.

conducted during the past decade, and concludes, "Regardless of the outcome measured, the studies found no evidence of negative economic impacts." *Id.* at 613. Indeed, the Surgeon General cites studies which show that smoke-free restaurant ordinances actually resulted in *increased* tourism and/or retail sales. *Id.* at 615. *See also*, Mark K. Pyles et al., *Economic Effect of a Smoke-Free Law in a Tobacco-Growing Community*, 16 TOBACCO CONTROL 66 (2007) (finding that smoke-free ordinance implemented in Kentucky county had no negative economic impact on either restaurant or bar employment, and actually had positive effects on restaurant employment). Even, however, if it were true that the Town's ordinance has caused a negative economic impact on Appellants' business, as this Court previously declared,

> [W]e find no merit in the contention of the plaintiffs that the enforcement of the ordinance will result in financial loss to them, as affecting the validity of the ordinance. . . . [I]n this State the law will never, by any construction, advance a private interest to the destruction of a public interest; but, on the contrary, that it will advance the public interest, so far as it is possible, though it be to the prejudice of a private one.

Arnold v. City of Spartanburg, 201 S.C. 523, 538, 23 S.E.2d 735, 741 (1943) (upholding local liquor ordinance against claims that ordinance was prohibited by, or conflicted with, state licensing statute). *See also Denene, Inc. v. City of Charleston*, 359 S.C. 85, 97-99, 596 S.E.2d 917, 923-24 (2004) (discussing cases supporting the proposition that "no one has unfettered right to pursue a business detrimental to the public health, safety and welfare," and noting that even though city ordinance had a negative economic impact on bar owners, "quantifying peace, quietude, safety, order, and quality of life in a community is a normative decision best left to a legislative body").

Preemption of local control has an adverse effect on public health because it undermines the very entities which, traditionally, are in the vanguard of protecting public

health. Moreover, preemption of local control is contrary to the democratic principles underlying home rule. Thus, rigorous application of the requirement that legislative intent to preempt must be made clear serves not only the rule of law, but also the principles of democracy, particularly in a home-rule state.

II. THE ORDINANCE IS VALID BECAUSE SULLIVAN'S ISLAND HAS HOME RULE AUTHORITY TO ENACT IT, AND IT IS CONSISTENT WITH SOUTH CAROLINA'S CONSTITUTION AND GENERAL STATE LAW.

To determine the validity of a local ordinance, the Court first ascertains whether the local government had the authority to enact the ordinance. *South Carolina State Ports Auth. v. Jasper County*, 368 S.C. 388, 394-95, 629 S.E.2d 624, 627 (2006). If the local government had no such authority or its authority has been preempted, then the ordinance is invalid. *Id*. If the local government was empowered to enact the ordinance, however, then the Court determines whether the ordinance is inconsistent with South Carolina's Constitution or general law. *Id.*

The lower court correctly held that the Town's ordinance was within the scope of the Town's home rule authority.[10] Appellants do not appeal that holding, but rather argue that the Town's authority was preempted by state or federal law, and is inconsistent with other South Carolina law. To reach this conclusion, however, Appellants fail to properly apply the rules of statutory construction and the constitutional mandate that laws relating to local governments are to be construed in their favor. S.C. Const. art. VIII, § 17. *See also* S.C. Code Ann. §§ 4-9-25 (1986 & Supp. 2006); 5-7-10 and 5-7-30 (2004 & Supp. 2006). *See Hospitality Ass'n of South Carolina, Inc.*, 320 S.C. at 225, 464 S.E.2d at 117.

[10] Ct. of Common Pleas Order 7-8 (R. at 7-8).

A. Statutes Affecting Home Rule Authority Should Be Construed in Favor of Preserving This Authority As Much As Possible.

To preempt an entire field, an act must manifest a legislative intent that no other enactment may touch upon the subject in any way. *Denene, Inc. v. City of Charleston*, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002) (hereinafter "*Denene I*"). Legislative intent to preempt local regulations may be manifested in three ways: 1) by explicit language (or "express preemption"), 2) by indicating an intent to occupy the entire field of regulation (or "implied field preemption"), or 3) where the local regulation conflicts with state law, "such that compliance with both is impossible or the [local] law hinders the accomplishment of the federal [or state] law's purpose." *Jasper County*, 368 S.C. at 396-98, 629 S.E.2d at 627-28.

To determine the legislative intent of a statute, a court first looks to the plain language of the statute. *See, e.g., Barnhill v. City of North Myrtle Beach*, 333 S.C. 482, 486-87, 511 S.E.2d 361, 363-64 (1999); and *Jasper County*, 368 S.C. at 397, 629 S.E.2d at 628. If terms are clear and unambiguous, no construction is necessary and the statute should be applied according to its literal meaning. *Sloan v. South Carolina Bd. of Phys. Therapy Exam'rs*, 370 S.C. 452, 468, 636 S.E.2d 598, 606 (2006). *See, e.g., Barnhill*, 333 S.C. at 486-87 & n.2, 511 S.E.2d at 363-64 & n. 2 (referring to statutory language which on its face preempted local ordinances pertaining to vessels "operated *on the waters of this State*" that are not "identical" to state law) (emphasis in original).

If, however, the statute must be construed to ascertain intent, the statute should be read as a whole, giving each section effect, rather than "concentrating on an isolated phrase." *Jasper County*, 368 S.C. at 398, 629 S.E.2d at 629 (citations omitted). "A statute as a whole must receive practical, reasonable, and fair interpretation consonant

with the purpose, design, and policy of lawmakers. The real purpose and intent of the lawmakers will prevail over the literal import of particular words." *Sloan*, 370 S.C. at 468, 636 S.E.2d at 606-07.

Finally, in this case where the legislative intent of a statute allegedly invalidating a local government's home rule authority is at issue, home rule principles are also applicable. South Carolina's Constitution requires that "laws concerning local government shall be liberally construed in their favor." S.C. Const. art. VIII, § 7. Thus, South Carolina law requires that local government powers be construed liberally in favor of local governments. S.C. Code Ann. §§ 4-9-25 and 5-7-10. These mandates reflect South Carolina's public policy that a local government's home rule authority should not be invalidated unless the General Assembly has made clear its intent to do so. Unsurprisingly, South Carolina's case law on state law preemption reflects this public policy as well. As the trial court noted in the *Greenville* decision attached to Appellants' brief, this Court has been reluctant to hold that state law preempts an entire field of regulation, and in fact has never held so. *Foothills Brewing Concern, Inc. v. City of Greenville*, No. 2006-CP-23-7803, at 7 (Ct. of Common Pleas Order dated March 8, 2007) (Appellants' Br. App. 7) (citing *Greenville County v. Kenwood Enterprises, Inc.*, 353 S.C. 157, 577 S.E.2d 428 (2003); *Denene I*, 352 S.C. 208, 574 S.E.2d 196; *Bugsy's Inc. v. City of Myrtle Beach*, 340 S.C. 87, 530 S.E.2d 890 (2000); *Town of Hilton Head Island v. Fine Liquors, Ltd.*, 302 S.C. 550, 397 S.E.2d 662 (1990); *AmVets Post 100 v.*

Richland County Council, 280 S.C. 317, 313 S.E.2d 293 (1984); and *State v. Coin-Operated Video Game Machines*, 338 S.C. 176, 525 S.E.2d 872 (2000)).[11]

As these cases reflect, where it is doubtful whether certain state law provisions preempt a local government's home rule authority, such doubts should be resolved in favor of upholding local government authority. This presumption favoring the validity of local government action is especially pertinent where the local government is exercising its traditional police powers. *See Fine Liquors*, 302 S.C. at 554, 397 S.E.2d at 664 (noting that "a presumption of validity attaches to all legislation, especially legislation relating to police powers"); and *Kirk v. Wyman*, 83 S.C. 372, 65 S.E. 387, 390 (1909) ("In all judicial inquiry, with respect to health laws and regulations, every intendment is to be allowed in favor of the validity of the statute and the lawfulness of the measures taken under it."). As the Kentucky Supreme Court has noted in a similar preemption challenge to a home rule county's authority to pass a secondhand smoke ordinance, protecting the public health is "uniformly recognized as a most important municipal function. 'It is not only a right but a manifest duty of a city.'" *Lexington Fayette County Food & Beverage Ass'n*, 131 S.W.3d at 750. Indeed, the Town enacted this ordinance expressly "in furtherance of its duty to protect the health of its citizens and employees in the workplace." Town Code §14-29 (SIC 30) (A) (R. at 358).

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[11] This state policy of favoring local autonomy as much as possible is consistent with home rule principles articulated in other states, in cases involving challenges to traditional home rule authority based on state law. *See, e.g., City of Baton Rouge v. Ross*, 654 So. 2d 1311, 1320 (La. 1995) (finding that state law preempting local governments' authority under home rule to define certain crimes must be narrowly construed to avoid "impermissibly infring[ing] upon the local affairs of a home rule government") (citation omitted); and *Am. Cancer Soc'y v. Montana*, 103 P.3d 1085, 1088 (Mont. 2004) (noting that under state constitutional provisions, doctrine of state preemption cannot co-exist with home rule authority unless based on an express prohibition against local authority).

Particularly in a home rule state such as South Carolina, local governments should not be stripped of their powers to carry out this "manifest duty" of protecting public health without clear direction that the state or federal legislatures intended such a result. Applying these standards, the trial court correctly held that the Town's ordinance is not preempted by or inconsistent with state or federal law.

B. The Federal Synar Regulations Relate to Reducing Sales of Tobacco Products to Underage Youth and Do Not Require Preemption of Local Authority.

The statutory provisions which Appellants rely on as preempting local authority do not include language which specifically preempts local governments from enacting secondhand smoke ordinances. *Cf.*, S.C. Code Ann. § 50-21-30(1) (1992 & Supp. 2006) (specifically limiting local government authority to regulate operation of watercraft on state's waters to local regulations identical to state law). Thus, these provisions must be construed to ascertain legislative intent.

Appellants erroneously assert that the following language in S.C. Code Ann. section 16-17-504 expresses intent to preempt local governments from regulating secondhand smoke:[12]

> (A) Sections 16-17-500, 16-17-502, and 16-17-503 must be implemented in an equitable and uniform manner throughout the State and enforced to ensure the eligibility for and receipt of federal funds or grants the State receives or may receive relating to the sections. Any laws, ordinances, or rules enacted pertaining to tobacco products may not supersede state law or regulation. Nothing herein shall affect the right of any person having ownership or otherwise controlling private property to allow or prohibit the use of tobacco products on such property.
>
> (B) Smoking ordinances in effect before the effective date of this act are exempt from the requirements of subsection (A).

[12] Appellants' Br. 16-23.

S.C. Code Ann. § 16-17-504 (2003).

Applying the rules of statutory construction, it is clear that these sections address "laws, ordinances, or rules" that relate to the sale or distribution of tobacco products to minors under 18 years old ("youth access" ordinances), and not secondhand smoke ordinances.

The topic sentence of section 16-17-504 expressly refers to the provisions of S.C. Code Ann. sections 16-17-500 to -503, which all relate to youth access restrictions. *See* S.C. Code Ann. §§ 16-17-500 to -503 (2003 & Supp. 2006). As Appellants note, the General Assembly's purpose in enacting sections 16-17-500 to -504 was to comply with 42 U.S.C.A. § 300x-26 (2003) (the "Synar Amendment"), and its implementing regulations found at 45 C.F.R. section 96.130 (2006) (collectively, "Synar Regulations").[13] Thus, this language should be construed in light of the directives in these regulations and the policies underlying them, which are aimed at reducing sales of tobacco products to youth, not penalizing private conduct.

The Synar Amendment conditions a state's eligibility for block grants on the state's enactment of a law prohibiting "any manufacturer, retailer, or distributor of tobacco products" from selling or distributing these products to youth under the age of 18. 42 U.S.C.A. § 300x-26(a)(1) (2003). The implementing regulations specify that these laws should apply to "any sales or distribution outlet, including over-the counter, and vending machine sales." 45 C.F.R. § 96.130 (b) (2006). "Outlet" is defined as "any location which sells at retail or otherwise distributes tobacco products to consumers." 45 C.F.R. § 96.130 (a) (2006). Thus, the Synar Regulations essentially require regulation of

[13] Appellants' Br. 20-21.

commercial, not private, behavior. Further, the Synar Regulations require that states demonstrate success in reducing the sale of tobacco products to minors under 18 years old. *See, e.g.*, 42 U.S.C.A. § 300x-26 (b) (2003), and 45 C.F.R. § 96.130 (c)-(i) (2006).

The Synar Regulations do not preempt (or require preemption of) state or local governments in *any* area (including the youth access area), much less the secondhand smoke area. Appellants mistakenly argue that "federal law would negatively affect the block grants/allotments" if South Carolina did not preempt all local regulation of youth access to tobacco products.[14] Appellants' incorrect assertion reflects a faulty impression that tobacco industry lobbyists actively fostered in the mid-1990s while the Synar Regulations were being promulgated, that these regulations required broad preemptive clauses to be included in state youth access laws. Robin Hobart, PREEMPTION: TAKING THE LOCAL OUT OF TOBACCO CONTROL 7 (updated ed. 2003), *available at* http://www.rwjf.org/newsroom/SLSPreemption2003.pdf. To the contrary, the Department of Health and Human Services (DHHS) (which promulgated and enforces the Synar Regulations) repeatedly affirmed throughout the rulemaking process that the Synar Regulations do not preempt state or local government authority.[15]

For example, in January 1996 the DHHS published a clarification with the final rule that expressly rejected this notion:

> In no way should they [Synar Regulations] be considered as limiting, or requiring, States to limit, the powers of local governments to enact or enforce tobacco control laws. . . . The Department [DHHS] encourages

[14] Appellants' Br. 21 and n. 47.

[15] Indeed, DHHS noted that it has no authority to even require states to prohibit tobacco sales to minors or regulate tobacco retailer conduct, which is why this program is structured as a block grant eligibility program. Tobacco Regulation for Substance Abuse Prevention and Treatment Block Grants, 61 Fed. Reg. 1492, 1493 (January 19, 1996) (final regulation codified at 45 C.F.R. pt. 96).

> States to allow localities the flexibility to enact stricter laws or to more rigorously enforce tobacco control laws.

Tobacco Regulation for Substance Abuse Prevention and Treatment Block Grants, 61 Fed. Reg. 1492, 1496 (January 19, 1996) (final rule codified at 45 C.F.R. pt. 96) (citation omitted) (hereinafter, "Final Synar Rule").

Similarly, in the notice of proposed rulemaking, DHHS specifically pointed out that the proposed rule did not address possession or use of tobacco by underage youth. Substance Abuse Prevention and Treatment Block Grants: Sale or Distribution of Tobacco Products to Individuals Under 18 Years of Age, 58 Fed. Reg. 45156, 45163, 45164-65 (proposed August 26, 1993) (final rule codified at 45 C.F.R. pt. 96) (hereinafter, "Notice of Proposed Rulemaking"). *See also* Final Synar Rule, 61 Fed. Reg. at 1492 (noting that rules being proposed at the time by the Food and Drug Administration seek "to reduce young people's *use* of tobacco" while the Synar rule applied to *sales* of tobacco products to minors) (emphasis added). DHHS noted that while communities may wish to prohibit youth possession of tobacco products, DHHS would not require such legislation because it was less relevant to the Synar Amendment's purpose of reducing widespread availability of tobacco products to youth. Notice of Proposed Rulemaking, 58 Fed. Reg. at 45165. *See* 45 C.F.R. § 96.130 (final regulation). Unsurprisingly, South Carolina Code Ann. section 16-17-500 did not prohibit youth from possessing tobacco products when it was first enacted. *See* 1996 Act. No. 445 § 3 (R. at 318).[16]

Appellants hinge their argument that the language in section 16-17-504 should be read broadly in part on the fact that it was enacted as part of a bill that also amended the

[16] This prohibition, among others, was added several years later.

CIAA, which is codified at S.C. Code Ann. §§ 44-95-10 to -60.[17] It is true that the subjects of these laws (reducing secondhand smoke and sales of tobacco products to youth) share a connection. Nonetheless, it is also true that these laws regulate two very different kinds of conduct – the CIAA regulates secondhand smoke exposure in a limited number of indoor public places, and the youth access law regulates sales of tobacco products to underage youth. If the General Assembly had wished to demonstrate an intent to preempt local home rule authority to enact secondhand smoke ordinances, it easily could have included preemptive language in the sections of 1996 Act No. 445 which amended the CIAA. Obviously, it did not choose to do so.

Thus, section 16-17-504 should be construed in light of the policy and directives of the Synar Regulations, which are to reduce sales of tobacco products to youth, and to encourage regulatory flexibility, including more restrictive local regulation.

1. Section 16-17-504 (A) Does Not Apply to Secondhand Smoke Ordinances.

The Kentucky Supreme Court recently addressed a similar challenge to a home rule county's secondhand smoke ordinance, in which the challengers unsuccessfully asserted the ordinance was preempted by (among other laws) Kentucky's youth access law. *See Lexington Fayette County Food & Beverage Ass'n*, 131 S.W.3d at 748-52. Similar to the language in section 16-17-504(A), the Kentucky youth access statute includes a provision stating that it supersedes any subsequently enacted local ordinances relating to "the use, display, sale, or distribution of tobacco products." Ky. Rev. Stat. Ann. § 438.300 (1999 & Supp. 2006). The Kentucky Supreme Court construed this provision in light of the county's home rule authority, the historical exercise of police

[17] Appellants' Br. 18.

powers by local governments to protect public health, and the rules of statutory construction, and held that this language "does not preempt the use of a local ordinance which serves to prohibit the use of tobacco products in public places by anyone," 131 S.W.3d at 751, despite the fact that the provision expressly referred to "use" of tobacco products.

Here, the South Carolina language that Appellants point to is even less clear, referring only to ordinances "pertaining to tobacco products." To construe this phrase as invalidating the home rule authority of local governments to pass secondhand smoke ordinances requires the Court to interpret this sentence in isolation from the rest of the youth access statute of which it is a part. Construed in this way, without regard to the context in which the General Assembly has placed it, this provision could even apply to zoning ordinances pertaining to location of tobacco shops, for example. Reading this provision broadly thus results in its meaning being expanded in a way that is highly detrimental to local government authority, contrary to the constitutional mandate that laws relating to local governments be construed in their favor.

Appellants also argue that the language "any . . . ordinances . . . enacted may not supersede state law or regulation" must be interpreted to mean that no local governments may enact secondhand smoke ordinances, because, Appellants assert, any other meaning would render the sentence superfluous.[18] A more reasonable construction of this phrase, particularly in conjunction with section 16-17-504(B), is that it shows that the General Assembly was aware that local ordinances touching on the topic of youth access could exist, and that this new state law set a floor for any future youth access regulations. *See*

[18] Appellants' Br. 19-20.

Denene I, 352 S.C. at 213, 574 S.E.2d at 199. For example, as noted above, section 3 of 1996 Act. No. 445, (which was codified at S.C. Code Ann. §16-17-500) did not include any provisions prohibiting underage youth from possessing tobacco products, nor did it address sales to youth through vending machines. These provisions were added later. *See* S.C. Code Ann. §16-17-500 (2003 & Supp. 2006) and 2006 Act No. 231 § 2 (R. at 235). In the meantime, these omissions left gaps which, according to the federal agency that promulgated the Synar Regulations, local governments might appropriately fill.

The last sentence of section 16-17-504(A) states, "Nothing herein shall affect the right of any person having ownership or otherwise controlling private property to allow or prohibit the use of tobacco products on such property." S.C. Code Ann. §16-17-504(A) (2003). Similar to the previous sentence in this section, this statement shows that the General Assembly was aware that other laws or ordinances could and did exist which touched on the "right" mentioned. Clearly, the South Carolina CIAA is just such a law. *See* S.C. Code Ann. § 44-95-20 (2) and (5) (2002) (prohibiting smoking in in-home daycares and in elevators, respectively, regardless of whether the building is publicly or privately owned). Taken as a whole, this sentence is an express disavowal by the General Assembly that sections 16-17-500 to -504 have anything to do with allowing or prohibiting smoking on private property. This construction is not only consistent with the Synar Regulations' focus on youth access to tobacco products at commercial outlets, but is also harmonious with the rest of the paragraph. Read in this way, this sentence emphasizes that the purpose of these sections is to reduce youth access to tobacco products, not necessarily to penalize youth caught smoking or using tobacco, or to punish adults for acquiescing to use of tobacco products by youth. *Cf.* Utah Code Ann. § 76-10-

103 (2003) (prohibiting "proprietors of any place of business to knowingly permit persons under 19 to frequent their place of business while they are using tobacco").

2. Section 16-17-504(B) Also Does Not Preempt Secondhand Smoke Ordinances.

Section 16-17-504(B) "exempts" "smoking ordinances" in effect at the time that 1996 Act No. 445 was passed from the "requirements" of section 16-17-504(A). S.C. Code Ann. §16-17-504(B) (2003). Appellants mistakenly assert that this section also manifests legislative intent to prohibit local authorities from regulating secondhand smoke.

First, an exemption from a state law requirement is not the same as a ban on home rule authority to act. "[A]n 'exemption' assumes that there is authority or power to act and grants *freedom* or *immunity* from that power. . . . In other words, an exemption is an *exception to*, not a *denial of* the power to act." *Am. Cancer Soc'y v. State of Montana*, 103 P.3d 1085, 1089-90 (Mont. 2004) (emphasis in original) (holding that express exemption from local secondhand smoke ordinances more restrictive than state clean indoor air act for video-gaming premises did not preempt all local secondhand smoke regulation).

Second, it must be remembered that South Carolina's original youth access statute left some obvious gaps (youth possession and sales by vending machines, to name two). Clearly, in the context of sections 16-17-500 to -504, and the Synar Regulations that drove the adoption of these laws, it is more reasonable to construe section 16-17-504(B) as applying to any youth access provisions contained in a local "smoking code," such as a provision barring sales of cigarettes to youth by vending machines, rather than all secondhand smoke ordinances in general.

Third, even if section 16-17-504(B) were improperly construed to apply to the Town's ordinance and others like it, this section merely exempts the Town's ordinance from the "requirements" of section 16-17-504(A), which mandates that local ordinances "may not supersede" state law. S.C. Code Ann. § 16-17-504(B). The Town's ordinance meets this requirement – it does not conflict with, replace, or otherwise supersede state law. *See Lexington Fayette County Food & Beverage. Ass'n*, 131 S.W.3d at 750 (holding that county's secondhand smoke ordinance was not preempted by state youth access law which superseded local ordinances pertaining to "use, display, sale, or distribution of tobacco products").

Thus, whatever effect section 16-17-504 may have on local government authority,[19] this paragraph as a whole must be construed in light of the "purpose, design, and policy" of the General Assembly in enacting sections 16-17-500 to -504. *See Sloan*, 370 S.C. at 468, 636 S.E.2d at 606-07. This "purpose, design, and policy" was to comply with the Synar Regulations and reduce the availability of tobacco products to minors under 18, from retail and other outlets.

C. South Carolina's Clean Indoor Air Act Does Not Impliedly Preempt Local Governments from Enacting Secondhand Smoke Ordinances Because It Is Neither Thorough nor Pervasive, and Does Not Require Statewide Uniformity.

An ordinance is impliedly preempted "when the state statutory scheme so thoroughly and pervasively covers the subject so as to occupy the field or when the subject mandates statewide uniformity." *Jasper County*, 368 S.C. at 397, 629 S.E.2d at 628. Preemption will not be found simply because a local ordinance regulates where

[19] *Amici* simply note that it is far from clear whether this paragraph even preempts local governments in the youth access area, except by invalidating any ordinances that may be less restrictive than South Carolina's youth access statute.

state law is silent. *See Denene I*, 352 S.C. at 212-15, 574 S.E.2d at 198-200; *Bugsy's*, 340 S.C. at 94, 530 S.E.2d at 893; *Barnhill*, 333 S.C. at 487, 511 S.E.2d at 363-64; *Hospitality Ass'n of South Carolina, Inc.*, 320 S.C. at 228-29, 464 S.E.2d at 119-20; and *Fine Liquors*, 302 S.C. at 553, 397 S.E.2d at 664. South Carolina's CIAA neither occupies the field of secondhand smoke regulation, nor does it, even on its face, mandate statewide uniformity.

Section 44-95-20 of the CIAA designates certain locations where smoking is either entirely prohibited, or where an owner or manager may designate smoking areas. S.C. Code Ann. § 44-95-20 (2002). In locations where the CIAA permits the designation of smoking areas, however, it requires the owner or manager to follow certain additional requirements (such as posting signs and providing for separate ventilation, if necessary). S.C. Code Ann. §§ 44-95-30 and 44-95-40 (2002). South Carolina's CIAA also invites local measures to prohibit smoking in some of the specified locations. *See* S.C. Code Ann. § 44-95-20 (1), (3)-(4) (2002).

Smoking in public places is not a protected right,[20] and nothing in the CIAA *requires* that smoking be permitted in other places not listed in the CIAA. Simply because state law restricts certain conduct in some partial way (such as smoking in certain areas), the partial restriction does not create an implied right to engage in that conduct at all other times or places. *Denene I*, 352 S.C. at 215, 574 S.E.2d at 199 (holding that state law prohibiting Sunday liquor sales "does not impliedly provide businesses with a 'right' to sell beer and wine at all other times"). *See also, City of*

[20] *See, e.g., City of Tucson v. Grezaffi*, 23 P.3d 675, 681-82 (Ariz. Ct. App. 2001); *Craig v. Buncombe County Bd. of Educ*., 343 S.E.2d. 222, 223 (N.C. Ct. App. 1986); *The Players, Inc. v. City of New York*, 371 F. Supp. 2d 522, 542 (S.D.N.Y. 2005); and *Roark & Hardee L.P. v. City of Austin*, 394 F. Supp. 2d 911, 918 (W.D. Tex. 2005).

Charleston v. Jenkins, 243 S.C. 205, 211, 133 S.E.2d 242, 244 (1963) (finding no preemption where local ordinance "does not attempt to authorize what the legislature has forbidden, or forbid what the legislature has expressly licensed, authorized, or required") (quoting 37 Am. Jur., Municipal Corporations, Section 165, at 790).

Although the South Carolina Attorney General reached a different conclusion on this issue, Attorney General Opinions are not binding precedent. *Eargle v. Horry County*, 344 S.C. 449, 455, 545 S.E.2d 276, 280 (2001). Indeed, both trial courts to consider this issue ultimately disagreed with the reasoning in these opinions,[21] as have courts in other jurisdictions that have considered implied preemption claims based on state CIAAs. *See, e.g., D.A.B.E. v. City of Toledo*, 292 F. Supp. 2d 968, 973-4 (N.D. Ohio 2003) (holding that restaurant/bar exemption from state CIAA did not preempt local governments' home rule authority to regulate secondhand smoke in those places), *aff'd*, 393 F.3d 692 (6th Cir. 2005); *McNeil v. Charlevoix County*, 275 Mich. App. 686 (Mich. Ct. App. 2007) (holding that Michigan CIAA did not impliedly preempt field of indoor smoking regulation); and *Oregon Rest. Ass'n v. City of Corvallis*, 999 P.2d 518, 520 (Or. Ct. App. 2000) (holding that state CIAA did not preempt more restrictive local secondhand smoke ordinances because the CIAA "does not contain the slightest hint that the legislature intended to create a positive right to smoke in all public places where it did not expressly forbid smoking" and because there was no inconsistency between state law and "a local jurisdiction's decision to impose greater limits on public smoking"). *But see Entm't. Indus. Coal. v. Tacoma-Pierce County Bd. of Health*, 105 P.3d 985 (Wash. 2005) (holding that state CIAA preempted local regulation banning smoking in all indoor public

[21] Ct. of Common Pleas Order 18 (R. at 18); and *Foothills Brewing Concern*, *supra*, at 7-9 (Appellants' Br. App. 7-9).

places where state law expressly empowered proprietors to designate smoking areas in most public places).

Here, unlike in *Entertainment Industry Coalition.*, South Carolina's CIAA is *silent* as to whether smoking must be permitted or prohibited in other public indoor spaces; it does not expressly authorize or license smoking in all other public areas, and thus nothing in the CIAA is inconsistent with a local ordinance which imposes greater restrictions on secondhand smoke. *See Traditions Tavern v. City of Columbus*, 870 N.W.2d 1197, 1203 (Ohio Ct. App. 2006) (concurring with *D.A.B.E* court's analysis that Ohio CIAA does not preempt local authority to enact smoke-free workplaces ordinance, in part because "the statute does not address a wide category of public places . . . [and] there is no reason to believe or declare that the omission of these establishments from the statute demonstrates the Ohio legislature's desire to prohibit regulation of smoking in them").

Appellants' argument that the ordinance prohibits conduct authorized by state law, and thus is unconstitutional, also fails for this same reason. Though they both regulate secondhand smoke exposure, there is no conflict between South Carolina's CIAA and the Town's ordinance because the CIAA regulates only a limited number of public places, all of which are specifically exempted from the Town's ordinance. Town Code §14-29 (SIC 30) (E) (R. at 359-60). If local governments could not regulate an area simply because a state law existed which touched on the same subject matter in some way, such a result would invalidate a wide area of local regulatory authority, as well as a broad swath of this Court's own precedent. *See, e.g., Jasper County*, 368 S.C. 388, 629 S.E.2d 624 (upholding county ordinance regarding development of marine terminal);

Denene I, 352 S.C. 208, 574 W.E.2d 196 (upholding local liquor ordinances); *Bugsy's*, 340 S.C. 87, 530 S.E.2d 890 (upholding zoning ordinance regulating location of video game machines); *Barnhill*, 333 S.C. 482, 511 S.E.2d 361 (upholding local regulation of watercraft on beaches); and *Hospitality Ass'n of South Carolina*, 320 S.C. 219, 464 S.E.2d 113 (upholding local ordinances imposing additional fees on motel/hotel users).

Thus, the trial court correctly held that the Town's ordinance is not impliedly preempted by South Carolina's CIAA.

D. The Town's Ordinance Is Not Preempted by Other Law.

Finally, the lower court also correctly held that the ordinance is not preempted by the federal or state Occupational Safety and Health ("OSH") acts.[22] The federal OSH law may preempt state or local law relating to an occupational safety or health issue for which a federal standard has been promulgated pursuant to 29 U.S.C.A. § 655. 29 U.S.C.A. § 667(a) (1999). Appellants concede that South Carolina's state OSH standards must be "identical to or 'at least as effective'" as the federal OSH act standards.[23] No federal or state OSH standard regulating tobacco smoke in the workplace has been promulgated, and thus, the Town's ordinance does not conflict with existing state or federal law.

The federal OSH Administration ("federal OSHA") has not promulgated any rule specifically regulating tobacco smoke in workplaces. *See Empire State Rest. & Tavern Ass'n v. New York State*, 360 F. Supp. 2d 454, 458-60 (N.D.N.Y. 2005). It has declined to do so precisely because "many state and local governments already began to address

[22] The South Carolina OSHA is codified at S.C. Code Ann. §§ 41-15-10 to -640 (1986). The federal OSHA is codified at 29 U.S.C.A §§ 651 - 678 (1999).
[23] Appellants' Br. 38.

this problem by curtailing smoking in public places and workplaces." *Id.* at 459. Further, the *Empire State Restaurant & Tavern Ass'n* court found that "formal OSH policy indicates not only compatibility of state and local smoking legislation and the OSH Act and regulations, but also the acknowledgment and approval of OSHA with such state and local action." *Id.* at 459-60. Nor has South Carolina established a standard regarding secondhand smoke in workplaces under its own federally-supervised OSH program. *See* S.C. Code Ann. §§ 41-15-10 to -640 (1986) and S.C. Code Ann. Regs. 71-100 to -113 (1991 & Supp. 2006).

Finally, the state "general duty" clause that Appellants claim preempts the Town's ordinance is virtually identical to the language in 29 U.S.C.A. § 654 (a)(1), the federal OSH statute. *See* 29 U.S.C.A. § 654 (a)(1) (1999). This "general duty" language does not constitute a "standard" as defined by the federal OSH law which preempts other law. *See, e.g., Wilcox v. Niagara of Wisconsin Paper Corp.*, 965 F.2d 355, 366 n.* (7th Cir. 1992) (Cummings, J., concurring) (noting that the Seventh Circuit has never held that the "general duty" clause preempts state regulation, and that "[s]uch a holding would imperil numerous traditional areas of state general health and safety regulation and would seem to subvert 29 U.S.C. § 667(a). . . . [S]uch preemption would be extremely ill-advised") (citations omitted). Similarly, there is nothing in the state "general duty" provision or OSH law indicating that the General Assembly meant this law to occupy the field of workplace tobacco smoke regulation.

Therefore, the lower court correctly held that the Town's home rule authority to enact the ordinance was not preempted by the federal or state OSH laws.

CONCLUSION

The Town's Ordinance is a valid, constitutional exercise of its police powers to protect public health and safety, and is not preempted by state or federal law. *Amici* respectfully request that this Court affirm the lower court's decision in all respects and uphold the Ordinance.

Respectfully submitted by:

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