STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPERIOR COURT

MAHFOUD ABDELLA, et al.,
Plaintiffs,

v.

TOWN OF JOHNSTON,
Defendant,

and

LA ENTERPRISES INC., et al.,
Interested parties.

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C.A. No.: PC-2018-0466

BRIEF OF PUBLIC HEALTH LAW CENTER, AMERICAN CANCER SOCIETY CANCER ACTION NETWORK, AMERICAN LUNG ASSOCIATION, CAMPAIGN FOR TOBACCO-FREE KIDS, CITY OF PROVIDENCE, CITY OF CENTRAL FALLS, TOWN OF MIDDLETOWN, TOWN OF NORTH PROVIDENCE, TRUTH INITIATIVE, AND TOBACCO FREE RHODE ISLAND AS *AMICI CURIAE* IN SUPPORT OF THE DEFENDANT TOWN OF JOHNSTON'S OPPOSITION TO PLAINTIFFS' COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

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January 22, 2019

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*

This case is about whether the Town of Johnston can remove deadly products that are designed to be attractive to youth from the shelves of its own neighborhood corner stores. Facing a public health crisis, the Town enacted the Tobacco Ordinance that: (1) removes flavored tobacco products from general stores and requires that they be sold in vape shops or smoking bars, and (2) prohibits tobacco retailers from accepting coupons or providing discounts for any tobacco product. Ordinance 2017-7 (adopted June 12, 2017). The Town enforces this law by requiring tobacco retailers to obtain licenses, and then withdrawing the license if monetary penalties fail to compel compliance. *Id.*

As this Court is well aware, Johnston is not alone in adopting this Ordinance. *See Ecig Shed, Inc. v. Barrington*, Bench Decision, PC 2018-0471 (Providence Sup. Ct.) (July 19, 2018) (hereinafter "Barrington Op.").[1] Over seven years ago, Providence adopted an ordinance that is a near carbon copy of the one at issue today. And it has been a success. Unsurprisingly then, other cities and towns across the State and region have followed its model, exercising their local authority to protect public health.

The plaintiffs ask this Court to invalidate this crucial public health measure. But there is no statute that prohibits the Town—or other municipalities across the state—from taking this important 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

[1] The following municipalities in Rhode Island, in addition to Johnston, 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 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). Yet the plaintiffs still argue that the Town's hands are tied—that all Rhode Island municipalities' are. They argue that because the Tobacco Ordinance regulates business and involves licensing, it exceeds the Town's home rule authority. That argument should be rejected for three reasons.

First, the plaintiffs are asking to undo the fundamental framework that allows local governments to pass regulations that assure the health and safety of their inhabitants unless those regulations are preempted by state law. Their argument, if adopted, would not only invalidate Johnston's Ordinance, but Providence's and many other towns' nearly-identical tobacco regulations, eliminating one of the most effective public health interventions in the country. This Court has already invalidated the Barrington Tobacco Ordinance.[2] But this Court should realize that the plaintiffs' constricted view of home rule does not stop there. Their theory that municipalities cannot pass health ordinances that incidentally regulate businesses would have this Court eliminate basic health and safety ordinances across the state, even outside of the tobacco context. Local safety regulations for trampoline parks and other potentially hazardous activities would all be on the chopping block, curbing Rhode Island municipalities' ability to protect public

[2] *Amici* respectfully disagree with this Court's decision to invalidate the Barrington Ordinance. However, as demonstrated in this brief, there are issues unique to Johnston's Charter that distinguish this case from Barrington. And the two ordinances are materially different, particularly because Johnston's Ordinance does not increase the tobacco purchase age to 21. Moreover, in its bench opinion in the Barrington case (at 26), this Court stated that it "wouldn't mind being told [it's] wrong" and welcomes appellate review. In addition to distinguishing the Barrington matter, this brief points to areas where *amici* believe the Court erred in the Barrington matter and highlights issues that are appropriate for appellate review.

health and safety. Rhode Island's home rule jurisprudence, properly construed, does not necessitate this drastic result.

Second, and most simply, Johnston has local authority to enact this important public health ordinance because the Legislature delegated such power to the Town in both its Charter and in RIGL § 45-6-1(a). The Johnston Charter explicitly grants the Town power to legislate for "the preservation of the public peace, health, safety, [and] welfare" of its residents, subject only to "the constitution of [Rhode Island] or by laws enacted by the general assembly" preempting local power. Home Rule Charter for the Town of Johnston, §§ 1-3, 3-8. Additionally, the General Assembly has mandated that the localities may regulate "the purchase and sale of merchandise or commodities" within their boundaries. RIGL § 45-6-1(a). The Court should reject the plaintiffs' invitation to dismiss the plain *and explicit* language of the Charter and the statute as an insufficient delegation of authority to enact the Tobacco Ordinance. Doing so would render the statutory language meaningless, in violation of basic canons of construction.

Third, even assuming these explicit delegations provide insufficient authority for the Tobacco Ordinance, the Town's home rule authority provides it because, under Rhode Island's home rule scheme, municipalities may adopt health and safety policies that address local concerns. *See Town of E. Greenwich v. O'Neil*, 617 A.2d 104 (R.I. 1992). The plaintiffs' position 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 DJ at 6.[3] Thus, even without the licensing scheme, the plaintiffs contend that the rest of the Tobacco Ordinance still

[3] Plaintiffs' Memorandum in Support of Their Request for Declaratory Judgment and in Support of Their Motion for Preliminary and Permanent Injunctive Relief, filed Jan. 26, 2018 (hereinafter "Pls.' Mem. in Supp. of DJ").

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.

Amici curiae submit this brief to highlight the plaintiffs' extreme position regarding the Town's scope of authority to enact basic public health measures. And *amici* have particular experience and expertise to aid the Court in evaluating this matter. To be sure, *amici*—which consist of both local and national public health groups and Rhode Island municipalities—can speak to the importance of this tobacco ordinance for health outcomes. (Full list of *amici* listed in the addendum.) But they also can speak to the authority of Rhode Island's local governments to adopt this and other public health policies. 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 also in how local governments can act within their authority to adopt and enforce such measures. The municipal signatories also have enacted (or are considering enacting) similar tobacco ordinances to protect their residents, particularly youth, from the deadly harms of tobacco use. Not only do these municipalities have expertise in home-rule jurisprudence, but they also grasp the full—and shocking—breadth of the plaintiffs' argument that *all* local public health and safety ordinances that also regulate business must be invalidated. As *amici* demonstrate, in the absence of any conflicting statute, the Town—like others have done throughout Rhode Island—can exercise its fundamental authority to protect

its residents from deadly products and address the public health epidemic within its borders. Examining the sheer breadth of the plaintiffs' arguments to the contrary, and appreciating their implications, reveals their folly.

ARGUMENT

I. Adopting the plaintiffs' view of home rule authority would dramatically impede local authority to protect health and safety.

The plaintiffs' theory of home rule authority is so constricted that it fundamentally alters the balance between local and state government, invalidating one of the most important tobacco use interventions in the country and myriad other health and safety laws throughout Rhode Island.

A. The Tobacco Ordinance is a textbook local health regulation that has been proven to reduce youth tobacco use.

It is undisputed that Johnston's Ordinance seeks to tackle one of the most difficult public health issues of our time—youth use of tobacco products. And it's not alone. In coordination with the Rhode Island Department of Health (RIDOH), Providence passed a tobacco ordinance in 2012 that has been dubbed the "Rhode Island Model Tobacco Policy" by state authorities. RIDOH, *Patterns of Tobacco Use by Rhode Island High School Students at the City/Town Level* 2 (2017). Building on the success in Providence, five other local governments with tobacco ordinances have adopted the Rhode Island Model Tobacco Policy as their local law. The policy includes local licensing, prohibitions on coupon redemption, and the flavor restriction—the same key elements at issue in this case. *Id.*

It is unsurprising that Johnston, like other towns throughout Rhode Island, has targeted the use of flavored products in its attempt to thwart youth tobacco use. Quite simply, flavors attract young people. The tobacco industry knows it, as do health professionals. *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*, 11 (2016), https://perma.cc/SS67-G7LD ("Surgeon General's Report") ("Flavors

have been used for decades to attract youth to tobacco products and to mask the flavor and harshness of tobacco."). Just consider new products that one finds on the shelves of convenience stores today—unless ordinances like this one keep them away from children. Most people have not heard of a Da Bomb Blueberry cigarillo, a flavored mini cigar that is made to look like a cigarette. But young people know about them. At present, cigars are so popular that high school boys in Rhode Island are twice as likely to smoke them as cigarettes. Laura Kann et al., CDC, *Surveillance Summaries: Youth Risk Behavior Surveillance—United States, 2015*, 65 MMWR 1, 82, 90 (June 10, 2016). Smokeless tobacco products (*e.g.*, chew tobacco) come in flavors like cinnamon roll and sour apple. And, like cigarettes, mini cigars and smokeless tobacco products are addictive and deadly. Deeming Rule, 81 Fed. Reg. 28,974, 29,020 (May 10, 2016).

What about a Unicorn Milk e-cigarette? As the U.S. Surgeon General has warned, the surge of youth e-cigarette use is now an epidemic that puts young people on a track towards a lifetime of nicotine addiction. *See* U.S. Surgeon General's Advisory on E-Cigarette Use Among Youth (Dec. 18, 2018), https://perma.cc/44HL-MGGA. And new e-cigarette devices are being marketed which are made to look like everyday objects, like computer flash drives, that can easily avoid detection in schools and other places where young people can use them for vaping flavored nicotine surreptitiously. For example, a device called JUUL "fits easily in a pocket and looks nondescript when plugged into a laptop's USB drive to recharge or sitting on a desk." Anne Marie Chaker, *Schools & Parents Fight a 'Juul' E-Cigarette Epidemic*, Wall Street J. (April 4, 2018). As FDA Commissioner Scott Gottlieb noted, JUUL-like products "have become wildly popular with kids" and are "more difficult for parents and teachers to recognize or detect." Press Release, FDA, Statement from FDA Commissioner Scott Gottlieb, M.D. on new enforcement actions (April 4, 2018). Research also indicates that e-cigarettes may serve as a gateway to the use of other more hazardous tobacco products like cigarettes. A Report of the National Academies of Sciences,

Engineering & Medicine, *Public Health Consequences of e-Cigarettes* 16–30 (2018), recently concluded: "There is substantial evidence that e-cigarette use increases [the] risk of ever using combustible tobacco cigarettes among youth and young adults." A recent study estimated that, because of e-cigarette use in 2014, 168,000 adolescents and young adults would transition to smoking conventional cigarettes in 2015, eventually becoming daily cigarette smokers, resulting in more than 1.5 million years of life lost. Samir S. Soneji et al., *Quantifying population-level health benefits & harms of e-cigarette use in the United States*, PLOS ONE 1 (March 14, 2018), https://perma.cc/ZCD4-ABWD. Thus, in addition to the direct harm of e-cigarettes to the health of young people, their increasing use threatens to undermine the progress of communities across the nation, and in Rhode Island, in curbing youth smoking.

The health effects on youth are particularly grave because nicotine exposure at a young age "may have lasting adverse consequences for brain development." Deeming Rule, 81 Fed. Reg. at 29,033; *see also* Surgeon General's Report at vii (reporting that adolescents—whose brains are not yet fully developed—are particularly "vulnerable to the negative consequences of nicotine exposure."). Neuroscience research over the past few decades has shown that, contrary to earlier assumptions, brain development continues into one's twenties. Because nicotine exposure at this younger age induces structural changes in the brain, those who begin to use tobacco as adolescents are more likely to smoke into adulthood, have more difficulty quitting, and experience deeper levels of addiction. Surgeon General's Report at 105. Beyond addiction and "priming for use of other addictive substances," the effects include "reduced impulse control, deficits in attention and cognition, and mood disorders." *Id.* at vii.[4]

[4] For further discussion of the health crisis addressed by Rhode Island's municipalities that have adopted tobacco ordinances like Johnston's, see generally Brief of Amici Curiae Campaign for Tobacco Free Kids et al., *Ecig Shed v. Barrington*, C.A. No. PC-2018-0471 (filed June 1, 2018).

To address this public health emergency, localities in Rhode Island have stepped up to the plate. Cities like Providence and towns like Johnston have adopted innovative policy approaches to reduce youth use of tobacco products, particularly by targeting flavored products. "[C]ities' smaller scale, concentrated political preferences, and streamlined lawmaking processes facilitate public health innovation." Paul Diller, *Why Do Cities Innovate in Public Health? Implications of Scale and Structure*, 91 Wash. U. L. Rev. 1219, 1219 (2014). As the Court recognized in the Barrington matter, localities' efforts to stem the tide of youth tobacco and e-cigarette use just like this Ordinance are not only important and "valued," but are "almost . . . an absolute necessity at this point in time." Barrington Op. at 25. This innovation is much-needed now, in the face of a public health emergency. This Court must decide whether to disrupt this progress.

B. The plaintiffs' theory, if adopted, would not only eliminate a proven means of addressing youth tobacco use, it would invalidate scores of other local health and safety regulations throughout the state.

The plaintiffs' arguments stretch far beyond tobacco products, e-cigarettes, or this Ordinance, making this case one of particular importance well beyond its particular context. The plaintiffs argue that Johnston—and all Rhode Island municipalities—lack *any* inherent or explicit authority to regulate businesses for the health and safety of their residents, and to impose licensing to enforce such regulations. Accordingly, their view, if adopted, would not only invalidate the Tobacco Ordinance, but would also threaten to invalidate all Rhode Island municipalities' ability to protect the health and safety of their residents in numerous other areas.

Consider, for example, some of the local health and safety regulations across Rhode Island that, like the Tobacco Ordinance here, also regulate businesses. The Court need not look hard to find examples. Providence, for example, requires licensing for those operating trampoline parks to ensure the safety of their guests; if a licensee is not following the safety rules, the license is revoked. *See* Providence Ordinance § 14-220. Similarly, some jurisdictions require a license for a business to

have valet parking, so that the city can ensure that traffic obstruction is mitigated and that there is a safe place for those valeting a vehicle. *See, e.g.*, *id.* § 14-285. And in the Town of Warwick, make-up tattooing businesses have to be licensed and must meet requirements set by the board of public safety, given the potential health dangers with this form of permanent make-up.[5] Warwick Ordinance § 10-32. These are but a few examples of how localities regulate business for the health and safety of their residents. The plaintiff's view of home rule authority could require invaliding these regulations and many more, leaving towns with no options to address identified dangers that have already been successfully regulated at the local level.

II. The General Assembly explicitly delegated authority to Johnston and other municipalities to regulate the sale and purchase of merchandise, like tobacco products, to further public health and safety.

There can be no doubt that Johnston has authority to enact the Tobacco Ordinance if there is an explicit delegation in state law, or if the Ordinance is within the power necessarily implied by an explicit delegation. *See Amico's Inc. v. Mattos*, 789 A.2d 899, 911 (R.I. 2002). And there are two such explicit delegations that give the Town authority to restrict flavored tobacco products and tobacco sales discounts.

First, the Johnston Charter—ratified by the Rhode Island Legislature in 1963—explicitly delegated broad legislative power to the Town. Among those powers, the Town Council has authority to "enact, amend, or repeal rules, ordinances and resolutions for the government of the town which have to do with the preservation of the public peace, health, safety, welfare and comfort of the inhabitants" and to "[g]rant, suspend or revoke licenses in accordance with law." Charter § 3-8(10); P.L. 1963, Ch. 187. Enacting policies to protect the public health, such as the Tobacco

[5] Permanent make-up is tattooed onto a client's face and can lead to serious health consequences, including hospitalization from infections, if it is done without adhering to health standards or using substandard equipment.

Ordinance here, fall squarely within this authority. The Town has identified a public health crisis, identified a proven solution, and acted for "the preservation of the public . . . health." The fact that businesses are incidentally affected does not remove the Ordinance beyond the Town's broad authority to regulate for public health. Indeed, the Charter specifically states that the Town's powers include "all powers implied in or incident to the powers expressly granted." Charter § 1-3. If to protect health, some of the Town's regulations impact business, the power to regulate business is necessarily implied or incident to the Town's authority—and responsibility—to protect the health of its residents. The General Assembly saw this language and explicitly ratified it, making it supersede any general rule that towns cannot regulate in this way without such authority.

Second, the clear text of RIGL § 45-6-1(a) 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." (citation omitted)). The application of the plain text here is straightforward: By its plain terms, Johnston's law is an "ordinance[]" "respecting the purchase and sale" of "merchandise"—*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 redemption of coupons and other discounts. And the Tobacco Ordinance's licensing scheme is merely an effective enforcement mechanism for this law, and therefore it too "respect[s] the purchase and sale of . . . commodities." RIGL § 45-6-1(a).

There is no sound basis to dismiss the plain meaning of RIGL § 45-6-1(a). The plaintiffs suggest that, despite RIGL § 45-6-1(a), municipalities still cannot exercise any police powers, including the regulation of business. But they fail to recognize that the General Assembly explicitly 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) (emphasis added). Yet to say that the Town has no police power to enact the Tobacco Ordinance, as the plaintiffs maintain, directly contradicts this precedent and the statute's plain language.

Indeed, there is no logical way to say that municipalities can—as state law explicitly states—enact laws "respecting the purchase or sale of merchandise," but cannot (as plaintiffs say) "regulate business." Logic dictates that any ordinance that does the former must also do the latter. Thus, the plaintiffs' interpretation requires rewriting the statute to delete this explicit power that the Legislature granted to municipalities over the purchase and sale of merchandise. But courts do not have that power. *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." (citation omitted)).

With respect to the Barrington matter, this Court concluded that RIGL § 45-6-1(a) did not delegate authority for that town's tobacco ordinance because that statute does not "expressly grant power to municipalities to ban the sale of flavored tobacco, or any product for that matter." Barrington Op. at 23. But the Tobacco Ordinance here does not totally ban any product (or raise the age of purchase, as in the Barrington case). By its terms, the Tobacco Ordinance only prohibits the sale of flavored tobacco merchandise *in some types of stores*, but allows it in others, namely, specialty shops like vape stores or smoking bars. Ordinance 2017-17. And contrary to the plaintiffs' contention, it has not made flavored tobacco products "contraband," such that possession is

outlawed. *See* Pls. Mem. in Supp. of DJ at 10. 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 (at 11), the Tobacco Ordinance does not regulate advertising. It restricts purchases and sales—*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).

Nor should the Court be concerned that RIGL § 45-6-1(a) is not specific enough because it does not mention tobacco, flavors, or discounts specifically. The statute specifically mentions "merchandise" and its "purchase or sale." The level of specificity the plaintiffs request is unnecessary. In *Bradley*, for example, 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: Johnston has determined that widespread sale of 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 go. No more specificity is required by law.

Interpreting RIGL § 45-6-1(a) to require a more explicit delegation 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 Court ruled that a more specific delegation is required—*i.e.*, 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.

Lastly, the fact that RIGL § 45-6-1(a) and the Charter do not specifically describe retail licensing does not mean that the licensing provisions in the Ordinance must fail. The licensing scheme here is a regulation for "the preservation of the public . . . health," explicitly part of the Johnston Charter. And it only "respect[s] the sale and purchase of merchandise" as provided in RIGL § 45-6-1(a). 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 explicit authority 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 merchandise" and are not targeted at health effects. And the licensing scheme is not a tax and does not generate any revenue; the fee only supports the law's enforcement. Thus, no additional delegation for licensing is required. Indeed, local tobacco licensing schemes have existed in Rhode Island for over 18 years, and the General Assembly has never prohibited nor modified them. *See supra,* n.1. Neither should this Court.

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

Even without the specific delegations described above, the Town appropriately adopted the Tobacco Ordinance pursuant to its home rule authority, as reflected in 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 in 1951, every city or town that has enacted a home rule charter—such as Johnston since the Legislature's approval of its Charter in 1963—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, 1264 (R.I. 1989); R.I. Const. Art. 12, §§ 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 fact, 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. As an initial matter, they 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 DJ at 6. Next, they argue that even if Johnston may exercise police powers, it cannot enact the Tobacco Ordinance under *O'Neil.* They are wrong on both counts, and the Court should reconsider its analysis from the Barrington case, to the extent it has adopted this constrained view of home rule. Moreover, to the extent that this Court is bound by *Newport Amusement* to strike the Ordinance's licensing scheme, this Court should sever licensing and uphold the remainder of the law and call for the Rhode Island Supreme Court to reverse that flawed and antiquated precedent.

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 DJ at 6. 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 (R.I. 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). 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. *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. Adopting that expansive view would render home rule authority anemic; unsurprisingly, recent precedent clarifies that it is not the law.

1. The Rhode Island Supreme Court has held that municipalities have police powers.

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. 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 Johnston 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*.

Bradley's 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. 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 Johnston Charter, is to mean anything, it must mean that absent conflicting state statutes, towns can exercise police powers to protect the health and wellbeing of their inhabitants.

2. The plaintiffs' antiquated cases do not demonstrate that the Town can never regulate businesses to advance health and safety.

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 DJ at 6. 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. 13, § 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 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," 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 DJ 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 opinions are not controlling, and that case, if anything, supports the Town's authority because it holds that a town can *add* health and safety conditions to licenses that the state did not explicitly specify. *Id.* at 905. Similarly, their citation (at 7) to *Brancato* provides little support. There, though the court recites the antiquated language about towns not being able to regulate business, it never has to contemplate whether it can undertake such regulation in the name of public health. Because the Court in *Brancato* held that the regulation of sewers explicitly delegated to the municipality, it did not have to determine what would be beyond the town's general home rule authority. 565 A.2d at 1264. These cases, too, 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.

3. The Rhode Island Supreme Court has moved away from a categorical approach to home rule authority.

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 been implicitly rejected by more modern cases. 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"). Other powers, such as the authority to address local nuisances, were thought to be within local home rule authority. *See Town of W. Greenwich v. Stepping Stone Enters., Ltd.*, 416 A.2d 659, 662–63 (1979) (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, Note, *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 (presumed to be a local matter) can also mean the regulation of business (once presumed to be a statewide concern)—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 O'Neil*, 617 A.2d at 112. But a town's requirement that street vendors must obtain a license and abide by various noise limitations and other rules before selling on 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 wellbeing 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, and because the populace is mobile, thus not restricted to a particular locality, 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 now 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, *Constitutional Home Rule in Rhode* Island, 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. 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*. *Amici curiae* discuss these variables below as they relate to the Tobacco Ordinance, but the point here is that even though the previous cases have not been explicitly overruled, modern precedent reflects 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 enjoined 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) (applying factors to uphold local regulation of hotels), *aff'd*, 667 F.3d 17 (1st Cir. 2011).

The upshot: both state and local governments in Rhode Island share the police power—including the ability to regulate business 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 preemption, 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 (citations omitted). None of these factors is dispositive, though the third is given the most weight. *See id.* These factors support the Town's authority to adopt the Tobacco

Ordinance. And the plaintiffs' interpretation of the *O'Neil* factors—and the Court's analysis in the Barrington matter—is flawed. Such 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. This Court concluded, with regard to the Barrington ordinance, that this factor weighed in favor of the plaintiffs, but such a conclusion both ignores the evidence and misunderstands the nature of this factor.

The plaintiffs first argue (and the Court appeared to agree, Barrington Op. at 16–17) 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 DJ at 9–10. 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 Johnston Town Council revealed that other cities and towns that have adopted similar ordinances have done so to protect youth and have seen reductions in underage tobacco use. *See supra,* Part I. 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* Surgeon General's Report at vii, 11. 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), 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 by young people and others, even if the same products were available in neighboring towns.

To be sure, as the Court concluded in the Barrington matter (at 17), 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. *Id.* 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 "more desirable," *id.*, but that alone cannot divest a town of the authority to adopt it in the first place, lest a town never be able to adopt a health regulation. 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). This Court is under no legal duty to let the perfect be the enemy of the good.

Lastly, the Court expressed concern in the Barrington matter (at 17–18) that uniform regulation is "more desirable" because, if towns are allowed to enact various tobacco sale ordinances, there would a "patchwork" of regulation across the state. But by this analysis, 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. This factor alone would doom almost all public

health regulations (from trampolines to opiates) because, if they differ from other towns, there would be a "patchwork."

But 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, a highly-regulated network that serves the entire state, 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 municipality's 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 or network here. The Town's tobacco licensing 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. *O'Neil*, 617 A.2d at 112.

The bottom line is that the democratic process protects against any 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. 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 even after more than a decade of such regulation by Rhode Island communities. 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. Since the Home Rule Amendment, 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. Laws similar to the Tobacco Ordinance have existed in Rhode Island's municipalities for 18 years and are now scattered throughout the state. *See supra*, n.1 (listing ten examples). And local laws regulating business to protect health and safety outside of the tobacco arena are similarly well-established throughout Rhode Island. *See supra*, Part I.B.

In response, the plaintiffs argue that the power to declare a product contraband has historically been exercised by the state. Pls' Mem. in Support of DJ at 10. The plaintiffs provide no historical support for such a proposition, just the sole example of marijuana regulation. But even if true as a historical matter, the Tobacco Ordinance (as explained above) does not make flavored tobacco products contraband. It just limits their sale to tobacco specialty stores, smoking lounges, and vape stops, thereby taking them off the shelves of everyday convenience stores that give youth easy access. The Ordinance therefore falls within the scope of traditional local power to regulate for health and safety, and this factor favors the Town.

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

The "most critical" *O'Neil* factor focuses on whether a municipality's action has "significant effect upon people 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 Johnston because customers from outside the Town "looking to shop" there will not be able to buy flavored tobacco products or use coupons. Pls.' Mem. in Supp. of DJ at 10. They also argue that business owners and their employees, who may not be Johnston residents, 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 who happens to own or work at a business in town or out-of-town customers passing through. It's axiomatic that *any* local law would impact those who are operating in or passing through the town. With the advent of personal 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 or ride a bus, 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 DJ at 11. 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 a Smoking Employee*, 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 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, negative, or indeterminate) 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 (*e.g.* prohibiting high-voltage power lines serving other parts of the state). That is, does one town's actions intrude upon another town's same ability to protect the health and wellbeing of its inhabitants? The answer here is easy: No.

C. To the extent that this Court concludes that *Newport Amusement* precludes the licensing scheme, it should sever the Ordinance and call for that case to be overruled.

In this case, the licensing scheme is merely incident to the Town's public health regulation, and thus also should be upheld as a useful public health tool. Importantly, the Ordinance does not use licensing to restrict the number of vendors, to raise revenue, or to set professional standards, as licensing schemes often do. Instead, the sole purpose of the licensing scheme here is to enforce the flavored tobacco and discount sales restrictions. Thus, the licensing scheme should be upheld along with the Ordinance's restriction on sales of flavored tobacco products and discounts.[6]

Amici of course recognize that *Newport Amusement* and its progeny have stated that licensing is not a local matter within a town's home rule authority. 166 A.2d at 218. But, as explained above (*supra*, Part III.A.3), the Rhode Island Supreme Court's modern home rule jurisprudence has moved away from a categorical analysis of entire areas that are off-limits to local authority (*e.g.*, business regulation or licensing), and now employs the *O'Neil* three-factor tests. Though it has never explicitly overruled *Newport Amusement*, it has abandoned the categorical analysis, leaving significant doubt as to whether it must be followed here. If, however, the Court considers itself bound by *Newport Amusement*, *see* Barrington Op. at 12, it should sever the licensing scheme from the rest of the Tobacco Ordinance so at minimum the restrictions on tobacco sales remain. And it should use this occasion to call for the overruling of *Newport Amusement*.

The reasoning and holding of *Newport Amusement* was flawed then, and it is flawed now. In that case, the Rhode Island Supreme Court determined the City of Newport exceeded its home-rule authority when it passed an ordinance requiring any business within the city to obtain a license

[6] For an explanation of how licensing schemes are used as an enforcement mechanism as part of public health regulation, see generally Public Health Law Center Tobacco Control Legal Consortium, *Using Licensing and Zoning to Regulate Tobacco Retailers*, https://perma.cc/S3V9-MDS8.

and pay a fee if it had a juke box. 166 A.2d at 217. The Court invalidated the ordinance, declaring that "[l]icensing is definitely not a local matter" within home-rule authority. But its reasoning is so fundamentally flawed that the decision cannot hold. *See State v. Werner*, 865 A.2d 1049, 1056 (R.I. 2005) (recognizing that despite *stare decisis*, overruling precedent is sometimes necessary).

The Court rested its holding on history, explaining that "[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. But when the Court made that observation (in 1960) the Home Rule Amendment was brand new and many localities had not even adopted charters yet. Before the Home Rule Amendment and local charters, municipalities could not enact any legislation, including licensing, without explicit state delegation. Thus, its "observation" that localities had not "exercised" the power to license reflects the pre-home-rule standard. By tethering its interpretation of municipal power *after* the Home Rule Amendment to the practice *before* it, the Court essentially tied municipal power to a pre-home-rule scheme. Though the Amendment was meant to change the balance of power between state and local governments, *Newport Amusement* cemented the old regime in place—at least with respect to licensing. And though subsequent cases have followed *Newport Amusement* in stating that licensing is always a statewide concern, in doing so, they were repeating the pre-home rule standard whether they realized it or not. 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 the Home Rule Amendment would effectively have no meaning.

The Court's analysis was further flawed. It reasoned that had the Home Rule Amendment meant to "divest the legislature" of licensing power, it "would have clearly said so." 166 A.2d at 218. But the Court's reasoning that the Home Rule Amendment needed to specifically mention

licensing is without merit. The Home Rule Amendment does not enumerate *any* specific municipal powers; instead, it uses broad language giving localities the power of "self government in all local matters" and to enact "local laws relating to [their] property, affairs, and government." R.I. Const., Art. 13. Adopting the Court's rationale that the Home Rule Amendment needs to "clearly" mention a specific local power would render the Amendment meaningless, as it lists none at all.

Lastly, the Court's reasoning in *Newport Amusement* is premised on a fundamental misunderstanding of how power is shared between municipalities and the state. The Court determined that it could not "be reasonably" argued that localities could "enact licensing laws for those localities" because then they would be able to enact licensing schemes "inconsistent with those enacted by the legislature on the same matters for the rest of the state." 166 A.2d at 219. The Court inexplicably thought that home rule power meant that a particular state power "would be transferred completely to each home rule city or town" and hence that the state would be entirely "divest[ed]" of its authority to license. *Id.* That's just not so. The Court did not need to pick which side had the licensing power—state or local. The Home Rule Amendment did not *divest* the state of licensing power, it only made some of its powers *concurrent* with municipal power, subject to state preemption. That is, both municipalities and the state could exercise licensing power; and if the state's licensing scheme conflicted with a local system, the State's would be superior. The Court's concern that local licensing schemes would override state law was simply mistaken.

This flawed analysis tethers local authority back to Dillion's Rule. It should be overturned.

* * *

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. The fact remains that the General Assembly retains the power to act in this

area. Thus far it has not stopped local governments from taking these basic steps to protect their citizens' health and wellbeing. Neither should this Court.

CONCLUSION

For these reasons, and the reasons set forth by the Town's brief, *amici curiae* respectfully request that the Court enter judgment affirming the validity of the Tobacco Ordinance.

Respectfully submitted,

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January 22, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2019, 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

ADDENDUM: IDENTITY OF *AMICI CURIAE*

Public Health Law Center Tobacco Control Legal Consortium
The Public Health Law Center, Inc., at Mitchell Hamline School of Law in Saint Paul, Minnesota, is the home of the Tobacco Control Legal Consortium, a national network of nonprofit legal centers working to protect the public from the devastating health consequences of tobacco use. The affiliated legal centers include: ChangeLab Solutions in Oakland, California; Legal Resource Center for Tobacco Regulation, Litigation & Advocacy at the University of Maryland School of Law in Baltimore, Maryland; Public Health Advocacy Institute and the Center for Public Health and Tobacco Policy at Northeastern University School of Law in Boston, Massachusetts; Smoke-Free Environments Law Project at the University of Michigan in Ann Arbor, Michigan; and Global Advisors on Smokefree Policy in Summit, New Jersey.

American Cancer Society Cancer Action Network, Inc.
American Cancer Society Cancer Action Network, Inc. (ACS CAN) is the nonpartisan advocacy affiliate of the American Cancer Society, a nationwide, community-based voluntary health nonprofit organization. Because smoking is a principal cause of lung and other forms of cancer, ACS CAN has been a leader in educating the public about the dangers of using tobacco products and in advocating for policies and programs to discourage tobacco initiation and encourage cessation. ACS CAN advocates for effective tobacco control at every level of government, including supporting efforts by the town of Johnston to restrict access to tobacco products by youth.

American Lung Association
The American Lung Association is the nation's oldest voluntary health organization and does business in Rhode Island as the American Lung Association in Rhode Island. Because smoking causes or makes worse many lung diseases, including lung cancer and chronic obstructive pulmonary disease, the American Lung Association has long been active in research, education and public policy advocacy regarding the adverse health effects caused by tobacco use. This includes supporting restrictions on the sale of tobacco products to protect children and teens.

Campaign for Tobacco-Free Kids
The Campaign for Tobacco-Free Kids is a leading force in the fight to reduce tobacco use and its deadly toll in the United States and around the world. The Campaign envisions a future free of the death and disease caused by tobacco, and it works to save lives by advocating for public policies that prevent kids from smoking, help smokers quit and protect everyone from secondhand smoke.

City of Providence, City of Central Falls, Town of Middletown
All three of these municipalities have implemented tobacco ordinances and thus may be impacted by a decision in this case on the scope of their home rule authority. These municipalities have a unique interest in this case given their commitment to reducing youth tobacco access in the retail environment. Providence, with a population of nearly 180,000, is the capital of Rhode Island and the center of a metropolitan area including 1.6 million residents.

Town of North Providence
North Providence is a town in Rhode Island with home rule authority under its charter and an interest in protecting the public health of its residents.

Truth Initiative
The Truth Initiative envisions an America where tobacco is a thing of the past and where all youth and young adults reject tobacco use. Truth Initiative's proven-effective and nationally recognized public education programs include truth®, the national youth smoking prevention campaign that has been cited as contributing to significant declines in youth smoking; EX®, an innovative smoking cessation program; and research initiatives exploring the causes, consequences, and approaches to reducing tobacco use. Truth Initiative also develops programs to address the health effects of tobacco use—with a focus on priority populations disproportionately affected by the toll of tobacco—through alliances, youth activism, training, and technical assistance. Located in Washington, D.C., Truth Initiative was created as a result of the November 1998 Master Settlement Agreement between attorneys general from 46 states, five U.S. territories, and the tobacco industry.

Tobacco Free Rhode Island
The mission of Tobacco Free Rhode Island (TFRI) is to educate, mobilize, and protect all Rhode Island residents from the destructive effects of nicotine addiction and commercial tobacco use. As a network organization, TFRI does not have a policy agenda; however, it focuses its efforts on education around effective tobacco control strategies, increases access to cessation services, and works to prevent youth use of tobacco products.