

COMMONWEALTH OF MASSACHUSETTS

# Appeals Court

No. 2022-P-1201

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SIX BROTHERS, INC. D/B/A BROOKLINE SUNOCO & others,  
Appellants

v.

TOWN OF BROOKLINE & others, Appellees

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On Appeal From A Decision Of  
The Norfolk Superior Court

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**APPELLANTS' BRIEF FOR SIX BROTHERS, INC. & others**

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Date: 2/23/2023

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**CORPORATE DISCLOSURE STATEMENTS**

Pursuant to Rule 1:21 of the Rules of the Supreme Judicial Court, the Plaintiff-Appellants, Six Brothers, Inc., IPGG, Inc., Comm. Ave. Gas & Service, Inc., and OMR Corporation state that they have no parent corporations, and that no publicly held corporation owns ten percent (10%) or more of their stock.

**TABLE OF CONTENTS**

CORPORATE DISCLOSURE STATEMENTS.....- 2 -

TABLE OF AUTHORITIES.....5

STATEMENT OF ISSUES.....7

STATEMENT OF THE CASE.....7

STATEMENT OF THE FACTS.....9

    MASSACHUSETTS SETS A STATEWIDE MINIMUM AGE  
    TO PURCHASE TOBACCO PRODUCTS.....9

    THE TOWN DEVIATES FROM STATE LAW BY  
    ATTEMPTING TO SET AN EVER-INCREASING  
    MINIMUM AGE FOR TOBACCO PURCHASES.....12

    THE BY-LAW DISCRIMINATES ON THE BASIS OF  
    BIRTHDATE, DIVIDING ADULTS INTO TWO  
    CLASSES, SOME OF WHOM HAVE FEWER RIGHTS  
    THAN OTHERS.....13

SUMMARY OF THE ARGUMENT.....16

ARGUMENT.....17

    I. The Superior Court Erred as a Matter of  
    Law by Holding that the Complaint Fails  
    to State a Claim as to Preemption.....17

        A. The Act Establishes Twenty-One as  
        the Statewide Minimum Age for  
        Purchasing Tobacco Products and  
        Expressly Preempts Conflicting  
        Local By-Laws.....18

        B. The Court Sees No Conflict Between  
        the Act and the By-Law Because it  
        Oversimplifies the Legislature’s  
        Intention.....26

C. The By-Law Does Not Complement the Act; it is "Mischievous and Even Intolerable" because it Interferes with the Establishment of a Uniform Statewide Minimum Age for Purchasing Tobacco.....31

II. The Superior Court Erred as a Matter of Law by Holding that the Complaint Fails to State a Claim as to Equal Protection.....35

A. Enhanced Rational Review is Appropriate.....36

B. The By-Law's Incremental Approach is Not Rationally Related to a Legitimate Government Interest.....40

CONCLUSION.....43

ADDENDUM.....44

CERTIFICATE OF COMPLIANCE.....71

CERTIFICATE OF SERVICE.....72

**TABLE OF AUTHORITIES**

**Cases:**

*Allegheny Pittsburgh Coal Co. v. Cty. Comm’n*,  
488 U.S. 336 (1989).....39

*Bell Atlantic Corp. v. Twombly*,  
550 U.S. 544 (2007).....17

*Commonwealth v. Morgan*,  
476 Mass. 768 (2017).....18

*Commonwealth v. Peterson*,  
476 Mass. 163 (2017).....18

*Commonwealth v. Woods Hole, Martha’s Vineyard &  
Nantucket S.S. Auth.*,  
352 Mass. 617 (1967).....19

*Gill v. Off. of Pers. Mgmt.*,  
699 F. Supp. 2d 374 (D. Mass. 2010).....37

*Iannacchino v. Ford Motor Co.*,  
451 Mass. 623 (2008).....17

*In re Guardianship of B.V.G.*,  
474 Mass. 315 (2016).....19, 27

*Louisville Gas & Elec. Co. v. Coleman*,  
277 U.S. 32 (1928).....39

*Massachusetts v. U.S. Dep’t of Health & Hum. Servs.*,  
682 F.3d 1 (1st Cir. 2012).....37

*Massachusetts v. U.S. Dep’t of Health & Hum. Servs.*,  
698 F. Supp. 2d 234 (D. Mass. 2010), *aff’d*,  
682 F.3d 1 (1st Cir. 2012).....37

*Metropolitan Life Ins. Co. v. Massachusetts*,  
471 U.S. 724 (1985).....22

*Osborne-Trussell v. Children’s Hosp. Corp.*,  
488 Mass. 248 (2021).....17

*Plyler v. Doe*,  
457 U.S. 202 (1982).....39

*Romer v. Evans*,  
517 U.S. 620 (1996).....39

*Sam’s Food Mart, LLC et al. v. Town of Middletown*,  
C.A. No. NC-2017-0443 (Newport Superior Court)  
(October 30, 2018).....32

*Sullivan v. Chief Justice for Admin. & Mgt. of  
the Trial Court*, 448 Mass. 15 (2006).....19, 27

*U.S. Dept. of Agric. v. Moreno*,  
413 U.S. 528 (1973).....37

*United States v. Gonzalez*,  
520 U.S. 1 (1997).....22

**Statutory Provisions:**

Article 1 of the Massachusetts Declaration of  
Rights, as Amended by Article 106 of the  
Amendments to the Massachusetts Constitution.....8

M.G.L. c. 40, § 32.....15

M.G.L. c. 231A, § 1.....8

M.G.L. c. 270, § 6(b).....19, 20

State 2018, c. 157, “An Act Protecting Youth from  
the Health Risks of Tobacco and Nicotine  
Addiction”.....*passim*

Town of Brookline Article 8.23 of the Town’s  
General By-Laws.....*passim*

**Other Authorities:**

Mass. R. Civ. P. 12(b)(6).....8, 17, 33

**STATEMENT OF ISSUES**

1. Whether the Superior Court (Davis, J.) erred in holding that the Plaintiff-Appellants' First Amended Complaint fails to state a claim for preemption.
2. Whether the Superior Court erred in holding that the Plaintiff-Appellants' First Amended Complaint fails to state a claim for equal protection.

**STATEMENT OF THE CASE**

The Plaintiff-Appellants, Six Brothers, Inc. *et al.*<sup>1</sup> (collectively "Appellants") are retail vendors licensed to sell tobacco products and e-cigarettes in the Town of Brookline, Massachusetts ("Town").

At a Special Town Meeting on November 17, 2020, the Town approved an amendment to Section 8.23 of the Town's General By-Laws ("By-Law"), prohibiting the sale of tobacco or e-cigarette products to anyone born on or after January 1, 2000.

On September 17, 2021, the Appellants filed their Complaint and Prayer for Declaratory Relief Pursuant

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<sup>1</sup> Fahd Iqbal, IPGG, Inc. d/b/a One Stop Market, Sukhjinder Gill, Comm. Ave. Gas & Service, Inc. d/b/a Commonwealth Mobil, Emile Heraiki, OMR Corporation d/b/a Village Mobil and Elias Audy.

to M.G.L. c. 231A, § 1. On November 15, 2021, the Appellants, by right, filed their First Amended Complaint and Prayer for Declaratory Relief Pursuant to M.G.L. c. 231A, § 1 ("Complaint"). The Complaint asserts claims against The Town and members of its Select Board (collectively "Appellees") for a declaratory judgment nullifying the By-Law.

Specifically, the Appellants' Complaint seeks to nullify the By-Law on the grounds that it is (1) preempted by a previously-enacted state law, St. 2018, c. 157, "An Act Protecting Youth from the Health Risks of Tobacco and Nicotine Addiction" ("Act") and (2) incompatible with the equal protection guarantees set forth in Article 1 of the Massachusetts Declaration of Rights, as amended by Article 106 of the Amendments to the Massachusetts Constitution.

On December 24, 2021, the Appellees filed a motion to dismiss the Complaint, along with the Appellants' opposition papers. The Superior Court (Davis, J.) heard oral argument on the matter on July 28, 2022 and subsequently, on October 17, 2022, issued a written Memorandum of Decision and Order on Defendants' Mass. R. Civ. P. 12(b)(6) Motion to Dismiss ("Order").

The Order dismisses the Complaint, with prejudice, on the grounds that the Appellants fail to state a claim for declaratory judgment both with respect to preemption and with respect to equal protection.

The Appellants timely filed notices of appeal.

**STATEMENT OF THE FACTS**

**MASSACHUSETTS SETS A STATEWIDE MINIMUM AGE TO PURCHASE TOBACCO PRODUCTS**

1. Chapter 157 of the Acts of 2018, "An Act Protecting Youth from the Health Risks of Tobacco and Nicotine Addiction" (again, the "Act"), took effect on December 31, 2018. Joint Appendix ("JA"), Ex. B, ¶ 17.

2. The legislative intent behind the Act was to prohibit youth under the age of twenty-one from purchasing tobacco products, without infringing on the rights of adults, including eighteen-year-olds whose local communities permitted them to purchase tobacco products before the Act took effect. The legislative intent was to gradually establish a uniform statewide minimum age for purchasing tobacco products. JA, Ex. B, ¶ 23.

3. Debating Bill H.4479, a predecessor to the Act, Rep. Kate Hogan noted that "[r]etailers must deal

with a patchwork of laws throughout the Commonwealth... This bill eliminates confusion by establishing one minimum age statewide." Rep. Hogan further commented that "21 will be the age of everything allowed and under everything is prohibited... We want 21 to be that age..." JA, Ex. B, ¶ 24.

4. Commenting on Bill S.2571, Sen. Jason M. Lewis stated that it is "consistent to have an age of 21 for [purchasing] alcohol, tobacco and marijuana. Many communities have already raised the age to 21 for buying tobacco, including our 3 biggest cities... We need to create a level playing field for retailers." Sen. Lewis further stated that "[o]n our local boards of health, many communities have put in place regulations to reduce nicotine use. This is in many ways positive, but also creates a patchwork of laws throughout the Commonwealth. Another goal of this legislation is to create consistency. First, it would raise the legal age of sale for all nicotine or tobacco products to 21, grandfathering in teens who are currently of legal age." JA, Ex. B, ¶ 25.

5. At the signing ceremony for the State Tobacco Act, Governor Baker observed that, "There's more than enough evidence to support ensuring that we

have a statewide standard with respect to when the purchase and use of these [tobacco] products would be considered age appropriate... At this time, it's our view that a statewide approach is perfectly appropriate." JA, Ex. B, ¶ 26.

6. Section 6(b) of the Act prohibits the sale of tobacco products (defined to include electronic cigarettes) to persons under twenty-one years of age. JA, Ex. B, ¶ 18.

7. Section 19 of the Act creates an exception that allows tobacco sales to persons who attained the age of eighteen before December 31, 2018 in communities where, as of that date, no "municipal ordinance, by-law or other regulation... prohibited sales of tobacco products to persons under the age of nineteen, twenty or twenty-one..." JA, Ex. B, ¶ 19.

8. On the subject of preemption, Section 22 of the Act states as follows: "This act shall preempt, supersede or nullify any inconsistent, contrary or conflicting state or local law relating to the minimum sales age to purchase tobacco products; provided, that this act shall neither preempt, supersede nor nullify any inconsistent, contrary or conflicting local law in effect on December 30, 2018 that prohibits the sale of

tobacco products to persons under the age of 19, 20, or 21 as applied to persons who attained the age of 18 before December 31, 2018. This act shall not otherwise preempt the authority of any city or town to enact any ordinance, by-law or any fire, health or safety regulation that limits or prohibits the purchase of tobacco products.” JA, Ex. B, ¶ 20.

9. Plaintiffs sell and/or purchase tobacco products and e-cigarettes in the Town of Brookline. JA, Ex. B, ¶ 27.

**THE TOWN DEVIATES FROM STATE LAW BY ATTEMPTING TO SET AN EVER-INCREASING MINIMUM AGE FOR TOBACCO PURCHASES**

10. On November 17, 2020, at a Special Town Meeting, a proposal to amend Article 8.23 of the Town’s General By-Laws (again, the “By-Law”) was presented as Warrant Article 14. Warrant Article 14 originally proposed to prohibit the sale of tobacco products to persons born on or after January 1, 1976, but a later revision moved the cut-off date to January 1, 2000. JA, Ex. B, ¶¶ 35-6.

11. Warrant Article 14 also proposed to amend General By-Law 8.23.5(H) regarding required signage to state, “[t]he sale of tobacco or e-cigarette products to someone under the minimum legal sales age of 21

years of age born on or after 1/1/2000 is prohibited.”  
JA, Ex. B, ¶ 37.

12. The Town Select Board, which considered Warrant Article 14, consisted of Bernard W. Greene (Chair), Heather Hamilton (Vice Chair), Nancy S. Heller, Raul A. Fernandez, John VanScoyoc and Melvin A. Kleckner (Town Administrator). JA, Ex. B, ¶ 39.

13. The Select Board voted to take no action on Warrant Article 14. JA, Ex. B, ¶ 41.

**THE BY-LAW DISCRIMINATES ON THE BASIS OF BIRTHDATE,  
DIVIDING ADULTS INTO TWO CLASSES, SOME OF WHOM HAVE  
FEWER RIGHTS THAN OTHERS**

14. At the time, the Town Advisory Board, consisting of thirty-two (32) Brookline residents, found that “[t]he wording of some provisions in [Warrant Article 14] are arbitrary and vague... [T]he major change proposed in this article (focused on prohibiting adults born after 1976 from purchasing tobacco) is a radically different approach from prior efforts that no other community or state is known to have attempted and, according to Town Counsel’s office, is likely to be struck down by the Attorney General.” JA, Ex. B, ¶ 44.

15. The Advisory Board expressed reservations about "the most contentious part" of Article 14: "taking away the right of some adults - those born after January 1, 1976 - but not others to buy a legal product." JA, Ex. B, ¶ 45.

16. The Advisory Board also discussed the proposed revision to Warrant Article 14 that would move the cut-off date to January 1, 2000, but concluded that it "would not change the fact that Brookline would be dividing adults into groups of people, some of whom would have less rights than others." JA, Ex. B, ¶ 46.

17. Assistant Town Counsel Patty Correa wrote that "the proposed 'declassification' based on a birth date must pass... muster under the Equal Protection Clause. It is doubtful as to whether the '1/1/2000' date of birth change recommended by the subcommittee would be any different from a constitutionality aspect than the '1976' proposal." JA, Ex. B, ¶ 47.

18. Furthermore, Ms. Correa expected "that the Attorney General's Office is likely to find the birthdate restriction in the proposed article to be in conflict with [state law]." JA, Ex. B, ¶ 48.

19. Brookline voters approved Warrant Article 14, in its revised form, thereby amending Article 8.23 of

the Town's General By-Laws to prohibit sales of tobacco or e-cigarette products to anyone born after January 1, 2000. JA, Ex. B, ¶ 50.

20. M.G.L. c. 40, § 32 requires pre-approval of a proposed by-law from the Attorney General to review and verify that a proposed by-law does not conflict with the Constitution or laws of the Commonwealth. Pursuant to this statute, the Town Clerk of Brookline sent a certified copy of General By-Law 8.23 to the Attorney General and requested approval. JA, Ex. B, ¶ 51.

21. By letter dated July 19, 2021 the Attorney General's Office approved Warrant Article 14. The reviewing Assistant Attorney General did not discuss any Constitutional challenges to Article 14, but did consider whether it conflicts with Chapter 157 of the Acts of 2018. She concluded that it does not. JA, Ex. B, ¶ 52.

22. The By-Law became effective on August 27, 2021, and enforcement commenced on September 27, 2021. JA, Ex. B, ¶ 53.

23. When confirming the above enforcement date for Warrant Article 14, the Town's Director of Public Health, Dr. Swannie Jett, also noted the following: (i) business owners will be obligated to prevent sales of

tobacco products to persons born on or after January 1, 2000; (ii) the health department did not engage in any studies or analysis to evaluate the potential impact or effects of the new By-Law; and (iii) the health department requested that the petitioners of the By-Law consider staffing issues and budget requirements for enforcement of the new by-law, but those requests seemingly were ignored. JA, Ex. B, ¶ 54.

24. The Town acknowledges, *inter alia*, that its own Public Health Department was not given the opportunity to perform any studies or analysis concerning Warrant Article 14 and how it might impact consumers or residents and business owners in the Town. JA, Ex. B, ¶ 55.

#### **SUMMARY OF THE ARGUMENT**

1. The Complaint states a claim for preemption based on the express statutory language and the clear legislative intent to create a uniform, statewide standard for the minimum age at which tobacco products may be purchased. (pp. 17-35)

2. The Complaint states a claim for equal protection and, based on the quasi-suspect classification (birth date) and the Town's

demonstrably false rationale, the Court should impose enhanced rational basis review. (pp. 35-43)

**ARGUMENT**

**I. The Superior Court Erred as a Matter of Law by Holding that the Complaint Fails to State a Claim as to Preemption.**

In order to survive a motion to dismiss under Mass. R. Civ. P. 12(b)(6), a complaint must only set forth “factual allegations plausibly suggesting (not merely consistent with) an entitlement to relief...” *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008), quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007). In assessing the sufficiency of a complaint, the Court must accept the well-pleaded facts as true and draw all reasonable inferences in the plaintiff’s favor. See *Osborne-Trussell v. Children’s Hosp. Corp.*, 488 Mass. 248, 253 (2021).

Count I alleges that the Act establishes twenty-one as the uniform, statewide minimum age for purchasing tobacco and, by its express terms, pre-empts conflicting local by-laws. In holding that Count I fails to state a claim, the Court concludes that (1) there is no “sharp conflict” between the Act and the Town’s By-Law because Section 22 of the Act expressly

permits towns to further restrict the sale of tobacco products and (2) the By-Law complements, rather than conflicts with, the purpose of the Act. Sections B and C below demonstrate that both conclusions rest on reversible error.

First, however, section A explains how the plain language of the Act expressly preempts the authority of cities and towns to enact by-laws relating to the minimum sales age to purchase tobacco products.

**A. The Act Establishes Twenty-One as the Statewide Minimum Age for Purchasing Tobacco Products and Expressly Preempts Conflicting Local By-Laws**

The goal of statutory interpretation is “to discern and effectuate the intent of the Legislature.” *Commonwealth v. Morgan*, 476 Mass. 768, 777 (2017), citing *Commonwealth v. Peterson*, 476 Mass. 163, 167 (2017). “[T]he primary insight into that intent” comes from “[t]he plain language of the statute,” but statutes must also be “read as a whole.” *Id.* “We do not confine our interpretation to the words of a single section.” *Id.*

Nor do we confine ourselves to the “simple, literal or strict verbal meaning” of statutory language. Rather, statutes are to be read “in

connection with their development, their progression through the legislative body, the history of the times [and] prior legislation." *In re Guardianship of B.V.G.*, 474 Mass. 315, 321 (2016) (emphasis added); citing *Sullivan v. Chief Justice for Admin. & Mgt. of the Trial Court*, 448 Mass. 15, 24 (2006).

A proper interpretation is one that gives every provision of the statute its due weight, such that "[n]one of the words of a statute is to be regarded as superfluous, but each is to be given its ordinary meaning without overemphasizing its effect upon the other terms appearing in the statute." *Commonwealth v. Woods Hole, Martha's Vineyard & Nantucket S.S. Auth.*, 352 Mass. 617, 618 (1967).

Prior to the Act, M.G.L. c. 270, § 6(b), stated as follows: "No person shall sell or provide a tobacco product to a person who is under 18 years of age." But M.G.L. c. 270, § 6(b) did not expressly prohibit towns from increasing the minimum age for purchasing tobacco products to nineteen, twenty or twenty-one, which some did. As a result, tobacco retailers and customers faced a bewildering "patchwork of laws throughout the Commonwealth." JA, Ex. B, ¶ 24. With the Act, the Legislature intended to "eliminate[] confusion by

establishing one minimum age statewide.” *Id.* In other words, the Act establishes twenty-one as the single “statewide standard with respect to when the purchase and use of [tobacco] products would be considered age appropriate.” JA, Ex. B, ¶ 26.

The Act accomplishes that task by amending M.G.L. c. 270 in three ways.

First, Section 9 of the Act amends M.G.L. c. 270, § 6(b) to prohibit the sale of tobacco products to persons under the age of twenty-one, instead of eighteen.

Second, Section 19 of the Act states as follows:

Notwithstanding subsection (b) of section 6 of chapter 270 of the General Laws, the prohibition on the sales of tobacco products to persons under the age of 21 shall not prohibit such sales to persons who attained the age of 18 before December 31, 2018; provided, however, notwithstanding section 22, that a person who attained the age of 18 before December 31, 2018 shall be subject to any municipal ordinance, by-law or other regulation that prohibited sales of tobacco products to persons under the age of 19, 20 or 21 in effect on December 30, 2018.

Section 19 is essential to understanding how the Act is intended to work.

The first provision allows tobacco sales to some persons under the age of twenty-one, which M.G.L. c. 270, § 6(b) otherwise prohibits. Specifically, it

permits tobacco sales to persons under the age of twenty-one who attained the age of eighteen before December 31, 2018. With this provision, the Act preserves the rights of persons who had already attained the previously-prevailing minimum age for purchasing tobacco products. Section 19 shows that the Legislature's intention was to incrementally establish twenty-one as the statewide minimum age for purchasing tobacco, rather than in a single stroke, so that no one who had previously attained the right to purchase tobacco would lose that right.

On the other hand, the Legislature did not intend to permit tobacco sales to persons who did not already meet the minimum age for tobacco sales in their local communities. Accordingly, the second provision of Section 19 states that persons who attained the age of eighteen before December 31, 2018 remain subject to any local by-law that (1) prohibits sales of tobacco products to persons under the age of nineteen, twenty or twenty-one and (2) was in effect on December 30, 2018. The second provision of Section 19 applies "notwithstanding section 22" and must be understood in conjunction with that Section.

Third, Section 22 of the Act contains the statutory preemption clause, which begins as broadly as possible. “This act shall preempt, supersede or nullify any inconsistent, contrary or conflicting state or local law relating to the minimum sales age to purchase tobacco products...” Every word the Legislature chose here conveys the intent to maximize the class of state and local laws that suffer preemption. “[T]he word ‘any’ has an expansive meaning, that is, ‘one or some indiscriminately of whatever kind.’” *United States v. Gonzalez*, 520 U.S. 1, 5 (1997). Likewise, the word “inconsistent” has an expansive meaning and ensures that the Act preempts not only state and local laws that directly conflict with the Act, but also those that merely differ. Finally, “the phrase ‘relate to’ [has a] broad common-sense meaning,” which requires nothing more than “a connection with or reference to” the matters in question. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985) (noting the “broad scope” of a statutory preemption clause using this phrase, which was intended to displace “all” state laws within its ambit, “even including [consistent] state laws”).

Accordingly, in the broadest possible terms, Section 22 of the Act begins by expressly preempting each and every state and local law that is connected to, or references, the minimum sales age for purchasing tobacco products and differs with the terms of the Act. As a practical matter, this provision preempts every state and local by-law that references the minimum age for purchasing tobacco products.

After all, Section 19 contemplates that even local by-laws prohibiting the sale of tobacco to persons under the age of twenty-one - seemingly consistent with the Act - are preempted by Section 22. That is why Section 19 needs to preserve local by-laws that prohibited tobacco sales to persons under twenty-one and were in effect on December 30, 2018, "notwithstanding section 22." The Legislature took a maximalist view of what constitutes an "inconsistent, contrary or consistent" local by-law, subject to preemption.

It is clear, therefore, that the first provision of Section 22 expressly preempts the By-Law. The By-Law, which contemplates an ever-increasing minimum age for purchasing tobacco products, patently differs from the Act, which fixes the minimum age at twenty-one

statewide. Moreover, the By-Law, by increasing the minimum age to purchase tobacco products above twenty-one, creates the confusing patchwork of local laws that the Act eliminates and replaces. The By-Law is "inconsistent, contrary or conflicting" with the Act and the first provision of Section 22, therefore, preempts it.

The second provision in Section 22, however, identifies certain "inconsistent, contrary or conflicting" local laws that shall not be preempted. The By-Law can only be spared from preemption if it fits the criteria set forth there: "[T]his act shall neither preempt, supersede nor nullify any inconsistent, contrary or conflicting local law in effect on December 30, 2018 that prohibits the sale of tobacco products to persons under the age of 19, 20 or 21 as applied to persons who attained the age of 18 before December 31, 2018." This passage requires close attention.

The second provision rescues some of the "inconsistent, contrary or conflicting" local by-laws that would otherwise be preempted. But in order to survive preemption, such local by-laws must meet two criteria: they must (1) have been in effect on

December 30, 2018; and (2) prohibit the sale of tobacco to persons under the age of nineteen, twenty or twenty-one, as applied to persons who attained the age of 18 before December 21, 2018.

Importantly, those are the only “inconsistent, contrary or conflicting” local by-laws that the Act does not preempt. To survive, a statute must meet both criteria. The By-Law meets neither.

First, the By-Law was not in effect on December 30, 2018. The By-Law did not go into effect until August 27, 2021. For that reason alone, the Act is not spared from preemption.

Second, the By-Law impermissibly applies to persons who attained the age of eighteen after December 31, 2018. The Act is clear that a local By-Law is only exempt from preemption “as applied to persons who attained the age of 18 before December 31, 2018. The By-Law prohibits the sale of tobacco products to anyone born on or after January 1, 2000, so it applies to persons who turned eighteen after December 31, 2018. Section 22 of the Act expressly preempts any local by-law that applies in that manner. The Act preempts the By-Law.

**B. The Court Sees No Conflict Between the Act and the By-Law Because it Oversimplifies the Legislature's Intention**

The Court holds that, in order for the Act to preempt the By-Law, there must be a sharp conflict between the two, but there is no conflict at all because both statutes serve to restrict the sale of tobacco products. The Court reasons as follows: "The Act was approved by the Legislature for the express purpose of *raising* the minimum age at which most Massachusetts residents can purchase tobacco. It was intended to *restrict* the sale of such products (as a general matter) to residents below the age of twenty-one." JA, Ex. F at 6 (emphasis in original). There is no conflict between the Act and the By-Law, therefore, because "the Legislature intended to permit cities and towns to further restrict the sale of tobacco products within their jurisdictions if they wish to do so, including to the point of *prohibiting the sale of tobacco entirely*." *Id.* (emphasis in original).

The Court's interpretation rests on several errors.

To begin with, it is an oversimplification to hold, as the Court does, that the Legislature approved the Act for the purpose of "raising" the minimum age

for purchasing tobacco products. To understand the Legislature's intent, it is important to read the Act in light of its "development, [its] progression through the legislative body, the history of the times [and] prior legislation." *In re Guardianship of B.V.G.*, 474 Mass. 315, 321 (2016) (emphasis added); citing *Sullivan v. Chief Justice for Admin. & Mgt. of the Trial Court*, 448 Mass. 15, 24 (2006). Attending to the statutory history helps clarify that the purpose of the Act was not to facilitate further restrictions on the sale of tobacco products, but actually to benefit tobacco retailers, such as the Appellants, by eliminating the confusion that arises when the minimum age for purchasing tobacco varies from town to town and city to city across the Commonwealth.

As Rep. Kate Hogan observed, "[r]etailers must deal with a patchwork of laws throughout the Commonwealth... This bill eliminates confusion by establishing one minimum age statewide." Similarly, Sen. Jason M. Lewis stated that, "On our local boards of health, many communities have put in place regulations to reduce nicotine use. This is in many ways positive, but also creates a patchwork of laws throughout the Commonwealth. Another goal of this

legislation is to create consistency. First, it would raise the legal age of sale for all nicotine or tobacco products to 21, grandfathering in teens who are currently of legal age.” JA, Ex. B, ¶ 25.

It is true that the Act raised the statewide minimum age for purchasing tobacco products from eighteen to twenty-one. But the Legislature took pains to ensure that anyone whose local community previously enforced a lower minimum age to purchase tobacco products, and who had attained that age, could continue legally purchasing tobacco products. The Legislature did not simply intend to restrict the sale of tobacco products, otherwise it would not have carefully preserved some local by-laws that set a lower minimum age to purchase tobacco products.

The Court errs by giving virtually no consideration to those provisions of the Act that *limit* restrictions on the sale of tobacco products. Rather than interpret the entire statutory text as a coherent whole, the Court does not even mention Section 19 of the Act at all. The closest that the Court comes to acknowledging that the Legislature had more complex intentions than simply restricting the sale of tobacco products is through a parenthetical

aside. The Court finds that the Act was intended to restrict the sale of tobacco products "(as a general matter) to residents below the age of twenty-one." *Id.* at 6.

That parenthetical undermines the Court's finding. If the Legislature's intent was only to restrict the sale of tobacco products to persons under the age of twenty-one "as a general matter," rather than in all cases, then it should be clear that local by-laws do not escape preemption merely because they are more restrictive than the Act.

The Court is wrong to conclude that because the By-Law is more restrictive than the Act, it is not conflicting and therefore not preempted. In fact, the reverse is true. The By-Law conflicts with the Act, and is preempted, because it is more restrictive. The Act seeks, in a gradual manner, to stamp out any local variation in the minimum age at which tobacco products can be purchased and establish twenty-one as the uniform statewide standard. The By-Law creates that local variation by progressively increasing the minimum age for purchasing tobacco products in the Town. The Act therefore preempts the By-Law.

Although the Court correctly points out that Section 22 of the Act contemplates the possibility that a local by-law could prohibit the sale of tobacco products, it is wrong to conclude that any less restrictive local by-law is therefore consistent with the Act. The Court fails to give every word of the statute significance and instead creates surplusage. Specifically, the Court overlooks the word "otherwise."

Section 22 of the Act states that it preempts inconsistent local laws and then, in the final sentence, says that the Act "shall not otherwise preempt" a town's authority to limit or prohibit the purchase of tobacco products. The word "otherwise" is key. It confirms that, although local by-laws may further limit or prohibit the purchase of tobacco products, they may not do so by way of age restrictions. Apart from preempting the Town's authority to pass age-based restrictions on the purchase of tobacco products, the Act does not "otherwise" preempt the Town's authority to limit or prohibit the purchase of tobacco products, but it does not need to. The Act preempts the By-Law because the By-Law attempts to take local action in the one realm

where the Legislature expressly forbade it: with respect to the minimum age requirement for purchasing tobacco.

**C. The By-Law Does Not Complement the Act; it is "Mischievous and Even Intolerable" because it Interferes with the Establishment of a Uniform Statewide Minimum Age for Purchasing Tobacco**

Although the Court construes the By-Law as complementary to the Act, they are inconsistent and conflicting. As demonstrated above, the Act is intended to eliminate the confusion that arises from local variation in laws relating to the minimum age for purchasing tobacco; it seeks to do that incrementally so as not to infringe on anyone's rights. That is why Section 19 of the Act contemplates that even some local by-laws establishing the minimum age to purchase tobacco products at twenty-one, just as the Act does, can nevertheless be inconsistent with the Act, triggering preemption. The By-Law does not "augment" the Act by placing further restrictions on the sale of tobacco products. The By-Law frustrates the purpose of the Act in two ways.

First, the By-Law deviates from the statewide standard that twenty-one is the minimum age at which tobacco products may be purchased. The Court is

mistaken to conclude that the Act permits more restrictive local action on that subject. The Legislature found the patchwork of local age-based restrictions, where the minimum age for tobacco purchases varied from one community to the next, to be confusing and unfair for retailers. The Legislature's intention, therefore, was to replace that confusing patchwork of local laws with one uniform, statewide standard. Allowing the Town to establish a different minimum age for purchasing tobacco products - regardless of whether that is more or less restrictive - can only frustrate that intention.

In striking down a town ordinance that imposed greater restrictions on the purchase of tobacco products than what state law already provided, a Rhode Island court noted that "uniform regulation throughout the state" is preferable to local regulation and "[m]unicipal action would not be useful, and indeed diverse local decisions would be mischievous and even intolerable." *Sam's Food Mart, LLC et al. v. Town of Middletown*, C.A. No. NC-2017-0443 (Newport Superior Court) (October 30, 2018). Addendum, pp. 63-64 (internal quotations omitted). That is the case here.

Second, the By-Law frustrates the intention of the Act by eliminating the previously-attained right of some persons under the age of twenty-one to purchase tobacco products.

The Court fails to mention this problem, although it figures prominently in the Appellants' Complaint. The Act takes special care not to foreclose the rights of eighteen, nineteen, or twenty year-olds -- indeed, as we have seen, even twenty-one year-olds -- whose local community previously allowed them to purchase tobacco products. The By-Law does the opposite. Although the Court seems to credit the Town with crafting the By-Law in such a way that it did "not impact anyone with the present right to purchase tobacco," that conclusion is unsupported by the evidentiary record. JA, Ex. F at 10. On the contrary, the Complaint alleges that the By-Law did impermissibly strip some Town residents of their present right to purchase tobacco products. JA, Ex. B, ¶ 56.

In ruling on a motion under Rule 12(b)(6), the Court was obligated to assume the truth of the Appellants' well-pled facts. Instead, the Court did the reverse and assumed, contrary to what the

Complaint alleges, that the By-Law did not deprive anyone of a pre-existing right to purchase tobacco products.

Assuming that the Act did not impact any person's existing rights, when the Complaint alleges that it did, is not only improper in the context of a motion to dismiss; it is also factually incorrect. As alleged in the Complaint, the By-Law did not become effective until August 27, 2021. JA, Ex. B, ¶ 53. The By-Law prohibits persons born on or after January 1, 2000 from purchasing tobacco products, so a person born on January 2, 2000 would have attained the age of twenty-one on January 2, 2021 and enjoyed the right to purchase tobacco in the Town for more than six months before the Act became effective and ripped that right away. The Court's holding that the By-Law did "not impact" persons who had previously attained the right to purchase tobacco products - a class of persons whose rights the Act scrupulously maintains - is plainly erroneous.

Indeed, the Court contradicts itself on this very point when the Court concedes that some harm "may be suffered by the segment of the population that the By-Law renders unable to lawfully purchase tobacco

products in the Town.” JA, Ex. F at 10. By acknowledging that, for some persons, the By-Law removes their pre-existing rights - “renders [them] unable to lawfully purchase tobacco products,” in the Court’s phrase - the Court undermines its finding that the By-Law had “no impact” on anyone with the present right to purchase tobacco products. *The Act* had no impact on anyone with the present right to purchase tobacco products and that was the legislature’s intent. But once again, the By-Law is not consistent or compatible with the Act; it is a conflicting statute and, therefore, expressly preempted.

**II. The Superior Court Erred as a Matter of Law by Holding that the Complaint Fails to State a Claim as to Equal Protection.**

The Court holds that Count II of the Appellants’ Complaint, which alleges that the By-Law violates the equal protection provisions of the Massachusetts constitution, fails to state a claim. The Court concludes that “rational basis” is the applicable standard of review and the By-Law is rationally related to public health goals associated with restricting the sale of tobacco products.

The Court’s conclusion is doubly erroneous. First, enhanced rational basis is the appropriate

standard of review. Second, even under the more lenient rational basis standard, the By-Law cannot survive because it is not rationally related to the Town's purported interest.

**A. Enhanced Rational Review is Appropriate.**

It is well-known that statutes nearly always survive rational basis review. With rare exceptions, the determination that rational basis review is the appropriate standard also determines the outcome of the case: the statute stands. That familiar point is well illustrated by the Order. Once the Court determines that rational basis review applies, there is hardly any need for further analysis. The Court reformulates the issue presented as "whether the By-Law's incremental prohibition on the sale of tobacco products is 'rationally related' to the Town's recognized interest in addressing [a] legitimate health concern" and then, in the very next sentence, concludes that "[i]t plainly is." JA, Ex. F at 10.

Contrary to what the Court suggests, this case calls for an intermediate level of judicial scrutiny. Massachusetts has a history of applying a heightened rational basis review even where no fundamental right is burdened or suspect classification imposed. See

*Gill v. Off. of Pers. Mgmt.*, 699 F. Supp. 2d 374, 387 (D. Mass. 2010), *aff'd sub nom. Massachusetts v. U.S. Dep't of Health & Hum. Servs.*, 682 F.3d 1 (1st Cir. 2012); *Massachusetts v. U.S. Dep't of Health & Hum. Servs.*, 698 F. Supp. 2d 234, 248 (D. Mass. 2010), *aff'd*, 682 F.3d 1 (1st Cir. 2012). Where the government's justification is "thin," the reviewing Court may impose a level of statutory review with enhanced rigor - one that is "not classic rational basis review." *Massachusetts v. U.S. Dep't of Health & Hum. Servs.*, 682 F.3d 1, 10 (1st Cir. 2012).

In *Massachusetts*, the First Circuit discusses a line of cases where government entities may not have implicated fundamental rights or discriminated on traditionally suspect grounds, but nevertheless demonstrated a "bare congressional desire to harm a politically unpopular group." *Id.*, citing *U.S. Dept. of Agric. v. Moreno*, 413 U.S. 528 (1973). In following that line of cases, the First Circuit acknowledges that it is not applying normal rational basis review but instead applying "a more careful assessment of the justifications than the light scrutiny offered by conventional rational basis review." *Id.* at 11.

That more careful assessment is what is required here. At this stage, the Appellants are entitled to the reasonable inference that the By-Law reflects a bare and ignoble legislative desire to harm a politically unpopular or powerless group - persons in their late teens and early twenties, who, by virtue of their age, will have voted in few if any elections. The evidentiary record is not sufficiently developed on that subject to support a determination one way or the other. What is apparent from the record, however, is that the Town's rationale for the By-Law is thin and suspect.

As discussed above, the Court uncritically accepts the Town's explanation that the By-Law did "not impact anyone with the present right to purchase tobacco." JA, Ex. F at 10. But disproving that contention is a simple matter of calendars and calculators. When the By-Law took effect, some persons born on or after January 1, 2000 had already attained the right to lawfully purchase tobacco products in the Town, only to have that right taken away - for life - while their slightly older peers carry on purchasing tobacco products just as before.

As pled in the Complaint, by permanently depriving some adults of the right to purchase tobacco products, while allowing other adults to do so for life, the By-Law "is the first legislation of its kind in Massachusetts and represents discrimination of an unusual character." JA, Ex. B, ¶ 72. "Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." See *Romer v. Evans*, 517 U.S. 620, 633 (1996) (discussing federal constitutional principles and quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928)). The U.S. Supreme Court has repeatedly applied a heightened level of scrutiny when the discrimination at issue is novel. See, e.g., *Louisville Gas*, 277 U.S. at 37, 38 (striking down a tax imposed on debts that matured after a particular period of time); *Plyler v. Doe*, 457 U.S. 202, 225 (1982) (striking down state regulation of education on the basis of alien status because alien status is "rarely... relevant to legislation by a State"); *Allegheny Pittsburgh Coal Co. v. Cty. Comm'n*, 488 U.S. 336, 344-45, 344 n.4 (1989) (indicating that the disparate tax treatment of recently acquired property was unusual).

For much the same reason, a heightened standard of review should apply here. The By-Law is the first of its kind and discrimination based on birthdate is novel and thus should be closely examined. In light of the fact that the Town's rationale does not withstand scrutiny, and the By-Law strips some persons of their previously-attained right to purchase tobacco products, the Court should reverse the Order and remand for further proceedings with instructions that the trial court is to apply enhanced rational basis review.

**B. The By-Law's Incremental Approach is Not Rationally Related to a Legitimate Government Interest.**

The appropriate standard of review in this case is enhanced rational basis, but even if the Court applies a lower level of scrutiny, the By-Law cannot survive because it is not rationally related to any legitimate government objective. The Court concludes that "phasing out the sale of tobacco over time" is rationally related to the goal of "preventing new users from starting [to use tobacco] and helping those that want to quit." JA, Ex. F at 10. But even if the By-Law does "phase out the sale of tobacco over time," the Court is wrong to assume, without any analysis,

that discriminating against adults on the basis of birth date is rationally related to that goal. It is not.

It is easy to imagine by-laws that would phase out tobacco sales over time, but do so in a way that is so arbitrary and capricious as to bear no rational relationship to the government's interest. For example, a by-law could prohibit the sale of tobacco to any person whose residential address includes the word "Street," then gradually expand that prohibition to include persons whose residential address includes the word "Road," then "Boulevard," then "Avenue," then "Drive," "Circle," "Way," "Path," "Lane," and so forth. That by-law would phase out tobacco sales over time, but it would not do so in a way that relates rationally to the objective. Similarly, a by-law could prohibit tobacco sales to persons based on their astrological sign. The by-law could begin by prohibiting tobacco sales to an Aries, then expand the prohibition to Cancers, Libras, Scorpios, and so forth.

Each of those hypothetical by-laws would do precisely the same thing that the By-Law at issue does: pursue the goal of phasing out tobacco sales

over time in a way that is arbitrary and not rationally related to the objective at hand. There is no rational reason to prohibit someone born on January 1, 2000 from purchasing tobacco products, for life, while permitting someone born on December 31, 1999 to do so. That arbitrary distinction will follow those two hypothetical individuals forever. Even when the two individuals are both 45 years old, one will be able to buy tobacco products and the other will not. That is not rational.

Although the Court finds that the By-Law is “plainly” rationally related to the Town’s legitimate interests, the Appellants respectfully suggest that matters are not so plain. As pleaded in the Complaint, Assistant Town Counsel Patty Correa has stated, in writing, that it is “doubtful” whether the proposed By-Law would survive judicial review under principles of equal protection. The Advisory Board was equally pessimistic, concluding that the By-Law was likely unconstitutional and that even changing the cutoff date to January 1, 2000 “would not change the fact that Brookline would be dividing adults into groups of people, some of whom would have less rights than others.” JA, Ex. B, ¶ 46.

That perfectly encapsulates the reason why the By-Law cannot be considered rationally related to the Town's legitimate interests. The Town claims to have a legitimate interest in preventing youth from beginning to use tobacco, but nothing can change the fact that the By-Law promotes that goal in an irrational and constitutionally infirm manner: by dividing adults into groups, some of whom have fewer rights than others.

**CONCLUSION**

For the foregoing reasons and those to be proffered at a hearing on this matter, Plaintiff-Appellants respectfully request that this Honorable Court REVERSE the decision of the Norfolk Superior Court dismissing the Complaint with prejudice and ORDER that the Complaint is restored to the active docket for further proceedings in that forum.

Respectfully submitted,

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# **ADDENDUM**

**ADDENDUM**  
**TABLE OF CONTENTS**

Memorandum of Decision and Order on Defendants'  
Mass. R. Civ. P. 12(b)(6) Motion to Dismiss.....46

*Sam's Food Mart, LLC et al. v. Town of  
Middletown*, C.A. No. NC-2017-0443 (Newport  
Superior Court) (October 30, 2018).....57

18

**COMMONWEALTH OF MASSACHUSETTS**

**NORFOLK, ss.**

**SUPERIOR COURT  
CIVIL ACTION  
NO. 2182CV00863**

**SIX BROTHERS, INC. d/b/a BROOKLINE SUNOCO & others<sup>1</sup>**

**vs.**

**TOWN OF BROOKLINE & others<sup>2</sup>**

**MEMORANDUM OF DECISION AND ORDER ON  
DEFENDANTS' MASS. R. CIV. P. 12(b)(6) MOTION TO DISMISS**

Plaintiffs Six Brothers, Inc., *et al.* (collectively, "Plaintiffs") are licensed vendors who purportedly sell tobacco products and e-cigarettes in the Town of Brookline, Massachusetts ("Town").<sup>3</sup> By way of this action, Plaintiffs challenge the legality of a recently enacted Town by-law prohibiting the sale of tobacco or e-cigarette products in the Town to anyone born after January 1, 2000 (the "By-Law"). In their First Amended Complaint and Prayer for Declaratory Relief Pursuant to M.G.L. c. 231A, § 1 ("Amended Complaint," Docket Entry No. 9.0), Plaintiffs assert claims against the Town and members of its Select Board (collectively, "Defendants") for a declaratory judgment setting aside the By-Law as null and void because it

<sup>1</sup> Fahd Iqbal, IPGG, Inc. d/b/a/ One Stop Market, Sukhjinder Gill, Comm. Ave. Gas & Service, Inc. d/b/a Commonwealth Mobil, Emile Heraiki, OMR Corporation d/b/a Village Mobile, and Elias Audy.

<sup>2</sup> Heather Hamilton, as Chair of Brookline Select Board, Raul Fernandez, as Vice Chair of Brookline Select Board, and Bernard Greene, John Vanscoyoc, and Miriam Aschkenasy, as Brookline Select Board Members.

<sup>3</sup> According to the First Amended Complaint, plaintiff Comm. Ave. Gas & Service, Inc. d/b/a Commonwealth Mobil actually is located and does business in the City of Boston, not in Brookline. See First Amended Complaint, ¶ 6. The Town previously moved, as a result, to dismiss Commonwealth Mobil and its owner, Emile Heraiki, as plaintiffs for lack of standing. See Defendants' Mass. R. Civ. P. 12(b)(6) Motion to Dismiss, and in the Alternative, Defendants' Mass. R. Civ. P. 12(b)(1) Motion to Dismiss Plaintiffs Commonwealth Mobil and Emile Heraiki for Lack of Standing (the "Motion to Dismiss," Docket Entry No. 12.0). The Town withdrew that part of its Motion to Dismiss, however, in its reply memorandum. See Defendants' Reply Brief at 5 (Docket Entry No. 12.3).

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- 46 - Oct 17, 2023

purportedly: (1) is preempted by state law, specifically St. 2018, c. 157, “An Act Protecting Youth from the Health Risks of Tobacco and Nicotine Addiction” (Count I); and (2) violates the equal protection guarantees set forth in art. 1 of the Massachusetts Declaration of Rights, as amended by art. 106 of the Amendments to the Massachusetts Constitution (Count II).

The case came before the Court most recently on Defendants’ Mass. R. Civ. P. 12(b)(6) Motion to Dismiss (the “Motion,” Docket Entry No. 12.0). The Court heard oral argument on the Motion on July 28, 2022. Upon consideration of the parties’ written submissions and the oral arguments of counsel, Defendants’ Motion will be **ALLOWED** for the reasons summarized below.

**Background**

The following facts are taken from the Amended Complaint, with certain additional facts reserved for discussion below.

On November 17, 2020, Brookline voters approved a warrant article amending Section 8.23 of the Town’s General By-Laws (again, the “By-Law”). In its present, amended form, the By-Law states, in relevant part:

**SECTION 8.25.5 – SALE AND DISTRIBUTION OF TOBACCO PRODUCTS**

d. Prohibition of Sales – No person, firm, corporation, establishment, or agency shall sell tobacco or e-cigarette products to anyone born on or after 1/1/2000.

.....

h. Required Signage

.....

2. The owner or other person in charge of an entity authorized to sell tobacco or e-cigarette products at retail shall conspicuously post a sign stating that “The sale of tobacco or e-cigarette products to someone born on or after 1/1/2000 is prohibited.”

Amended Complaint, Exhibit G at 14-12.

The Town warrant article amending the By-Law subsequently was approved by the Massachusetts Attorney General's Office and published by the Town pursuant to G.L. c. 40, § 32. The By-Law became effective on August 27, 2021, and its enforcement commenced on September 27, 2021.

As previously noted, Plaintiffs are licensed to sell cigarettes and other tobacco products at retail in Massachusetts. They complain that the effect of the By-Law is to unlawfully "prohibit legal tobacco sales" in the Town, by themselves and other licensed retailers, "to any persons born on or after January 1, 2000, purely on the basis of their age" in violation of state law. Amended Complaint, ¶ 56. Plaintiffs filed their original Complaint and Prayer for Declaratory Relief Pursuant to M.G.L. c. 231A, § 1 (Docket Entry No. 1.0) on September 17, 2021, and their Amended Complaint on November 15, 2021. Defendants' Motion was filed on December 24, 2021.

### Discussion

#### **I. The Rule 12(b)(6) Standard.**

Defendants have moved to dismiss both counts of Plaintiffs' Amended Complaint under Mass. R. Civ. P. 12(b)(6) for failure to state a claim. To survive a motion to dismiss under Rule 12(b)(6), a complaint must set out "factual 'allegations plausibly suggesting (not merely consistent with)' an entitlement to relief...." *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008), quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007). The allegations must be "more than labels and conclusions," and must "raise a right to relief above the speculative level...." *Id.* at 636, quoting *Twombly*, 550 U.S. at 555. In assessing a complaint under Rule 12(b)(6), the court accepts as true the well-pleaded factual allegations in the complaint

and draws all reasonable inferences in the plaintiff's favor. See *Osborne-Trussell v. Children's Hosp. Corp.*, 488 Mass. 248, 253 (2021). The extent of the court's review generally is limited to the facts alleged in the complaint and any facts contained in any attached exhibits. See *Eigerman v. Putnam Invs., Inc.*, 450 Mass. 281, 285 n.6 (2007). The court also may consider, however, matters of public record, items in the record of the case, and any documents cited and relied upon in the complaint. See *Marram v. Kobrick Offshore Fund, Ltd.*, 442 Mass. 43, 45 n.4 (2004); *Schaer v. Brandeis Univ.*, 432 Mass. 474, 477 (2000).

Applying the foregoing standard, the Court concludes that Plaintiffs' Amended Complaint does, in fact, fail to state a claim upon which relief can be granted with respect to both Plaintiffs' preemption claim and their equal protection claim. The Court addresses each claim separately.

## **II. Plaintiffs' Preemption Claim.**

In Count I of their Amended Complaint, Plaintiffs claim that the By-Law is preempted by St. 2018, c. 157, "An Act Protecting Youth from the Health Risks of Tobacco and Nicotine Addiction" (the "Act"). The Act was passed by the Massachusetts Legislature on July 27, 2018, and it became effective, by its terms, on December 31, 2018. The Act, among other things, amended G.L. c. 270, §§ 6 and 7. See St. 2018, c. 157, § 9. Of particular relevance here is the amendment to G.L. c. 270, § 6(b), which effectively raised the minimum age at which most Massachusetts residents can purchase tobacco products from 18 to 21 by revising Section 6(b) to state that "[n]o person shall sell or provide a tobacco product to a person who is under 21

years of age.”<sup>4</sup> Also relevant is Section 22 of the Act, which expressly addresses the preemptive effect of the Act on other state and local laws.<sup>5</sup> Section 22 states, in its entirety, that:

[t]his act shall preempt, supersede or nullify any inconsistent, contrary or conflicting state or local law relating to the minimum sales age to purchase tobacco products; provided, that this act shall neither preempt, supersede nor nullify any inconsistent, contrary or conflicting local law in effect on December 30, 2018 that prohibits the sale of tobacco products to persons under the age of 19, 20, or 21 as applied to persons who attained the age of 18 before December 31, 2018. This act shall not otherwise preempt the authority of any city or town to enact any ordinance, by-law or any fire, health or safety regulation that limits or prohibits the purchase of tobacco products.

St. 2018, c. 157, § 22.

Plaintiffs contend that Section 22 of the Act demonstrates an express legislative intent to preempt local rules and ordinances like the By-Law. In Plaintiffs’ view, the By-Law’s prohibition on the sale of tobacco or e-cigarette products to anyone born on or after January 1, 2000, “relat[es] to the minimum sales age to purchase tobacco products,” is “inconsistent, contrary or conflicting” with the minimum age for purchasing such products set by G.L. c. 270, § 6(b), and therefore is preempted by the Act. Plaintiffs’ Opposition to Defendants’ Mass. R. Civ. P. 12(b)(6) Motion to Dismiss (“Plaintiffs’ Opp.,” Docket Entry No. 12.2), at 6-7.

The Town disagrees. It argues that the plain purpose of the By-Law is to “incrementally prohibit tobacco and e-cigarette sales [in the Town] altogether” over a period of years, which is exactly the type of local “ordinance, by-law or ... fire, health or safety regulation ... limit[ing] or prohibit[ing] the purchase of tobacco products” that Section 22 expressly permits.

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<sup>4</sup> Section 6(a) of c. 270 defines “tobacco product” as “a product containing, made or derived from tobacco or nicotine that is intended for human consumption” with certain exceptions not relevant here, and expressly includes, among other things, “electronic cigarettes.”

<sup>5</sup> Section 22 was not codified.

Memorandum in Support of Defendants' Rule 12(b)(6) Motion to Dismiss ("Defendants' Memo.," Docket entry No. 12.1), at 6-8.

Massachusetts law as to when a local ordinance or by-law is preempted by purportedly contrary state law is reasonably well developed. "Municipal by-laws," as a general matter, "are presumed to be valid." *Take Five Vending, Ltd. v. Provincetown*, 415 Mass. 741, 744 (1993). Municipalities have "considerable latitude" in crafting their ordinances and by-laws, so long as the ordinance or by-law is not in "sharp conflict" with state law. *Id.* (internal quotation marks and citation omitted). A "sharp conflict" exists where "either the legislative intent to preclude local action is clear, or, absent plain expression of such intent, the purpose of the statute cannot be achieved in the face of the local by-law." *Id.* (internal quotation marks and citation omitted). Absent demonstration of a "sharp conflict," the ordinance or by-law is not preempted. *Id.*

This Court has carefully examined both the Act and the By-Law, and it perceives no conflict, let alone a "sharp conflict," between the two laws. The Act was approved by the Legislature for the express purpose of *raising* the minimum age at which most Massachusetts residents can purchase tobacco products. It was intended to *restrict* the sale of such products (as a general matter) to residents below the age of twenty-one. Section 22 makes it clear, however, that the Legislature intended to permit cities and towns to *further restrict* the sale of tobacco products within their jurisdictions if they wish to do so, including to the point of *prohibiting the sale of tobacco products entirely*. Certainly, the proviso in Section 22 that the Act does not "preempt the authority of any city or town to enact any ordinance, [or] by-law ... that limits or prohibits the purchase of tobacco products" cannot reasonably be read in any other way. See, e.g., *Casseus v. Eastern Bus Co.*, 478 Mass. 786, 787 (2018) ("Courts must follow the plain language

of a statute when it is unambiguous and when its application would not lead to an absurd result, or contravene the Legislature's clear intent.”) (internal quotation marks and citation omitted). The Court is persuaded that “[t]he intention of the Legislature [in adopting the Act] could not be more clear: the language of the statute itself defeats any claim of preemption.” See *American Lithuanian Naturalization Club, Athol, Mass., Inc. v. Bd. of Health of Athol*, 446 Mass. 310, 321 (2006).

It is equally clear that the By-Law is not subject to preemption for the further reason that it complements, rather than conflicts with, the purpose of the Act. The By-Law, on its face, places additional restrictions on the sale of tobacco products within the Town by imposing, over the course of years, a complete prohibition on the sale of such products to all persons, not just those under the age of twenty-one. It thus “augments” the protection against smoking-related illnesses provided by the Act by going beyond where the Legislature was willing to go, but where the Legislature (by means of Section 22) expressly has invited cities and towns to go, if they so desire. See *Take Five Vending, Ltd.*, 415 Mass. at 746 (holding that town by-law banning cigarette vending machines “does not detract from, but rather augments” state law prohibiting use of cigarette vending machines by minors). Compare *American Lithuanian Naturalization Club, Athol, Mass., Inc.*, 446 Mass. at 321-322 (town regulation prohibiting smoking in membership associations that was intended to protect and improve public health and welfare was “complimentary” to statute prohibiting smoking in all workplaces that was intended to protect health of employees in the Commonwealth); *Tri-Nel Management, Inc. v. Bd. of Health of Barnstable*, 433 Mass. 217, 224 (2001) (town regulation prohibiting smoking in restaurants did not conflict with statute setting forth minimum restrictions on smoking in restaurants that was intended to protect and accommodate nonsmokers). In this way, the By-Law “not only does not conflict with the [Act], but instead helps

create an ‘harmonious structure faithful to the basic designs and purposes of the Legislature.’” See *Metropolitan Property & Casualty Ins. Co. v. Emerson Hosp.*, 99 Mass. App. Ct. 513, 520, review denied, 487 Mass. 1108 (2021), quoting *Mailhot v. Travelers Ins. Co.*, 375 Mass. 342, 345 (1978).

Because the Legislature, in adopting the Act, did not intend to preempt the Town’s authority to enact the By-Law, and because the By-Law does not conflict with the purpose of the Act, Plaintiffs’ preemption claim fails.<sup>6</sup>

### **III. Plaintiffs’ Equal Protection Claim.**

In Count II of their Amended Complaint, Plaintiffs further claim that the By-Law violates the equal protection guarantees set forth in the Massachusetts Constitution because it,

arbitrarily divides the adult (over-21) population into two groups -- those born before January 1, 2000 and those born on or after January 1, 2000 -- and allows retailers to sell tobacco products only to the former, but never to the latter.

Plaintiffs’ Opp. at 7.

The Town, once again, disagrees. It asserts that “reduction of tobacco use – a deadly product – serves a valid governmental ... purpose,” which is all that is required to justify the restrictions imposed by the By-Law for equal protection purposes. Defendants’ Memo. at 8-10.

Massachusetts law holds that a local ordinance or by-law that neither “burdens the exercise of a fundamental right protected by our State Constitution, [nor] discriminates on the basis of a suspect classification” is “subject to a rational basis level of judicial scrutiny.”

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<sup>6</sup> The Court’s determination that the By-Law is not preempted by the Act also disposes of Plaintiffs’ related argument that the By-Law’s signage requirement (which obligates sellers of tobacco products within the Town to post signs informing the public of the terms of the By-Law) is preempted by the Act. It is neither unlawful, nor nonsensical for the Town to require sellers to notify potential purchasers of the additional restrictions that the By-Law permissible imposes.

*Commonwealth v. Roman*, 489 Mass. 81, 86 (2022) (internal quotation marks and citations omitted). See *Take Five Vending, Ltd.*, 415 Mass. at 748. Plaintiffs conceded at oral argument on Defendants' Motion that the By-Law at issue in this case does not implicate a fundamental right or discriminate based on a suspect classification. Accordingly, the By-Law is appropriately subject to "rational basis" review.<sup>7</sup>

Under the rational basis test, "a State action will be upheld as long as it is rationally related to the furtherance of a legitimate [S]tate interest." *Roman*, 489 Mass. at 86 (internal quotation marks and citation omitted). See *Take Five Vending, Ltd.*, 415 Mass. at 748. In the equal protection context, this "requires that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class." *Roman*, 489 Mass. at 89 (internal quotation marks and citation omitted). The party challenging a particular law on equal protection grounds has the "onerous burden" of proving its invalidity. *Take Five Vending, Ltd.*, 415 Mass. at 748 (internal quotation marks and citation omitted).

Here, there is no plausible set of facts that Plaintiffs could prove to show that the Town's By-Law is not rationally related to the furtherance of a legitimate state interest. The Massachusetts Supreme Judicial Court already has ruled that "the ill effects of tobacco use, particularly when it involves minors, [constitute] a legitimate municipal health concern justifying municipal regulation of tobacco products." *Tri-Nel Management, Inc.*, 433 Mass. at 222. Thus,

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<sup>7</sup> Notwithstanding their concession that the By-Law does not violate any fundamental right or discriminate based on any suspect classification, Plaintiffs urge the Court to apply "a heightened standard of review" because the By-Law is "novel." Plaintiffs' Opp. at 8. Novelty, however, is not a legally recognized basis for subjecting a challenged ordinance or by-law to a higher level of judicial scrutiny. Moreover, adopting Plaintiffs' position would effectively do away with the "rational basis" standard of review because courts rarely are faced with equal protection challenges to longstanding laws.

the real question presented is whether the By-Law's incremental prohibition on the sale of tobacco products is "rationally related" to the Town's recognized interest in addressing that legitimate health concern.

It plainly is. As explained by the Town, "[b]y incrementally phasing out the sale of tobacco over time," the By-Law will simultaneously serve the goal of "preventing new users from starting [to use tobacco] and helping those that want to quit" and "not impact anyone with the present right to purchase tobacco and allow[] owners to adapt to a new business model incrementally." Amended Complaint, Exhibit G at 14-13. This explanation makes eminent sense. It also provides a sufficient basis for an impartial lawmaker to logically believe that the By-Law's incremental, age-based prohibition serves a legitimate public purpose that transcends the harm that may be suffered by the segment of the population that the By-Law renders unable to lawfully purchase tobacco products in the Town. See *Roman*, 489 Mass. at 89.

Plaintiffs nonetheless insist that the By-Law's January 1, 2000, birthdate cut-off for purchasing tobacco products "cannot survive even [a] rational basis review" because,

[t]here is no rational reason to prohibit someone born on January 1, 2000 from purchasing cigarettes while allowing someone born just one day earlier, on December 31, 1999, to purchase them.

Plaintiffs' Opp. at 8.

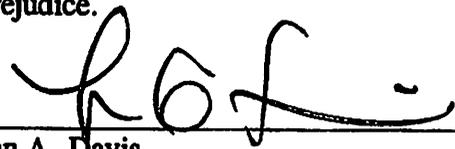
This argument, upon scrutiny, rings hollow. Every law that incorporates a bright line of one type or another is equally susceptible to being described as "irrational." Bright lines are, by their very nature, arbitrary. However, the mere fact that the By-Law includes a January 1, 2000, birthdate cut-off for purchasing tobacco products does not make it arbitrary, irrational, or unlawful. "Every economic classification is in some manner arbitrary but the drawing of the

line between classifications is a task to be exercised at the discretion of the appropriate branch of government.” *Chebacco Liquor Mart, Inc. v. Alcoholic Beverages Control Comm’n*, 429 Mass. 721, 724 (1999) (internal quotation marks and citation omitted). It is well-settled that “[l]egislative line drawing ... does not violate equal protection principles simply because it ‘is not made with mathematical nicety or because in practice it results in some inequality.’” *Doe No. 1*, 479 Mass. at 395, quoting *Chebacco Liquor Mart, Inc.*, 429 Mass. at 723. Such is the case here.

Because the By-Law is rationally related to the furtherance of a legitimate state interest, Plaintiffs’ equal protection claim fails.<sup>8</sup>

**Order**

For the foregoing reasons, Defendants’ Mass. R. Civ. P. 12(b)(6) Motion to Dismiss (Docket Entry No. 12.0) is **ALLOWED** in its entirety. All claims asserted in Plaintiffs’ Amended Complaint shall be **DISMISSED**, with prejudice.

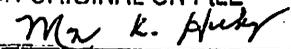


Brian A. Davis  
Associate Justice of the Superior Court

Date: October 17, 2022

<sup>8</sup> The fourth Prayer for Relief in Plaintiffs’ Amended Complaint requests an award of the reasonable attorneys’ fees and costs that Plaintiffs incurred in bringing this action pursuant to G.L. c. 12, § 11I, the Massachusetts Civil Rights Act (“MCRA”). At oral argument on Defendants’ Motion, Plaintiffs’ counsel explained that Plaintiffs have not asserted an independent claim under the MCRA, but rather seek statutory fees and costs on account of their equal protection claim. Because Plaintiffs’ equal protection claim fails as a matter of law, the Court need not address whether they would be entitled to fees and costs under the MCRA.

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STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

NEWPORT, SC.

SUPERIOR COURT

[Filed: October 30, 2018]

SAMS FOOD MART, LLC, ABDUL KAHN, :  
SAUDABBAD CONVENIENCE, INC., :  
MOHAMMAD SIDDIQUI, :  
*Plaintiffs,* :

v. :

C.A. No. NC-2017-0443

TOWN OF MIDDLETOWN, :  
*Defendant,* :

and :

THE STOP & SHOP SUPERMARKET :  
COMPANY, LLC, MAXI DRUG SOUTH, :  
L.P., COLBEA ENTERPRISES, LLC, :  
CUMBERLAND FARMS, INC., :  
AQUIDNECK PACKAGE STORE, INC., :  
SHAWS SUPERMARKET, INC., :  
BJS WHOLESALE CLUB, INC., :  
NEWPORT NATIONAL GOLF CLUB, INC., :  
MICHAEL SANTOS d/b/a SANDY'S :  
LIQUORS, SKEES REALTY, LTD., BEACH :  
LIQUORS, LLC, SPEEDWAY, LLC, :  
7-ELEVEN, INC., WALGREEN EASTERN :  
CO., INC., ANDREW'S AT EASTGATE, :  
LTD., SPLASH ECIG AND VAPOR :  
EMPORIUM, LLC, :

*Interested Parties.* :

DECISION

NUGENT, J. Before this Court is a complaint for declaratory judgment and injunctive relief with respect to the Town of Middletown's (Middletown) Tobacco Ordinance. Plaintiffs seek a declaration from the Court that the Tobacco Ordinance is unconstitutional, exceeding the constitutional authority of the municipality. Jurisdiction is pursuant to the Uniform Declaratory Judgments Act (UDJA), G.L. 1956 §§ 9-30-1, *et seq.*

**I**

**Facts**

On December 4, 2017, the Middletown Town Council adopted an ordinance regulating the sale of tobacco (Tobacco Ordinance). Middletown Code of Ordinances § 119; Am. Compl. ¶ 26. The Tobacco Ordinance requires anyone selling tobacco products in Middletown to obtain a “tobacco dealer’s license from the Town Council,” and pay an annual fee of \$100. Middletown Code of Ordinances § 119.02. Additionally, the Tobacco Ordinance prohibits the use of coupons or volume discounts with the sale of tobacco as well as the sale of any flavored tobacco products. Middletown Code of Ordinances §§ 119.05(D), (E).

The Plaintiffs are owners and operators of retail stores in Middletown which sell tobacco products. Plaintiffs Mohammad Siddiqui and Saudabbad Convenience, Inc. operate a store known as Newport Mart located at 52 East Main Road in the Town of Middletown. Am. Compl. ¶ 1. Plaintiffs Abdul Khan and Sams Food Mart, LLC operate a store known as Sam’s Food Mart located at 356 West Main Road in the Town of Middletown. Am. Compl. ¶ 2. The Plaintiffs have separate licenses to sell tobacco products from the State Division of Taxation under G.L. 1956 §§ 44-20-1, *et seq.* and/or from the Department of Health pursuant to G.L. 1956 § 23-1-56; Am. Compl. ¶ 31.

The Middletown Town Council initially enacted a similar ordinance on June 19, 2017, but the Plaintiffs asserted a violation of the Open Meetings Act, G.L. 1956 §§ 42-46-1, *et seq.* as part of their initial Complaint on October 26, 2017. *See* Middletown Code of Ordinances § 118; Compl. ¶¶ 33-39. Pursuant to a consent order entered on December 4, 2017, enforcement of Chapter 118 was stayed. The new Tobacco Ordinance Chapter 119 was enacted on December 4, 2017. *See* Am. Compl. ¶ 26. In their Amended Complaint filed on December 5, 2017, the Plaintiffs request declaratory and injunctive relief, alleging the Tobacco Ordinance is

unconstitutional under the Rhode Island Constitution and is therefore null and void. Am. Compl. ¶¶ 37-40. Pursuant to a consent order entered on February 6, 2018, Middletown agreed to be temporarily enjoined from enforcing the Tobacco Ordinance until further order of this Court.

## II

### Standard of Review

Under the UDJA, the Superior Court possesses the “power to declare rights, status, and other legal relations whether or not further relief is or could be claimed.” Sec. 9-30-1; *see also P.J.C. Realty, Inc. v. Barry*, 811 A.2d 1202, 1207 (R.I. 2002) (quoting § 9-30-1). The Court’s power under UDJA is broadly construed, and allows the trial justice to “facilitate the termination of controversies[.]” *Malachowski v. State*, 877 A.2d 649, 656 (R.I. 2005). Therefore, the plaintiff must present the Court with an actual controversy when seeking declaratory relief. *Millett v. Hoisting Eng’rs’ Licensing Div. of Dep’t of Labor*, 119 R.I. 285, 291, 377 A.2d 229, 233 (1977). Further, it is well-established that a trial court’s “decision to grant or to deny declaratory relief under the [UDJA] is purely discretionary.” *Sullivan v. Chafee*, 703 A.2d 748, 751 (R.I. 1997).

“[I]n deciding whether to issue a preliminary injunction, the hearing justice should determine whether the moving party (1) has a reasonable likelihood of success on the merits, (2) will suffer irreparable harm without the requested injunctive relief, (3) has the balance of the equities, including the possible hardships to each party and to the public interest, tip in its favor, and (4) has shown that the issuance of a preliminary injunction will preserve the status quo.” *Iggy’s Doughboys, Inc. v. Giroux*, 729 A.2d 701, 705 (R.I. 1999). When deciding upon the constitutional validity of a municipal enactment, it is true that “[a] plaintiff is generally entitled to injunctive relief when a municipality seeks to enforce an invalid ordinance.” *Women & Infants Hosp. v. City of Providence*, 527 A.2d 651, 654 (R.I. 1987). Ultimately, “[t]he issuance

and measure of injunctive relief rests in the sound discretion of the trial justice.” *Cullen v. Tarini*, 15 A.3d 968, 981 (R.I. 2011).

### III

#### Analysis

##### A

#### Authority Under Middletown’s Home Rule Charter

Middletown contends the Tobacco Ordinance is a valid exercise of a municipality’s authority under the Home Rule Amendment to the Rhode Island Constitution. R.I. CONST. art. XIII, § 2. “Traditionally, cities and towns were held to be creatures of the Legislature having no inherent right to self-government but deriving all of their authority and power from the Legislature.” *Lynch v. King*, 120 R.I. 868, 876, 391 A.2d 117, 122 (1978) (citing *City of Providence v. Moulton*, 52 R.I. 236, 246, 160 A. 75, 79 (1932)). Under the Home Rule Amendment, cities and towns have the . . . “power at any time to adopt a charter, amend its charter, enact and amend local laws relating to its property, affairs and government not inconsistent with this Constitution and laws enacted by the general assembly in conformity with the powers reserved to the general assembly.” R.I. CONST. art. XIII, § 2. This legislative authority for cities and towns is still limited to addressing something of “purely local concern.” *Westerly Residents for Thoughtful Dev., Inc. v. Brancato*, 565 A.2d 1262, 1264 (R.I. 1989) (quoting *DePetrillo v. Coffey*, 118 R.I. 519, 523, 376 A.2d 317, 319 (1977)). The limits of a municipality’s authority under its Home Rule Charter can be easily defined as whatever constitutes a purely local concern, but discerning between state and local concerns requires first looking to what the state has exclusive domain over under its police power.

There are certain subject areas where any legislative action categorically falls under the state's police power, barring any further legislation by a municipality in that same area without some express delegation to do so. *See Bruckshaw v. Paolino*, 557 A.2d 1221, 1223 (R.I. 1989). (“This court has held that the state maintains sovereignty over the regulation of police affairs, the conduct of business, licensing, education, and elections.”). The Tobacco Ordinance’s licensing provision clearly conflicts with what is an exclusive power of the General Assembly over a statewide concern. *See Newport Amusement Co. v. Maher*, 92 R.I. 51, 56, 166 A.2d 216, 218 (1960) (“Licensing is definitely not a local matter. The 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.”) (Emphasis added.) The Rhode Island Supreme Court’s language in *Newport Amusement Co.* leaves this Court with no option other than to find the Tobacco Ordinance’s licensing provision invalid. *See D’Arezzo v. D’Arezzo*, 107 R.I. 422, 426-27, 267 A.2d 683, 685 (1970) (“[A]n opinion declares the law and the law thus announced becomes a precedent which must be followed by any inferior court.”).

While the licensing provision of the Tobacco Ordinance is clearly in excess of Middletown’s authority as a municipality under the Home Rule Amendment, Middletown, relying on *Landrigan v. McElroy*, contends that the Tobacco Ordinance would still be constitutionally valid as a whole because the licensing requirement is severable. 457 A.2d 1056, 1061 (R.I. 1983) (“The test for determining the separability of portions of a statute is whether, at the time the statute was enacted, the legislature would have passed it absent the constitutionally objectionable provision.” (Internal quotations omitted)). However, Middletown’s reliance on *Landrigan* is misplaced. The problems with the Tobacco Ordinance do not end with the

licensing requirement because the other provisions still interfere with the General Assembly's exclusive authority to regulate business.

With respect to the state's sovereignty over regulating "the conduct of business," there is no bright line for where a municipal regulation—addressing a local concern such as health or safety—becomes an unconstitutional infringement upon the state's exclusive authority over the conduct of business. *Bruckshav*, 557 A.2d at 1223. Elaborating upon the state's authority over such conduct of business, the Rhode Island Supreme Court has previously stated:

"[T]he general assembly, as representing the sovereign power of the state, has the right to impose reasonable conditions upon the right to carry on business, or to follow any given trade, profession, or calling, is beyond question; . . . If the imposition of such a condition has for its primary object the regulation of the business, trade, or calling to which it applies, its exercise is properly referable to the police power; but, if the main object is the obtaining of revenue, it is properly referable to the taxing power." *State v. Foster*, 22 R.I. 163, 46 A. 833, 835-36 (1900).

By prohibiting the use of coupons and volume discounts, as well as prohibiting the sale of flavored tobacco, the Tobacco Ordinance would have a clear effect on the Plaintiffs and other Middletown businesses by restricting the products one can have available for sale—and the manner by which those products can be sold.

Middletown, in its memorandum, contends the Tobacco Ordinance is intended to promote the health and safety of its citizens, so the impact on private businesses is merely incidental—however great that impact may be. Middletown may have a legitimate local concern it is attempting to address under its home rule authority, but the best of intentions will not permit a municipality to act beyond its constitutional authority. *See Nugent v. City of E. Providence*, 103 R.I. 518, 525, 238 A.2d 758, 763 (1968) ("[W]e are unable to agree that legislation accomplishing the regulation and control of business can ever be absent some peculiar

circumstance, an appropriate matter for local legislation, absent a grant of such power either in express terms or by necessary implication.”). While it may be well-intentioned, the Tobacco Ordinance does “accomplish[] the regulation and control of business,” and the constitutional authority for this action concerns the effect rather than a municipality’s intent. *Id.*

Case law pertaining to the outer limits of the state’s police power does not provide a full diagnostic for what is—and isn’t—under that control, but the Rhode Island Supreme Court has supplied a test for such an instance where an ordinance arguably falls in between. *See Town of E. Greenwich v. O’Neil*, 617 A.2d 104, 111 (R.I. 1992). These factors further support finding that tobacco regulation is better addressed as a statewide concern rather than a purely local concern. In *O’Neil*, the Rhode Island Supreme Court put forth three variables to consider in order to “define the limits of the local-general equation.” *Id.* These variables are:

“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. 1 Antieau, § 3.40 at 3–113. Second, whether a particular matter is traditionally within the historical dominion of one entity is a substantial consideration. 1 Antieau, § 3.40 at 3–115; *see Marro v. Gen. Treasurer of Cranston*, 108 R.I. 192, 196, 273 A.2d 660, 662 (1971); *Nugent v. City of E. Providence*, 103 R.I. 518, 524–26, 238 A.2d 758, 761–63 (1968); *Op. to the House of Representatives*, 80 R.I. 288, 294, 96 A.2d 627, 630 (1953); 2 McQuillin, § 4.85 at 206. 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. 1 Antieau, § 3.40 at 3–115 to 3–119; 2 McQuillin, § 4.85 at 208; *see McCarthy*, 574 A.2d at 1231; *Brancato*, 565 A.2d at 1264; *Bruckshaw*, 557 A.2d at 1223.” *Id.*

With respect to the first factor, uniform regulation throughout the state would certainly better effect what the Tobacco Ordinance seeks to accomplish. “A subject in need of statewide uniformity is one in which the needs with respect to those matters do not vary locally in their

nature or intensity. Municipal action would not be useful, and indeed diverse local decisions would be mischievous and even intolerable.” *Mack Paramus Co. v. Mayor and Council of Borough of Paramus*, 103 N.J. 564, 577, 511 A.2d 1179, 1186 (N.J. 1986) (quoting *Summer v. Township of Teaneck*, 53 N.J. 548, 553, 251 A.2d 761, 763-64 (N.J. 1969)). If intended to protect children by preventing them from getting their hands on these tobacco products, the Tobacco Ordinance only better prevents the children from getting tobacco in Middletown. If enacted locally, piece-meal regulation by similarly-minded municipalities across the state does not effectively address youth smoking—even for those municipalities that do enact such ordinances. At most, the Tobacco Ordinance merely inconveniences the consumer who can drive to the next municipality, but this is something any regular commuter will do anyway. Although the Tobacco Ordinance is aimed at preventing children from getting their hands on tobacco, and younger children are unable to drive themselves to the next municipality, it is reasonable to anticipate many of these children can still acquire these prohibited tobacco products from enabling adults who can purchase it for them on their regular commute. Thirty-eight state licensed tobacco dealers are within three and one-half miles of Plaintiffs’ stores just over in Newport—ten of which are within less than a mile and one-half of these stores. *See* Stipulated Facts, Ex. J. Indeed, this impediment for children actually puts the hardship more squarely at the feet of those such as the Plaintiffs, who may lose regular customers to a store in a nearby municipality. This practical reality shows the flaw with the Tobacco Ordinance’s incidental impact relative to its goal, suggesting this is a matter of statewide concern.

With respect to the second factor, it appears the state possesses historical dominion over tobacco. In its brief, Middletown asserts that the state and municipalities have shared dominion over the sale of tobacco products. The state has long imposed a tax on tobacco products and

required licensure of tobacco dealers. Secs. 44-20-2; 44-20-12. The state has also imposed age restrictions to buy tobacco. G.L. 1956 § 11-9-13. With respect to the municipalities, a number of them have enacted their own forms of tobacco ordinances in recent years. The state has a longer history of tobacco regulation. The various municipal ordinances are more recent. Out of the three, this factor is the least helpful to Middletown.

With respect to the third factor—and the most important of the three—the effect of piecemeal regulation such as this will create a patchwork of inconsistent rules among the municipalities. Typically, the appropriate subject matter for municipal regulation would be for something specific in the town and its effects will not be felt elsewhere. *See, e.g., Brancato*, 565 A.2d at 1264 (finding municipal regulation of Westerly’s sewers and drains appropriate because it was a matter of local concern); *Bruckshaw*, 557 A.2d at 1223 (finding Providence’s employee pension plan to be a matter of local concern). The Tobacco Ordinance’s incidental impact on commerce may very well endanger the livelihoods of store owners subjected to such ordinances when their regular customers—whether from this municipality or another municipality—are redirected to another store simply because they can offer more in their municipality. Municipal regulation will have far more of an impact on competition between businesses in different municipalities than it would with its primary goal for public health and safety. Therefore, legislation regulating tobacco sales—whether business-related or motivated by public health and safety—should be recognized as a statewide concern. Having determined that regulating the sale of tobacco is not a purely local concern, Middletown is without the authority to legislate unilaterally under the Home Rule Amendment on this matter.

**B**

**Delegation of Authority**

Recognizing tobacco regulation is a statewide concern, Middletown lacked the authority under its Home Rule Charter to enact the Tobacco Ordinance. *See Bertrand v. Di Carlo*, 111 R.I. 509, 511, 304 A.2d 658, 659-60 (1973) (“It is a well-settled rule that cities and towns have no power to enact ordinances, except those powers from time to time delegated to them by the Legislature. And it is a fundamental rule of construction that such powers, *being delegated*, should be strictly construed.”) (Emphasis added.) “The police power is vested in the state and 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.” *State v. Krzak*, 97 R.I. 156, 160, 196 A.2d 417, 420 (1964).

In order to determine whether the General Assembly intended to delegate any authority to the municipalities, this Court must first see if the intent behind the statute can be determined from “the plain language used in the statute.” *Kingston Hill Acad. v. Chariho Reg’l Sch. Dist.*, 21 A.3d 264, 271 (R.I. 2011). This Court “shall not interpret a statute to include a matter omitted unless the clear purpose of the legislation would fail without the implication.” *State v. Feng*, 421 A.2d 1258, 1264 (R.I. 1980). More specifically, in *Nigent*, the Rhode Island Supreme Court displayed hesitation that “legislation accomplishing the regulation and control of business can ever be, absent some peculiar circumstance, an appropriate matter for local legislation, absent a grant of such power either in express terms or by necessary implication.” 103 R.I. at 526, 238 A.2d at 763.

Middletown further contends that the Tobacco Ordinance is not preempted by state law because the General Assembly did not express its intent to exclusively occupy the field of

tobacco regulation. For the reasons explained above, this argument fails to recognize the crucial preceding step: citing an express delegation or necessary implication of authority from the General Assembly upon which a municipality can legislate in that given area. *See Nugent*, 103 R.I. at 522, 238 A.2d at 761. With that said, “preemption only exists in circumstances in which the municipality would have the authority to regulate a particular subject in the absence of state action.” *Town of Warren v. Thorton-Whitehouse*, 740 A.2d 1255, 1261 (R.I. 1999). After finding that the Tobacco Ordinance could not have been enacted under Middletown’s home rule authority because it did not address a local concern, this Court does not even encounter a preemption issue unless Middletown acted with authority delegated to the municipalities by the General Assembly. *See id.* at 1260 (“[B]efore [the Rhode Island Supreme Court] could conclude that such a delegation has occurred, [the Court] would require an *express statement* of intent by the Legislature to delegate that authority.”) (Emphasis added.)

To uphold the Tobacco Ordinance, this Court must look for some “express statement” by the General Assembly that this type of authority has been delegated to the municipalities. *Id.* “When we determine the true import of statutory language, it is entirely proper for us to look to ‘the sense and meaning fairly deducible from the context.’” *In re Brown*, 903 A.2d 147, 150 (R.I. 2006) (quoting *In re Estate of Roche*, 16 N.J. 579, 109 A.2d 655, 659 (N.J. 1954)). Middletown cites G.L. 1956 § 45-6-1(a), which states:

“(a) Town and city councils may, from time to time, *make and ordain all ordinances and regulations for their respective towns and cities, not repugnant to law, which they deem necessary for the safety of their inhabitants* from fire, firearms, and fireworks; to prevent persons standing on any footwalk, sidewalk, doorstep, or in any doorway, or riding, driving, fastening, or leaving any horse or other animal or any carriage, team, or other vehicle on any footwalk, sidewalk, doorstep, or doorway within the town or city, to the obstruction, hindrance, delay, disturbance, or annoyance of passersby or of persons residing or doing business in this vicinity:

to regulate the putting up and maintenance of telegraph and other wires and their appurtenances; to prevent the indecent exposure of any one bathing in any of the waters within their respective towns and cities; against breakers of the Sabbath; against habitual drunkenness; *respecting the purchase and sale of merchandise or commodities within their respective towns and cities*; to protect burial grounds and the graves in these burial grounds from trespassers; and, generally, all other ordinances, regulations and bylaws for the well ordering, managing, and directing of the prudential affairs and police of their respective towns and cities. not repugnant to the constitution and laws of this state, or of the United States.” (Emphasis added.)

To say the General Assembly’s express delegation for municipal regulation of tobacco is clear from this very broad language—so as to permit municipalities to prohibit sales of tobacco products under this authority—is far-fetched. The statute permits municipalities to “make and ordain all ordinances and regulations . . . which they deem necessary for the safety of their inhabitants . . .” and then goes on to provide a laundry list of what may endanger the safety of those inhabitants. Sec. 45-6-1(a). As a whole, these listed concerns are more related to the safe operation of a town, and this one vague provision regarding enacting ordinances “respecting the purchase and sale of merchandise or commodities within their respective towns and cities” is surrounded by what could be considered rather specific concerns about the operation of a town. *Id.* This lack of express delegation is further supported by the catch-all language near the end of the statute, stating, “and, generally, all other ordinances, regulations and bylaws for the *well ordering, managing, and directing of the prudential affairs and police of their respective towns and cities . . .*” *Id.* (Emphasis added.) Due to the fact that the Rhode Island Supreme Court has expressed such reservation for municipalities “accomplishing the regulation and control of business . . . absent some peculiar circumstance,” it would seem the language of § 45-6-1 does not provide the “express terms” needed for the delegation of authority required for Middletown to enact the Tobacco Ordinance. *Nugent*, 103 R.I. at 526, 238 A.2d at 763.

Furthermore, the authority for the Tobacco Ordinance has not been delegated or authorized by necessary implication. *See id.* This Court’s interpretation of § 45-6-1(a) does not render the relevant clause “mere surplusage.” *State v. Clark*, 974 A.2d 558, 572 (R.I. 2009) (quoting *State v. DeMagistris*, 714 A.2d 567, 573 (R.I. 1998)). Even without the authority to ban the sale of tobacco for safety reasons, a municipality would still have the authority to enact a wide array of ordinances “respecting the purchase and sale of merchandise or commodities.” Sec. 45-6-1(a). The regulation of tobacco for safety purposes was not a necessary part of § 45-6-1, so the authority to enact an ordinance to that effect was not authorized by necessary implication.

In addition to § 45-6-1(a), Middletown summarily cites in its reply memorandum to other statutes as evidence of “an overarching intent from the General Assembly for cities and towns to be partners with the State in the areas of smoking regulation and the control of youth access to tobacco.” *See* Def.’s Reply Mem. 3 (citing §§ 23-20.10-12; 23-20.10-9(d)(2); 11-9-13.6). This Court will not “search the record to substantiate that which a party alleges.” *Riley v. Stone*, 900 A.2d 1087, 1098 n.14 (R.I. 2006); *see also Tworog v. Tworog*, 140 A.3d 159, 160 (R.I. 2016). However, it does not appear as though these aforementioned statutes provide any better support for either finding an express delegation from the General Assembly or one that is necessarily implied.

## IV

### Conclusion

For the foregoing reasons, this Court finds Middletown's Tobacco Ordinance is in excess of the municipality's authority under the Home Rule Amendment, and Middletown lacked the necessary delegation of authority by the General Assembly. The Tobacco Ordinance is unconstitutional and, therefore, null and void. Plaintiffs' complaint for a declaratory judgment is granted. Middletown is enjoined from enforcing the Tobacco Ordinance. The Plaintiffs will submit a form of final order and judgment consistent with this Decision.

**CERTIFICATE OF COMPLIANCE**

I hereby certify, under the pains and penalties of perjury, that this brief complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of briefs and appendices, including, but not limited to:

- Mass. R. A. P. 16 (a)(13) (addendum);
- Mass. R. A. P. 16 (e) (references to the record);
- Mass. R. A. P. 18 (appendix to the briefs);
- Mass. R. A. P. 20 (form and length of briefs, appendices, and other documents); and
- Mass. R. A. P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the monospaced font Courier New at size 12-point, 10½ characters per inch, and contains 37, total non-excluded pages prepared with Word 2013.

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**CERTIFICATE OF SERVICE**

Pursuant to Mass.R.A.P. 13(d), I hereby certify, under the penalties of perjury, that on February 23, 2023, I have made service of this Brief, Addendum and Record Appendix upon the attorney of record for each party, by Electronic Mail and priority mail, postage prepaid:

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