



Preemption: The Biggest Challenge to Tobacco Control

Background

Preemption occurs when a “higher” level of government eliminates or limits the authority of a “lower” level of government to regulate a certain issue.¹ For example, federal laws and policies can preempt (that is, invalidate or trump) state and local laws; and state laws and policies can preempt local laws, including ordinances, board of health rules, and other types of local laws.² When laws are preempted, they have no force or effect. Because local control is so integral to tobacco control, the tobacco industry and its allies have historically used, and continue to use, preemptive strategies to thwart smoke-free laws, youth access and retailer licensing restrictions, advertising and promotion regulations, and similar policies.



This fact sheet is meant to serve as a reminder of the tobacco industry’s relentless pursuit of preemption to weaken, impede or defeat tobacco control efforts. The fact sheet describes how preemptive policies and legal challenges often can block state and local advances in tobacco control, and provides examples of how seemingly innocuous preemptive language inserted into proposed legislation can derail important tobacco control initiatives.

Types of Preemption

The preemption doctrine is derived from the Supremacy Clause of the U.S. Constitution.³ Under this doctrine, a hierarchy of laws exists where the Constitution, laws passed by the U.S. Congress, federal agency regulations, executive orders or treaties are the supreme law of the land and can override state and local laws and rules. Similarly, state statutes and regulations can preempt local laws. The damaging effect of preemption on local tobacco control measures is illustrated by the term often used to describe it: “ceiling preemption.” As the term suggests, ceiling preemption caps the regulatory authority of lower levels of government, or even strips away that authority entirely.⁴

A law can explicitly preempt state or local authority (“**express preemption**”) or it can preempt by implication (“**implied preemption**”). For example, the Federal Cigarette Labeling and Advertising Act (“FCLAA”) expressly preempts state or local governments from regulating cigarette labeling, including all warnings, and the content of cigarette advertisements and promotions.⁵ Also, the Family Smoking Prevention and Tobacco Control Act of 2009 (“Tobacco

Control Act”) expressly preempts state and local governments from regulating tobacco product standards, premarket review, manufacturing practices, labeling, and product registration.⁶ Those powers are reserved to the federal government. However, the Tobacco Control Act includes language stating that the Act does NOT preempt state and local communities from enacting more stringent tobacco sales and distribution restrictions; youth possession restrictions; use restrictions (typically, smoke-free laws); fire safety standards for products; or taxes on tobacco products.⁷ The Tobacco Control Act thus sets a minimum standard in regulating some aspects of tobacco products, but allows states and localities to adopt more restrictive tobacco control regulations in these areas.⁸

As one would expect, “implied preemption,” which can take several different forms and sometimes requires an understanding of the lawmakers’ intent, can present thornier issues than express preemption. Courts occasionally find a law preemptive even when it contains no express preemption language but when, given the context, it seems clear the “higher” level of government intends to – or needs to – control regulation of the subject. To find implied preemption at the federal level, courts must determine whether Congress has “occupied the field” in the area of law the state is attempting to regulate (“field preemption”) or whether a state or local law either directly conflicts with federal law or might frustrate federal purposes (“conflict preemption”).⁹ To accomplish this, courts often try to determine either Congress’s intent or the state legislature’s intent in passing a particular law.¹⁰ As described below, many legal challenges to state or local tobacco control laws are based on claims of express or implied preemption.

How Preemption Harms Tobacco Control

A broad consensus exists among public health practitioners and tobacco control advocates that preemption is detrimental to tobacco control efforts.¹¹ Traditionally, the strongest and most innovative tobacco control policies have emerged at the local level – often after long and hard-fought grassroots community efforts – before ultimately being adopted at the state or federal level. These grassroots campaigns increase local awareness of tobacco control issues, build community readiness and support, and foster public debate about the need for policy change and healthy social norms.¹² A preemptive state or federal law can invalidate many local tobacco control policies that represent years of efforts at the local level.¹³ Moreover, once enacted, preemptive laws are traditionally difficult to repeal, and can affect not just the legal but also the advocacy landscape for years to come.¹⁴ Unfortunately, but not surprisingly, research has shown that preemption has resulted in health and social norm disparities between states where local authorities have the ability to adopt tobacco control policies and states where local authorities are preempted from enacting such policies.¹⁵

For years, the tobacco industry has pursued preemptive legislation, particularly at the state level, to impede the adoption of local tobacco control laws and to undermine state initiatives. As the perils of preemption became more apparent in the mid-90s, tobacco control advocates and public health practitioners pushed for non-preemption clauses in tobacco control policies, and a few states have successfully repealed preemption provisions in smoke-free laws.¹⁶ Despite this, preemptive language continues to appear in tobacco control and other public health legislation, often introduced by the tobacco industry and disguised in ostensibly well-meaning proposals, such as youth access provisions in (for example) e-cigarette regulations.

Preemption & Tobacco Control Policies

While states generally have the power to enact youth access restrictions, smoke-free laws, and certain tobacco product advertising restrictions, a local government's authority to do so depends largely on the authority a state has reserved for itself and the authority it has delegated to local governments through legislation or the allowance of home rule charters. Below are a few common ways preemption can affect tobacco control strategies.

- **Youth Access Restrictions:** A typical tobacco industry practice is to endorse the passage of a state law limiting sales to youth and simultaneously preempting local government authority to pass similar or other tobacco control laws.¹⁷ At least twenty-two states have laws that preempt local ordinances related to youth access to tobacco products.¹⁸ Twenty states preempt local restrictions on selling tobacco products to youth and nineteen states preempt local restrictions on distributing tobacco products to youth. For instance, local governments considering raising the minimum legal sales age for the sale of tobacco products would want to ensure that they were not preempted by state law from doing this. Another state law (such as the state's age-of-majority law, for example) might limit local authority to increase the minimum legal sales age.¹⁹
- **Smoke-free Policies:** As of March 31, 2014, twelve states have laws in effect that explicitly preempt local ordinances from restricting smoking in government worksites, private worksites, restaurants, and/or bars.²⁰ Twenty-seven states have enacted laws that explicitly enable local communities to adopt smoking restrictions that are more stringent or comprehensive than the state standard.²¹ Over the years, several courts have upheld state and local smoke-free laws in the face of preemption challenges.²² Despite this, the tobacco industry and its allies continue to rely on the doctrine of preemption when challenging tobacco control measures passed by state and local governments, including local boards of health.²³
- **Retailer Licensing & Related Restrictions:** Federal law does not preempt state or local governments from regulating the number, placement or type of tobacco retailers; or from adopting local sales restrictions or licensing laws.²⁴ Most state tobacco retailer licensing laws do not preempt local governments from licensing retailers, but local governments need to assess whether state law preempts their authority to regulate tobacco retailers or impose related sales restrictions.
- **Tobacco Advertising or Promotion Restrictions:** As mentioned earlier, under federal law, state and local governments are preempted from restricting the content of cigarette advertising. However, FCLAA (the preemptive law) enables state and local governments to regulate the *time, place and manner* of the advertising or promotion of cigarettes.²⁵ Because FCLAA only regulates cigarette advertising, it does not impact a state or local law regulating non-cigarette tobacco product advertising. (However, policymakers should be aware of potential First Amendment issues that may be implicated by advertising restrictions.) States, on the other hand, can preempt local tobacco product advertising.²⁶ As of March 31, 2014, eighteen states have laws preempting localities from

enacting ordinances related to the advertising or promotion of tobacco products.²⁷ For example, these laws limit local restrictions related to tobacco advertising generally and the display of tobacco products in stores, retail promotions, and the distribution of free tobacco product samples to the public.

- Taxation:** While taxing authority is often reserved to states and not shared with local governmental bodies, the preemptive nature of laws may be difficult to determine. Preemptive language is occasionally inserted into seemingly unrelated sections of state statutes. For example, in a recently adopted statute that would prevent minors from purchasing e-cigarettes, language was added that would also prohibit such products from being subject to any taxes beyond local and state sales tax.²⁸

Examples of Expressly Preemptive Tobacco Control Laws

Below are examples of a few provisions in select tobacco-related legislation that expressly preempt tobacco control laws.²⁹

Type of Preemption	Legislation	Excerpts
Express preemption (broad federal)	21 U.S.C. § 387p(a)(2) (2009)	“No State or political subdivision of a State may establish or continue in effect with respect to a tobacco product any requirement which is different from, or in addition to, any requirement under the provisions of this subchapter relating to tobacco product standards, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards, or modified risk tobacco products.” Family Smoking Prevention and Tobacco Control Act (2009)
Express preemption (b) and savings clause (c) (broad federal and savings clause)	15 U.S.C. § 1334(b-c) (2009)	“(b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act. “(c) Notwithstanding subsection (b), a State or locality may enact statutes and promulgate regulations, based on smoking and health . . . imposing specific bans or restrictions on the time, place, and manner, but not content, of the advertising or promotion of any cigarettes.” Federal Cigarette Labeling & Advertising Act (2009)
Express preemption (state)	Fla. Stat. § 386.209 (2003)	“This part expressly preempts regulation of smoking to the state and supersedes any municipal or county ordinance on the subject; however, school districts may further restrict smoking by persons on school district property.” Florida Clean Indoor Air Act (2003)

	S.D. Codified Law §§ 10-50-64 (1995)	“The legislature is the exclusive regulator of all matters relating to the use of tobacco products. Nothing prohibits a person or a public entity from voluntarily regulating the use of tobacco products on the person's or entity's property.” S.D. CODIFIED LAWS §§ 10-50-64 (1995)
Express preemption (limited state)	Mo. Rev. Stat. § 407.926 subd. 3 (2014)	“Alternative nicotine products and vapor products...shall be subject to local and state sales tax, but shall not be otherwise taxed or regulated as tobacco products.” Merchandising Practices, Missouri Revised Statutes

Examples of Tobacco Control Laws Expressly Allowing Local Regulation

Below are a few examples of legislative provisions in tobacco control laws that expressly allow local regulation.³⁰ The Tobacco Control Legal Consortium does not endorse or recommend any of these provisions and is providing these examples for illustrative purposes only.³¹

Type of Provision	Legislation	Excerpts
Anti-preemption (savings or enabling clause)	Minn. Stat. § 144.417 subd. 4(a) (2007)	“Nothing in sections 144.414 to 144.417 prohibits a statutory or home rule charter city or county from enacting and enforcing more stringent measures to protect individuals from secondhand smoke.” Minnesota Clean Indoor Air Act (2007)
	410 Ill. Comp. Stat. 82/65 (2008)	“Any home-rule unit of local government, any non-home rule municipality or any non-home rule county within the unincorporated territory of the county in this state may regulate smoking in public places, but that regulation must be no less restrictive than state law. In addition, any home rule unit of local government, any non-home rule municipality, or any non-home rule county within the unincorporated territory of the county may regulate smoking in any enclosed indoor area used by the public or serving as a place of work if the area does not fall within the definition of a 'public place' under state law.” Smoke-free Illinois Act (2008)
Legislative Intent	CA Health & Safety Code 118875-118915	“The Legislature declares its intent not to preempt the field of regulation of the smoking of tobacco. A local governing body may ban completely the smoking of tobacco, or may regulate such smoking in any manner not inconsistent with this chapter or any other provision of state law.” California Clean Indoor Air Act (1976)

Limited Anti-Preemption Clause (i.e., smoke-free schools)	RI Gen L § 23-20.9-11 (2013)	<p>“Nothing contained in this chapter shall be construed to restrict the power or authority of any Rhode Island city, town or other legal subdivision to adopt and enforce additional local laws, ordinances, or regulations that comply with at least the minimal applicable standards to establish smoke free schools as set forth in this chapter.” Rhode Island General Laws, Health and Safety, Smoking in Schools.</p>
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Select Preemption Challenges to Tobacco Control Laws

Below are a few examples of legal challenges to state or local tobacco laws based on either express or implied preemption claims.

Tobacco control policy	Lawsuit	Preemption claim and outcome
Graphic warning requirement (preempted)	23-24 94 th St. Grocery v. N.Y.C. Board of Health, 685 F.3d 174 (2d Cir. 2012)	In 2009, the New York City Board of Health adopted a resolution requiring tobacco retailers to post signs that graphically depict the adverse health effects of tobacco use. The tobacco industry and a few trade associations sued New York City claiming the resolution was preempted by FCLAA. In 2012, the U.S. Court of Appeals for the Second Circuit upheld the district court’s decision that struck down the Board of Health resolution on the basis that it was preempted by FCLAA. The appellate court found that the signage requirement affected the content of the promotion and was preempted on that basis.
Sales prohibition of flavored tobacco products (not preempted)	U.S. Smokeless Tobacco Manufacturing Company, LLC v. City of New York, 708 F.3d 428 (2d Cir. 2013)	The U.S. Court of Appeals for the Second Circuit upheld the district court’s ruling that the Tobacco Control Act allows state and local governments to enact tobacco product sales restrictions that are more stringent than federal regulations and does not preempt New York City’s authority to prohibit the sale of flavored tobacco products.
Prohibition of (1) discount coupons for tobacco products and (2) sale of flavored tobacco products (not preempted)	National Association of Tobacco Outlets, Inc. v. City of Providence, 731 F.3d 71 (1st Cir. 2013)	In 2013, the U.S. Court of Appeals for the First Circuit affirmed the district court’s ruling that neither Providence, Rhode Island’s ordinance prohibiting discounts on tobacco products nor its ordinance prohibiting the sale of flavored tobacco products was preempted by FCLAA or the Tobacco Control Act.

Smoke-free restrictions (not preempted)	Lexington-Fayette County Food and Beverage Ass'n v. Lexington-Fayette Urban County Gov't, 131 S.W.3d 745, 749 (Ky. 2004)	Lexington-Fayette County, KY adopted an ordinance prohibiting smoking in public buildings, which was challenged on state preemption grounds. The Supreme Court of Kentucky upheld the ordinance, finding that “the simple fact that the state has made certain regulations does not prohibit local governments from establishing additional requirements so long as there is no conflict between them.”
Regulation of cigar packaging, sale and distribution (preempted)	Altadis U.S.A., Inc., et al. v. Prince George's County, Maryland, No. 85 Sept. 2010 – April 25, 2013.	Prince George's County, MD passed an ordinance imposing a minimum pack size for cigars, exempting premium products and those sold by tobacconists. The tobacco industry sued, claiming state law impliedly preempted the local ordinance. The circuit court found that a “hodgepodge” of state laws regulating the sale of tobacco products is not evidence of state preemption of all local tobacco regulation. The Court of Appeals reversed the Circuit Court, finding that “state law comprehensively regulates the packaging, sale, and distribution of tobacco products, including cigars, and thus preempts this field.”

Preemption Guidelines

- Be prepared for preemption to become part of any proposed tobacco control legislation at the federal, state or local levels, even if it is not in the original bill and even if it pertains to a subject area outside the scope of the bill.
- Review all draft legislation carefully to ensure that preemptive language has not been introduced either at the outset or later in the legislative process. Watch out for the following terms: “preemption,” “supersede,” “shall be consistent with state law,” “uniform state standard,” “exclusive,” and “occupy the field.”
- Become familiar with your state and local tobacco regulatory scheme and network of tobacco control laws.
- Seek legal technical assistance to ensure that—
 - Laws drafted are not susceptible to preemption challenges by the tobacco industry or third parties.
 - Proposed amendments, clauses, provisions or competing proposals do not contain preemptive language (e.g., sometimes Trojan horse tobacco control bills are introduced that contain “enough pro-health provisions to give cover to legislators” but also contain a broader preemptive clause).³²
 - Anti-preemption language has not been removed or weakened.
 - Draft tobacco control legislation includes broad, express anti-preemption language that preserves the authority of lower jurisdictions to adopt stronger tobacco control protections: For example, compare: “Nothing in this statute shall be construed to limit a local jurisdiction from prohibiting the sale of menthol cigarettes” to “Nothing in this statute shall be construed to limit a local jurisdiction from regulating tobacco

products.” The narrower clause only “saves” local authority to prohibit the sale of menthol cigarettes, while the broader clause cuts against any field occupation argument.³³

- For questions about preemption, local authority and tobacco control, consult with an attorney familiar with the laws of your jurisdiction or contact one of our attorneys at the Tobacco Control Legal Consortium at publichealthlawcenter@wmitchell.edu.

Other Helpful Resources

The Tobacco Control Legal Consortium has several publications on its website that cover preemption and tobacco-related issues, including [Legal Authority to Regulate Tobacco and Common Threats and Challenges](#) (2009); [Checked at the Check-Out Counter: Preemption at the Tobacco Point of Sale](#); and Mark Pertschuk et al., [Assessing the Impact of Federal and State Preemption in Public Health: A Framework for Decisionmakers](#) (2012).

The Public Health Law Center’s website (<http://publichealthlawcenter.org/topics/other-public-health-law/preemption-public-health>) contains more information about preemption, as well as resources for understanding how it works and how it can impact public health policy development. Other resources include CDC’s [State Tobacco Activities Tracking and Evaluation \(STATE\) System](#) database, the American Lung Association’s [State Legislated Actions on Tobacco Issues \(SLATI\)](#) database, and Americans for Nonsmokers’ Rights’ [Protect Local Control](#) website, with its [Preemption Watch Bill Tracking Summary](#) of proposed tobacco control legislation.

Contact Us

Please feel free to contact the Tobacco Control Legal Consortium at publichealthlawcenter@wmitchell.edu with any questions about the information included in this fact sheet.

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Notes

¹ National Policy & Legal Analysis Network (NPLAN) & Public Health Law Center, *The Consequences of Preemption for Public Health Advocacy* (2010), available at <http://www.publichealthlawcenter.org/sites/default/files/resources/nplan-fs-consequences-2010.pdf>.

² Proponents of federal and state preemption often cite the need for a single uniform standard, cost efficiencies, and ease of public comprehension as rationales for supporting these laws. National Policy & Legal Analysis Network & Public Health Law Center, *Preemption: What It is, How It Works, and Why It Matters for Public Health* (2009), available at <http://publichealthlawcenter.org/sites/default/files/resources/nplan-memo-preemption-2009.pdf>.

³ U.S. CONST. art. VI, cl. 2.

⁴ “Home rule” protects local governments in some states against state preemption by giving local governments independent authority over certain matters. Some states that do not have home rule apply the principle known as Dillon’s Rule to determine the bounds of a municipal government’s legal authority.

See, e.g., Virginia Natural Resources Leadership Institute, *Dillon's Rule: Legal Framework for Decision Making* (last accessed April 12, 2014), available at

http://ien.arch.virginia.edu/vnrli/docs/briefs/Dillons_Rule_09.pdf. A less common type of preemption, called “floor preemption,” establishes a minimum level of regulation without limiting the authority of lower levels of governments to impose tougher regulations. See NPLAN & Public Health Law Center, *supra* note 2.

⁵ Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282 (1965) codified as amended 15 U.S.C. §§ 1331-1341, 1334(b-c) (2009), available at <http://www.law.cornell.edu/uscode/text/15/1334>.

⁶ Family Smoking Prevention and Tobacco Control Act, Publ. L. No. 111-31, 123 Stat. 1776 (June 22, 2009) (Codified as amended in scattered sections of 5 U.S.C., 15 U.S.C., and 21 U.S.C.), available at <http://www.publichealthlawcenter.org/sites/default/files/resources/fda-tobacco-regulation-final-bill.pdf>.

⁷ *Id.* at 21 U.S.C. § 387p.

⁸ For more background on the federal regulation of tobacco, see Tobacco Control Legal Consortium, *Federal Regulation of Tobacco: A Summary* (2009), available at <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-fda-summary.pdf> and Tobacco Control Legal Consortium, *Federal Regulation of Tobacco: Impact on State and Local Authority* (2009), available at <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-fda-impact.pdf>.

⁹ See Cheryl Sbarra, Tobacco Control Legal Consortium, *Legal Authority to Regulate Smoking and Common Threats and Challenges: 2009 2* (2009), available at http://publichealthlawcenter.org/sites/default/files/resources/tclc-syn-authority-2009_0.pdf.

¹⁰ Centers for Disease Control and Prevention, *State Tobacco Activities Tracking & Evaluation, State Preemption Fact Sheet* (2014), available at http://www.cdc.gov/tobacco/state_system/index.htm.

¹¹ For example, each of the following national organizations has taken positions opposing preemption: American Cancer Society Cancer Action Network, American Heart Association, American Lung Association, American Medical Association, Association of State and Territorial Health Officials; U.S. Department of Health and Human Services, Campaign for Tobacco-Free Kids, [National Association of County and City Health Officials](#), National Latino Tobacco Control Network, National African American tobacco Prevention Network, National Association of Local Boards of Health, Tobacco Technical Assistance Consortium, Tobacco Control Network, Americans for Nonsmokers' Rights, and the Tobacco Control Legal Consortium. See, e.g., Americans for Nonsmokers' Rights et al., *Fundamentals of Smoke-free Workplace Laws* (2009), available at http://www.no-smoke.org/pdf/CIA_Fundamentals.pdf. Also, the U.S. Department of Health and Human Services' Healthy People 2010 Framework adopted as a critical objective the elimination of state preemption mechanisms that otherwise annul stronger tobacco control laws at the local level. U.S. DEPT. HEALTH AND HUMAN SERVICES, *HEALTHY PEOPLE 2020: A FRAMEWORK FOR ENDING THE TOBACCO USE EPIDEMIC* (2010) (Objective TU-16: Eliminate state laws that preempt stronger local tobacco control laws), available at <http://www.healthypeople.gov/2020/topicsobjectives2020/objectiveslist.aspx?topicid=41>.

¹² Public Health Law Center, *Preemption and Movement Building in Public Health, Essentials of Preemption* (2011), available at <http://publichealthlawcenter.org/sites/default/files/resources/pw-fs-essentials-2010.pdf>.

¹³ Paul D. Mowery et al., *The Impact of State Preemption of Local Smoking Restrictions on Public Health Protections and Changes in Social Norms*, J ENVIRON PUBLIC HEALTH 632629 (2012), available at <http://www.hindawi.com/journals/jeph/2012/632629>. See also NPLAN and Public Health Law Center, *The Consequences of Preemption for Public Health Advocacy*, *supra* note 2.

¹⁴ Despite this, nine states since 2002 have successfully repealed provisions that preempted local smoking restrictions in some or all settings. Mowery et al., *supra* note 13, at 3.

¹⁵ Mowery et al., *supra* note 13.

¹⁶ *Id.* at 2.

¹⁷ See Robin Hobart, Am. Med. Ass'n, *Preemption: Taking the Local Out of Tobacco Control* 7 (2003), available at http://www.wmdesigngroup.com/staging/smokeless/downloads/1_1_1.pdf. At least 22 states have laws that preempt local authority over access to tobacco products, according to a 2011 study by the Centers for Disease Control and Prevention (CDC). CDC, U.S. Dep't of Health and Human Services, *State Preemption of Local Tobacco Control Policies Restricting Smoking, Advertising, and Youth Access – United States, 2000-2010*, 60 MORBIDITY & MORTALITY WEEKLY REP. 1124 (Aug. 26, 2011), available at <http://www.cdc.gov/mmwr/pdf/wk/mm6033.pdf>.

¹⁸ CDC, *State Preemption of Local Tobacco Control Policies Restricting Smoking, Advertising, and Youth Access – United States*, *supra* note 17.

¹⁹ Tobacco Control Legal Consortium, *Raising the Minimum Legal Sale Age for Tobacco and Related Products* (2013), available at <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-guide-minimumlegal-saleage-2014.pdf>.

²⁰ Centers for Disease Control and Prevention, *State Tobacco Activities Tracking & Evaluation System (STATE) State Preemption Fact Sheet* 3-4 (2014), available at http://apps.nccd.cdc.gov/statesystem/common/File_Download.aspx.

²¹ *Id.* If a state law that is either non-preemptive or preemptive with a savings clause allows local jurisdictions to enact tobacco control ordinances that are more stringent or comprehensive than the state, the state law is essentially the floor in tobacco control. In contrast, a state preemption law, with no savings clause, would typically serve as the ceiling in this area.

²² See Sbarra, *supra* note 9, at 2-4.

²³ See, e.g., *Bullitt County Board of Health v. Bullitt County Fiscal Court*, No. 11-CI-002348 (Ky. App. 2012) (upholding the Bullitt County Board of Health's smoke-free regulation and ruling that local boards of health have the authority to adopt administrative regulations of this nature). This case, which is likely to determine whether local boards of health in Kentucky have the authority to adopt smoke-free policies, is currently before the Kentucky Supreme Court.

²⁴ See generally Center for Public Health Systems Science and Tobacco Control Legal Consortium, *Point-of-Sale Strategies: A Tobacco Control Guide* (2014), available at <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-guide-pos-policy-WashU-2014.pdf>.

²⁵ See Elisa P. Laird-Metke, Tobacco Control Legal Consortium, *Regulating Tobacco Marketing: Commercial Speech Guidelines for State and Local Governments* (2010), available at <http://publichealthlawcenter.org/sites/default/files/resources/tclc-guidelines-speech-2010.pdf> (explaining how state and local regulation of tobacco product marketing and promotion might be limited by the provisions of the Federal Cigarette Labeling and Advertising Act or the First Amendment to the U.S. Constitution).

²⁶ *Id.*

²⁷ CDC, *State Preemption of Local Tobacco Control Policies Restricting Smoking, Advertising, and Youth Access – United States*, *supra* note 17.

²⁸ See MO. REV. STAT. § 407.926 subd. 3 (2014).

²⁹ For a summary of states that preempt local tobacco control ordinances related to tobacco product advertising, youth access and smoke-free indoor air, see CDC, *State Tobacco Activities Tracking & Evaluation, State Preemption Fact Sheet*, *supra* note 20.

³⁰ For more information about states with anti-preemption (i.e., local control) laws related to tobacco control, visit the Americans for Nonsmokers' Rights' [Protect Local Control](http://www.protectlocalcontrol.org) website.

³¹ Some of these examples were adapted from Kathleen Susan Hoke, “Preemption in Tobacco Control – Beware: State Preemption May Restrict Local Action,” a webinar sponsored by the Tobacco Control Legal Consortium (Aug. 13, 2013) (including also the example of Prince George’s County, Maryland and a legal challenge based on implied preemption to the county’s ordinance restricting the pack size of cigars).

³² See Hobart, *supra* note 17, at 7-9 (2003).

³³ See Hoke, *supra* note 31.