STATE OF RHODE ISLAND
NEWPORT, SC.

SUPERIOR COURT

ABDUL KHAN, et al.,
Plaintiffs,

v.

TOWN OF MIDDLETOWN,
Defendant,

and

THE STOP & SHOP SUPERMARKET COMPANY, LLC, et al.,
Interested parties.

§
§
§
§
§
§
§
§
§
§
§
§
§
§
§
§
§

C.A. No. NC-2017-0443

BRIEF OF PUBLIC HEALTH LAW CENTER AS *AMICUS CURIAE* IN SUPPORT OF THE DEFENDANT TOWN OF MIDDETOWN'S OPPOSITION TO PLAINTIFFS' COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

SONJA DEYOE
LAW OFFICES OF SONJA DEYOE P.C.
395 Smith Street,
Providence, RI 02908
(401) 864-5877
sld@the-straight-shooter.com

RACHEL BLOOMEKATZ
GUPTA WESSLER PLLC
1900 L Street, NW, Suite 312
Washington, DC 20036
(202) 888-1741
rachel@guptawessler.com

July 30, 2018

Counsel for Amicus Curiae

INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

This case is about whether the Town of Middletown can remove a deadly product—that is attractive to youth—from the shelves of its own neighborhood corner stores. Facing a public health crisis, the Town enacted the Tobacco Ordinance, which generally prohibits retailers within the Town's borders from selling flavored tobacco products (except in vape shops or smoking bars) and from accepting coupons or providing other discounts for any tobacco product. Ordinance 2017-17 (adopted Dec. 4, 2017). The Town enforces this policy by requiring retailers to obtain licenses, and then withdrawing the license if monetary penalties fail to compel compliance. *Id.* There is no state statute that prohibits the Town from taking this step to protect youth and others from the harms of tobacco use. No state statute conflicts with the Tobacco Ordinance, nor does the General Assembly's minimal regulation of tobacco sales occupy the field—it leaves room for local governments to do more to curb tobacco use and prevent the epidemic of tobacco product use among youth. The First Circuit has indeed already held that the General Assembly has not occupied the field of tobacco regulation as it relates to flavors generally or coupons and multi-pack discounts in particular. *See Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence,* 731 F.3d 71, 83 (1st Cir. 2013). The plaintiffs do not argue otherwise. *See* Pls.' Reply, at 12–16.[1]

Yet the plaintiffs still contend that the Town's hands are tied. They are wrong for two reasons. *First*, the plaintiffs give short shrift to the General Assembly's explicit mandate that the Town may regulate "the purchase and sale of merchandise or commodities" within its boundaries. RIGL § 45-6-1(a). The plaintiffs attempt to dismiss this statute as an insufficient delegation of authority to enact the Tobacco Ordinance, but their argument would render this statutory language meaningless, in violation of basic cannons of statutory construction.

[1] Plaintiffs' Reply Memorandum of Law in Response to the Town of Middletown's Memoranda (filed April 2, 2018) (hereinafter, "Pls.' Reply").

Second, even assuming RIGL § 45-6-1(a) provides insufficient authority for the Tobacco Ordinance, the Town's home rule authority provides it because, under its Charter, Middletown may adopt health and safety policies that address local concerns. The plaintiffs' response paints a dismal portrait of home rule authority. In their view, not only is the Town barred from imposing licensing requirements on businesses, but it is also barred from exercising all "police powers" *whatsoever*, including regulating business to protect public health. Pls.' Mem. in Supp. of D.J., at 7–8.[2] Thus, even without the licensing scheme, the plaintiffs contend that the rest of the Tobacco Ordinance still fails. *Id.* That extreme position is directly contravened by the Rhode Island Supreme Court's modern home rule jurisprudence, which explicitly grants cities and towns "historic police powers," including "the authority to legislate matters of public health and safety." *State ex. rel. Town of Westerly v. Bradley*, 877 A.2d 601, 607–08 (R.I. 2005) (per curiam). Applying the proper framework for home rule questions demonstrates that the Town acted within its authority in enacting the Tobacco Ordinance, including implementing a licensing scheme to enforce these important steps to protect its youth from the harms of tobacco use.

Amicus curiae, the Public Health Law Center, submits this brief to highlight the plaintiffs' extreme position regarding the Town's scope of authority to enact basic public health measures. The plaintiffs' arguments fail to show that the Town—in the absence of any conflicting state statute—cannot exercise the fundamental authority to protect its residents from deadly products and public health epidemics within its borders. Examining the sheer breadth of the plaintiffs' arguments, and their implications, reveals their folly.

[2] Plaintiffs' Memorandum in Support of Its Request for Declaratory Judgment and In Support of Its Motion for Preliminary and Permanent Injunctive Relief (filed Dec. 5, 2017) (hereinafter, "Pls.' Mem. in Supp. of D.J.").

The Public Health Law Center works with state and local governments throughout the country to advance public health policies on tobacco use and a range of other issues from obesity, to child care, to workplace wellness. Thus, it has particular expertise not only in how various policies can advance public health, but how local governments can act within their authority to adopt and enforce such measures. There is no doubt—given the extensive testimony presented at the Town's public hearings and the published research on the topic—that the Tobacco Ordinance is a critical measure for reducing tobacco use in the Town, particularly among youth who are especially attracted to flavored tobacco products. And the experience in other cities demonstrates that these policies are effective in reducing youth addiction. *See* Town's Br. in Opp., at 4.[3] Therefore, rather than focus on the undisputed health justification for the Tobacco Ordinance, this brief responds to the plaintiffs' narrow construction of home rule authority. Their view, if adopted, would not only invalidate the Tobacco Ordinance, but would also threaten all Rhode Island municipalities' ability to protect the public health of their residents.

ARGUMENT

I. The General Assembly explicitly delegated authority to municipalities to regulate the sale and purchase of commodities, like tobacco products.

The plaintiffs contend that the Town is usurping the state's "police power" in adopting the Tobacco Ordinance, *see* Pls.' Mem. in Supp. of D.J., at 8–9, but they fail to recognize that the General Assembly delegated just that authority with RIGL § 45-6-1(a). As the Rhode Island Supreme Court has described, with RIGL § 45-6-1, "the General Assembly has given town and city councils the police power to promulgate regulations and ordinances to protect the safety of their inhabitants." *Town of W. Greenwich v. Stepping Stone Enters., Ltd.*, 416 A.2d 659, 662 (1979). To

[3] Town of Middletown's Memorandum Opposing Plaintiffs' Complaint for Declaratory and Injunctive Relief (filed March 16, 2018) (hereinafter, "Town's Br. in Opp.").

say that the Town has no police power to enact the Tobacco Ordinance, as the plaintiffs maintain, directly contradicts this precedent.

The clear text of RIGL § 45-6-1(a) only reinforces the Town's power to enact this Ordinance. The statute provides, in relevant part, that "[t]own and city councils may" adopt "all ordinances and regulations . . . *respecting the purchase and sale of merchandise or commodities within their respective towns and cities*." *Id.* (emphasis added). This statute, like all statutes, should be interpreted in accordance with its plain language. *See Alessi v. Bowen Court Condo.*, 44 A.3d 736, 740 (R.I. 2012) ("It is well settled that when the language of a statute is clear and unambiguous, this Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings." (internal quotation marks and citation omitted)). The application of the plain text here is straightforward: By its plain terms, Middletown's law is an "ordinance[]" "respecting the purchase and sale" of "commodities"—*i.e.*, cigarettes and other tobacco products. It "respect[s] the purchase and sale" of tobacco products by limiting the places where flavored tobacco products may be sold and by prohibiting coupons and other discounts. And the Tobacco Ordinance's licensing scheme is just the enforcement mechanism for this law, and therefore it too "respect[s] the purchase and sale of . . . commodities." RIGL § 45-6-1(a).

The plaintiffs would have the Court dismiss the clear application of § 45-6-1(a). They offer three responses, but none are persuasive. *First*, the plaintiffs argue that RIGL § 45-6-1(a) does not allow the Town to "ban the sale" or "regulate the advertisement" of *any* product, so it cannot supply authority for the Tobacco Ordinance. Pls.' Reply, at 19. According to the plaintiffs, RIGL § 45-6-1(a) only allows towns to pass ordinances that do not "prohibit[] or regulate business," such as setting the time that shops close, prohibiting selling wares on public sidewalks, or requiring merchants to provide customers with paper (as opposed to plastic) shopping bags. *Id.* With these examples, it is unclear where the plaintiffs are proposing that the Court draw a line between

ordinances that (properly) "respect[] the purchase or sale of commodities" and those that (improperly, in their view) "regulate business." Logic dictates that any ordinance that does the former, would also do the latter. But even if it were clear how the plaintiffs draw that line, the plain language of the statute includes no such limitation. The plaintiffs' interpretation requires rewriting the statute, which courts cannot do. *See Pierce v. Pierce*, 770 A.2d 867, 872 (R.I. 2001) ("It is not the function of this [C]ourt to rewrite or to amend statutes enacted by the General Assembly." (internal quotation marks and citation omitted)).

More fundamentally, however, the plaintiffs misperceive the Tobacco Ordinance, as it neither totally bans any product nor regulates any advertising. By its terms, the Tobacco Ordinance only prohibits the sale of flavored tobacco products *in some locations*, but allows them in others, namely, specialty shops like vape stores or smoking bars. Ordinance 2017-17, § (E)(3). Contrary to the plaintiffs' contention, it has not made flavored tobacco products "contraband," such that possession is outlawed. *See* Pls. Mem. in Supp. of D.J., at 10–11. The Town has, instead, adopted an ordinance "respecting the purchase and sale" of flavored tobacco products by limiting the types of establishments where they may be sold. Likewise, contrary to the plaintiffs' assertion, the Tobacco Ordinance does not regulate advertising. It restricts particular pricing practices—*e.g.,* accepting coupons or giving discounts. *See Nat'l Ass'n of Tobacco Outlets, Inc.*, 731 F.3d at 77 (holding that "price regulations and other forms of direct economic regulation do not implicate First Amendment concerns" because they do not restrict speech). A retailer cannot discount the "sale" of tobacco products or accept a coupon for their "purchase," but the law says nothing about how tobacco products may be advertised. *See* Ordinance 2017-17, § 119.05(D).

Second, the plaintiffs further argue that RIGL § 45-6-1(a) is not specific enough because it does not mention tobacco, flavors, or discounts specifically. Pls.' Reply, at 18. Their view, in short, is that the statute must name the specific subject matter of the town's ordinance. But neither the

text of the statute or the governing precedents require such specificity. In *Bradley*, the Rhode Island Supreme Court relied upon RIGL § 45-6-1(a) to uphold a town's restrictions on swimming in breachways. 877 A.2d at 608. This statute says nothing explicitly about swimming or breachways, but that was immaterial. *See id.* The Court upheld the ordinance in part under RIGL § 45-6-1(a) because the town had determined that the practice "is dangerous" and thus "enacted an ordinance prohibiting this activity." *Id.* So too here; Middletown has determined that widespread access to flavored tobacco products is dangerous, particularly to youth who often start their nicotine addictions with flavored products, and it has prohibited their sale at general retail establishments, like the corner store or local grocery where young people are likely to be. No more is required.

Interpreting RIGL § 45-6-1(a) as narrowly as the plaintiffs suggest would render it meaningless, contravening basic cannons of statutory interpretation. *See Spagnoulo v. Bisceglio*, 473 A.2d 285, 287 (R.I. 1984) (holding that courts "must give effect to all parts of the statute," and not render any "language meaningless"). The statute says that towns can adopt ordinances "respecting the purchase and sale of merchandise of commodities within their respective towns and cities." That language does not mention any specific product or practice. Therefore, if the plaintiffs' rule governed—that the statute has to mention a specific product or practice—it would nullify these words, rendering an entire clause of the statute completely superfluous. Indeed, it would mean that the plaintiffs' own suggestion that the statute authorizes municipalities to require paper bags (as opposed to plastic bags) is wrong. The statute does not say anything about bags, nor about environmental consciousness. The plaintiffs' own purported example defeats their argument.

Third, the plaintiffs contend that RIGL § 45-6-1(a) does not explicitly allow for licensing, and hence that portion of the Ordinance must fail. But the licensing scheme here only "respect[s] the sale and purchase . . . of commodities"—that is, there are no limitations on obtaining (or keeping) a license beyond abiding by the flavor and discount rules, which clearly fall within the

bounds of RIGL § 45-6-1(a). It does not impose any other obligations on license holders that do not "respect[] the sale and purchase . . . of commodities." And the licensing scheme does not generate any revenue; the fee only supports the law's enforcement. Thus, no specific delegation for licensing is required. True, in other examples that the plaintiffs emphasize, the General Assembly has explicitly delegated to cities the ability to license particular businesses or activities, such as for theatrical performances. Pls.' Reply, at 20. But the existence of such state-designated licensing schemes does not preclude other town-initiated schemes. Indeed, local tobacco licensing schemes have existed in Rhode Island for over 18 years, and the General Assembly has never prohibited nor modified them.[4] Neither should this Court.

II. Adopting the Tobacco Ordinance is within the Town's home rule authority.

The Town also appropriately adopted the Tobacco Ordinance pursuant to its home rule authority, as reflected in the Rhode Island Constitution, the Middletown Charter, and the Rhode Island Supreme Court's modern home rule jurisprudence. It is well-known that historically, under "Dillon's Rule," Rhode Island municipalities could only act in areas where the state legislature had explicitly delegated authority to them. *Lynch v. King*, 391 A.2d 117, 122 (R.I. 1978) (citing *City of Providence v. Moulton,* 160 A. 75, 79 (R.I. 1932)). And it is equally well-known that Rhode Island is no longer governed by such a regime. *Id.* With the passage of the Home Rule Amendment, every city or town that has enacted a home rule charter—as has Middletown—has "the right of self-government in all local matters" as long as the local enactments do not conflict with the Rhode Island Constitution or state laws. *Westerly Residents for Thoughtful Dev., Inc. v. Brancato*, 565 A.2d. 1262,

[4] The following municipalities in Rhode Island, in addition to Middletown, require tobacco retail licenses: the City of Warwick (enacted in 2000); the Town of Coventry (2001); the Town of Tiverton (2002); the City of Cranston (2011); the City of Providence (2012); the Town of Richmond (2014); the City of Central Falls (2015); the Town of West Warwick (2017); the City of Woonsocket (2017); the Town of Johnston (2017).

1264 (R.I. 1989); R.I. Const. Art. XII, §§ 1, 2. Of course, they do not have authority to enact "statewide" legislation. *See Brancato*, 565 A.2d at 1264 (home rule authority does not give localities the power to "legislate on matters of statewide concern."). But applying this "local" versus "statewide" framework, the Rhode Island Supreme Court has held that "[c]ities and towns with home rule charters . . . are vested with the authority to legislate matters of public health and safety." *Bradley*, 877 A.2d at 607. Despite this, the plaintiffs advance a theory of home rule authority that is so narrow that it would preclude basic local legislation for public health. They essentially ask this Court to revert to Dillon's Rule.

The Town's briefs address in detail its home rule authority to enact policies to protect the public health and, in particular, its power to adopt licensing schemes to enforce these policies. *Amicus curiae* build upon the Town's arguments by responding to two of the plaintiffs' main arguments. *First*, the plaintiffs argue that localities have no home rule authority to exercise police powers *whatsoever*—that the regulation of business in any way, even to protect public health or safety, can "never" be considered a "local matter" over which municipalities can legislate. Pls.' Mem. in Supp. of D.J., at 6. That extreme position contravenes modern home rule precedent. *Second*, they argue that even if Middletown may exercise police powers, it cannot enact the Tobacco Ordinance because a statewide policy banning flavored tobacco products and tobacco price discounts would be preferable and because, if other towns duplicate Middletown's efforts, there might be an economic impact on the state. But those same arguments could be made about almost any local public health policy. By the plaintiffs' standard for home rule authority, it is hard to think of any public health measures that would pass the test. This Court should not adopt their view of local authority.

A. Under Rhode Island's Home Rule Amendment, police powers are not reserved solely to the General Assembly.

The plaintiffs' argument centers on a singular premise: that the "police power" is "exclusively retained by the General Assembly." Pls. Mem. in Supp. of D.J., at 7. The "police power," as the Rhode Island Supreme Court has summarized, refers to a government's broad authority "to make such regulations relating to personal and property rights as appertain to the public health, the public safety, and the public morals." *State v. Dalton*, 46 A. 234, 235 (1900). These powers are expansive and not easily defined. *Id.* (explaining that it "would be presumptuous for any court to attempt to formulate an exact definition of the term 'the police power of the state'" because it is a concept that can be applied in an "infinite variety of circumstances."). They refer broadly to government power to act "in the interest of the safety, morality, health and decency of the community." *Bourque v. Dettore*, 589 A.2d 815, 819 (R.I. 1991) (internal quotation marks omitted). As the plaintiffs note, the police power includes the "right to impose reasonable conditions upon the right to carry on business," and, as a corollary, the right to require businesses to hold licenses. *See* Pls. Mem. in Supp. of D.J., at 7–8; *State v. Foster*, 46 A. 833, 835 (R.I. 1900) (explaining that "one of the most common of the conditions which is imposed under [the police] power is that of the payment of a license fee"). The plaintiffs posit that the police power is "categorically" held by the state and, because "the Tobacco Ordinance attempts to exercise the police power," it is impermissible. Pls. Mem. in Supp. of D.J., at 9. Adopting that expansive view would render home rule authority anemic; unsurprisingly, recent precedent clarifies that it is not the law.

The Rhode Island Supreme Court has rejected the plaintiffs' contention that the police powers are the exclusive domain of the state legislature. Over a decade ago, the Court clarified that "[c]ities and towns with home rule charters . . . are vested with the authority to legislate matters

of public health and safety"—quintessential police powers. *Bradley*, 877 A.2d at 607. In its words, "[t]he historic police powers" including "the regulation of matters of health and safety" are within the type of authority that may be exercised by local governments under their town charters. *Id.* at 608 (internal quotation marks omitted). The Court there upheld a town ordinance as falling within the town's home rule powers precisely because it was "related directly to preserving the public peace, safety, comfort and welfare." *Id*. The plaintiffs' contention that Middletown cannot exercise any police power to protect the health and safety of its residents—and that all such authority rests exclusively with the state—directly contravenes *Bradley*.

That holding is both good law and good sense. What else are municipal and town governments meant to do but protect the health and safety of their inhabitants? To be sure, there are particular duties that the Rhode Island Constitution exclusively vests with the state—*e.g.*, taxation and the conduct of elections. *See* R.I. Const. Art. 4 (elections), Art. 13 (taxes). But police powers are not one of them. Without authority to exercise any police powers, as the plaintiffs argue, local governments are left with essentially no power to act, save what the legislature has explicitly delegated by statute.[5] In other words, the plaintiffs' view is indistinguishable from Dillon's Rule, where local governments cannot act for the health and welfare of their communities absent a specific mandate from the General Assembly. But Rhode Island rejected that very scheme in adopting the Home Rule Amendment. If Rhode Island's home rule system, including the Middletown Charter, is to mean anything, it must mean that absent conflicting state statutes, towns can exercise police powers to protect the health and well-being of their inhabitants. The plaintiffs'

[5] As argued in Part I, *supra*, the General Assembly delegated to localities the authority to exercise police powers with RIGL § 45-6-1(a). *See Stepping Stone Enters.*, 416 A.2d at 662 (holding that, with § 45-6-1(a), "the General Assembly has given town and city councils the police power to promulgate regulations and ordinances to protect the safety of their inhabitants."). However, the plaintiffs reject this view, so *amicus curiae* address a town's authority to exercise police powers even in the absence of this delegation.

theory would render home rule authority virtually meaningless, and the Middletown Charter's charge to legislate for "the preservation of the public peace, health, safety, comfort and welfare, and for the protection of persons and property" would be an empty letter. *See* Middletown Charter, § 206 (1968).[6]

The plaintiffs attempt to ignore this precedent by relying on antiquated cases. To start, the plaintiffs reach back to a case from the turn of the century—the 20th Century—explaining that the regulation of business, including licensing, "falls within the police power of the state." *Foster*, 46 A. at 836 (R.I. 1900). To the plaintiffs, if the police power (including the authority to regulate and license businesses) is a power of the state, it cannot also be a concurrent power of local government. Pls.' Mem. in Supp. of D.J., at 7. But *Foster* said no such thing; and, in any event, its discussion of state licensing has no application to the present, as the Home Rule Amendment was still half a century away. *See* R.I. Const. Art. XIII, § 2 (1951).

Next, the plaintiffs rely upon a case from the sixties, *State v. Krzak*, which broadly states that the "police power . . . may be exercised by the several municipalities only when authorized so to do by the general assembly and then only within such limitations as the general assembly may have provided." 196 A.2d 417, 420 (R.I. 1964); *see also Nugent v. City of E. Providence*, 238 A.2d 758, 763 (R.I. 1968). In its broadest reading, this language supports the plaintiffs' view, but in context it does not. *Krzak* dealt with "a question of delegated authority" and whether or not "an ordinance adopted pursuant to such authority is void if not conformable to the delegation as limited." 196

[6]The Middletown Town Charter was adopted pursuant to the provisions of the 28th Amendment to the Rhode Island Constitution and ratified by the electorate of the Town of Middletown at the general election held November 5, 1968. The Charter became effective December 16, 1968. Section 206 of the Charter provides that the Town Council may "enact, amend or repeal ordinances for the preservation of the public peace, health, safety, comfort and welfare, and for the protection of persons and property."

A.2d at 420. It was not considering the question of a local government's general police powers. In *Krzak*, the General Assembly had specifically provided that local governments could license secondhand dealers, like pawnshops, but provided that "the penalty for violation of any such ordinance shall be a fine not in excess of $200 or by imprisonment not exceeding six months." *Id.* at 419. The city of Pawtucket established such a licensing system, but provided violations "shall be punished by a fine not exceeding five hundred dollars . . . or by imprisonment not exceeding one year or by both such fine and imprisonment"; this was in clear conflict with the explicit limitation imposed by the state law. *Id.* In this case, the plaintiffs do not argue that the Tobacco Ordinance contravenes any express limitation imposed by the state's tobacco licensing scheme or otherwise found in state law.

Tellingly, the plaintiffs' only recent authority to support the point that local governments cannot, as a categorical matter, exercise police power and regulate businesses in any way comes from a dissent. *See* Pls.' Mem. in Supp. of D.J., at 8; *Amico's Inc. v. Mattos*, 789 A.2d 899, 911 (R.I. 2002) (Goldberg, J., concurring in part and dissenting in part, relevant quotation reflects part dissenting from majority). Needless to say, dissenting options are not controlling. And they cannot overshadow the unanimous opinion in *Bradley*—holding that "towns with home rule charters . . . are vested with the authority to legislate matters of public health and safety." 877 A.2d at 607.

The plaintiffs' reliance on this antiquated precedent to argue that all police power is vested exclusively in the state is problematic not only because it has been directly contravened by *Bradley*, as described above, but also because it reflects a notion of home rule authority that has long since been rejected. The cases the plaintiffs rely on harken back to a time when the courts tried to divide local and statewide authority by categories, with some powers allotted to each. As mentioned above, the Rhode Island Constitution specifically vests the General Assembly with exclusive power in some areas, including taxation and elections. Along with those categories, earlier court decisions

stated that police powers, including the regulation of business and licensing, were within the exclusive province of the state. *See Newport Amusement Co. v. Maher*, 166 A.2d 216, 218 (R.I. 1960) ("Licensing is definitely not a local matter."); *Nugent*, 238 A.2d at 763 (stating that "the regulation and control of business" is not "an appropriate matter for local legislation, absent a grant of such power either in express terms or by necessary implication.").[7] Other powers, such as the authority to address local nuisances, were thought to be within local home rule authority. *See Stepping Stone Enters.*, 416 A.2d at 662–63 (holding that towns may enjoin businesses from violating a town's ordinances when the violation constitutes a nuisance because regulation of nuisances is within a town's historic control).

But that system of categorization has broken down. *See* Terrence P. Haas, *Constitutional Home Rule in Rhode Island*, 11 Roger Williams U. L. Rev. 677, 702 (2006) ("The Rhode Island Supreme Court's attitude toward home rule in Rhode Island saw significant development toward a broader view of the authority granted to home rule municipalities beginning in the late 1980s."). And for good reason. None of these categories is neat; they overlap. The regulation of nuisances can also mean the regulation of business—if, for example, a business (or one of its practices) is considered a nuisance. Also, these categories do not necessarily reflect the division between local and statewide concerns. There are some local actions that have statewide implications; if a locality, for example, deems particular high-voltage electrical wires a nuisance and prohibits them from traversing its boundaries, those wires have to go into another locality, potentially disrupting the efficient delivery of service throughout the state. *See Town of E. Greenwich v. O'Neil*, 617 A.2d 104, 112 (R.I. 1992). But a town's requirement that street musicians must obtain a license and abide by various noise

[7] The Town's brief further demonstrates why these cases regarding licensing—particularly *Newport Amusement*—should no longer be binding. Though *amicus curiae* agrees with those arguments, it does not repeat them here, instead focusing on the plaintiffs' larger argument that *all* police powers are vested with the state.

limitations and other rules before performing on its downtown streets is wholly contained to the Town's boundaries and places no burdens on its neighboring cities and towns. A categorical approach is also unworkable given that, at some level, every issue within a locality could be considered a statewide concern. For example, the health and well-being of people in a given community is a concern to the state. Laws that impact a local economy in turn impact the economy of the state. In short, because the state is composed of towns and cities, all local concerns could, in theory, be considered state concerns. And even when several localities face the same challenges, it does not necessarily mean there is a "statewide concern" that can only be addressed by the General Assembly. All localities may want to protect their residents from fires, but that does not mean the purchase of a fire engine is a matter of statewide concern that can only be decided by the General Assembly. Accordingly, the "local" versus "statewide" analysis is a complex one that has been subject to changing analysis from the Rhode Island Supreme Court since the state's ratification of the Home Rule Amendment.

Given these challenges, it is unsurprising that the Rhode Island Supreme Court has moved away from a categorical analysis and instead requires that courts evaluate whether a local ordinance falls within a town's home rule authority based on its individual substance rather than inflexible labels. *See* Haas, *supra* at 707 (explaining that the Court has "developed a more nuanced understanding of the concept of home rule, and as the case law has slowly developed, the [C]ourt has moved away from the almost fearful analysis of *Newport Amusement Co.*"). The Rhode Island Supreme Court, in fact, explicitly recognized that its prior case law was "devoid of guidelines defining the parameters of 'local' and 'general' legislation." *O'Neil*, 617 A.2d at 111 (internal quotation marks omitted). So it set forth "three variables" for courts to use to "discern[]" the "limits of the local-general equation," including weighing (1) the necessity of uniform statewide regulation, (2) historical practice, and (3) the actions' effect outside the locality's boundaries. *Id. Amicus curiae*

discuss these variables below as they relate to the Tobacco Ordinance, but the point here is that these variables now govern home rule analysis. Even when exercising powers previously thought to be "categorically" reserved to the state, such as the police power to protect health and safety or the power to regulate business, Rhode Island courts have applied these factors rather than categorically enjoin the local government's action. *See*, *e.g.*, *N. End Realty, LLC v. Mattos*, 25 A.3d 527, 535 (R.I. 2011) (applying factors to determine if local government could regulate real estate developers); *R.I. Hosp. Ass'n v. City of Providence ex rel. Lombardi*, 775 F. Supp. 2d 416, 437 (D.R.I. 2011), aff'd, 667 F.3d 17 (1st Cir. 2011) (applying factors to uphold local regulation of hotels).

The upshot: both state and local governments in Rhode Island share the police power—including the ability to regulate for the health and safety of their inhabitants. *Bradley*, 877 A.2d at 607–08. To be sure, state law may have preemptive effect, either by directly conflicting with a local law or by occupying a field so as to preclude local regulation. But there is no preemption here. *Nat'l Ass'n of Tobacco Outlets, Inc.*, 731 F.3d at 83. And absent that, courts employ the *O'Neil* factors to determine whether a city or town's action is "purely local" or so interferes with the rest of the state to be considered a "matter[] of statewide concern" that is beyond its home rule authority. *O'Neil*, 617 A.2d at 111.

B. The *O'Neil* factors demonstrate that the Town's Tobacco Ordinance is a matter of local concern.

Application of the *O'Neil* factors demonstrates that enacting the Tobacco Ordinance was within the Town's home rule authority. In determining whether an ordinance fits within a town's local authority, courts apply the following three-part test to determine whether the regulation constitutes "local or general legislation":

> First, when it appears that uniform regulation throughout the state is necessary or desirable, the matter is likely to be within the state's domain. Second, whether a particular matter is traditionally within the historical dominion of one entity is a substantial consideration. 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. *O'Neil*, 617 A.2d at 111 (internal citations omitted).

None of these factors is dispositive, though the third is given the most weight. *See id.* The Town's brief demonstrates how these factors support its authority to adopt the Tobacco Ordinance. *Amicus curiae* builds upon that argument by demonstrating how the plaintiffs' interpretation of the *O'Neil* factors is deeply flawed. Again, the plaintiffs' extremely overbroad reading of the *O'Neil* factors would preclude almost all local public health regulation.

1. The record reveals that statewide uniformity is not necessary for the Ordinance's effectiveness.

The first *O'Neil* factor considers whether the subject "requires uniform [statewide] regulation." *Id.* at 112. The plaintiffs' arguments as to this factor are unpersuasive.

The plaintiffs first argue that statewide policy is necessary because local restrictions on the sale of flavored tobacco "will not serve to diminish the sale of tobacco generally" given that customers will just buy it in neighboring communities. Pls.' Mem. in Supp. of D.J., at 11. With this argument, the plaintiffs assert an empirical argument that is contradicted by the evidence and, in any event, is within the Town's authority to evaluate. In passing the Tobacco Ordinance, the Town Council was particularly concerned about tobacco use by youth. And the evidence before the Middletown Town Council revealed that other cities and towns that have adopted similar ordinances have seen substantial reductions in underage tobacco use. *See* Town's Mem. in Opp., at 4. That is not surprising given the research. Flavors, in particular, are known to attract youth to tobacco products, and because adolescents' brains are still developing, exposure to tobacco products during adolescence can be particularly destructive. *See* Office on Smoking & Health, Dep't of Health & Human Servs., *E-Cigarette Use Among Youth and Young Adults: A Report of the Surgeon General*, vii, 11 (2016), available at https://perma.cc/SS67-G7LD. Moreover, because of their

limited income and mobility, young people are more price sensitive and less able to travel to neighboring towns to purchase tobacco. *See* Dep't of Health & Human Servs., *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General*, 530 (2012), available at https://perma.cc/NMP4-3W8S. Based on this and other research, the Town was within its legislative judgment to determine that making tobacco products more expensive, less convenient to attain, and less desirable because of taste, would reduce the rates of tobacco use especially by young people.

To be sure, as the plaintiffs next argue, the General Assembly *could* adopt uniform statewide legislation regarding tobacco product flavors and pricing practices. A statewide policy may even be more effective and may help more people. But that is true of most any public health policy—and many other local policies outside of the health arena. Taking a good idea and implementing it statewide might be "desirable," but that alone cannot divest a town the authority to adopt it in the first place. Just look at the plaintiffs' own examples. A policy requiring paper rather than plastic bags (which plaintiffs concede would be permissible for a town to enact) may have more environmental impact if adopted statewide, but that does not mean towns and cities are devoid of the authority to impose a paper bag ordinance. So too here, that a statewide policy limiting tobacco product flavors and discounts may be even better does not mean a town cannot take the first steps to protect its inhabitants. Indeed, those first local steps often serve as the "experiments" that the state can learn from and potentially later adopt. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973) (recognizing that by "analogy to the Nation-State relationship in our federal system," at the state-local level "[p]luralism also affords some opportunity for experimentation, innovation, and a healthy competition" to develop policies).

Lastly, the plaintiffs contend that uniform regulation is necessary because, if towns are allowed to enact various prohibitions on products, there would a "chaotic regulatory framework

that would hurt the economy of the state." Pls.' Reply, at 7; *see also* Pls.' Mem. in Supp. of D.J., at 11. The plaintiffs posit an absurdist parade of horribles, where cheeseburgers, soda, and other products are banned outright. This argument proves too much. By this account, cities and towns can *never* regulate business *in any way* because, if other localities were to adopt similar legislation, businesses would have to navigate the "patchwork" of different regulations when operating in various locations throughout the state. Indeed, by this measure, localities could not even prohibit giving customers plastic bags—as the plaintiffs already concede is a proper use of local authority—because other jurisdictions may not prohibit them.

That is not the type of regulatory "patchwork" that the Rhode Island of Supreme Court was worried about in *O'Neil*. There, the Court confronted a town that imposed a moratorium on building electrical transmission lines that exceeded a certain voltage; three nearby municipalities had already "enacted similar legislation." 617 A.2d at 111. Because the case involved the state's utility system, such a "patchwork . . . of electrical transmission legislation" could "handicap compliance with safety regulations and inhibit the efficient distribution of electrical power." *Id.* at 111–12. Each municipalities' decision that high voltage line could not pass through its boundaries meant that the lines had to go elsewhere, forcing the state utility "to transmute its electrical distribution network into an unwieldy leviathan that would unnecessarily snake through many extra miles of the state." *Id.* at 112. Unlike *O'Neil*, there is no concern about interfering with a statewide scheme here. The Town's tobacco licensing scheme complements the state's statutory scheme—which requires tobacco sales licenses anyway. RIGL § 44-20-8. Thus, unlike "public-utility regulatory policy," the law regarding tobacco product flavors and discounts does not "require[] uniform regulation" across the state. 617 A.2d at 112.

The bottom line is that the democratic process protects against the plaintiffs' exaggerated fears of "chaos." If a town council enacts regulations that its citizens disagree with, it is for the

people to elect new representatives, or for the General Assembly to step in and preempt such laws if they are having a detrimental impact on the state. It is not for the court to speculate about what actions may happen ten steps down the line that *could*—but do not now—necessitate statewide action. The Town determined that complying with the Tobacco Ordinance is not too cumbersome on businesses and that any detriment was outweighed by the public health benefits. And the General Assembly has not preempted such action. This Court should not interfere with such democratic processes; it should allow local innovation for the protection of public health to thrive.

2. State and local governments have historically shared responsibility for the health and welfare of their citizens.

The second *O'Neil* factor considers whether the particular matter has traditionally been within state or local domain. As the Town's brief explains, regulating to protect the public health and welfare, including from the harms of smoking, has long been a shared responsibility of the state and local governments. *See* Town's Mem. in Opp., at 9. And laws similar to the Tobacco Ordinance have existed in Rhode Island's municipalities for 18 years and are now scattered throughout the state. *Id.* (listing ten examples).

In response, the plaintiffs argue that localities have not historically had the power to regulate businesses or implement licensing schemes. But their authorities draw from the division of authority between the state and local governments from *before* the Home Rule Amendment (which was enacted in 1951) and *before* most localities adopted home rule charters (which most localities adopted decades later). Just look at the cases they cite with respect to the power to regulate business. *See* Pls.' Reply, at 9–10 (citing *Foster*, 46 A. at 835; *State v. Guyette*, 102 A.2d 446, 448 (R.I. 1954), *Opinion to the Governor*, 69 A.2d 531, 547 (R.I. 1949); *Dalton*, 46 A. at 238). Those cases, two dating

back to 1900, demonstrate that the state has traditionally regulated businesses, but they say nothing about localities' power to do so after the Home Rule Amendment and subsequent charters.[8]

So too with licensing. In 1960, for example, the Court held in *Newport Amusement* that "[l]icensing is definitely not a local matter," because "[t]he power to license has never been exercised by the municipalities of this state as far as we are aware except by express authorization of the legislature." 166 A.2d at 218. When the Court made that observation, the Home Rule Amendment was brand new and most localities had not even adopted charters. Its observation that licensing is not a local concern therefore reflects only the pre-home rule view. Some subsequent cases followed *Newport Amusement* on this point, but again, they were (perhaps inattentively) repeating the pre-home rule standard. Following it now too, even after the Court has signaled a more variable analysis for home rule questions, would be inappropriate and require that local governments be stuck with the few powers they had prior to the Home Rule Amendment. But that cannot be how the scope of local authority is cabined, or else the Home Rule Amendment would have no meaning.

The upshot: while the plaintiffs may be correct that the exercise of police powers and implementation of licensing schemes are historically state powers, adhering too much to pre-home rule history would debilitate the very change the home rule scheme was meant to facilitate. That

---

[8] For this point, the plaintiffs also cite *Vitterito v. Sportsman's Lodge & Rest.*, 228 A.2d 119, 122–23 (R.I. 1967), which is about state power over alcohol sales; a *sui generis* area where the state "so completely" controls its prohibition or regulation that localities only have specifically delegated authority. *Id.* It is not analogous here. The plaintiffs also cite (at p. 8) *Krzak*, 196 A.2d at 420, which *amicus curiae* addresses above. *See supra*, at p. 11–12. Here, the plaintiffs attempt to use *Krzak* to show that the Home Rule Amendment did not transfer police power to localities. But that is not what the case says. Instead, it says that the "*sovereignty of the state* with relation to the exercise of the police power" was not transferred to localities with the Home Rule Amendment. *Id.* at 421 (emphasis added). That is, the state is still *sovereign* and can preempt local laws that exercise police power locally. As the court explained, "th[e] amendment does not purport to diminish the legislative power of the general assembly in matters of state-wide application." *Id.*

is, it would unduly tether local authorities to Dillon's Rule even though the Constitution no longer requires it.

3. The Tobacco Ordinance has no significant effect on people outside Middletown.

The "most critical" *O'Neil* factor focuses on whether a municipality's action has "significant effect outside the home rule town or city." 617 A.2d at 111. This factor strongly supports upholding the Tobacco Ordinance because its effects are confined to the Town. The Ordinance only restricts retailers with respect to tobacco sales within the Town's borders. It does not impact how the state or any other municipality operates with respect to tobacco, or anything else.

The plaintiffs' arguments to the contrary only serve to highlight that this is a truly local ordinance. The plaintiffs, for example, argue that the Tobacco Ordinance will have effects outside of Middletown because customers from outside the Town who come to shop there will not be able to buy flavored tobacco products or use coupons. Pls.' Mem. in Supp. of D.J., at 11. They also argue that business owners, whom they claim are "mostly not residents of Middletown," and their employees will be affected *if* the Tobacco Ordinance significantly impacts their business. *Id.*

But the distinction between what constitutes a local versus general law does not hinge on the vagaries of out-of-town customers passing through or who happens to own or work at a business in town. It's axiomatic that *any* local law would impact those who are operating in or passing through the town. With the advent of vehicles and public transportation, people from neighboring towns often cross municipal lines and work in towns different from where they reside. If that alone could convert any legislation into a "statewide" concern, home rule legislation would cease to exist in Rhode Island. It cannot be that because people can drive, there can be no local public health regulation. What the plaintiffs' examples prove instead is that the Ordinance only affects those *in*

town—the customers there, the businesses there, the employees there, and, most importantly, the youth there whom this law protects.

Nor should the Court adopt the plaintiffs' argument that the Tobacco Ordinance cannot be allowed because, if similar laws are passed by other localities, the "economy of the state as a whole will be affected." Pls. Mem. in Supp. of D.J., at 11; *see also* Pls.' Reply at 12. As an initial matter, this argument is based on the assumed—and false—premise that this regulation harms the economy of the state: the evidence shows otherwise. Protecting people from death and disease has important positive economic implications, for health care costs and worker productivity, as well as for the basic public welfare. Xin Xu, et al., *Annual Healthcare Spending Attributable to Cigarette Smoking: An Update*, 48 Am. J. of Preventive Med. 326 (Mar. 2015); Micah Berman, et al., *Estimating the Cost of an Employee Smoking*, 23 Tobacco Control 428 (June 2013).

Setting that aside, however, the plaintiffs' economic argument is again overbroad. Almost any local regulation is going to have economic implications, including all the examples plaintiffs give; whether it dictates what hours a store can operate, whether the grocer is allowed to give customers plastic bags, or whether merchants can sell their wares on the sidewalk, there is always *some* effect (either positive or negative) on the economy. And if multiple municipalities adopt such similar ordinances, the economic effect could be multiplied. According to the plaintiffs' theory, because at some speculative point there might be too much aggregate economic effect, no singular local regulation can stand. This position is absurd and would cripple local authority. It is not the law, as courts have sanctioned numerous local actions with economic impacts. *See*, *e.g.*, *Bruckshaw v. Paolino*, 557 A.2d 1221 (R.I. 1989) (holding that regulation of city's employee pension plan was not a matter of statewide concern); *R.I. Hosp. Ass'n*, 775 F. Supp. 2d at 437 (upholding local regulations regarding hotel employees).

More fundamentally, the *O'Neil* test does not ask the Court to play economist and weigh the significance of economic outcomes. It is focused on whether the town's ordinance will reach outside its boundaries and constrain the sovereignty of other towns. That is, does one town's actions intrude upon another town's same ability to protect the health and well-being of its inhabitants? The answer here is easy: No.

* * *

The plaintiffs' exceedingly narrow conception of a town's home rule authority is disturbing and, if adopted by the Court, would leave no room for basic public health regulations at the heart of local governance. Each of their arguments individually is flawed. They somehow read a statute that explicitly provides for ordinances "respecting the sale and purchase of . . . commodities" as insufficient to allow a town to limit flavored tobacco sales to specialty stores. They say a town can *never* exercise police powers without explicit statutory authority, despite modern Supreme Court jurisprudence pointing in the opposite direction. They construe the *O'Neil* factors as preventing any regulation that could, if replicated by other towns, impact the economy. They would even eliminate local regulations as impermissibly broad because they impact everyone within the Town's borders, including out-of-towners driving through. Taken together, these arguments reflect an extreme position that undermines the plaintiffs' entire argument.

The fact remains that the General Assembly retains the power to act in this area. But it has not stopped local governments from taking these basic steps to protect their citizens' health and well-being. Neither should this Court.

CONCLUSION

For these reasons, and the reasons set forth by the Town, *amicus curiae* respectfully requests that the Court enter judgment affirming the validity of the Tobacco Ordinance.

Respectfully submitted,

/s/ Sonja Deyoe

RACHEL BLOOMEKATZ
GUPTA WESSLER PLLC
1900 L Street, NW, Suite 312
Washington, DC 20036
(202) 888-1741
rachel@guptawessler.com

SONJA DEYOE
LAW OFFICES OF SONJA DEYOE P.C.
395 Smith Street,
Providence, RI 02908
(401) 864-5877
sld@the-straight-shooter.com

July 30, 2018

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2018, I electronically filed and served this document on all parties through the Rhode Island Judiciary's Electronic Filing System. The document electronically filed and served is available for viewing and downloading on the electronic filing system.

/s/ Sonja Deyoe
Sonja Deyoe