IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-3519

CIGAR ASSOCIATION OF AMERICA, INC.; ITG CIGARS, INC.; SWEDISH MATCH NORTH AMERICA, LLC; SWISHER INTERNATIONAL, INC.,
Plaintiff-Appellees,

V.

CITY OF PHILADELPHIA; COMMISSIONER PHILADELPHIA DEPARTMENT OF PUBLIC HEALTH
Defendant-Appellants.

BRIEF FOR APPELLANTS CITY OF PHILADELPHIA AND DEPARTMENT OF PUBLIC HEALTH COMMISSIONER DR. THOMAS FARLEY AND APPENDIX VOLUME 1 (pp. 1-20)

Appeal of the November 13, 2020 Order granting Plaintiffs' Motion for a Preliminary Injunction, issued by the United States District Court for the Eastern District of Pennsylvania, the Honorable Gene E. K. Pratter, at No. 20-cv-03220.

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Dated: February 24, 2021

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STATEMENT OF JURISDICTION

This action was originally filed in the Court of Common Pleas of Philadelphia County. Defendant-Appellants removed it to the United States District Court pursuant to 28 U.S.C. §§ 1332, 1441 and 1446. This Court has jurisdiction over this interlocutory appeal of the District Court's grant of Plaintiff-Appellees' motion for a preliminary injunction pursuant to 28 U.S.C. § 1292(a).

STATEMENT OF THE STANDARD OF REVIEW

When reviewing a District Court's grant of a preliminary injunction, this Court reviews the District Court's findings of fact for clear error, its conclusions of law *de novo*, and the ultimate decision granting the preliminary injunction for an abuse of discretion. See Bimbo Bakeries USA, Inc. v. Botticella, 613 F.3d 102, 109 (3d Cir. 2010). Specifically, "any determination that is a prerequisite to the issuance of an injunction . . . is reviewed according to the standard applicable to that particular determination." Southco, Inc. v. Kanebridge Corp., 258 F.3d 148, 150–51 (3d Cir. 2001). Thus, "[d]espite oft repeated statements that the issuance of a preliminary injunction rests in the discretion of the trial judge[,] whose decisions will be reversed only for 'abuse,' a court of appeals must reverse if the district court has proceeded on the basis of an erroneous view of the applicable law." Kos Pharm., Inc. v. Andrx Corp., 369 F.3d 700, 708 (3d Cir. 2004).

"The scope of preemption presents a pure question of law, which [this Court] review[s] *de novo*." In re Federal-Mogul Global Inc., 684 F.3d 355, 364 n.16 (3d Cir. 2012).

The District Court's factual findings and credibility determinations are entitled to deference and ought not be disturbed absent clear error. See United States v. Local 560 (I.B.T.), 974 F.2d 315, 335 (3d Cir. 1992).

STATEMENT OF RELATED CASES AND PROCEEDINGS

Several tobacco manufacturers, distributors, and sellers filed an action in July 2020 in the Philadelphia Court of Common Pleas challenging — and seeking a preliminary injunction to enjoin — a different City ordinance restricting the sale of high nicotine salt and flavored e-cigarette and vaping products in Philadelphia to licensed adults-only establishments, Philadelphia Code § 9-638. Asian Am. Licensed Beverage Ass'n v. City of Philadelphia, July Term 2020, Case No. 2307 (Pa. Ct. Com. Pleas, Phila. Cnty.). Plaintiffs in that action argue that the City's Vaping Ordinance is expressly preempted by the same preemption statutes at issue in the instant case. The Court of Common Pleas held a hearing on the preliminary injunction motion on December 3, 2020, but has not yet issued a decision.

STATEMENT OF THE ISSUES PRESENTED ON APPEAL

1. Did the District Court err in finding that the City's Flavored Cigar Ordinance is likely expressly preempted, where the plain language of the preemption statute states that it narrowly preempts only ordinances concerning the particular areas regulated by 18 Pa. C.S. § 6305; where the legislative history and caselaw strongly support that narrow reading; where the Ordinance does not touch on any of those particular areas; and where, in any event, the Ordinance is not preempted even under the District Court's broad construction of the statute's preemptive scope?

Answered below: No.

Suggested answer: Yes.

Defendants raised this issue throughout the proceedings below, including in our response in opposition and surreply to the motion for preliminary injunction, Appx336-41 (Response at 27-32), (ECF No. 13, Surreply at 1-3); as well as at the hearing on the motion, Appx103-13 (10/7/20 N.T. at 79-89); and in our proposed findings of fact and conclusions of law (ECF No. 22, COL at ¶¶ 28-49).

2. Did the District Court err in finding Plaintiffs proved they will suffer irreparable injury, where Plaintiffs may be able to recover money damages by pursuing the constitutional claims set forth in their complaint; where, even if damages are not recoverable, the District Court agreed that Plaintiffs' revenue loss estimates are speculative; and where, in any event, the Court's finding that

Plaintiffs will suffer "some" non-compensable economic harm is not enough, as Plaintiffs did not establish they will suffer *substantial* economic harm?

Answered below: No.

Suggested answer: Yes.

The City and Commissioner Farley raised this issue throughout the proceedings below, including at the hearing on the motion for preliminary injunction, Appx92-102, 128-29 (10/7/20 N.T. at 68-78, 104-05); in our post-hearing memorandum (ECF No. 20 at 1-5); proposed findings of fact and conclusions of law (ECF No. 22, COL at ¶¶ 11-26); and in our response in opposition and surreply to the motion for preliminary injunction, Appx357-62 (Response at 48-53); (ECF No. 13 at 8-11).

STATEMENT OF THE CASE AND OF THE FACTS

Tobacco products are addictive and harmful. The City of Philadelphia — utilizing its broad legislative powers as a home rule jurisdiction and city of the first class — enacted legislation restricting the sale of flavored cigars that proliferate in Philadelphia's corner stores and are marketed to look and taste like candy (the "Flavored Cigar Ordinance" or the "Ordinance"). Following a hearing, the District Court granted Plaintiffs' motion for a preliminary injunction and enjoined the City from enforcing the Flavored Cigar Ordinance. The City and Public Health Commissioner Thomas Farley appealed.

I. Statement of the Facts

A. The Parties.

Plaintiff Swisher International, Inc., is a manufacturer of cigars. Swisher does not sell cigars directly to the public; rather, it sells its flavored and unflavored cigars to distributors and dealers, who in turn sell them in or to establishments located in Philadelphia. Appx255-56 (Ex. P-8, Saber ¶¶ 2-3, 5). Three other Plaintiffs are named in the Complaint – Cigar Association of America (a trade association); ITG Cigars, Inc.; and Swedish Match North America, LLC – but none of those Plaintiffs came forward with any evidence that they, or any of their members, sell any tobacco products into or in the Philadelphia market.

Defendant the City of Philadelphia is a city of the first class with home rule powers. See Act of April 21, 1949, § 17, P.L. 665, as amended by Act of Nov. 30 2004, No. 193, § 1, P.L. 1523, 53 P.S. § 13131. Defendant Dr. Thomas Farley is the Commissioner of the City's Department of Public Health, and a regionally and

nationally recognized public health expert. Appx142 (City Ex. A, declaration of Commissioner Farley ("Farley") at ¶ 1). As Commissioner, Dr. Farley oversees all Department of Public Health operations, including the Department's programs to prevent disease and promote health, to provide primary medical care through the City's health centers, and permitting and enforcement. Appx142 (Farley ¶ 3).

B. Tobacco use leads to horrible public health consequences.

It is widely accepted that nicotine, a chemical in tobacco, is addictive. Appx144 (Farley ¶ 10). Tobacco addiction, with its attendant health consequences, represents one of the most serious public health challenges to the City of Philadelphia. Appx143 (Farley ¶ 5). It is the single largest preventable cause of death in the City, causing almost 4,000 deaths each year, more people than overdoses, gun homicides, alcohol, and physical inactivity combined. Id.

Once addicted, a smoker often faces disastrous health consequences. Appx143 (Farley ¶¶ 7, 8). The average smoker dies ten years early due to tobacco use, and often suffers for years from chronic lung disease, involving painful struggles to breathe and limited ability to work. Appx143 (Farley ¶ 7). Tobacco use also causes an increased risk of premature birth, Sudden Infant Death Syndrome, and childhood asthma from secondhand smoke. Appx143 (Farley ¶ 8).

C. The sale and marketing of flavored cigars inflicts particular damage upon vulnerable, low-income and minority residents.

Flavored tobacco products — and flavored cigars and cigarillos in particular — are especially targeted to low-income neighborhoods and to minority

populations, who disproportionately bear the negative health impacts of these dangerous products. Appx143 (Farley ¶¶ 6, 9); Appx171-72 (City Ex. B, declaration of Councilmember Curtis Jones ("Jones") at ¶ 4-5).

Stores in low-income, minority neighborhoods are more likely to sell cigars and cigarillo products, which are aggressively marketed in African American and Latino neighborhoods as "hood wraps." Appx143, 172 (Farley ¶ 9; Jones ¶ 10). Indeed, cigarillos often sell for 99 cents for a pack of four or five, in contrast to a pack of cigarettes, which currently retails for approximately ten dollars. Appx146 (Farley ¶ 27). Each cigarillo contains the tobacco of about three cigarettes, so that a five-pack of cigarillos, at a fraction of the cost, carries the addictive equivalent of three-quarters of a pack of cigarettes. (Id.).

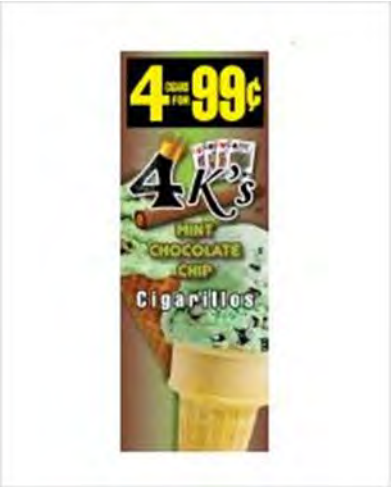
Twenty-nine percent of Philadelphians with incomes at or below the poverty line smoke, as compared to nineteen percent of those living above the poverty line. Appx143 (Farley ¶ 6). Twenty-three percent of African-Americans in Philadelphia smoke, compared to seventeen percent of White residents. (Id.).

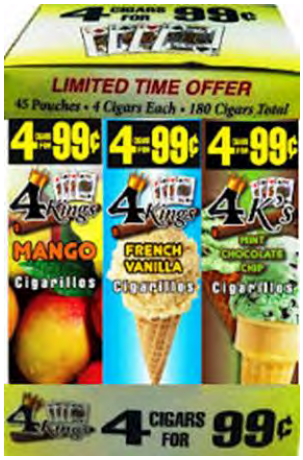
Until passage of the Ordinance in December 2019, cheap flavored cigars and cigarillos flooded corner stores throughout Philadelphia, particularly in low-income neighborhoods. Appx172 (Jones ¶ 5, 10).

D. Flavored cigars are packaged in bright colors and made to taste like fruits or candy to appeal to young people and to entice young users.

Flavored cigars and cigarillos are often indistinguishable from and placed alongside displays of candy, wrapped in bright colors with pictures of sweet snacks

such as ice cream cones and brownies on the front, and taste like fruit punch, French vanilla, and similar flavors. Appx145 (Farley ¶¶ 19-20, 22-23); Appx172 (Jones ¶¶ 7-8). Here are some typical examples:





Appx149-56 (Photos, Ex. 1 to Farley Decl.).

These flavors mask the harsher taste of tobacco and subtly send the counter-factual message to unwary purchasers that these products are safe. Appx145 (Farley ¶¶ 21, 24).

They also are actively marketed and designed to appeal to young people. Notwithstanding that federal, state, and local laws prohibit the sale of tobacco products to minors,[1] young people are still accessing tobacco products. Appx172 (Farley ¶ 12). This is particularly problematic because youth and young adults' developing brains make them more susceptible to nicotine addiction and the lasting detrimental health effects it causes. Appx144 (Farley ¶ 11). And, while studies have shown that cigarette use among teens has been decreasing, there has been a

[1] 21 U.S.C. § 387f; 18 Pa. C.S. § 6305; Phila. Code § 9-622(1)(a).

significant recent increase in teen cigar use, fueled by a near tripling in cigar use among African American teens. Appx146 (Farley ¶ 28).

By packaging their products in bright colors and making them taste like fruit or candy, manufacturers, distributors, and dealers of flavored cigars invite users to start young and to continue using until they reach full addiction in adulthood. Indeed, eighty-one percent of youth and eighty-six percent of young adults who report ever using tobacco in their lifetimes initiated with a flavored product; and those who started with flavored tobacco report a higher likelihood of remaining tobacco users. Appx145 (Farley ¶¶ 25-26).

E. The Flavored Cigar Ordinance

On December 18, 2019, following unanimous passage by City Council, Mayor Kenney signed the Flavored Cigar Ordinance into law. Appx175-78 (City Ex. C, Phila. Bill No. 180457).

The substantive provisions of the legislation are straightforward. The Ordinance restricts the sale of Flavored Cigars and Flavored Roll-Your-Own Tobacco: tobacco products that "impart[] a Characterizing Flavor," *i.e.,* that smell or taste like fruit, candy, or anything other than tobacco. See Phila. Code § 9-639(1)-(2).[2]

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[2] A "Characterizing Flavor" is specifically defined as:

> A taste or aroma, other than the taste or aroma of tobacco, imparted either prior to or during consumption of a Tobacco Product or any byproduct produced by the Tobacco Product, including, but not limited

(footnote continued on next page)

The Flavored Cigar Ordinance restricts the sale of these products to licensed "Tobacco Products Distribution Businesses," which are establishments that derive at least ninety percent of their sales from tobacco products and accessories, only allow entry by adults, and do not sell food. See Phila. Code § 9-639(3). In August 2020, there were 16 approved Tobacco Products Distribution Businesses in the City, with additional applications pending. Appx147 (Farley ¶¶ 33-34).

Philadelphia is not alone in restricting the sale of these dangerous products. The Flavored Cigar Ordinance is similar to comparable legislation in other jurisdictions, including Massachusetts, California, and the Cities of New York and San Francisco. See Mass. Gen. Laws Ann. ch. 270, § 28; Cal. Health & Safety Code § 104559.5; N.Y.C. Admin. Code § 17-715; San Francisco Health Code § 19Q.3. Indeed, reflecting the increased recognition of flavors as a driver of tobacco initiation, more than 300 states and localities have restricted sales of flavored non-cigarette tobacco products.[3] See Campaign for Tobacco Free Kids,

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> to, any taste or aroma relating to fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, mint, wintergreen, herb, or spice; provided, however, that a Tobacco Product shall not be determined to have a Characterizing Flavor solely because of the use of additives or flavorings or the provision of ingredient information.

Phila. Code § 9-639(1). The Philadelphia Code can be found at https://codelibrary.amlegal.com/codes/philadelphia/latest/overview. Note that the Ordinance numbers this Section as 9-637, but the Code Editor renumbers it as 9-639 in the online publication of The Philadelphia Code.

[3] The sale of almost all flavored cigarettes and loose tobacco is prohibited nationwide. See 21 U.S.C. § 387g(a)(1)(A).

Fact Sheet: States & Localities That Have Restricted The Sale Of Flavored Tobacco Products, available at https://www.tobaccofreekids.org/assets/factsheets/0398.pdf; Am. Nonsmokers' Rights Found., *Municipalities Prohibiting the Sale of Flavored Tobacco Products* (2020), available at https://no-smoke.org/wp-content/uploads/pdf/flavored-tobacco-product-sales.pdf.

F. The Multi-Faceted Purposes of The Flavored Cigar Ordinance.

The City enacted its Flavored Cigar Ordinance for multiple purposes. By removing flavored cigars from convenience and corner stores and restricting their sale to stores that are almost exclusively devoted to the sale of tobacco, the Ordinance sought to:

- reduce smoking of flavored tobacco by minors, Appx146 (Farley ¶ 31); Appx175 (Ordinance, 4th Whereas clause);
- reduce smoking of flavored tobacco by young adults, Appx146-47 (Farley ¶¶ 31, 35); Appx173 (Jones ¶ 18);
- protect the City's most vulnerable populations, particularly in low-income and minority neighborhoods, where flavored tobacco products are particularly heavily marketed, Appx175 (Ordinance, 2nd and 5th Whereas clauses); Appx459 (Compl. Ex. 7, 6/5/2018 N.T. at 38, Council Committee on Public Health Hearing on Bill No. 180457); Appx171-72 (Jones ¶¶ 5, 11); Appx143 (Farley ¶¶ 6, 9); and
- prevent the normalization of flavored tobacco, *i.e.*, the clear message sent by the sale and marketing of flavored tobacco that flavored tobacco is no

less unhealthy than candy or ice cream. Appx146-47 (Farley ¶¶ 31, 35); Appx180 (City Ex. D, Board of Health Regulation, 6th Whereas clause).

II. Statement of the Case

Plaintiffs originally filed their complaint and motion for preliminary injunction against the City and Commissioner Farley in the Court of Common Pleas of Philadelphia County. The complaint alleges that the City's Flavored Cigar Ordinance is preempted by two state laws: Section 301 of the General Local Government Code, 53 Pa. C.S. § 301 ("Section 301"), and Section 2 of Act 42 of 2018, Act of June 22, 2018, P.L. 281 ("Act 42"), 72 P.S. § 232-A(a). Appx392-94 (Compl. at Counts I-II). It also asserts several claims for constitutional violations, namely, that the Ordinance violates Plaintiffs' due process rights and is unconstitutionally vague. Appx397-401 (Compl. at Counts III-VI). Defendants removed the action to federal court. Appx23 (Docket at ECF No. 1).

A. The Preliminary Injunction Motion and Hearing.

On October 7, 2020, the District Court heard arguments and accepted evidence on the Motion for Preliminary Injunction. Appx24 (Docket at ECF No. 18); Appx25-140 (10/7/2020 N.T.). The Motion relied on Plaintiffs' preemption claims only; Plaintiffs did not pursue the alleged federal and state constitutional violations. Appx23 (Docket at ECF No. 1-2). The parties agreed not to present live testimony; they relied on the written declarations and/or reports of their witnesses and other exhibits offered into the hearing record. Appx28, 139 (10/7/20 N.T. at 4, 115); Appx141- 216 (City Exhibits); Appx217-296 (Plfs. Exhibits).

Plaintiffs presented the expert report of economist Peter Angelides, Ph.D., AICP of Econsult Solutions, Inc., who claims no expertise in the tobacco industry. Dr. Angelides provided his opinion: (1) estimating how many Philadelphia businesses could potentially be classified as Tobacco Products Distribution Businesses; and (2) estimating how much Philadelphia and Pennsylvania Tobacco and Sales Tax revenue he believed is implicated by the Ordinance. Appx228-54 (Plf. Ex. 7, Angelides Report). As part of his tax computation, Dr. Angelides stated that approximately $69.5 million dollars in annual City-wide cigar sale revenue derives from products that he believes are now restricted by the Ordinance; and assumed that all $69.5 million in sales would be entirely lost. Appx236-39 (Id. at ¶¶ 23-32).

Plaintiffs also presented a declaration by Karen Saber, an analyst who works for Plaintiff Swisher, which set forth her conclusory lay opinion that the Ordinance would harm Swisher. Appx255-57 (Plf. Ex. 8, Saber Decl. at ¶¶ 6-10).

Finally, Plaintiffs presented a declaration by Kimberly Ferrari, a paralegal at the law firm representing Plaintiffs, which discussed her observations about where flavored tobacco products were displayed in four of the roughly 2,500 retail tobacco outlets in the City. Appx272-77 (Plf. Ex. 12).

The City presented the declaration of Commissioner Farley, which provides his expert opinion supporting the City's need for the Flavored Cigar Ordinance, including the detrimental impacts of flavored tobacco products on public health in Philadelphia. Appx142-69 (City Ex. A). The City also presented declarations by

three Councilmembers who co-sponsored the Ordinance: Curtis Jones, Jr., Helen Gym, and Cindy Bass. Appx171-73 (City Ex. B, Jones Dec.); Appx185-87 (City Ex. M, Bass Dec.); Appx188-91 (City Ex. N, Gym Dec.). Plaintiffs did not offer evidence to rebut the City's evidence regarding the marketing and public health implications of flavored cigars.[4]

After the hearing, the Court asked for supplemental briefing on "whether Plaintiffs' inability to secure money damages from Defendants due to sovereign immunity satisfies the federal irreparable harm requirement," which both parties filed. (ECF No. 17, 19-20). As requested by the Court, the parties also filed proposed findings of fact and conclusions of law. (ECF No. 21-22).

B. The District Court's Order and Opinion.

On November 13, 2020, the District Court granted Plaintiffs' motion and enjoined enforcement of the Ordinance. Appx3 (Order).

The District Court first concluded that Plaintiffs are likely to succeed on the merits of their claim that the Ordinance is preempted by 53 Pa. C.S. § 301

[4] At the hearing, Plaintiffs objected to parts of the declarations of the Councilmembers and Commissioner Farley. The Court stated it would hold the evidentiary objections in abeyance pending receipt of further post-hearing briefing it requested on the evidentiary issues, which both the City and Plaintiffs filed. Appx41-44, 139 (10/7/20 N.T. at 17-20, 115); (ECF No. 17, 19-20). The District Court did not rule on these objections.

Plaintiffs also raised evidentiary objections to two declarations probative only as to the Plaintiffs' claim that the Flavored Cigar Ordinance is preempted by Act 42, which claim the District Court did not reach. Appx38-40 (N.T. at 14-16); (City Ex. K, Solomon Dec.); (City Ex. L, Farnese Dec.); (ECF No. 19, Plfs.' 10/21/2020 Post-Hearing Supp. Memo at 12-13).

("Section 301") (attached hereto as Exhibit A), which states, as relevant here, that "any local ordinance . . . concerning the subject matter of 18 Pa. C.S. § 6305" ("Section 6305") (attached hereto as Exhibit B) is preempted. The Court rejected the City's plain language reading of Sections 301 and 6305 as narrowly preempting local laws concerning only the particular areas that Section 6305 expressly regulates.

Instead, the District Court concluded that Section 301 preempts all local legislation concerning "youth access to tobacco." Appx6-15 (Op. at 3-12). Although it essentially found Section 301 ambiguous, the District Court refused to apply the presumption against preemption or to look to the directly on-point legislative history. Further, notwithstanding that the Ordinance restricts sales of flavored cigars to adults, the Court also found that the City's Ordinance regulates youth access to tobacco and is therefore preempted. Id.

Having determined that Plaintiffs were likely to succeed on the merits of their Section 301 claim, the Court addressed the other preliminary injunction factors. First, it concluded that Plaintiffs established irreparable harm. Appx15-18 (Op. 12-15). In finding irreparable harm, the District Court exclusively relied on Plaintiffs' expert, who stated the Ordinance will cause a loss in City-wide flavored cigar sales revenue. Although economic loss ordinarily does not constitute irreparable harm, the Court found that, here, the City was entitled to immunity from any damages claim, which would preclude Plaintiffs from being compensated after the fact for any preemption violation. Appx16-17 (Op. at 13-14). The Court

agreed with the City that the expert's projection of the amount of that loss – some $69.5 million – was speculative and that any actual losses would likely be "far lower" than Plaintiffs' expert estimated. Appx17 (Op. at 14). Yet, the District Court still determined the expert's report "contains enough information to demonstrate" that "Plaintiffs will suffer at least *some* harm that cannot be compensated through an award of money damages," which it deemed a sufficient showing of irreparable harm absent preliminary injunctive relief. Appx18 (Op. at 15) (emphasis added).[5]

Finally, the District Court found that violation of Section 301 constitutes *per se* harm to the public interest. Having found *per se* harm, it did not look at or weigh the voluminous evidence offered by the City demonstrating the grave harm to the public caused by Plaintiffs' products. Appx 18-19 (Op. at 15-16).

The City and Commissioner Farley appealed to this Court. Appx1-2 (NOA).

[5] The Court "put[] little weight" on Karen Saber's declaration. Appx18 (Op at 15 n.7); Appx255-47 (Ex. P-8). Specifically, the Court found Saber not credible because her declaration "offers nothing more than Ms. Saber's *ipse dixit*" that the Ordinance would harm Swisher's sales and business relationships and "she does not state *how* her qualifications lead her to [so] believe." Id. (emphasis in original).

SUMMARY OF THE ARGUMENT

The District Court erred in granting a preliminary injunction that prohibits the City from enforcing its Flavored Cigar Ordinance. Plaintiffs failed to show that they are likely to succeed on the merits of their claim that the Ordinance is expressly preempted by 53 Pa. C.S. § 301 ("Section 301"). And their evidence falls woefully short of satisfying their burden of showing that they will suffer irreparable harm.

First, Section 301 does not preempt the City's Ordinance. Section 301 preempts local legislation "concerning the subject matter of 18 Pa. C.S. § 6305." The most natural reading of Section 301, with the most fidelity to the plain language of Sections 301 and 6305, is that it narrowly preempts local legislation concerning only the particular areas that Section 6305 expressly regulates. By expansively interpreting Section 301 as preempting local legislation concerning the subject matter of "youth access to tobacco," the District Court improperly went well beyond the words of Sections 301 and 6305. And, even if Section 301 is ambiguous -- which the District Court effectively acknowledged it is -- the City's narrow reading should control. In reading Section 301's preemptive scope broadly, the District Court ignored the presumption against preemption and compelling legislative history demonstrating that the General Assembly intended for Section 301 to be read as the City suggests.

The restrictions in the City's Ordinance do not fall within Section 301's preempted domain. The Ordinance facially does just one thing: it restricts in what stores lawful *adult* purchasers can buy flavored cigars. It plainly does not touch on

any of the specific items Section 6305 expressly regulates. That one of Council's *goals* in passing the Ordinance — among several other important motivations — was to deter youth from accessing flavored cigars is irrelevant. There is no "preemption of purpose" doctrine when applying an express preemption clause. For the same reason, the Ordinance is not preempted even if the District Court's expansive reading of Section 301 is used. By finding the Ordinance intrudes into regulating "youth access to tobacco," the District Court went far beyond the plain language and actual operation of the Ordinance, which simply (and only) regulates *adult* activity.

Second, the District Court erred for three reasons in holding that Plaintiffs' expert's report established they would suffer "at least some [non-compensable financial] harm," and this was "just enough to demonstrate irreparable injury" absent an injunction. First, because Plaintiffs may be entitled to damages via constitutional claims they have alleged in their complaint, they did not establish that money damages are unavailable to them.

Second, the expert's statements on revenue loss are speculative, lack any credible factual foundation, and rest on patently faulty assumptions, *points with which the District Court largely agreed*. The Court's conclusion that the report still shows Plaintiffs will lose *some amount* of non-compensable sales revenue is thus conjecture. Third, the District Court erred in finding "some" unquantified amount of economic loss is enough to satisfy the onerous irreparable harm standard. To be irreparable, the harm has to be substantial. Plaintiffs did not

establish they will suffer substantial loss. This Court should reject the District Court's novel theory that *any* economic loss that is unrecoverable because of governmental immunity constitutes *per se* irreparable harm.

ARGUMENT

Plaintiffs argue the General Assembly preempted the City from enacting its Flavored Cigar Ordinance. That Ordinance, which operates only to restrict in what stores lawful adult purchasers can buy flavored cigars in Philadelphia, does not intrude into any preempted domain. Nor did Plaintiffs prove that enforcement of the Ordinance will cause them to suffer irreparable injury absent an injunction. The District Court thus erred in granting a preliminary injunction.

I. A preliminary injunction is an extraordinary remedy which should be granted only in limited circumstances.

A preliminary injunction is "an extraordinary remedy" which "should be granted only in limited circumstances." Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 24 (2008); Greater Phila. Chamber of Commerce v. City of Phila., 949 F.3d 116, 133 (3d Cir. 2020). In this case, the District Court erred in granting that drastic remedy.

In order for a district court to issue a preliminary injunction, the moving party must show:

(1) that plaintiff is likely to succeed on the merits at a final hearing;

(2) that plaintiff will suffer irreparable harm in the absence of an injunction;

(3) that the granting of a preliminary injunction will not result in greater harm to the non-moving party and other interested persons; and

(4) that a preliminary injunction is in the public interest.

See Chamber of Commerce, 949 F.3d at 133; Reilly v. City of Harrisburg, 858 F.3d 173, 176 (3d Cir. 2017).

This Court recognizes that likelihood of success on the merits and irreparable harm are the "most critical" factors. Reilly, 858 F.3d at 179. Only if both of these "gateway factors" are met should the district court consider the remaining factors. Id. The court then determines in its sound discretion if all four factors, taken together, balance in favor of granting the requested preliminary relief. Id.

Here, the District Court erred in issuing a preliminary injunction, as Plaintiffs failed to meet either of the "gateway factors": likelihood of success on the merits *or* irreparable harm.

II. The District Court erred in finding that Plaintiffs are likely to succeed on the merits of their claim that the Flavored Cigar Ordinance is expressly preempted by 53 Pa. C.S. § 301.

The District Court incorrectly held that Plaintiffs are likely to succeed on their claim that the Flavored Cigar Ordinance is expressly preempted by Section 301. There is simply no overlap between what Section 301 preempts and what the Ordinance regulates.[6]

Section 301 provides that "any local ordinance or rule concerning the subject matter of 18 Pa. C.S. § 6305" is preempted. The plain language and most natural reading of Section 301 is that it narrowly preempts local legislation concerning

[6] Plaintiffs also claimed that the Ordinance is preempted by Section 2 of Act 42 of 2018, P.L. 281, 72 P.S. §232-A ("Act 42"). Having concluded that Plaintiffs were likely to succeed on their Section 301 claim, the District Court did not reach Plaintiffs' alternative Act 42 claim, or the City's defense that Section 2 of Act 42 was enacted in violation of two mandatory provisions of Article III of the Pennsylvania Constitution: the single subject and original purpose requirements. Appx15 (Op. at 12 n.5). We likewise do not discuss the Act 42 claim here.

only the particular areas that Section 6305 expressly regulates.

The District Court expansively read Section 301 as preempting local laws concerning the subject matter of "youth access to tobacco." In so doing, it improperly went beyond the words of Sections 301 and 6305. And, even if Section 301 is ambiguous -- which the District Court essentially found it is -- rules of statutory construction dictate the City's narrow reading is the best interpretation of Section 301. In broadly reading Section 301's preemptive scope, the District Court ignored the presumption against preemption and compelling legislative history demonstrating that the General Assembly intended for Section 301 to be read as the City proffers.

The Flavored Cigar Ordinance does not intrude into what Section 301 narrowly preempts: just the specific items that Section 6305 expressly regulates. Thus, it is not preempted. Moreover, even under the District Court's broad, thematic scope of Section 301's preemption — legislation concerning "youth access to tobacco" — the Ordinance still is not preempted. That one of Council's *goals* in passing the Ordinance was to deter youth from smoking is irrelevant. There is no "preemption of purpose" doctrine when applying an express preemption clause. In finding the Ordinance preempted, the District Court went far beyond the language and operation of the Ordinance, which simply (and only) restricts where adults can purchase flavored cigars.

A. What does Section 301 preempt? The words of Section 301 are clear; it narrowly preempts only local legislation concerning the specific areas that Section 6305 expressly regulates.

Resolving whether the Ordinance is expressly preempted by Section 301 requires the Court to answer two questions: first, what exactly does Section 301 preempt, which involves defining the subject matter of Section 6305; and second, do the restrictions in the City's Flavored Cigar Ordinance fall within that preempted domain? As to the first question, Section 301 narrowly preempts only regulation of the specific areas that Section 6305 *expressly* regulates. The words of Sections 301 and 6305 make this clear; and the rules of statutory construction provide strong, additional support. As to the second, the Ordinance's restriction on the stores where adults can buy flavored cigars does not fall within that narrow domain.

"When examining an express preemption clause, the task of statutory construction must in the first instance focus on the plain wording of the express preemption clause, which necessarily contains the best evidence of the legislature's pre-emptive intent." JoJo Oil Co. v. Dingman Twp. Zoning Hearing Bd., 77 A.3d 679, 690 (Pa. Cmwlth. 2013); 1 Pa. C.S. § 1921(b) ("When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit."); accord Sprietsma v. Mercury Marine, a Div. of Brunswick Corp., 537 U.S. 51, 62-63 (2002).

Section 301 states, in relevant part:

> Except as set forth in subsection (b), the provisions of 18 Pa. C.S. § 6305 (relating to sale of tobacco products) **shall preempt and**

> **supersede any local ordinance or rule concerning the subject matter of 18 Pa. C.S. § 6305** . . . .

53 Pa. C.S. § 301(a) (emphasis added) (attached hereto as Exhibit A).[7] Section 6305, titled "Sale of tobacco products," in turn, provides, in pertinent part:

> (a) Offense defined.-- Except as set forth in subsection (f), a person is guilty of a summary offense if the person:
>
> (1) sells a tobacco product to any minor;
>
> (2) furnishes, by purchase, gift or other means, a tobacco product to a minor;
>
> (3) Deleted * * *
>
> (4) locates or places a vending machine containing a tobacco product in a location accessible to minors;
>
> (5) displays or offers a cigarette for sale out of a pack of cigarettes; or
>
> (6) displays or offers for sale tobacco products in any manner which enables an individual other than the retailer or an employee of the retailer to physically handle tobacco products prior to purchase unless the tobacco products are located within the line of sight or under the control of a cashier or other employee during business hours, except that this paragraph shall not apply to retail stores which derive 75% or more of sales revenues from tobacco products.
>
> (a.1) Purchase.— A minor is guilty of a summary offense if the minor:
>
> (1) purchases or attempts to purchase a tobacco product; or
>
> (2) knowingly falsely represents himself to be at least 21 years

[7] Section 301 additionally preempts local ordinances "concerning the subject matter of . . . section 206-A of the act of April 9, 1929 (P.L. 343, No. 176)." 53 Pa. C.S. § 301(a). Because Section 206-A (relating to cigarette sale licensing) is not at issue here, we limit our discussion of Section 301's scope to the subject matter of Section 6305.

> of age or if the minor is a member of the active or reserve components of any branch or unit of the armed forces of the United States or a veteran who received an honorable discharge from any branch or unit of the active or reserve components of the armed forces of the United States, at least 18 years of age to a person for the purpose of purchasing or receiving a tobacco product.

18 Pa. C.S. § 6305 (attached hereto as Exhibit B).

The simplest and most natural reading of Section 301 is that it preempts local legislation concerning the narrow areas that Section 6305 explicitly regulates, namely, selling tobacco to a minor; giving tobacco to a minor; locating a vending machine containing tobacco in a place accessible to minors; selling loose cigarettes to anyone; putting tobacco in a place that allows any individual to handle it before purchase; attempting to purchase tobacco by a minor; and misrepresenting age to purchase tobacco by a minor.[8] This reading has the most fidelity to the plain language of the preemption provision, *i.e.*, to what Sections 301 and 6305 actually say.

B. Do the restrictions in the City's Ordinance fall within Section 301's preempted domain? Under either the City's construction or the District Court's construction of the preemption's scope, the answer is "no."

Having shown what Section 301 preempts — only the narrow areas that Section 6305 expressly regulates — we now address whether the City's Flavored

[8] The District Court suggested the City (and Plaintiffs) ignored certain parts of Section 6305. Appx12 (Op. at 9). Not so. Subsections (a) and (a.1) set forth the "meat" of Section 6305 – *i.e.*, what the statute prohibits. The remainder of the statute merely gives teeth to enforce these prohibitions by fixing penalties and administrative consequences for committing a Section 6305 offense; providing for checks to assess compliance with the statute; listing affirmative defenses; and giving definitions. See 18 Pa. C.S. § 6305(b)-(k).

Cigar Ordinance falls within that preempted domain. It plainly does not. First, the Ordinance does not touch on any of the specific items Section 6305 expressly regulates. Second, the Ordinance is not preempted even if the District Court's expansive reading of Section 301 is used. By finding the Ordinance intrudes into regulating "youth access to tobacco," the District Court went far beyond the plain language and actual operation of the Ordinance, which simply (and only) restricts where *adults* can purchase flavored cigars. That one of Council's *goals* in passing the Ordinance was to deter youth from smoking is irrelevant because there is no "preemption of purpose" doctrine in Pennsylvania.

1. The Ordinance does not touch on any of the specific items identified in Section 6305.

The Ordinance does not touch on any of the specific items identified in Section 6305. The Ordinance facially does just one thing: it restricts in what stores lawful adult purchasers can buy flavored cigars. See Phila. Code § 9-639. It does none of the things Section 6305 does: it neither imposes restrictions on nor penalizes persons for selling or giving those products to minors specifically (subsections (a)(1)-(2)); nor prohibits minors from attempting to buy or misrepresenting their age to purchase the products (subsection (a.1). It does not restrict selling loose cigarettes to anyone, where vending machines containing tobacco can be placed or where in a store tobacco can be handled before purchase (subsections (a)(4)-(6)). There is simply no overlap between the specific subjects of legislation contained in Section 6305 and what the City's Flavored Cigar Ordinance does.

The District Court did not analyze this question, having instead read Section 301 more broadly. Had the Court examined whether the Ordinance touches on any of the specific items identified in Section 6305, it would have concluded that it does not, so the Ordinance is not preempted. Its inquiry should have ended there.[9]

2. The District Court erred in broadly reading Section 301 as preempting municipal laws concerning "youth access to tobacco."

However, instead of honoring the plain language of Section 301, the District Court found that Section 301 preempts municipal laws concerning "youth access to tobacco," which for the District Court included ordinances like ours that simply have as one of their goals to reduce youth access to tobacco but do not actually regulate minors. Appx8-13 (Op. at 5-10). The Court arrived at this expansive construction after consulting dictionary definitions of the word "subject," which it admitted "give, at best, [only] vague guidance." Appx9 (Op. at 6). It also cited a Commonwealth Court case that analyzed a statutory provision with language similar to Section 301. Appx9-10 (Op. at 6-7) (discussing Mitchell's Bar & Restaurant, Inc. v. Allegheny County, 924 A.2d 730 (Pa. Cmwlth. 2007)).

From these sources, the District Court concluded that, by using the term

[9] Plaintiffs weakly suggested late in the proceedings below that the Ordinance directly implicates Subsection 6305(a)(2) because the Ordinance concerns "furnishing . . . a tobacco product to a minor." 18 Pa. C.S. § 6305(a)(2); (ECF No. 21, Plfs.' Proposed Conclusions of Law at ¶¶ 113-14); (ECF No. 25, Plfs.' Supp. Proposed Conclusions of Law at ¶¶ 219-220). To agree with Plaintiffs means going far beyond what our Ordinance actually *does*. Our Ordinance's restriction on which stores adults can buy flavored cigars in is far afield from what Subsection 6305(a)(2) does: criminalize furnishing tobacco to minors.

"subject matter," the statute means a "thematic thread that [binds] each element of the statute together." Appx9-11 (Op. at 6-8). The Court found that the "common thread that binds [Section 6305] together is preventing youth access to tobacco." Appx11 (Op. at 8).

The Court's expansive reading of Section 301 is improper because it goes beyond the plain words of Sections 301 and 6305, which provide the best indicator of the General Assembly's intent. The plain words suggest no need to search for a thematic preemptive thread, as the District Court did.

Nor does Mitchell's Bar. The question in that case was whether the state Clean Indoor Air Act's regulation of indoor smoking in restaurants preempted an Allegheny County ordinance prohibiting all smoking in restaurants. The state Act contained an express preemption provision with language similar to Section 301, prohibiting local laws "concerning the subject matter" of the Act. 924 A.2d at 733. Mitchell's Bar does not hold that courts must look for a "thematic thread that b[inds] each element of the statute together" to discern its "subject matter." Appx10 (Op. at 7). Indeed, the District Court concedes the opinion "did not detail how" a court should discern the subject matter. Id. Allegheny County primarily contended that the General Assembly had repealed the preemption provision. There was no serious argument that – if still valid – the preemption provision did not prohibit local legislation banning smoking in restaurants entirely. There was no serious argument that the subject matter of the Act was anything other than "smoking in restaurants," particularly where the statute set out rules for how

restaurants were to designate both smoking and non-smoking sections. 924 A.2d at 733 n.7. Simply put, the District Court erred in overreading Mitchell's Bar to set forth a roadmap for interpreting an ambiguous preemption provision because the reach of the provision in that case was not seriously at issue.[10]

3. Even if the District Court's expansive reading of Section 301 is used, the Ordinance is not preempted, because the Ordinance does not regulate "youth access to tobacco."

Regardless, the Ordinance is not preempted even if the District Court's expansive reading of Section 301 is used. The City's Ordinance restricts where lawful *adult* purchasers can get flavored cigars in Philadelphia; it facially does nothing to regulate *youth* access to tobacco. In finding the Ordinance regulates youth access to tobacco, the District Court erred and impermissibly went beyond the plain language and actual operation of the Ordinance.

We readily acknowledge that one *goal* of the Ordinance — among several other important motivations[11] — was to deter youth from smoking. But what

[10] The mere fact that, as the District Court pointed out in its Opinion, the General Assembly could have expressed more clearly its intent to limit preemption only to the specific matters set out in Section 6305 does not advance the analysis. Appx11 (Op. at 8). Indeed, the District Court's point works against its own conclusion. Surely, if the General Assembly had wanted to broadly preempt ordinances "concerning youth access to tobacco" it could have said *that* far more clearly.

[11] Other important goals of the Ordinance include: (1) reducing smoking of flavored tobacco by young adults, whose developing brains make them more susceptible to nicotine addiction, Appx146-47 (Farley ¶¶ 31, 35); Appx173 (Jones ¶ 18); (2) protecting low-income and minority residents, to whom flavored tobacco products are particularly heavily marketed, Appx175 (Ordinance, 2nd and 5th Whereas clauses); Appx464 (6/5/2018 N.T. at 38, Council Committee on Public Health Hearing on Bill No. 180457); Appx171-72 (Jones ¶¶ 5, 11); Appx143

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matters, for purposes of express preemption, is what the Ordinance *does*, not the *goals* of the Councilmembers who passed it into law. The District Court's holding boils down to finding that because one *purpose* of the Ordinance is to limit minors' access to tobacco, the Ordinance must be preempted. But that is wrong; there is simply no "preemption of purpose" doctrine in Pennsylvania as the result of an express preemption clause.

The District Court flatly misunderstood our position in contending that "[t]he City admit[ted] that the Ordinance directly regulates youth access to tobacco." Appx14 (Op. at 8). The City's position below was *not* that the Ordinance restricts the sale of flavored cigars to children. Indeed, the sale of *all* tobacco products to children is already banned by federal, state, and local law. See 21 U.S.C. § 387f; 18 Pa. C.S. § 6305; Phila. Code § 9-622(1)(a). We simply and only acknowledged that one *purpose* of the Ordinance was to deter youth smoking, and that is not enough to render the Ordinance preempted. Appx340-41 (City's Resp. to Plfs.' PI Motion at 31-32); Appx56, 107-08 (N.T. at 32, 83-84).

Finally, the District Court appeared to suggest that, because the City's ban on sales *to anyone* at convenience stores *includes* sales to children, the ban therefore intrudes into the District Court's broad preemption of regulating youth access to tobacco. (Op. at 11.) But, under that logic, *any* regulation of tobacco

(Farley ¶¶ 6, 9); and (3) preventing the normalization of flavored tobacco as a not unhealthy product by limiting exposure only to people who affirmatively elect to visit a specialty tobacconist, JA146-47 (Farley ¶¶ 31, 35); Appx180 (Board of Health Regulation, 6th Whereas clause).

sales would include within its scope sales to minors, so *any* regulation of tobacco sales by the City would be preempted. The argument "proves too much."

C. Rules of statutory construction support the City's narrow reading of Section 301's preemptive scope; the District Court erred in not applying them and selecting an extremely broad interpretation.

As explained above in Section II.A & B, *supra*, our narrow reading of Section 301 is most faithful to the plain language of the text, and the District Court's broad reading of its scope is incorrect. Further, as explained in Section II.A & B, under either interpretation of Section 301's preemptive scope, our restriction on the sale of tobacco products to adults is not preempted.

Even if this Court rejects the City's threshold contention that Section 301's plain language calls for our narrow reading of Section 301, there is an independent and alternative reason why the District Court should have credited the City's reading. At worst, even according to the District Court's analysis, there are multiple plausible readings of Section 301. Therefore, the District Court erred in refusing to apply two key tools for resolving ambiguity that dictated the correctness of our narrow reading. First, our narrow reading is the reading strongly supported by the legislative history. Second, it is the reading called for by the presumption against preemption, which the Court should have applied and requires choosing the narrowest plausible reading that disfavors preemption.

1. The District Court's opinion essentially finds Section 301 ambiguous.

As a threshold matter, the District Court stated it did not use these tools of

statutory construction because it ostensibly found the meaning of Section 301 plain on its face. Appx13 (Op. at 10 n.4). Respectfully, its opinion is internally inconsistent. The District Court essentially admitted that it considered Section 301 to be ambiguous, as its opinion recognizes *multiple plausible meanings* of Section 301, including the City's narrow reading, the Court's interpretation, and at least two others. Appx 7, 11-13 (Op. at 4, 8-10).[12]

Under Pennsylvania law, if a statute is reasonably susceptible to more than one interpretation, it is ambiguous. See Delaware Cty. v. First Union Corp., 992 A.2d 112, 118 (Pa. 2010).

Where the District Court candidly acknowledged it chose what it deemed the "best" among various plausible readings, it essentially found Section 301 was ambiguous. Appx8 (Op. at 5); see also id. ("the Court must examine the range of plausible interpretations and choose the one that is most probable"). It therefore should have relied on tools of statutory interpretation to discern its meaning, including examining the legislative history of the statute and applying the presumption against preemption.

[12] The Court stated Section 301 could be expansively read to preempt the theme of any legislation "concerning the subject matter of tobacco use"; or "concerning the subject matter of tobacco and illicit drug use." Appx12 (Op. at 9). Indeed, the Court explained that these readings are supported by Section 6305's broad title: "Sale of tobacco products." We note there are still other plausible "thematic" interpretations of Section 301, including regulating the *mechanics* of *how* retailers are to sell tobacco products (as opposed to *what* products retailers may sell or *in which stores* they may sell them).

2. Compelling legislative history shows that Section 301's preemption is limited to the areas specifically addressed in Section 6305.

The legislative history of Section 301 could not be clearer. It unmistakably demonstrates that the General Assembly intended the reading of Section 301 proposed by the City: narrowly preempting *only the specific areas listed by Section 6305*.

It is significant that an earlier version of what would become Section 301 contained very broad preemptive language, but the legislature then chose to significantly limit the scope of that preemption. Indeed, an early draft of the bill proposed to preempt all local regulation of "the acquisition, sale, purchase, transfer, possession and marketing of tobacco products in any form." See H.B. 1501, P.N. 3891, § 5, 2001 Gen. Assemb., Reg. Sess. (Pa. 2001) (excerpt attached hereto as Exhibit C).

That language was substantially changed by the State Senate to read, in pertinent part, as it reads today. See H.B. 1501, P.N. 4005, § 3, 2001 Gen. Assemb., Reg. Sess. (Pa. 2001) (excerpt attached hereto as Exhibit D).[13]

Senator Schwartz of Philadelphia thereafter moved to delete the preemption provision entirely from the bill. See Pa. Legislative Journal (Senate), June 26, 2002, No. 48, at 2016 (attached hereto as Exhibit E).[14] The floor leader for the bill,

[13] All prior versions of Section 301 (H.B. 1501), including the full text of P.N. 3891 and P.N. 4005, are available on the General Assembly's website at https://www.legis.state.pa.us/cfdocs/billinfo/BillInfo.cfm?syear=2001&sind=0&body=H&type=B&bn=1501.

[14] The complete legislative history of Section 301 (H.B. 1501), including the

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Senator Mowery, objected, explaining that the preemption provision *already was exceedingly narrow*: "The preemption language prohibits local governments from passing regulations **on areas that are specifically addressed in the bill**." Id. at 2017 (emphasis added).

He later continued:

> Mr. President, the preemption language really prohibits local governments from passing regulations on the areas **that we have specifically addressed in this bill**, and the **amended preemption language narrows the focus of preemption**.
>
> For example, **by limiting the preemption to areas addressed in the bill**, we have, for example, in local government, **we have not restricted them**, maybe they would like to pass an ordinance that prohibits advertising for cigarette sales or for placing signs in areas throughout the community to **try to discourage smoking by our young people**.

Id. at 2018 (emphasis added).

The foregoing demonstrates that the General Assembly intended to narrowly preclude local governments from legislating only with respect to the specific matters covered by Section 6305 and did not intend the type of broad thematic preemption the District Court envisioned. As Senator Mowery expressly noted, the legislature did not intend to broadly stop localities from passing any legislation "to try to discourage smoking by . . . young people." Id.

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full Remarks in the House and Senate Journals, is available on the General Assembly's website at https://www.legis.state.pa.us/cfdocs/billinfo/bill_history.cfm?syear=2001&sind=0&body=H&type=B&bn=1501.

3. Courts have a duty to apply a presumption against preemption and to choose the narrowest plausible reading that disfavors preemption.

Additionally, in choosing among the multiple plausible readings of an ambiguous preemption provision, courts have a duty to apply a presumption against preemption and to choose the narrowest plausible reading that disfavors preemption. The District Court incorrectly held that this well-established rule of construction only applies in cases of implied preemption, and not with respect to express preemption provisions. But no Pennsylvania case actually supports this distinction. Indeed, where an express preemption provision is susceptible to several different plausible interpretations, the logic of the presumption should fully apply.

Grounded in the strong deference afforded to the autonomous self-governance home rule authority guarantees, the Pennsylvania Supreme Court has stated its "reluctance to find that local legislation is preempted by state statutes." Mars Emergency Med. Servs., Inc. v. Twp. of Adams, 740 A.2d 193, 195 (Pa. 1999). Its cases recognize a presumption in favor of municipal power and against preemption, making clear that any ambiguities with respect to municipal authority are to be resolved in favor of the municipality. See, e.g., Nutter v. Dougherty, 938 A.2d 401, 414 (Pa. 2007) ("[w]e cannot stress enough that a home rule municipality's exercise of its local authority is not lightly intruded upon, with ambiguities regarding such authority resolved in favor of the municipality"); Delaware Cty. v. Middletown Twp., 511 A.2d 811, 813 (Pa. 1986) ("ambiguities [with respect to municipal authority are resolved] in favor of the municipality").

Indeed, the General Assembly affords Philadelphia complete autonomy and police power within its home rule boundaries, fully respected as if the General Assembly itself were legislating on the matter. See Pa. Const., Art. 9, § 2; 53 P.S. § 13131; Warren v. City of Philadelphia, 115 A.2d 218, 221 (Pa. 1955).

The District Court erred in refusing to apply the presumption, holding it applies in implied preemption cases, but not in express preemption cases. Appx7-8 (Op. at 4-5). While no Pennsylvania case has explicitly applied the presumption in the context of deciding whether a state statute expressly preempts local law, no case or logic suggests that the presumption against preemption only operates with respect to one type of preemption but not the other. Even where the General Assembly expresses its intent to preempt some amount of local legislation, the scope of that intent can be unclear, as the District Court essentially recognized. Under such circumstances, it simply makes sense that the presumption would apply to resolve that ambiguity.

Indeed, in Hoffman Mining Company, Inc. v. Zoning Hearing Board, 32 A.3d 587 (Pa. 2011), the Pennsylvania Supreme Court implicitly applied the presumption against preemption with respect to an express preemption provision. Id. at 600. The District Court attempted to distinguish Hoffman on the ground that a quotation we cited appeared in a sentence discussing field preemption. Appx8 (Op. at 5 n.1). However, Hoffman considered all three types of preemption. The District Court failed to consider that the Hoffman Court refused to construe the state Surface Mining Act's *express* preemption provision as barring a local zoning

setback for mining activities because the "General Assembly ha[d] not clearly incorporated [zoning] concerns into the [express preemption] clause." 32 A.3d at 600. That is all we asked the District Court to do here.

Moreover, in the analogous context of deciding potential federal preemption of state law, both the Pennsylvania Supreme Court and federal courts have squarely rejected the notion that the presumption applies only in implied preemption cases. "[E]ven when there is an express pre-emption clause . . . when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption." In re Nickelodeon Consumer Privacy Litig., 827 F.3d 262, 291 (3d Cir. 2016); Miller v. Southeastern Pa. Transp. Auth., 103 A.3d 1225, 1236 (Pa. 2014) ("presumption against preemption . . . even where federal law contains an express preemption clause"); see also CTS Corp. v. Waldburger, 573 U.S. 1, 18-18 (2014) (collecting cases); In re Estate of Sauers, 32 A.3d 1241, 1250 (Pa. 2011).

Those cases logically hold that, while inclusion of an express preemption clause tells us that the legislature intended to preempt *to some extent*, this "does not immediately end the [court's] inquiry because the question of the substance and scope of [that] displacement . . . still remains." Altria Grp., Inc. v. Good, 555 U.S. 70, 76 (2008); Miller, 103 A.3d at 1236.

There is no reason not to apply the same persuasive logic here.[15]

[15] Indeed, it is not uncommon for the Pennsylvania Supreme Court to borrow federal preemption principles when shaping Pennsylvania preemption law. See, e.g., Hoffman, 32 A.3d at 602 ("we can see no reason why the logic of . . .
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III. The District Court erred in finding that Plaintiffs carried their burden to prove irreparable harm absent a preliminary injunction.

The District Court held that Plaintiffs established they would suffer irreparable harm absent an injunction. Appx15-18 (Op. at 12-15). Specifically, relying exclusively on Plaintiffs' expert, whose report stated that enforcing the Ordinance would cause an industry-wide loss in flavored cigar sales revenue, the Court found Plaintiffs would suffer "at least some [financial] harm" and that this revenue loss "cannot be compensated through an award of money damages" because the City is entitled to immunity. Appx16 (Op. at 13). It concluded this financial loss was "just enough to demonstrate irreparable injury." Appx16-17 (Op. at 13-14).

This was error for three reasons. First, Plaintiffs did not establish that money damages are unavailable to them for harm caused by the Ordinance; they may well be able to get damages via constitutional claims alleged in their complaint. Second, the District Court *agreed* with the City that Plaintiffs' evidence purporting to show they will lose sales revenue is speculative. Thus, its conclusion that Plaintiffs will lose *some amount* of non-compensable sales revenue is pure conjecture. Third, just finding that Plaintiffs showed "some" economic loss is not enough. To be irreparable, the harm has to be substantial and immediate. Plaintiffs did not establish they will suffer substantial loss. The District Court erred in holding that *any amount* of unquantified economic loss that is

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federal preemption . . . should not apply [when considering a State law preemption claim]"); Fross v. Cty. of Allegheny, 20 A.3d 1193, 1203 (Pa. 2011) (citing federal preemption law).

unrecoverable is enough to satisfy the onerous irreparable harm standard.

A. Irreparable Harm Standard.

To obtain injunctive relief, Plaintiffs needed to make a clear showing of substantial and imminent irreparable injury in the absence of an injunction. See ECRI v. McGraw-Hill, Inc., 809 F.2d 223, 226 (3d Cir. 1987). Speculative or theoretical injury or a mere risk of irreparable harm does not constitute irreparable injury; instead, an injury must be certain. See Adams v. Freedom Forge Corp., 204 F.3d 475, 488 (3d Cir. 2000); Acierno v. New Castle Cty., 40 F.3d 645, 655 (3d Cir. 1994). A plaintiff must show that the "preliminary injunction must be the only way of protecting the plaintiff from harm." Id. "This is not an easy burden." Adams v. Freedom Forge Corp., 204 F.3d 475, 485 (3d Cir. 2000).

Further, in order to be irreparable, harm must be "substantial and immediate," not merely "trifling." Weinberger v. Romero–Barcelo, 456 U.S. 305, 311 (1982); O'Shea v. Littleton, 414 U.S. 488, 502 (1974).

Finally, it is well-established that injury measured solely in monetary terms ordinarily cannot constitute the sort of irreparable harm that is required for the issuance of a preliminary injunction because economic losses usually are compensable with money damages at a later date. See, e.g., Liberty Lincoln–Mercury, Inc. v. Ford Motor Co., 562 F.3d 553, 557 (3d Cir. 2009). While economic loss that is unrecoverable because of governmental immunity can in some circumstances constitute irreparable harm, such economic loss still must be substantial and immediate to be irreparable. See, e.g., Temple Univ. v. White, 941

F.2d 201, 215 (3d Cir. 1991); Apple, Inc. v. Samsung Elecs. Co., Ltd., 678 F.3d 1314, 1324–25 (Fed. Cir. 2012); ConverDyn v. Moniz, 68 F.Supp.3d 34, 49 (D.D.C. 2014).

B. Plaintiffs did not establish that money damages are unavailable to them for harm caused by the Ordinance.

As a threshold matter, while we do not dispute the Court's conclusion that Plaintiffs would be unable to later obtain damages specifically for a *violation of Section 301*,[16] we disagree that Plaintiffs established that money damages are unavailable to them for harm. The District Court erred in ignoring the potential availability of damages via Plaintiffs' constitutional claims to compensate them for any harm they theoretically might suffer from enforcement of the Ordinance.

Plaintiffs do not just have an *available* remedy for damages for harm; they have *already* and *actually* sued Defendants for constitutional violations allegedly resulting from the enactment and enforcement of the Ordinance. Namely, their Complaint alleges that the Ordinance violates Plaintiffs' due process rights and is unconstitutionally vague. Appx397-401 (Compl. at Counts III-VI). If Plaintiffs succeed on these claims, they could be compensated with damages under Section

[16] We do, however, disagree with the *reason* the District Court cited for Plaintiffs' inability to recover for a Section 301 violation. The Court incorrectly stated that no recovery is possible because the City and Commissioner Farley are entitled to *sovereign immunity* under the *11th Amendment*. Appx16-17 (Op. at 13-14). Plaintiffs' inability to procure damages for any alleged harm flowing from a violation of Section 301 is a function of (i) the lack of any recognized cause of action in Pennsylvania for violation of a preemption provision; and (ii) the local government immunity conferred by the Pennsylvania Tort Claims Act, 42 Pa. C.S. § 8541, *et seq.*

1983 for injuries caused by the Ordinance.

These available and viable avenues to compensate them "protect[] . . . [P]laintiff[s] from harm" caused by the Ordinance and obviate the need for a preliminary injunction. Campbell Soup Co. v. ConAgra, Inc., 977 F.2d 86, 91 (3d Cir. 1992). Plaintiffs' tactical decision to exclude their constitutional claims from their preliminary injunction motion does not act to somehow *negate* the adequacy of monetary damages potentially available on those constitutional claims. Yet, the District Court refused to even consider that damages are available to Plaintiffs via these constitutional claims, summarily stating it would not do so because those claims are as yet "[un]tested." Appx17 (Op. at 14 n.6). But the Court cited no authority for so refusing and, after an exhaustive search, we have found none.

Where money damages are potentially available, but Plaintiffs simply choose tactically not to pursue a theory to support such damages, and Plaintiffs fail to show the unavailability of such damages, Plaintiffs have failed to show that the harm they will suffer is irreparable. All they have shown is that for purposes of seeking this injunction they choose not to seek compensation for their harm. For this reason alone, Plaintiffs failed to prove irreparable harm.

C. The District Court agreed with the City that Plaintiffs' evidence purporting to show they will lose sales revenue is speculative; it thus erred in finding the report still established Plaintiffs would lose *some unquantified amount* of non-compensable sales revenue.

Even if damages prove not to be available, the District Court erred in finding the expert report of Dr. Angelides established Plaintiffs would likely suffer

revenue loss. Appx16-17 (Op. at 13-14). The expert's statements on revenue loss lack any credible factual foundation and rely on patently faulty assumptions, *points with which the District Court largely agreed*. The Court's finding that Plaintiffs will lose any sales at all — much less enough sales to rise to the level of irreparable harm — is pure conjecture and has no support in the expert's report.[17]

Dr. Angelides offered an expert opinion on how much tax revenue the City and Commonwealth would lose as a result of the Ordinance. Two premises underlie that opinion: first, he asserts that all revenue implicated by the Ordinance would be entirely lost if the law is enforced; and second, that fully $69.5 million in annual industry-wide sales revenue is implicated by the Ordinance, *i.e.*, is attributable to products now restricted by the Ordinance, Appx236-39 (Angelides Report at ¶¶ 23-32). Both points are fatally flawed.

[17] The District Court relied exclusively on Dr. Angelides' report in finding irreparable harm. A second witness, Karen Saber, conclusorily asserted that the Ordinance would "essentially wipe out the market in Philadelphia for the sale of Swisher flavored cigars," and the Ordinance "would substantially impair Swisher's goodwill and business relationships" with its dealers, distributors, sellers and customers. Appx256-57 (Plf. Ex. 8, Saber Dec. at ¶¶ 6-10). The District Court found Saber not credible and "put[] little weight" on her declaration, correctly finding that her declaration "offers nothing more than Saber's *ipse dixit*" that the Ordinance would harm Swisher and "she does not state *how* her qualifications lead her to [so] believe." Id. (emphasis in original). The Court's well-supported factual finding and credibility determination about this non-expert witness is, of course, entitled to deference by this Court, and ought not be disturbed. See, e.g., United States v. Local 560 (I.B.T.), 974 F.2d 315, 335 (3d Cir. 1992) (appellate court "owe[d] deference [to district court] on matters of credibility" and decision to reject former union president's testimony).

1. The expert assumes without foundation that the tobacco industry would entirely lose all flavored tobacco revenue.

First, no matter how much sales revenue is implicated by the Ordinance's restrictions, Dr. Angelides offered no basis for his assumption that "the Ordinance [would] prevent the sale of all [those] cigars," *i.e.*, that the tobacco industry would *entirely lose all revenue* formerly attributable to flavored cigar sales. Appx238 (Angelides Report at ¶ 32). For such a loss to occur, every single consumer who no longer can purchase a flavored cigar at a convenience store in Philadelphia would need to suddenly go cold-turkey and stop buying any cigars at all. This assumption contravenes logic and common sense for any low-cost retail product, but certainly for one containing nicotine, which is highly addictive. Appx144 (Farley Dec. ¶ 10).

There is every reason to believe that most lawful adult customers will still purchase available flavored and unflavored cigars. They will either find their way to Tobacco Product Distribution Businesses in Philadelphia or to out-of-Philadelphia sellers (in the suburbs) to continue to buy flavored products, or simply switch to unflavored cigars which they can continue to buy at several thousand convenience stores across the City.

Critically, Dr. Angelides offers no expertise and no logic to support his point; he just states it. His assumption that all revenue will be lost is not evidence; it is argument. And, as shown, it is logically flawed.

Indeed, as discussed above, hundreds of other jurisdictions around the country have passed legislation restricting the sale of flavored non-cigarette

tobacco products. See *supra* Facts Section I(E). If Dr. Angelides is right that all or most customers completely stop buying tobacco products in the face of such legislative restrictions, resulting in significant lost business, surely Dr. Angelides could have come forward with data from these jurisdictions. Yet neither he, nor Plaintiffs themselves, offered even a hint of lost revenues in any other jurisdiction, strongly suggesting that legislation restricting flavored products does not lead to the drastic revenue losses assumed by Dr. Angelides.

2. The expert's finding that $69.5 million in annual sales revenue is implicated by the Ordinance rests on flawed assumptions.

Second, the amount of revenue loss Dr. Angelides projects — $69.5 million annually — rests on profoundly flawed assumptions. To arrive at that number, he assumed that every single cigar not on a June 2020 list of examples of unrestricted cigars issued by the City is restricted by the Ordinance. Appx230, 236-37 (Angelides Report at ¶¶ 7, 25-29); Appx253-54 (06/20 List). But that list, issued in the legislation's infancy, self-identifies as "not exhaustive" and makes clear that it will be updated to reflect added unrestricted products as the industry submits additional cigars for testing. Appx253-54 (06/20 List).[18] It was thus wholly

[18] Indeed, prior to the hearing, the Department issued new regulations reiterating the list is "non-exclusive" and providing a process for anyone to request that a product be added to the list of unrestricted cigars. Appx179-84 (City Ex. D, Regulation Relating to the Sale of Flavored Tobacco Products (approved August 13, 2020)). Subsequent to the hearing, the Department updated the list, adding significantly more unflavored products. See Phila. Department of Public Health, List of unrestricted cigars (12/8/2020), available at https://www.phila.gov/departments/department-of-public-health/resources-for-tobacco-retailers/; United States v. Allergan, Inc., 746 Fed. Appx. 101, 108 (3d Cir. 2018) (unreported)
(footnote continued on next page)

illogical and counter-factual for Dr. Angelides to assume that any and all products not on that list (according to Angelides, 1,606 cigar brands!) were restricted. Appx237 (Angelides Report at ¶ 29). Notably, Dr. Angelides did not make any effort to determine which cigars are *actually* restricted by the statutory definition (set forth at Philadelphia Code § 9-639).

Moreover, Angelides estimates industry-wide losses; he made no effort to quantify how much of these restricted sales belong to *Plaintiffs* — let alone to the one Plaintiff (Swisher) who provided evidence that it actually sell flavored cigars to distributors and retailers in Philadelphia[19] — as opposed to the many other non-Plaintiff manufacturers and distributors whose products are sold in the City.

3. Having agreed that the expert's revenue projections were speculative, the Court had no basis for finding the report still proved revenue loss.

The City raised both of these problems with Dr. Angelides' report to the District Court. And the District Court agreed that the City's "objections . . . are powerful," that the "exact magnitude of damage to Plaintiffs may be speculative," and that sales would likely "decrease by an amount lower (even far lower) than estimated by Dr. Angelides." Appx17 (Op. at 14). Indeed, Dr. Angelides' counter-logical conclusions are no different than the *ipse dixit* of Swisher's

(taking judicial notice of federal agency guidance).

[19] On this record, no Plaintiff other than Swisher established that it manufactures, distributes or imports cigars that are sold in or to the Philadelphia market. See *supra* page 10; see also ECF No. 22, City's Proposed Findings of Fact ¶¶ at 2-3, 38.

marketing witness, Karen Saber, that the District Court readily (and correctly) rejected. Appx18 (Op at 15 n.7) (discounting Saber declaration, which "offers nothing more than Ms. Saber's *ipse dixit*"); Appx255-57 (Ex. P-8).

Yet, the Court still found Dr. Angelides' "report contains enough information to demonstrate" that Plaintiffs will suffer at least "some" loss in cigar sales revenue -- "just enough to demonstrate irreparable injury." Appx16-17 (Op. at 13-14). This was error.

Dr. Angelides cited no proper and credible factual foundation to lead him to conclude that the Ordinance would cause Plaintiffs to lose any sales revenue. Any statement in the expert's report about lost cigar revenues is a "castle made of sand" and is an insufficient evidentiary basis for finding irreparable harm to support a preliminary injunction. Benjamin v. Peter's Farm Condo. Owners Ass'n, 820 F.2d 640, 643 (3d Cir. 1987) (economic expert's testimony about injured party's postinjury earning capacity lacked a proper factual foundation and was merely speculative); A.O. Smith Corp. v. F.T.C., 530 F.2d 515, 528 (3d Cir. 1976) (error to issue preliminary injunction; "district court's summary conclusion [finding] irreparable harm is unsupported by basic findings of fact . . . [it relied on] figures [in] government reports, not specific evidence submitted by appellees"); see also Coal. of Concerned Citizens To Make Art Smart v. Fed. Transit Admin. of U.S. Dep't of Transp., 843 F.3d 886, 913 (10th Cir. 2016) (movant failed to satisfy irreparable harm requirement for preliminary injunction; harms identified were largely economic in nature and mostly speculative at that, including "witness

testimony about business decline . . . [which did] not provide[] any specific numbers or hard projections . . . to show how much business will be lost").

In short, the District Court's conclusion that Plaintiffs will lose *any* amount of non-compensable sales revenue is pure conjecture, with no evidentiary support.[20]

D. The District Court erred in finding irreparable harm where there is no evidence that Plaintiffs will lose *substantial* revenue.

Even assuming there is sufficient evidence in the record to establish that Plaintiffs will lose *some unspecified amount* of revenue if the Ordinance is enforced, the District Court erred in finding irreparable harm where there is no evidence that Plaintiffs will lose *substantial* revenue. There is no support for the District Court's novel theory that any economic loss that is unrecoverable because of governmental immunity constitutes *per se* irreparable harm.

As detailed above, the District Court agreed that Dr. Angelides' report has serious flaws. Even so, it found Plaintiffs will suffer "at least some" non-compensable revenue loss, and that that alone is enough to satisfy the onerous irreparable harm standard. Appx17-18 (Op. at 14-15).

But the mere fact there is "some" economic harm that may be unrecoverable

[20] To be sure, we certainly hope that the Ordinance will reduce purchases of flavored cigars now and in the future. But the City's *hope* that the Ordinance will eventually cut down on some lawful sales to adults cannot substitute for Plaintiffs' *proof*. On this record, we simply have no idea what magnitude of potential economic loss is even at issue because Plaintiffs' evidence was so speculative.

does not, in and of itself, support a finding of irreparable harm. Irreparable harm must be "substantial and immediate," not "trifling." Weinberger, 456 U.S. at 311 (1982) (injunction should not issue as a matter of course for irreparable harm that is "merely trifling"); see also O'Shea, 414 U.S. at 502 ("basic requisites of the issuance of equitable relief [require showing] . . . [a] likelihood of substantial and immediate irreparable injury") (emphasis added); Sherwin-Williams Co. v. Cty. of Delaware, Pa., 968 F.3d 264, 269 (3d Cir. 2020) ("a party seeking equitable relief for a prospective injury . . . must show a 'likelihood of substantial and immediate irreparable injury'").

And while economic loss that is unrecoverable because of governmental immunity can constitute irreparable harm, it too must be substantial and immediate to be irreparable. See, e.g., Apple, 678 F.3d at 1324-25 ("mere showing that Apple might lose some insubstantial market share . . . is not enough" to establish likelihood of substantial and immediate irreparable injury); ConverDyn, 68 F.Supp.3d at 49 ("a party seeking injunctive relief due to the inability to recover economic losses must nonetheless demonstrate that its harm will be sufficiently great to warrant a preliminary injunction"). Indeed, this Court has expressly stated that merely because immunity "may pose an obstacle to [the plaintiff's] recovery of damages . . . does not transform money loss into irreparable injury for equitable purposes." Black United Fund of New Jersey, Inc. v. Kean, 763 F.2d 156, 161 (3d Cir. 1985). This makes complete sense, as "[o]therwise, a litigant seeking injunctive relief against the government [when it is entitled to immunity] would

always satisfy the irreparable injury prong, nullifying that requirement in such cases." ConverDyn, 68 F.Supp.3d at 49.

Temple Univ. v. White, 941 F.2d 201, 215 (3d Cir. 1991), does not hold to the contrary. Indeed, Plaintiffs miscited White below on this point. White did not hold that economic damages unrecoverable due to sovereign immunity constitute irreparable harm *per se*, regardless of whether substantial losses are at issue. (Plfs' Post-Hearing Br. at 2); (Plfs.' Proposed COL at ¶¶ 162 n.9, 170).

In White, the district court had invalidated Pennsylvania's reimbursement rate scheme for inpatient treatment of Medicaid patients. There was evidence that, without stopgap relief until a new reimbursement plan was in place: (1) the entire state's participation in Medicaid funding was "endangered" and "might collapse"; and (2) one of the moving hospitals was on the brink of financial ruin and would become insolvent. Id. at 214-15, 218. On appeal, this Court unsurprisingly found the record "amply demonstrates the presence of irreparable harm" absent interim Medicaid payments. Id. at 214-15. It also found the hospitals lacked other adequate legal remedies because the Eleventh Amendment barred retroactive damages against the Commonwealth. Id. at 215. Thus, White merely supports the notion that economic loss unrecoverable because of governmental immunity may satisfy the irreparable harm requirement when *substantial*, a proposition with which we have already stated our *agreement*.

But that is not what happened here. Here, there is zero evidence in the preliminary injunction record that Plaintiffs will lose substantial revenue if the

Ordinance is enforced. Indeed, because Dr. Angelides report was so flawed, the District Court acknowledged it had no idea what magnitude of potential economic loss is at issue, except that it could be "far lower" than Angelides predicted. Appx17 (Op. at 14). Finding that Plaintiffs will lose *some unspecified amount* of revenue is simply not enough to satisfy the "not . . .easy burden" of showing irreparable harm. Adams, 204 F.3d at 485. By logical extension of the District Court's reasoning, the next movant might claim that losing a single dollar is enough, so long as it is unrecoverable. This Court should reject this novel holding.

For all the reasons discussed above, Plaintiffs' evidence falls woefully short of satisfying their burden of showing that they will suffer substantial and immediate unrecoverable financial harm. Without such evidence, and on this record, the District Court erred in finding the sort of harm that is necessary to support the issuance of a preliminary injunction.

CONCLUSION

For the foregoing reasons, Appellants, the City of Philadelphia and Commissioner Thomas Farley respectfully request that this Court reverse the District Court's order granting Plaintiffs' motion for a preliminary injunction and enjoining enforcement of the City's Flavored Cigar Ordinance.

If the Court finds that Plaintiffs failed to show irreparable harm, the Court should reverse the District Court, vacate the preliminary injunction and remand with directions to deny the motion outright. If the Court concludes Plaintiffs proved irreparable harm but are unlikely to succeed on their Section 301 claim, the Court should remand for consideration of Plaintiffs' alternative preemption claim under Act 42.

Respectfully submitted,

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Dated: February 24, 2021

CERTIFICATION OF BAR MEMBERSHIP

Pursuant to the Third Circuit Local Appellate Rule 46.1(e), I hereby certify that I am a member of the bar of this Court.

/s/ Kelly Diffily
Kelly Diffily, Esq.
City of Philadelphia Law Department

Dated: February 24, 2021

CERTIFICATION OF COMPLIANCE WITH RULE 32(a) AND REQUIREMENTS FOR ELECTRONIC FILING

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, Type Style Requirements, and Electronic Filing Requirements.

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains **12,561** words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

3. Pursuant to the Third Circuit Local Appellate Rule 31.1(c), I hereby certify that the text of the electronic brief is identical to the text in the hard, paper copies of the brief.

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/s/ Kelly Diffily
Kelly Diffily
City of Philadelphia Law Department

Dated: February 24, 2021

Exhibit A

53 Pa. C.S. § 301

Purdon's Pennsylvania Statutes and Consolidated Statutes
Title 53 Pa.C.S.A. Municipalities Generally (Refs & Annos)
Part I. Preliminary Provisions
Chapter 3. Preemptions

53 Pa.C.S.A. § 301

§ 301. Tobacco product

Effective: July 1, 2020
Currentness

(a) General rule.--Except as set forth in subsection (b), the provisions of 18 Pa.C.S. § 6305 (relating to sale of tobacco products) shall preempt and supersede any local ordinance or rule concerning the subject matter of 18 Pa.C.S. § 6305 and of section 206-A of the act of April 9, 1929 (P.L. 343, No. 176), [1] known as The Fiscal Code.

(b) Exception.--This section does not prohibit:

(1) Local regulation authorized by the act of April 27, 1927 (P.L. 465, No. 299), [2] referred to as the Fire and Panic Act.

(2) Local regulation enacted prior to January 1, 2002.

Credits
2002, July 10, P.L. 789, No. 112, § 3, effective in 30 days. Amended 2019, Nov. 27, P.L. 669, No. 93, § 3, effective in 60 days [Jan. 27, 2020]; 2019, Nov. 27, P.L. 759, No. 111, § 3, eff. July 1, 2020.

Footnotes

1 72 P.S. § 206-A.
2 35 P.S. § 1221 et seq.

53 Pa.C.S.A. § 301, PA ST 53 Pa.C.S.A. § 301
Current through 2021 Regular Session Act 1. Some statute sections may be more current, see credits for details.

End of Document

Exhibit B

18 Pa. C.S. § 6305

Purdon's Pennsylvania Statutes and Consolidated Statutes
Title 18 Pa.C.S.A. Crimes and Offenses (Refs & Annos)
Part II. Definition of Specific Offenses (Refs & Annos)
Article G. Miscellaneous Offenses (Refs & Annos)
Chapter 63. Minors (Refs & Annos)

18 Pa.C.S.A. § 6305

§ 6305. Sale of tobacco products

Effective: July 1, 2020
Currentness

(a) Offense defined.--Except as set forth in subsection (f), a person is guilty of a summary offense if the person:

(1) sells a tobacco product to any minor;

(2) furnishes, by purchase, gift or other means, a tobacco product to a minor;

(3) Deleted by 2002, July 10, P.L. 789, No. 112, § 1, effective in 30 days.

(4) locates or places a vending machine containing a tobacco product in a location accessible to minors;

(5) displays or offers a cigarette for sale out of a pack of cigarettes; or

(6) displays or offers for sale tobacco products in any manner which enables an individual other than the retailer or an employee of the retailer to physically handle tobacco products prior to purchase unless the tobacco products are located within the line of sight or under the control of a cashier or other employee during business hours, except that this paragraph shall not apply to retail stores which derive 75% or more of sales revenues from tobacco products.

(a.1) Purchase.--A minor is guilty of a summary offense if the minor:

(1) purchases or attempts to purchase a tobacco product; or

(2) knowingly falsely represents himself to be at least 21 years of age or if the minor is a member of the active or reserve components of any branch or unit of the armed forces of the United States or a veteran who received an honorable discharge from any branch or unit of the active or reserve components of the armed forces of the United States, at least 18 years of age to a person for the purpose of purchasing or receiving a tobacco product.

(b) Penalty.--

(1) Except as set forth in paragraph (2), a person that violates subsection (a) shall be sentenced as follows:

(i) for a first offense, to pay a fine of not less than $100 nor more than $250;

(ii) for a second offense, to pay a fine of not less than $250 nor more than $500; or

(iii) for a third or subsequent offense, to pay a fine of not less than $500 nor more than $1,000.

(2) A retailer that violates subsection (a) shall be sentenced as follows:

(i) for a first offense, to pay a fine of not less than $100 nor more than $500;

(ii) for a second offense, to pay a fine of not less than $500 nor more than $1,000;

(iii) for a third offense, to pay a fine of not less than $1,000 nor more than $3,000; or

(iv) for a fourth or subsequent offense, to pay a fine of not less than $3,000 nor more than $5,000.

(3) A minor who violates subsection (a.1) shall be sentenced to any or all of the following:

(i) not more than 75 hours of community service;

(ii) complete a tobacco use prevention and cessation program approved by the Department of Health; or

(iii) a fine not to exceed $200.

(c) Notification.--

(1) Upon issuing or filing a citation charging a violation of subsection (a.1), the affiant shall notify the parent or guardian of the minor charged.

(2) Upon imposing a sentence under subsection (b)(1) or (2), a court shall notify the department of the violation committed by the person if the person is a retailer or an employee of a retailer and the person committed the violation in the course of the person's employment.

(d) Nature of offense.--

(1) An offense under subsection (a.1) shall not be a criminal offense of record, shall not be reportable as a criminal act and shall not be placed on the criminal record of the offender. The failure of a minor to comply with a sentence under subsection (b)(3) shall not constitute a delinquent act under 42 Pa.C.S. Ch. 63 (relating to juvenile matters).

(2) A record of participation in an adjudication alternative program under subsection (e) shall be maintained for purposes of determining subsequent eligibility for such a program.

(3) Except as provided in subsection (f)(1), a retailer is liable for the acts of its agents as permitted by section 307 (relating to liability of organizations and certain related persons).

(e) Preadjudication disposition.--If a person is charged with violating this section, the court may admit the offender to the adjudication alternative program as authorized in 42 Pa.C.S. § 1520 (relating to adjudication alternative program) or any other preadjudication disposition if the offender has not previously received a preadjudication disposition for violating this section. Accelerated Rehabilitative Disposition or any other preadjudication alternative for a violation of subsection (a) shall be considered an offense for the purposes of imposing criminal penalties under subsection (b)(1) and (2).

(f) Exceptions.--

(1) The following affirmative defense is available:

(i) It is an affirmative defense for a retailer to an offense under subsection (a)(1) and (2) that, prior to the date of the alleged violation, the retailer has complied with all of the following:

(A) adopted and implemented a written policy against selling tobacco products to minors which includes:

(I) a requirement that an employee ask an individual who appears to be 25 years of age or younger for a valid photoidentification as proof of age prior to making a sale of tobacco products;

(II) a list of all types of acceptable photoidentification;

(III) a list of factors to be examined in the photoidentification, including photo likeness, birth date, expiration date, bumps, tears or other damage and signature;

(IV) a requirement that, if the photoidentification is missing any of the items listed in subclause (III), it is not valid and cannot be accepted as proof of age for the sale of tobacco products. A second photoidentification may be required to make the sale of tobacco products, with questions referred to the manager; and

(V) a disciplinary policy which includes employee counseling and suspension for failure to require valid photoidentification and dismissal for repeat improper sales.

(B) informed all employees selling tobacco products through an established training program of the applicable Federal and State laws regarding the sale of tobacco products to minors;

(C) documented employee training indicating that all employees selling tobacco products have been informed of and understand the written policy referred to in clause (A);

(D) trained all employees selling tobacco products to verify that the purchaser is at least 21 years of age or if the minor is a member of the active or reserve components of any branch or unit of the armed forces of the United States or a veteran who received an honorable discharge from any branch or unit of the active or reserve components of the armed forces of the United States, at least 18 years of age before selling tobacco products;

(E) conspicuously posted a notice that selling tobacco products to a minor is illegal, that the purchase of tobacco products by a minor is illegal and that a violator is subject to penalties; and

(F) established and implemented disciplinary sanctions for noncompliance with the policy under clause (A).

(ii) An affirmative defense under this paragraph must be proved by a preponderance of the evidence.

(iii) An affirmative defense under this paragraph may be used by a retailer no more than three times at each retail location during any 24-month period.

(2) No more than one violation of subsection (a) per person arises out of separate incidents which take place in a 24-hour period.

(3) It is not a violation of subsection (a.1)(1) for a minor to purchase or attempt to purchase a tobacco product if all of the following apply:

(i) The minor is at least 14 years of age.

(ii) The minor is an employee, volunteer or an intern with:

(A) a State or local law enforcement agency;

(B) the Department of Health or a primary contractor pursuant to Chapter 7 of the act of June 26, 2001 (P.L.755, No.77), [1] known as the Tobacco Settlement Act;

(C) a single county authority created pursuant to the act of April 14, 1972 (P.L. 221, No. 63), [2] known as the Pennsylvania Drug and Alcohol Abuse Control Act;

(D) a county or municipal health department; or

(E) a retailer.

(iii) The minor is acting within the scope of assigned duties as part of an authorized investigation, compliance check under subsection (g) or retailer-organized self-compliance check.

(iv) A minor shall not use or consume a tobacco product.

(g) Compliance checks.--This subsection shall apply to compliance checks conducted by the Department of Health, a primary contractor pursuant to Chapter 7 of the Tobacco Settlement Act, a single county authority created pursuant to the Pennsylvania Drug and Alcohol Abuse Control Act or a county or municipal health department for the purpose of conducting retailer education, assessing compliance with Federal or State law and enforcing the provisions of this section. Compliance checks shall be conducted, at a minimum, in accordance with all of the following:

(1) Compliance checks shall only be conducted in consultation with the Department of Health and the law enforcement agency providing primary police services to the municipality where the compliance check is being conducted.

(2) A minor participating in a compliance check must be at least 14 years of age, complete a course of training approved by the Department of Health and furnish the Department of Health with a signed, written parental consent agreement allowing the minor to participate in the compliance check.

(3) A retailer that is found to be in compliance with this section during a compliance check shall be notified in writing of the compliance check and the determination of compliance.

(4) Compliance checks conducted under this subsection shall be in a manner consistent with this subsection and the regulations as promulgated by the Department of Health.

(5) The Department of Health, a primary contractor pursuant to Chapter 7 of the Tobacco Settlement Act, a single county authority created pursuant to the Pennsylvania Drug and Alcohol Abuse Control Act or a county or municipal health department shall conduct a compliance check under this subsection no more than once every 30 days at any one retail location. This paragraph shall not preclude the law enforcement agency providing primary police services to the municipality in which the retail store is located from otherwise enforcing this section.

(6) Individuals participating in compliance checks under this subsection shall not be deemed employees under the act of July 23, 1970 (P.L. 563, No. 195),[3] known as the Public Employe Relations Act, nor shall participating individuals be considered policemen under the act of June 24, 1968 (P.L. 237, No. 111),[4] referred to as the Policemen and Firemen Collective Bargaining Act.

(h) Administrative action.--

(1) Upon receiving notice, in accordance with subsection (c) or otherwise, of a third conviction of a retailer during any 24-month period, the department may, after an opportunity for a hearing, suspend the retailer's cigarette license for up to 30 days. The department, in a hearing held pursuant to this paragraph, has jurisdiction only to determine whether or not the retailer was convicted of a violation of subsection (a). The introduction of a certified copy of a conviction for a violation of subsection (a) shall be sufficient evidence for the suspension of the cigarette license.

(2) Upon receiving notice, in accordance with subsection (c) or otherwise, of a fourth conviction of a retailer during any 24-month period, the department may, after an opportunity for a hearing, revoke the retailer's cigarette license for up to 60 days. The department, in a hearing held under this paragraph, has jurisdiction only to determine whether or not the retailer was convicted of a violation of subsection (a). The introduction of a certified copy of a conviction for a violation of subsection (a) shall be sufficient evidence for the revocation of the cigarette license.

(i) Enforcement.--An employee of the Department of Health, a single county authority created pursuant to the Pennsylvania Drug and Alcohol Abuse Control Act, a county or municipal health department or a primary contractor pursuant to Chapter 7 of the Tobacco Settlement Act may institute a proceeding to enforce the provisions of this section in accordance with any means authorized by the Rules of Criminal Procedure. The enforcement authority granted pursuant to this subsection may not be delegated.

(j) Other penalties.--Notwithstanding any other law to the contrary, prosecution or conviction under this section shall not constitute a bar to any prosecution, penalty or administrative action under any other applicable statutory provision.

(k) Definitions.--As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

"Cigarette." A roll for smoking made wholly or in part of tobacco, irrespective of size or shape and whether or not the tobacco is flavored, adulterated or mixed with any other ingredient, the wrapper or cover of which is made of paper or other substance or material except tobacco. The term does not include a cigar.

"Cigarette license." A license issued under section 203-A or 213-A of the act of April 9, 1929 (P.L. 343, No. 176),[5] known as The Fiscal Code.

"Department." The Department of Revenue of the Commonwealth.

"Electronic cigarette." An electronic device that delivers nicotine or other substances through vaporization and inhalation.

"Electronic nicotine delivery system" or **"ENDS."** A product or device used, intended for use or designed for the purpose of ingesting a nicotine product. The term includes an electronic cigarette.

"Minor." As follows:

(1) Except as provided under paragraph (2), an individual under 21 years of age.

(2) A member of the active or reserve components of any branch or unit of the armed forces of the United States under 18 years of age or a veteran who received an honorable discharge from any branch or unit of the active or reserve components of the armed forces of the United States under 18 years of age.

"Nicotine product." A product that contains or consists of nicotine in a form that can be ingested by chewing, smoking, inhaling or any other means.

"Pack of cigarettes." As defined in section 1201 of the act of March 4, 1971 (P.L. 6, No. 2),[6] known as the Tax Reform Code of 1971.

"Pipe tobacco." Any product containing tobacco made primarily for individual consumption that is intended to be smoked using tobacco paraphernalia.

"Retailer." A person licensed under section 203-A or 213-A of the act of April 9, 1929 (P.L. 343, No. 176), known as The Fiscal Code, or other lawful retailer of other tobacco products.

"Smokeless tobacco." Any product containing finely cut, ground, powdered, blended or leaf tobacco made primarily for individual consumption that is intended to be placed in the oral or nasal cavity and not intended to be smoked. The term includes, but is not limited to, chewing tobacco, dipping tobacco and snuff.

"Tobacco product." As follows:

(1) The term includes:

(i) Any product containing, made or derived from tobacco or nicotine that is intended for human consumption, whether smoked, heated, chewed, absorbed, dissolved, inhaled, snorted, sniffed or ingested by any other means, including, but not limited to, a cigarette, a cigar, a little cigar, chewing tobacco, pipe tobacco, snuff and snus.

(ii) Any electronic device that delivers nicotine or another substance to a person inhaling from the device, including, but not limited to, electronic nicotine delivery systems, an electronic cigarette, a cigar, a pipe and a hookah.

(iii) Any product containing, made or derived from either:

(A) tobacco, whether in its natural or synthetic form; or

(B) nicotine, whether in its natural or synthetic form, which is regulated by the United States Food and Drug Administration as a deemed tobacco product.

(iv) Any component, part or accessory of the product or electronic device under subparagraphs (i), (ii) and (iii), whether or not sold separately.

(2) The term does not include:

(i) A product that has been approved by the United States Food and Drug Administration for sale as a tobacco cessation product or for other therapeutic purposes where the product is marketed and sold solely for such approved purpose, so long as the product is not inhaled.

(ii) A device under paragraph (1)(ii) or (iii) if sold by a dispensary licensed under the act of April 17, 2016 (P.L. 84, No. 16),[7] known as the Medical Marijuana Act.

"Tobacco vending machine." A mechanical or electrical device from which one or more tobacco products are dispensed for a consideration.

Credits

1972, Dec. 6, P.L. 1482, No. 334, § 1, effective June 6, 1973. Amended 1990, Feb. 14, P.L. 54, No. 7, § 2, imd. effective; 2002, July 10, P.L. 789, No. 112, § 1, effective in 30 days; 2018, Oct. 24, P.L. 659, No. 95, § 2, effective in 180 days [April 22, 2019]; 2019, Nov. 27, P.L. 669, No. 93, § 1, effective in 60 days [Jan. 27, 2020]; 2019, Nov. 27, P.L. 759, No. 111, § 1, eff. July 1, 2020.

Editors' Notes

JT. ST. GOVT. COMM. COMMENT--1967

This section retains existing law as contained in Section 647 of The Penal Code of 1939 (18 P.S. § 4647) without substantial change.

Penalty: Increased from 30 to 90 days.

Notes of Decisions (1)

Footnotes

1 35 P.S. § 5701.701 et seq.
2 71 P.S. § 1690.101 et seq.
3 43 P.S. § 1101.101 et seq.
4 43 P.S. § 217.1 et seq.
5 72 P.S. §§ 203-A and 213-A.
6 72 P.S. § 8201.
7 35 P.S. § 10231.101 et seq.

18 Pa.C.S.A. § 6305, PA ST 18 Pa.C.S.A. § 6305
Current through 2021 Regular Session Act 1. Some statute sections may be more current, see credits for details.

Exhibit C

Legislative History -- Excerpt of H.B. 1501, P.N. 3891

PRIOR PRINTER'S NOS. 1826, 1907 PRINTER'S NO. 3891

THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE BILL

No. 1501 Session of 2001

INTRODUCED BY FEESE, ARMSTRONG, BENNINGHOFF, CALTAGIRONE, CAPPELLI, CAWLEY, L. I. COHEN, COLEMAN, CREIGHTON, CRUZ, DALEY, FLEAGLE, FRANKEL, GEIST, HENNESSEY, HERMAN, HORSEY, KAISER, LYNCH, MACKERETH, MAHER, MAITLAND, MAJOR, MELIO, R. MILLER, PALLONE, PHILLIPS, RUBLEY, SAYLOR, STERN, SURRA, E. Z. TAYLOR, TULLI, WANSACZ, WATSON, WILT, WOGAN, YOUNGBLOOD, DALLY, J. TAYLOR, STEELMAN, HARPER, CLARK, ROBERTS AND LEWIS, MAY 3, 2001

AS AMENDED ON THIRD CONSIDERATION, HOUSE OF REPRESENTATIVES, MAY 8, 2002

AN ACT

Amending ~~Title 18 (Crimes and Offenses)~~ TITLES 18 (CRIMES AND OFFENSES) AND 53 (MUNICIPALITIES) of the Pennsylvania Consolidated Statutes, further providing for ~~furnishing tobacco to minors.~~ SALE OF TOBACCO; PROVIDING FOR POSSESSION OF TOBACCO PARAPHERNALIA; FURTHER PROVIDING FOR FURNISHING CIGARETTES OR CIGARETTE PAPERS; PROVIDING FOR PLACEMENT AND OPERATION OF CIGARETTE VENDING MACHINES AND FOR COUPONS FOR TOBACCO PRODUCTS; AND PROVIDING FOR PREEMPTION.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

~~Section 1. Sections 6305 and 6306 of Title 18 of the Pennsylvania Consolidated Statutes are amended to read:~~

~~§ 6305. Sale of tobacco.~~

~~(a) [Offense defined.--A]~~ Sale or furnishing.--Except as set ~~forth in subsection (f), a~~ person is guilty of a summary offense ~~if [he]~~ the person:

~~(1) sells tobacco, in any form, to any minor under the~~

THIS ACT. IN ALL CASES, THE COURT MAY AWARD SUCH RELIEF AS IT DEEMS APPROPRIATE, INCLUDING THE AWARD OF ALL INVESTIGATIVE COSTS, COURT COSTS, ATTORNEY FEES AND OTHER COSTS INCURRED BY THE COMMONWEALTH, AND MAY PROHIBIT THE VIOLATOR FROM ENGAGING IN BUSINESS IN THE FUTURE IN PENNSYLVANIA AS A CIGARETTE MANUFACTURER, DEALER, WHOLESALER, RETAILER OR STAMPING AGENCY.

SECTION 5. TITLE 53 IS AMENDED BY ADDING A CHAPTER TO READ:

CHAPTER 3

PREEMPTIONS

SEC.

301. TOBACCO.

§ 301. TOBACCO.

(A) GENERAL RULE.--EXCEPT AS SET FORTH IN SUBSECTION (B), THE GENERAL ASSEMBLY PREEMPTS REGULATION OF THE ACQUISITION, SALE, PURCHASE, TRANSFER, POSSESSION AND MARKETING OF TOBACCO IN ANY FORM. THE ACQUISITION, SALE, PURCHASE, TRANSFER, POSSESSION OR MARKETING OF TOBACCO IN ANY FORM MAY NOT BE REGULATED BY A POLITICAL SUBDIVISION, A HOME RULE CHARTER MUNICIPALITY OR AN OPTIONAL PLAN FORM OF GOVERNMENT.

(B) EXCEPTION.--THIS SECTION DOES NOT PROHIBIT:

(1) LOCAL REGULATION AUTHORIZED BY THE ACT OF APRIL 27, 1927 (P.L.465, NO.299), REFERRED TO AS THE FIRE AND PANIC ACT.

(2) LOCAL REGULATION ENACTED PRIOR TO JULY 1, 2002.

Section ~~2~~ 6. This act shall apply to offenses committed on or after the effective date of this act. <—

Section ~~3~~ 7. This act shall take effect in 60 days. <—

Exhibit D

Legislative History -- Excerpt of H.B. 1501, P.N. 4005

SENATE AMENDED
PRIOR PRINTER'S NOS. 1826, 1907, 3891 PRINTER'S NO. 4005

THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE BILL

No. 1501 Session of 2001

INTRODUCED BY FEESE, ARMSTRONG, BENNINGHOFF, CALTAGIRONE, CAPPELLI, CAWLEY, L. I. COHEN, COLEMAN, CREIGHTON, CRUZ, DALEY, FLEAGLE, FRANKEL, GEIST, HENNESSEY, HERMAN, HORSEY, KAISER, LYNCH, MACKERETH, MAHER, MAITLAND, MAJOR, MELIO, R. MILLER, PALLONE, PHILLIPS, RUBLEY, SAYLOR, STERN, SURRA, E. Z. TAYLOR, TULLI, WANSACZ, WATSON, WILT, WOGAN, YOUNGBLOOD, DALLY, J. TAYLOR, STEELMAN, HARPER, CLARK, ROBERTS AND LEWIS, MAY 3, 2001

SENATOR MOWERY, PUBLIC HEALTH AND WELFARE, IN SENATE, AS AMENDED, JUNE 11, 2002

AN ACT

Amending Titles 18 (Crimes and Offenses) and 53 (Municipalities) of the Pennsylvania Consolidated Statutes, further providing for ~~sale of tobacco; providing for possession of tobacco paraphernalia; further providing for furnishing cigarettes or cigarette papers; providing for placement and operation of cigarette vending machines and for coupons for tobacco products; and providing for preemption.~~ SALE OF TOBACCO; AND PROVIDING FOR PLACEMENT OF CIGARETTE VENDING MACHINES AND FOR PREEMPTION. <—— <——

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Section 6305 of Title 18 of the Pennsylvania Consolidated Statutes is amended to read:

§ 6305. Sale of tobacco.

(a) Offense defined.--[A] Except as set forth in subsection (f), a person is guilty of a summary offense if [he] the person:

(1) sells a tobacco[, in any form,] product ~~or tobacco~~ <——

~~action for enforcement for a violation of the provisions of this act. In all cases, the court may award such relief as it deems appropriate, including the award of all investigative costs, court costs, attorney fees and other costs incurred by the Commonwealth, and may prohibit the violator from engaging in business in the future in Pennsylvania as a cigarette manufacturer, dealer, wholesaler, retailer or stamping agency.~~

SECTION 2. SECTION 6306 OF TITLE 18 IS REPEALED. <—

Section ~~5~~ 3. Title 53 is amended by adding a chapter to <— read:

CHAPTER 3

PREEMPTIONS

Sec.

301. Tobacco.

§ 301. Tobacco.

(a) General rule.--Except as set forth in subsection (b), ~~the General Assembly preempts regulation of the acquisition, sale, purchase, transfer, possession and marketing of tobacco in any form. The acquisition, sale, purchase, transfer, possession or marketing of tobacco in any form may not be regulated by a political subdivision, a home rule charter municipality or an optional plan form of government.~~ THE PROVISIONS OF 18 PA.C.S. § 6305 (RELATING TO SALE OF TOBACCO) SHALL PREEMPT AND SUPERSEDE ANY LOCAL ORDINANCE OR RULE CONCERNING THE SUBJECT MATTER OF 18 PA.C.S. § 6305. <—

(b) Exception.--This section does not prohibit:

(1) Local regulation authorized by the act of April 27, 1927 (P.L.465, No.299), referred to as the Fire and Panic Act.

(2) Local regulation enacted prior to ~~July~~ JANUARY 1, 2002. <—

Section ~~6~~ 4. This act shall apply to offenses committed on or after the effective date of this act. <—

Section ~~7~~ 5. This act shall take effect in ~~60~~ 30 days. <—

Exhibit E

Legislative History -- Pa. Legislative Journal (Senate), June 26, 2002, No. 48

COMMONWEALTH OF PENNSYLVANIA

Legislative Journal

WEDNESDAY, JUNE 26, 2002

SESSION OF 2002 186TH OF THE GENERAL ASSEMBLY No. 48

SENATE

WEDNESDAY, June 26, 2002

The Senate met at 2 p.m., Eastern Daylight Saving Time.

The PRESIDENT (Lieutenant Governor Robert C. Jubelirer) in the Chair.

PRAYER

The following prayer was offered by the Secretary of the Senate, Hon. MARK R. CORRIGAN:

Let us pray.

Heavenly Father, we thank You for the faithful care that has brought us safely to the light of a new day. As we convene in this Senate Chamber, we invoke Your blessing and pray that Your spirit would move in our midst in these long hours and days of work, that we may succeed working together to accomplish what we all want, an adequate and fair budget for our Commonwealth. Amen.

JOURNAL APPROVED

The PRESIDENT. A quorum of the Senate being present, the Clerk will read the Journal of the preceding Session of June 25, 2002.

The Clerk proceeded to read the Journal of the preceding Session, when, on motion of Senator BRIGHTBILL, and agreed to by voice vote, further reading was dispensed with and the Journal was approved.

COMMUNICATIONS FROM THE GOVERNOR

NOMINATIONS REFERRED TO COMMITTEE

The PRESIDENT laid before the Senate the following communications in writing from His Excellency, the Governor of the Commonwealth, which were read as follows and referred to the Committee on Rules and Executive Nominations:

JUDGE, COURT OF COMMON PLEAS,
MONTGOMERY COUNTY

June 26, 2002

To the Honorable, the Senate
of the Commonwealth of Pennsylvania:

In conformity with law, I have the honor hereby to nominate for the advice and consent of the Senate, Steven T. O'Neill, Esquire, 426 Bryn Mawr Avenue, Bala Cynwyd 19004, Montgomery County, Seventeenth Senatorial District, for appointment as Judge of the Court of Common Pleas of Montgomery County, to serve until the first Monday of January 2004, vice The Honorable Samuel W. Salus, II, resigned.

Mark S. Schweiker
Governor

JUDGE, COURT OF COMMON PLEAS,
NORTHAMPTON COUNTY

June 26, 2002

To the Honorable, the Senate
of the Commonwealth of Pennsylvania:

In conformity with law, I have the honor hereby to nominate for the advice and consent of the Senate, Emil A. Giordano, Esquire, 4380 Loraine Lane, Bethlehem 18017, Northampton County, Sixteenth Senatorial District, for appointment as Judge of the Court of Common Pleas of Northampton County, to serve until the first Monday of January 2004, vice The Honorable Robert E. Simpson, Jr., resigned.

Mark S. Schweiker
Governor

HOUSE MESSAGES

HOUSE CONCURS IN SENATE AMENDMENTS BY AMENDING SAID AMENDMENTS TO HOUSE BILL

The Clerk of the House of Representatives informed the Senate that the House has concurred in amendments made by the Senate by amending said amendments to **HB 599,** in which concurrence of the Senate is requested.

The PRESIDENT. Pursuant to Senate Rule XIV, section 5, this bill will be referred to the Committee on Rules and Executive Nominations.

SENATE BILL RETURNED WITH AMENDMENTS

The Clerk of the House of Representatives returned to the Senate **SB 630,** with the information the House has passed the same with amendments in which the concurrence of the Senate is requested.

The PRESIDENT. Pursuant to Senate Rule XIV, section 5, this bill will be referred to the Committee on Rules and Executive Nominations.

HOUSE CONCURS IN SENATE BILL

The Clerk of the House of Representatives returned to the Senate **SB 592,** with the information the House has passed the same without amendments.

Upon motion of Senator BRIGHTBILL, and agreed to by voice vote, the bill was laid on the table.

BILLS OVER IN ORDER

SB 1425 and **HB 2207** -- Without objection, the bills were passed over in their order at the request of Senator BRIGHTBILL.

SB 1210 CALLED UP

SB 1210 (Pr. No. 2100) -- Without objection, the bill, which previously went over in its order temporarily as amended, was called up, from page 5 of the Third Consideration Calendar, by Senator BRIGHTBILL.

BILL LAID ON THE TABLE

SB 1210 (Pr. No. 2100) -- The Senate proceeded to consideration of the bill, entitled:

An Act amending Title 75 (Vehicles) of the Pennsylvania Consolidated Statutes, further providing for suspension of operating privilege and for offenses relating to homicide by vehicle and aggravated assault by vehicle.

Upon motion of Senator BRIGHTBILL, and agreed to by voice vote, the bill was laid on the table.

RECONSIDERATION OF VOTE

NOMINATION LAID ON THE TABLE

The PRESIDENT. The Chair recognizes the gentleman from Mercer, Senator Robbins.

Senator ROBBINS. Mr. President, I move that the vote by which Katherene E. Holtzinger Conner was confirmed as a member of the Civil Service Commission on June 25, 2002, be reconsidered and that the nomination be laid upon the table.

The PRESIDENT. Senator Robbins moves that the vote by which the nomination of Katherene E. Holtzinger Conner to be a member of the Civil Service Commission was confirmed be reconsidered.

On the question,

Will the Senate agree to the motion?

A voice vote having been taken, the question was determined in the affirmative.

The PRESIDENT. The nomination will lie on the table.

THIRD CONSIDERATION CALENDAR RESUMED

BILL REREFERRED

HB 767 (Pr. No. 4067) -- The Senate proceeded to consideration of the bill, entitled:

An Act amending the act of March 28, 1984 (P.L.150, No.28), known as the Automobile Lemon Law, further providing for definitions and for resale of returned motor vehicle.

Upon motion of Senator BRIGHTBILL, and agreed to by voice vote, the bill was rereferred to the Committee on Appropriations.

BILL OVER IN ORDER

HB 1215 -- Without objection, the bill was passed over in its order at the request of Senator BRIGHTBILL.

HB 1501 CALLED UP

HB 1501 (Pr. No. 4088) -- Without objection, the bill, which previously went over in its order temporarily, was called up, from page 2 of the Third Consideration Calendar, by Senator BRIGHTBILL.

BILL REREPORTED FROM COMMITTEE AS AMENDED, AMENDED

HB 1501 (Pr. No. 4088) -- The Senate proceeded to consideration of the bill, entitled:

An Act amending Titles 18 (Crimes and Offenses) and 53 (Municipalities) of the Pennsylvania Consolidated Statutes, further providing for sale of tobacco; and providing for placement of tobacco vending machines and for preemption.

On the question,

Will the Senate agree to the bill on third consideration?

SCHWARTZ AMENDMENT A3923

Senator SCHWARTZ offered the following amendment No. A3923:

Amend Title, page 1, line 1, by striking out "Titles" and inserting: Title

Amend Title, page 1, line 1, by striking out "and 53 (Municipalities)"

Amend Title, page 1, line 9, by striking out "AND FOR PREEMPTION"

Amend Sec. 3, page 17, line 30; page 18, lines 1 through 23, by striking out all of said lines on said pages

Amend Sec. 4, page 18, line 24, by striking out "4" and inserting: 3

Amend Sec. 5, page 18, line 26, by striking out "5" and inserting: 4

On the question,

Will the Senate agree to the amendment?

The PRESIDENT. The Chair recognizes the gentlewoman from Philadelphia, Senator Schwartz.

Senator SCHWARTZ. Mr. President, this could be an extremely important piece of legislation. Actually it is something that we have attempted to do several times in my 12 years in the Senate, which is to find a way to be very clear about what is already current law that we are not changing, which is that it is illegal to sell tobacco products to minors. And so what we are trying to do in a variety of ways in this State is to make sure that we enforce that law. Of course, the Federal regulations have made it an even more serious task than obviously some of the

concerns about health care for young people. Just to remind my colleagues, and I do not think I will spend very much time on this because I think we all agree that we should limit young people's access to tobacco products, but just to remind my colleagues, that if in fact you get to age 21 without having started to smoke, it is extremely unlikely that you will ever smoke, which is why this is so important. Ninety percent of smokers start before they are 19 years old. That is an extraordinary statistic, so this is not really only about a few young people smoking, it is really about future generations smoking, as well as making sure that our young people are healthy. It is really about generations to come being far healthier than the ones who already are well over 21.

So what we have been trying to do is to state a very strong law on the State level to assure compliance of retailers, and many of them, I have to say, Mr. President, many retailers across the State, I have been in stores, convenience stores, where they have trained the clerks well, where there are good signs posted, where they are very clear about asking for identification and making sure that they refuse anyone who does not present valid identification. That is not what we are talking about. The concern here is really not so much about those retailers who are trying very hard to comply with the law and make sure that they do not in any way help contribute to young people getting tobacco products. So what we are looking at are ways in which we can both educate and enforce the law to make sure that neither young people seek tobacco products, nor retailers actually sell them. So that means citations and fines and eventually withholding a license from a retailer. And that is serious, and it is also serious for young people.

What we have also seen in the State are some local communities taking a strong hand in this, well before the State has, partly because we have not acted as much as we should have. We have seen local communities take strong action, and where we have, it has made an enormous difference. And I have visited and talked to a number of those people in Pittsburgh, in Allentown, in Philadelphia. I have actually accompanied young people on compliance checks, and we have had hearings where young people themselves have been horrified at adults actually selling them tobacco products when they should not. That is extremely important.

So while we do want to have a strong State law, and I will speak to some of the other problems in the bill with my other amendments, one of the things, because this bill is not yet good enough, and it simply is not, we have to make sure that our local communities, should they choose to take additional steps, particularly to help with compliance and education, that they should be able to do so. I do not think that we have really presented a very strong and good law that they would be inclined to do very much with that, but nonetheless, there may be things, and I will be happy to give you a list. I have a dozen different ways that a local community might choose to implement this with the local authority. I will not go into all that except to say it is important for us to allow local communities to take steps to protect the health of their young people now and into the future.

So I ask my colleagues to support this amendment, which simply removes the language that would preempt any local community from taking action to pass their own ordinance, such as Allegheny County has, such as Pittsburgh has, such as Philadelphia has, several in Montgomery County, that they would in the future be able to do that. So I hope that my colleagues support this amendment that simply removes the language that preempts all local ordinances in the future.

Thank you, Mr. President.

The PRESIDENT. The Chair recognizes the gentleman from Cumberland, Senator Mowery.

Senator MOWERY. Mr. President, Senator Schwartz has presented I think most all of our feelings, that we need to do more to try to recognize the importance of keeping cigarettes out of the hands of minors in Pennsylvania. The sale of cigarettes to minors threatens funding, however, that Pennsylvania receives from the Federal government to provide county drug and alcohol preventive programs. Failure to reduce the rate of sales to minors could result in Pennsylvania losing $23 million in Federal drug and alcohol funding, and House Bill No. 1501 seeks to limit access of minors to cigarettes by strengthening the penalties on retailers who sell to minors, by making it an offense for minors to purchase tobacco products or falsely represent themselves to be the age of 18, banning cigarette vending machines in locations accessible to anyone under the age of 18, and providing the Department of Health with new enforcement authority. This legislation includes tough but necessary penalties on retailers which are designed to stop the sale of cigarettes to minors.

The PRESIDENT. Senator, would you yield, please. Senator Schwartz is indicating that the only debate is on the preemption amendment at this point, Senator, and I ask you to confine yourself to the amendment, if you would, please.

Senator MOWERY. Thank you very much, Mr. President. I was trying to kind of give an overview so that the Members would have an idea of what House Bill No. 1501 is really all about. I appreciate your thoughts.

The preemption language prohibits local governments from passing regulations on areas that are specifically addressed in the bill. By including preemption, we are establishing one set of licensing standards and one set of penalties for failure to meet these standards. Preemption is very important because we believe that as the business reacts to the preemption provision, the only way they could even begin to look at it is to be able to provide probably one of the finest training programs for their employees, and the employees are really the ones who make that final decision as to whether or not they are going to go by the rules that are established in this legislation or make a decision to break the law. And when they do, it becomes very difficult for them in regard to the fines that are established in this bill. Failure to include preemption language would require retailers to deal with as many as 2,600 different sets of rules regarding how they can sell tobacco products.

This bill is a strong bill, it is a bill that we have waited a long time to be able to look at from a State level, and therefore I ask for a negative vote on the amendment to eliminate preemption language from this bill.

Thank you, Mr. President.

The PRESIDENT. The Chair recognizes the gentlewoman from Philadelphia, Senator Schwartz.

Senator SCHWARTZ. Mr. President, let me point out to the Members here as well that one of the areas where I am concerned about preemption is that this is a Criminal Code that we are pass-

ing, and if a local ordinance wanted to create a civil ordinance and some civil penalties and civil enforcement, it would be precluded from doing so, and I think that is particularly unfortunate since we do know, and I will speak to this again later on a different amendment, that it is really often the Health Department or the people who are responsible for licenses in a local community and not the police department that really have the time and the high priority of making sure that retailers comply. So that is one of the huge gaps in this legislation if we do not eliminate the preemption language.

Thank you, Mr. President.

The PRESIDENT. The Chair recognizes the gentleman from Cumberland, Senator Mowery.

Senator MOWERY. Mr. President, the preemption language really prohibits local governments from passing regulations on the areas that we have specifically addressed in this bill, and the amended preemption language narrows the focus of preemption. For example, by limiting the preemption to areas addressed in the bill, we have, for example, in local government, we have not restricted them, maybe they would like to pass an ordinance that prohibits advertising for cigarette sales or for placing signs in areas throughout the community to try to discourage smoking by our young people.

Again, for that reason, I ask for a negative vote on the amendment.

LEGISLATIVE LEAVE

The PRESIDENT. The Chair recognizes the gentleman from Allegheny, Senator Wagner.

Senator WAGNER. Mr. President, I ask for a temporary Capitol leave for Senator Musto.

The PRESIDENT. Senator Wagner requests a temporary Capitol leave for Senator Musto. Without objection, that leave will be granted.

And the question recurring,
Will the Senate agree to the amendment?

The PRESIDENT. The Chair recognizes the gentleman from Allegheny, Senator Wagner.

Senator WAGNER. Mr. President, I rise to support the amendment. I am from Allegheny County, as most of you know, and the problem with this legislation is that it preempts a better law in Allegheny County, a better law that reduces the potential for children to begin to smoke and ultimately to contract cancer, to become addicted to nicotine. There is some basis, I believe, some strong basis to this amendment, and it relates mainly, Mr. President, to local government versus State government. The question is, does local government know what is best for local residents when it relates to some issues and some instances? And the answer to that question, Mr. President, I believe is local government does at times when it comes to the health and the safety of the people living within that community. For that reason, Mr. President, I support the amendment. The bill does many good things also, but we can make this bill stronger with certain amendments.

Thank you.

And the question recurring,
Will the Senate agree to the amendment?

The yeas and nays were required by Senator SCHWARTZ and were as follows, viz:

YEA-19

Bell	Kitchen	Orie	Tartaglione
Bodack	Kukovich	Rhoades	Wagner
Fumo	Mellow	Schwartz	Williams, Anthony H.
Greenleaf	Musto	Stack	Williams, Constance
Hughes	O'Pake	Stout	

NAY-31

Armstrong	Erickson	Logan	Thompson
Boscola	Gerlach	Madigan	Tomlinson
Brightbill	Helfrick	Mowery	Waugh
Conti	Holl	Murphy	Wenger
Corman	Jubelirer	Piccola	White, Donald
Costa	Kasunic	Punt	White, Mary Jo
Dent	LaValle	Robbins	Wozniak
Earll	Lemmond	Scarnati	

Less than a majority of the Senators having voted "aye," the question was determined in the negative.

And the question recurring,
Will the Senate agree to the bill on third consideration?

SCHWARTZ AMENDMENT A4061

Senator SCHWARTZ offered the following amendment No. A4061:

Amend Sec. 3 (Sec. 301), page 18, line 22, by striking out "JANUARY" and inserting: July

On the question,
Will the Senate agree to the amendment?

The PRESIDENT. The Chair recognizes the gentlewoman from Philadelphia, Senator Schwartz.

Senator SCHWARTZ. Mr. President, since the previous amendment failed by not so much, but did fail, I am offering an amendment that would just create the preemption to begin instead of last January, which would actually mean that some local ordinances that are already in existence, including Allegheny County's, would no longer be in effect, and make the effective date of the preemption July 1, 2002. So it would be effective next week, but it would allow all local ordinances that currently exist to stay in effect.

The PRESIDENT. The Chair recognizes the gentleman from Cumberland, Senator Mowery.

Senator MOWERY. Mr. President, we really looked into that because that was one that we felt we might be able to accept. Our concerns are that we have not seen any of the regulations actually being written yet, and we have no idea how it would apply if there are local ordinances now that are more, in some areas, let us say, stronger than the ones that are in this bill, even though this is probably an extremely strong bill as it is currently written.

And so we tried with the attorneys to figure out how that would be interpreted, and we really could not come up with an answer to that particular part of the issue, so I ask for a negative vote on the amendment.

LEGISLATIVE LEAVE

The PRESIDENT. The Chair recognizes the gentleman from Lebanon, Senator Brightbill.

Senator BRIGHTBILL. Mr. President, I ask for a temporary Capitol leave for Senator Madigan.

The PRESIDENT. Senator Brightbill requests a temporary Capitol leave for Senator Madigan. Without objection, that leave will be granted.

And the question recurring,
Will the Senate agree to the amendment?

The yeas and nays were required by Senator SCHWARTZ and were as follows, viz:

YEA-20

Bell	Hughes	Musto	Stack
Bodack	Kitchen	O'Pake	Tartaglione
Costa	Kukovich	Orie	Wagner
Fumo	Logan	Rhoades	Williams, Anthony H.
Greenleaf	Mellow	Schwartz	Williams, Constance

NAY-30

Armstrong	Gerlach	Mowery	Tomlinson
Boscola	Helfrick	Murphy	Waugh
Brightbill	Holl	Piccola	Wenger
Conti	Jubelirer	Punt	White, Donald
Corman	Kasunic	Robbins	White, Mary Jo
Dent	LaValle	Scarnati	Wozniak
Earll	Lemmond	Stout	
Erickson	Madigan	Thompson	

Less than a majority of the Senators having voted "aye," the question was determined in the negative.

And the question recurring,
Will the Senate agree to the bill on third consideration?

SCHWARTZ AMENDMENT A4062

Senator SCHWARTZ offered the following amendment No. A4062:

Amend Sec. 1 (Sec. 6305), page 8, line 23, by striking out "or"

Amend Sec. 1 (Sec. 6305), page 8, lines 24 and 25, by striking out "FOR THE PURPOSE OF CONDUCTING RETAILER EDUCATION AND ASSESSING COMPLIANCE WITH FEDERAL LAW" and inserting: or any organization under contract with such agencies

Amend Sec. 1 (Sec. 6305), page 9, lines 20 through 30, by striking out all of lines 20 through 29 and "(6)" in line 30 and inserting: (5)

Amend Sec. 1 (Sec. 6305), page 11, line 11, by striking out "OR" and inserting a comma

Amend Sec. 1 (Sec. 6305), page 11, line 12, by inserting after "ACT": or any organization under contract with such agencies

Amend Sec. 1 (Sec. 6305), page 11, line 14, by inserting after "Procedure":; and may also issue citations for violations of this section

On the question,
Will the Senate agree to the amendment?

The PRESIDENT. The Chair recognizes the gentlewoman from Philadelphia, Senator Schwartz.

Senator SCHWARTZ. Mr. President, to get into some of the details of the bill, basically what this amendment does is clarifies in the bill the permission for local health departments and subcontractors to the Health Department to have the authority to do compliance checks and issue citations and eliminates some of the language that creates limitations on these compliance checks. And the reason this is extremely important, again, Mr. President, I have actually visited with organizations that have been conducting these compliance checks, and it is extremely important for them to be able to give the actual citation. The way the bill is drafted right now is that, again, because it is a Criminal Code bill, the only thing that can happen is that if a Health Department official goes into a retailer and sees that they are violating the law, they have to then call the police to come in and observe what they observed to issue a citation. It is practically not possible.

Right now the way it is written in the bill, these compliance checks done by the Department of Health are simply for, quote, the education of the retailer, and it leaves the enforcement to law enforcement, to the police department. Now, maybe in some communities this will be the top priority for law enforcement. It may be that in some communities they might hire additional police officers to do this. But, Mr. President, it is really unlikely that will happen, in which case you would have to be lucky enough potentially to have a law enforcement officer in a retail shop and choose to give that citation to them. Of course, they would have to be well educated on this new law to do that. It is not practical. What happens now is that those who are given the authority to enforce many of the health ordinances in our Commonwealth are also given the authority to give the citations. That is true in restaurants, it is true in a number of places where the Department of Health or the Department of Agriculture go in and they actually have the authority to give the citation, and then the fines would be applied. Without that authority, this bill is so weak it would have very little enforcement. And really, what we are trying to do here is enforce the law, and again, any retailer who is already complying with the law has no reason to be concerned. It is really, Mr. President, to help make sure that every retailer across the Commonwealth, particularly in areas where there is a lot of noncompliance or poor information potentially, we can make extra efforts in that regard, and that may well be where we might be able to use some of our tobacco dollars that are dedicated for this purpose, and we did dedicate 12 percent of the tobacco settlement dollars for this purpose. We are now taking away their real authority to do this, just so they will be able to go in and provide some education. That is really very different, and it takes away authority that some of our local health departments already have and have been using. So we are going in the opposite direction.

We are trying to make sure that we can comply with Federal law so that we will not lose $23 million next year, because we are barely meeting the benchmarks for curbing young people's smoking. We are not going to get there, Mr. President, unless we make this change. So it is potentially a small change in the bill, it makes some changes in the language, as I said, about the compliance checks, it gives some more authority to the Health Department. It does not take authority away from law enforcement, but it will give us a tool that in fact has been shown to be effective, and we should keep it in law in Pennsylvania.

Thank you.

The PRESIDENT. The Chair recognizes the gentleman from Cumberland, Senator Mowery.

Senator MOWERY. Mr. President, really, I have some concern about the statement that requires the police to come in to give the citation, because the bill gives the authority to local officials, including the local health department, and so forth, to offer the citations and to go in at any time and oversee the things that we are concerned about and that Senator Schwartz is concerned about. We certainly are not interested in passing legislation here tonight that has no enforcement powers, and in my opinion, we are providing enforcement powers. It may be after we have the bill in operation for a period of time that we will find that we need to do more, but at the present time, I really believe that the bill has been agreed to by so many different groups. And this was not an easy one to handle, as Senator Schwartz also is aware, because she is on the committee. We have an opportunity here to do something. We have raised the bar very high from no bar at all for our expectations as to what this bill will do, and I would just like to see the bill passed as it is so that we can have an opportunity this summer to get on for the next several months and really see just how good the bill is. So for that reason, I ask for a negative vote on the amendment.

LEGISLATIVE LEAVE

The PRESIDENT. The Chair recognizes the gentleman from Allegheny, Senator Wagner.

Senator WAGNER. Mr. President, I request a temporary Capitol leave for Senator O'Pake.

The PRESIDENT. Senator Wagner requests a temporary Capitol leave for Senator O'Pake. Without objection, that leave will be granted.

And the question recurring,
Will the Senate agree to the amendment?

The yeas and nays were required by Senator SCHWARTZ and were as follows, viz:

YEA-19

Bell	Hughes	O'Pake	Tartaglione
Bodack	Kitchen	Orie	Wagner
Dent	Kukovich	Rhoades	Williams, Anthony H.
Fumo	Mellow	Schwartz	Williams, Constance
Greenleaf	Musto	Stack	

NAY-31

Armstrong	Gerlach	Madigan	Thompson
Boscola	Helfrick	Mowery	Tomlinson
Brightbill	Holl	Murphy	Waugh
Conti	Jubelirer	Piccola	Wenger
Corman	Kasunic	Punt	White, Donald
Costa	LaValle	Robbins	White, Mary Jo
Earll	Lemmond	Scarnati	Wozniak
Erickson	Logan	Stout	

Less than a majority of the Senators having voted "aye," the question was determined in the negative.

And the question recurring,
Will the Senate agree to the bill on third consideration?

SCHWARTZ AMENDMENT A4060

Senator SCHWARTZ offered the following amendment No. A4060:

Amend Sec. 1 (Sec. 6305), page 4, line 8, by inserting after "HEALTH;": or

Amend Sec. 1 (Sec. 6305), page 4, lines 9 and 10, by striking out all of line 9, "(iv)" in line 10 and inserting: (iii)

On the question,
Will the Senate agree to the amendment?

The PRESIDENT. The Chair recognizes the gentlewoman from Philadelphia, Senator Schwartz.

Senator SCHWARTZ. Mr. President, there are fairly stiff fines for minors who attempt to buy cigarettes, and what this amendment does is deletes the $200 fine for minors while retaining the two other penalties, suspension of a driver's license, which I would contend would be far more threatening to a teenager, and also completing a tobacco cessation and prevention program. There are also some community service options here, but it really just deletes the fine.

Thank you, Mr. President.

The PRESIDENT. The Chair recognizes the gentleman from Cumberland, Senator Mowery.

Senator MOWERY. Mr. President, I ask for a negative vote on this. The $200 fine is just one of four, and there may be a situation where that would be very appropriate, depending upon the severity of what the minor had done. And so I think that leaving it in is certainly not hurting the bill at all. I am sure that the local officials who would be enacting this legislation and punishing the minors who go in to purchase cigarettes, I think it is pretty nice to just have it the way it is, and also, if we can, we can move the bill along, and I ask for a negative vote.

The PRESIDENT. The Chair recognizes the gentleman from Allegheny, Senator Murphy.

Senator MURPHY. Mr. President, I know that there have been some moves afoot to send the circumstances by which we deal with underage youth trying to purchase cigarettes back to the way things were when there was no fine at all. Overall, this bill does increase the fine substantially in some other areas other than those being discussed with this amendment.

As Senator Mowery pointed out, there are many options here as the bill exists. There can be community service, there may be a fine, there may be a loss of driving privileges, and it is important that local magistrates have some options for adolescents. One thing is very important. Anybody who has ever asked their kid to clean their room or pick up their clothes or do anything knows that one of the things that crosses kids' minds is what you are going to do about it? And having spent so much of my professional career working with teenagers, it is very common to hear them quote the law, and knowing that when it comes to cigarettes, there is nothing anybody is going to be able to do about it. I think it is important to maintain a menu, as it were, of options that someone may have to impress upon children the importance of this. If we really believe that having strong reactions to children who smoke, to clerks who sell, to stores that sell cigarettes as well, if we really believe that we are interested in the best interests of youth in not getting them started in cigarette smoking, it seems to me we ought to maintain several options, some quite substantial, for youth who purchase cigarettes. That sends a strong signal to them in terms that they can understand, that starting cigarette smoking at a young age is not a good idea. Teenagers, by the way they view the world, do not think in terms of when they are going to be 50 or 60 or 70 years old, or they think of themselves as invulnerable and not getting cancer or any one of a number of ailments from cigarettes. This helps show them that there are some things that a district justice or someone may place upon them now, at this time, in some ways to help them understand the seriousness of this, so I ask for a negative vote on the amendment.

And the question recurring,
Will the Senate agree to the amendment?

The yeas and nays were required by Senator SCHWARTZ and were as follows, viz:

YEA-9

Bell	Hughes	Kukovich	Tartaglione
Conti	Kitchen	Schwartz	Williams, Anthony H.
Greenleaf			

NAY-41

Armstrong	Helfrick	Musto	Tomlinson
Bodack	Holl	O'Pake	Wagner
Boscola	Jubelirer	Orie	Waugh
Brightbill	Kasunic	Piccola	Wenger
Corman	LaValle	Punt	White, Donald
Costa	Lemmond	Rhoades	White, Mary Jo
Dent	Logan	Robbins	Williams, Constance
Earll	Madigan	Scarnati	Wozniak
Erickson	Mellow	Stack	
Fumo	Mowery	Stout	
Gerlach	Murphy	Thompson	

Less than a majority of the Senators having voted "aye," the question was determined in the negative.

And the question recurring,
Will the Senate agree to the bill on third consideration?

SCHWARTZ AMENDMENT A4054

Senator SCHWARTZ offered the following amendment No. A4054:

Amend Title, page 1, line 1, by striking out "Titles" and inserting: Title

Amend Title, page 1, line 1, by striking out "and 53 (Municipalities)"

Amend Title, page 1, line 7, by inserting a period after "TOBACCO"

Amend Title, page 1, lines 7 through 9, by striking out "; AND" in line 7 and all of lines 8 and 9

Amend Sec. 1 (Sec. 6305), page 1, lines 15 through 17; page 2, lines 1 through 7, by striking out all of said lines on said pages and inserting:

(a) Offense defined.–A person is guilty of a summary offense if he:

(1) sells tobacco, in any form, to any minor under the age of 18 years;

(2) by purchase, gift or other means, furnishes tobacco, in any form, to a minor under the age of 18 years; [or]

(3) knowingly and falsely represents himself to be 18 years of age or older to another for the purpose of procuring or having furnished to him tobacco in any form[.]; or

Amend Sec. 1 (Sec. 6305), page 2, line 10, by striking out the semi colon and inserting a period

Amend Sec. 1 (Sec. 6305), page 2, lines 11 through 30; pages 3 through 12, lines 1 through 30; page 13, lines 1 through 28, by striking out all of said lines on said pages and inserting

(b) Penalty.–A person who violates this section shall, upon conviction, be sentenced to pay a fine of not less than $25 for a first offense and not less than $100 for a subsequent offense.

(c) Definitions.–As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

"Tobacco product." A cigarette, cigar, pipe tobacco or other smoking tobacco product or smokeless tobacco in any form, manufactured for the purpose of consumption by a purchaser and any cigarette paper or product used for smoking tobacco.

"Tobacco vending machine." A mechanical or electrical device from which one or more tobacco products are dispensed for a consideration.

Amend Bill, page 17, lines 29 and 30; page 18, lines 1 through 26, by striking out all of said lines on said pages

On the question,
Will the Senate agree to the amendment?

The PRESIDENT. The Chair recognizes the gentlewoman from Philadelphia, Senator Schwartz.

Senator SCHWARTZ. Mr. President, as you can tell from the series of other amendments that I offered that were defeated, and actually I have several others, but I can sense the impatience of my colleagues, even though I find this an extremely important piece of legislation, and also the direction in which my amendments are going in terms of trying to strengthen this bill, so I rise to offer an amendment that really takes out most of the language of this bill, because I really believe that while with one hand we strengthen the bill, with the other hand we take away the real ability to be effective in this law, and it means that we sound like we are doing the right thing, and I will give an example, we are going to hold retailers accountable, but the compliance checks are actually for educational purposes only, and then we give them suggestions and create an affirmative defense, and I am not a lawyer, but as I understand it, it is a rather strong way of letting them know that they can go in and have the action completely

reversed very quickly and not even have to pay the fines. We have also created short timeframes so that you would have to have a number of different fines implemented in a short period of time before you would ever take a license away and, Mr. President, this simply creates a mixed message for retailers, and that simply is unacceptable.

So while I would like to see us work it out, and I do appreciate the prime sponsor of this bill really working to try to accommodate the retailers, I believe again that any retailer that is complying with the law has nothing to worry about. There is no reason to not be stronger about the compliance and the enforcement aspects of this law, that we have actually preempted a good law potentially in Allegheny County, or other laws that might take effect to address specific communities because we have not taken care of those serious problems and the mixed messages of this legislation.

My amendment removes all of the language of this legislation except for one part. It does not introduce anything new, but there is just one part it holds on to, and that is that it sets a standard for prohibiting vending machines anywhere where minors may have access to those vending machines and applies the fines solely to that purpose. So it creates a very simple tool, something we know works. I believe in doing what works, Mr. President. We know what works is making sure that vending machines are not accessible to minors. We know the compliance checks which we took out and the way they were effective works, but let us hang on to one of the pieces we know really works, and that is banning vending machines. And hopefully, Mr. President, along with the efforts we have under the tobacco settlement, some of the efforts with the State Health Department under the Synar regulations with the potential of a change in the cigarette tax, we may see a reduction in youth smoking in Pennsylvania.

So I ask my colleagues, as impatient as they might be to have dinner, I did not choose the timing, Mr. President, that we actually set aside essentially most of the substance of this bill, hold on to the one piece that we all agree to, and if we need to, come back and look at some additional language at a future date.

Thank you, Mr. President.

The PRESIDENT. The Chair recognizes the gentleman from Cumberland, Senator Mowery.

Senator MOWERY. Mr. President, the bill already bans vending machines for anyplace that allows those under the age of 18 to enter. This is absolutely right. We believe that vending machines have been a source of a lot of minors obtaining cigarettes, particularly if they are not located in a very public area of a retail store. And so a very important piece of legislation was to ban them from anywhere where those under the age of 18 could have access to a vending machine. So once again, I ask for a negative vote on this particular amendment.

Thank you, Mr. President.

The PRESIDENT. The Chair recognizes the gentleman from Westmoreland, Senator Kukovich.

Senator KUKOVICH. Will the maker of the amendment stand for interrogation?

The PRESIDENT. She is standing right now, Senator, so I guess she will.

Senator SCHWARTZ. Mr. President, I do still have to grant permission, but yes.

Senator KUKOVICH. Mr. President, to clarify the amendment, I believe, in essence, the other provisions of the bill would be eliminated, the vending machine language to which both the gentlewoman and Senator Mowery agree would remain, and the only penalty provision that would be in it would be for the vending machine violation, is that correct?

Senator SCHWARTZ. Yes, Mr. President, that is correct.

Senator KUKOVICH. Mr. President, I think if the bill would pass as it currently is, we are going to have a bill that no one is going to like entirely. I think there are a number of retailers that are still concerned about some rather onerous provisions in this bill.

Secondly, I think that the American Lung Association and public health advocates are very unhappy with the weakening of this bill. I think the real reason, the only reason for this bill, is to try to ensure that the Federal funding to which both Senator Mowery and Senator Schwartz have alluded remains. I am convinced that what we could do that by accepting this amendment, since it would be targeted only to the vending machines, an issue with which everyone agrees, which the studies show do prevent youth smoking, coupled with the fact that within a few days we will probably pass some sort of cigarette tax which the studies show even more strongly has the biggest impact on reducing juvenile smoking. If we do that, along with better enforcement by the Health Department, the Federal Synar money will be there. I am not sure why we have to go through this and pass this kind of bill such as House Bill No. 1501, which is not going to make anyone happy. It is not going to necessarily ensure we get those funds.

I would suggest that at this point in time, rather than creating this whole new mechanism, we accept this amendment, do something positive again with which we all agree regarding the vending machines, and allow this bill to go forward that way. I think it will make the retailers happy, I think it will make the American Lung Association and public health people happy, and I do not think we are going to jeopardize the loss of any Federal money. I ask for a "yes" vote on the amendment.

The PRESIDENT. The Chair recognizes the gentleman from Cumberland, Senator Mowery.

Senator MOWERY. Mr. President, I would just like to add that if we do that particular amendment, my legal advisors have said that it would eliminate all the other fines in the bill. So there is just no way that I can say anything but ask for a negative vote.

Thank you, Mr. President.

LEGISLATIVE LEAVE

The PRESIDENT. The Chair recognizes the gentleman from Allegheny, Senator Wagner.

Senator WAGNER. Mr. President, I request a temporary Capitol leave for Senator Stout.

The PRESIDENT. Senator Wagner requests a temporary Capitol leave for Senator Stout. Without objection, that leave will be granted.

And the question recurring,

Will the Senate agree to the amendment?

The yeas and nays were required by Senator SCHWARTZ and were as follows, viz:

YEA-12

Bell	Kitchen	Orie	Tartaglione
Earll	Kukovich	Schwartz	Williams, Anthony H.
Hughes	LaValle	Stack	Williams, Constance

NAY-38

Armstrong	Gerlach	Mowery	Thompson
Bodack	Greenleaf	Murphy	Tomlinson
Boscola	Helfrick	Musto	Wagner
Brightbill	Holl	O'Pake	Waugh
Conti	Jubelirer	Piccola	Wenger
Corman	Kasunic	Punt	White, Donald
Costa	Lemmond	Rhoades	White, Mary Jo
Dent	Logan	Robbins	Wozniak
Erickson	Madigan	Scarnati	
Fumo	Mellow	Stout	

Less than a majority of the Senators having voted "aye," the question was determined in the negative.

And the question recurring,
Will the Senate agree to the bill on third consideration?

COSTA AMENDMENT A3934

Senator COSTA offered the following amendment No. A3934:

Amend Title, page 1, line 7, by inserting after "~~preemption.~~": criminal trespass and for

Amend Bill, page 1, lines 12 and 13, by striking out all of said lines and inserting:

Section 1. Section 3503 of Title 18 of the Pennsylvania Consolidated Statutes is amended by adding a subsection to read:

§ 3503. Criminal trespass.

* * *

(b.3) School trespasser.–

(1) A person commits an offense if he:

(i) fails to obey notices posted in a manner prescribed by law or reasonably likely to come to the person's attention at each entrance of school grounds that visitors are prohibited without authorization from a designated school, center or program official;

(ii) fails or refuses to obey instruction to leave school grounds as communicated by a school, center or program official, employee or agent or a law enforcement officer; or

(iii) makes an unauthorized entry onto school grounds with the intent to commit a crime.

(2) (i) An offense under paragraph (1)(i) constitutes a summary offense.

(ii) An offense under paragraph (1)(ii) constitutes a misdemeanor of the first degree.

(iii) An offense under paragraph (1)(iii) constitutes a felony of the second degree.

(3) As used in this subsection, the term "school grounds" means any building of or grounds of any elementary or secondary publicly funded educational institution, any elementary or secondary private school licensed by the Department of Education, any elementary or secondary parochial school, any certified day-care center or any licensed preschool program.

* * *

Section 2. Section 6305 of Title 18 is amended to read:

Amend Sec. 2, page 17, line 29, by striking out "2" and inserting: 3

Amend Sec. 3, page 17, line 30, by striking out "3" and inserting: 4

Amend Sec. 4, page 18, line 24, by striking out "4" and inserting: 5

Amend Sec. 5, page 18, line 26, by striking out "5" and inserting: 6

On the question,
Will the Senate agree to the amendment?

The PRESIDENT. The Chair recognizes the gentleman from Allegheny, Senator Costa.

Senator COSTA. Mr. President, I will be very brief. The amendment I propose here today for my colleagues to consider would essentially establish a new crime entitled school trespass. Essentially, the way the elements of this particular crime would be established is if a person fails to obey a notice that is posted in a conspicuous manner that they are likely to come in contact with regard to their entrance on school grounds, that particular visitor, without the authority of being in that school, would essentially commit the crime of school trespass and be subject to a summary offense for the failure of the notice.

The second provision that relates to that particular bill, Mr. President, would be that once that person ignores the signs that are posted on the facility, either the building or the school grounds or the center, they continue to stay in the school and refuse to leave the school, at that point in time they commit the same crime of school trespass but of a different degree in terms of the grading that would rise to a level of a misdemeanor of the first degree, which is subject up to a 5-year penalty.

And further, Mr. President, the final part of that particular piece of legislation refers to unauthorized entry onto the school grounds with the very specific intent to commit a crime in the school building that would rise to the level of a felony of the second degree. Back in 1998, we did a similar piece of legislation which was entitled agriculture trespass, and this is basically very similar to that nature. It is a distinction from the general crimes of trespass, criminal trespass, simple trespass, and defiant trespass. The reason for the legislation is that it was brought to our attention by a local police chief in the Churchill Borough and our district attorney in Allegheny County, who essentially were unable to prosecute an individual on the former grades of the trespass law because of the lack of ability to designate a very specific intent, the lack to meet that particular element. This particular piece of legislation does not require that that element be there, but rather it says by virtue of entering the school grounds, knowing that you are not permitted to be there, you meet that requirement. I ask my colleagues to adopt this amendment.

Thank you, Mr. President.

The PRESIDENT. The Chair recognizes the gentleman from Cumberland, Senator Mowery.

Senator MOWERY. Mr. President, I think there are a lot of good points to that particular amendment, but I question the germaneness of the amendment to this particular bill, so I ask for a negative vote.

The PRESIDENT. The Chair recognizes the gentleman from Allegheny, Senator Costa.

Senator COSTA. Mr. President, if I could respond to the germaneness. Mr. President, obviously, the bill that was proposed, House Bill No. 1501, is a Title 18 bill, as I understand it, as well as the amendment that I am offering today is to Title 18.

The PRESIDENT. The Chair recognizes the gentleman from Lebanon, Senator Brightbill.

Senator BRIGHTBILL. Mr. President, on amendment A3934, which provides a subsection of criminal trespass, we believe that the offense of trespassing onto a school would already be a criminal offense. There are already criminal penalties for it, and we do not believe that this is necessary. We suggest to the gentleman that if he feels there is some weakness in that law, then the gentleman should pursue this by offering a bill which would be taken up by the Committee on Judiciary.

One of the issues that happens to face this General Assembly at this time is a technical issue which deals with what are called general and specific crimes, and one of the ironies of this, because the gentleman mentioned the district attorney's office, is that the District Attorneys Association is pursuing language that tries to deal with a problem that arises when we pass a specific crime that basically encompasses the same or similar elements to a general crime. We think that this amendment potentially causes more harm than good, and I ask for a negative vote.

The PRESIDENT. The Chair recognizes the gentleman from Allegheny, Senator Costa.

Senator COSTA. Mr. President, with respect to the gentleman's comments as it relates to the legislation or the amendment already encompassed in the current statute of criminal trespass, as I indicated earlier, it is the opinion of the district attorney in our county, District Attorney Stephen Zappala's office, that this in fact was not covered. The situation that resulted in the introduction of this amendment and also House Bill No. 1873, by the way, Mr. President, Printer's No. 2739, this amendment is in legislative form, it is here in the Senate. It is my understanding it is not in the Committee on Judiciary but rather in the Committee on Education, and I welcome the opportunity for that measure to move forward out of that committee.

But despite that, Mr. President, this issue arose when we had a situation in my district at a local grade school where an individual proceeded to make his way into the grade school and was asked to leave, and he did leave. Mr. President, the individual went down to the next school within the same municipality, about a mile-and-a-half away, and entered that school again, and at that particular point in time he was asked to leave and refused to leave. At that point in time, upon the refusal of leaving, he was provided with a summary offense.

Essentially, what this legislation would do in that same circumstance would raise the level of this offense from a summary offense for a simple trespass to a misdemeanor of the first degree, where an individual who has no business being in a schoolhouse where our kids are in school and refuses to leave that schoolhouse, that this elevates the offense from a simple summary offense, which is subject to 90 days in jail or a $300 fine, up to a misdemeanor of the first degree. I believe that is appropriate, it is something that this General Assembly and this Chamber should consider, and I ask for an affirmative vote.

And the question recurring,
Will the Senate agree to the amendment?

The yeas and nays were required by Senator COSTA and were as follows, viz:

YEA-24

Bodack	Kasunic	Musto	Tartaglione
Boscola	Kitchen	O'Pake	Tomlinson
Costa	Kukovich	Orie	Wagner
Dent	LaValle	Schwartz	Williams, Anthony H.
Fumo	Logan	Stack	Williams, Constance
Hughes	Mellow	Stout	Wozniak

NAY-26

Armstrong	Gerlach	Mowery	Thompson
Bell	Greenleaf	Murphy	Waugh
Brightbill	Helfrick	Piccola	Wenger
Conti	Holl	Punt	White, Donald
Corman	Jubelirer	Rhoades	White, Mary Jo
Earll	Lemmond	Robbins	
Erickson	Madigan	Scarnati	

Less than a majority of the Senators having voted "aye, the question was determined in the negative.

And the question recurring,
Will the Senate agree to the bill on third consideration?

A.H. WILLIAMS AMENDMENT A3823

Senator A.H. WILLIAMS offered the following amendment No. A3823:

Amend Title, page 1, line 7, by inserting after "TOBACCO;": defining "bidis" or "beedies"; prohibiting the sale of bidis;

Amend Bill, page 17, by inserting between lines 29 and 30:

Section 3. Title 18 is amended by adding a section to read:

§ 7515. Sale of bidis.

(a) General rule.–The sale of bidis is prohibited.

(b) Penalty.–A cigarette dealer or wholesaler or retailer who holds a license who sells bidis commits a summary offense and shall, upon conviction, be sentenced to pay a fine of not more than $500.

(c) Definition.–As used in this section, the term "bidis" or "beedies" means a product containing tobacco that is wrapped in temburni leaf (diospyros melanoxylon) or tendu leaf (diospyros exculpra), or any other product that is offered to, or purchased by, consumers as bidis or beedies.

Amend Sec. 3, page 17, line 30, by striking out "3" and inserting: 4

Amend Sec. 4, page 18, line 24, by striking out "4" and inserting: 5

Amend Sec. 5, page 18, line 26, by striking out "5" and inserting: 6

On the question,
Will the Senate agree to the amendment?

The PRESIDENT. The Chair recognizes the gentleman from Philadelphia, Senator A.H. Williams.

Senator A.H. WILLIAMS. Mr. President, I listened intently to the discussion tonight with regard to what the object of this

piece of legislation is, and if the intent is to reduce or eliminate teen smoking, then this amendment fits perfectly to the process that we have begun tonight. If there is such a thing as a gateway drug, then this is a gateway cigarette. It comes in vanilla, mango, cherry, et cetera. There are not products on the market that relate to such types of cigarettes, because those who have mature, addicted lungs to nicotine do not need that type of attraction. And frankly, when I introduced the amendment, most of us said, what is a bidi? Is it a cap one wears on his head? Is it a type of cologne? And when we discovered it was a type of cigarette, we went further. We purchased these products from all over the Pennsylvania Commonwealth, so it is not just a Philadelphia phenomena, it is a Pennsylvania, a national phenomena. These are cigarettes that adults do not smoke, because they are not intended for adults. They have been produced, manufactured, marketed, distributed for one population, and that is the teenager. They are sold in mom and pop stores all across the Commonwealth of Pennsylvania. They are highly toxic, extremely addictive, and frankly, on more occasions than not, more powerful than a common cigarette, which is before most of us, who may consume them. This is not a product to be compromised. This is not a product that one can tax out of existence because, unfortunately, if we were to compromise and use taxes as a form of generating more revenue to do what we want to do, educate teenagers, we would be in fact collecting revenue from that population that we hope to remove from the smoking rolls in the future.

My plea is a very simple one, Mr. President. Tonight, if we plan to make a statement, let us make a defining statement. Let those teenagers realize that adults do know what is going on within that population, that we do believe what we are saying tonight is that we do not want to simply reduce teenage smoking, we want to eliminate it. And let us eliminate first the gateway cigarette, the bidis. I ask for your unanimous support tonight for this amendment.

Thank you, Mr. President.

The PRESIDENT. The Chair recognizes the gentleman from Cumberland, Senator Mowery.

Senator MOWERY. Mr. President, this is an agreed-to amendment, and I ask for a "yes" vote.

And the question recurring,

Will the Senate agree to the amendment?

It was agreed to.

The PRESIDENT. House Bill No. 1501 will go over in its order as amended.

RECONSIDERATION OF HB 2044

BILL AMENDED

HB 2044 (Pr. No. 4082) -- The PRESIDENT. The Chair recognizes the gentleman from Lebanon, Senator Brightbill.

Senator BRIGHTBILL. Mr. President, I move that the vote by which House Bill No. 2044 passed the Senate be reconsidered.

On the question,

Will the Senate agree to the motion?

A voice vote having been taken, the question was determined in the affirmative.

And the question recurring,

Shall the bill pass finally?

RECONSIDERATION OF VOTE

The PRESIDENT. The Chair recognizes the gentleman from Lebanon, Senator Brightbill.

Senator BRIGHTBILL. Mr. President, I move to reconsider the vote by which the bill was agreed to on third consideration.

On the question,

Will the Senate agree to the motion?

A voice vote having been taken, the question was determined in the affirmative.

And the question recurring,

Will the Senate agree to the bill on third consideration?

Senator BRIGHTBILL offered the following amendment No. A3978:

Amend Title, page 2, lines 5 through 9, by striking out all of said lines and inserting:

Amending Title 27 (Environmental Resources) of the Pennsylvania Consolidated Statutes, consolidating the Environmental Laboratory Accreditation Act; and making repeals.

Amend Bill, page 12, lines 26 through 30; page 13, lines 1 through 30; page 14, lines 1 through 16, by striking out all of said lines on said pages and inserting:

Section 1. Part IV heading of Title 27 of the Pennsylvania Consolidated Statutes is amended and the part is amended by adding a chapter to read:

PART IV
ENVIRONMENTAL PROTECTION
[(Reserved)]
CHAPTER 41
ENVIRONMENTAL LABORATORY ACCREDITATION

Sec.
4101. Scope of chapter.
4102. Definitions.
4103. Establishment of program.
4104. Powers and duties.
4105. Powers and duties of Environmental Quality Board.
4106. Requirements of certificate of accreditation.
4107. Interim requirements.
4108. Advisory committee.
4109. Unlawful conduct.
4110. Penalties.
4111. Records.
4112. Whistleblower protection.
4113. Continuation of existing rules and regulations.

§ 4101. Scope of chapter.

This chapter deals with environmental laboratory accreditation.

§ 4102. Definitions.

The following words and phrases when used in this chapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Accreditation." A determination by the Department of Environmental Protection that an environmental laboratory is capable of performing one or more classes of testing or analysis of environmental samples in accordance with this chapter.

"Certificate of accreditation." A document issued by the Department of Environmental Protection certifying that an environmental laboratory has met standards for accreditation.

"Department." The Department of Environmental Protection of the Commonwealth.

"Environmental Hearing Board." The board established under the act of July 13, 1988 (P.L.530, No.94), known as the Environmental Hearing Board Act.

"Environmental laboratory." A facility engaged in the testing or analysis of environmental samples.

"Environmental Quality Board." The board established under section 1920-A of the act of April 9, 1929 (P.L.177, No.175), known as The Administrative Code of 1929.

"Environmental sample." A solid, liquid, gas or other specimen taken for the purpose of testing or analysis as required by an environmental statute.

"Environmental statute." A statute administered by the Department of Environmental Protection relating to the protection of the environment or of public health, safety and welfare.

"Laboratory supervisor." A technical supervisor of an environmental laboratory who supervises laboratory procedures and reporting of analytical data.

"NELAC." The National Environmental Laboratory Accreditation Conference.

"NELAP." The National Environmental Laboratory Accreditation Program.

"Secretary." The Secretary of Environmental Protection of the Commonwealth.

§ 4103. Establishment of program.

(a) Establishment.–The department shall establish an accreditation program for environmental laboratories.

(b) Accreditation.–An environmental laboratory must be accredited under this chapter and be in compliance with all the provisions of this chapter in order to generate data or perform analyses to be used to comply with an environmental statute.

(c) Testing and analysis.–All testing and analysis requirements of an environmental statute shall be performed by an environmental laboratory accredited under this chapter. Testing and analysis shall be performed in accordance with the requirements of this chapter, the environmental statutes and any conditions imposed by the department.

§ 4104. Powers and duties.

The department shall have the following powers and duties:

(1) Establish, administer and enforce an environmental laboratory accreditation program which shall include accreditation standards necessary for a State certification program. The program shall also include a NELAP accreditation program for those laboratories seeking this certification. The program may also include any other specific broad-based Federal or State accreditation program for certification.

(2) Issue, renew, deny, revoke, suspend or modify certificates of accreditation to environmental laboratories in accordance with regulations adopted by the Environmental Quality Board.

(3) Impose terms or conditions on accreditation as necessary to implement and enforce this chapter.

(4) Conduct inspections and tests or samplings, including the examination and copying of records and data pertinent to a matter under investigation. Duly authorized agents and employees of the department may at reasonable times enter and examine property, facilities, operations and activities subject to regulation under this chapter.

(5) Issue orders and initiate proceedings as necessary to implement and enforce this chapter.

(6) Require a fee for the processing of an application for a certificate of accreditation, including the issuance, renewal, modification or other action relating to the certificate, in an amount sufficient to pay the department's cost of implementing and administering the accreditation program.

(7) Provide technical assistance and advice to persons and environmental laboratories subject to this chapter.

(8) Contract with third parties to inspect and monitor environmental laboratories.

(9) Cooperate with appropriate Federal, State, interstate and local government units and private organizations to implement this chapter.

(10) Allow the use of experimental procedures on a case-by-case basis to satisfy the testing or analysis requirements established under an environmental statute.

(11) Seek approval as an accrediting authority from NELAP.

§ 4105. Powers and duties of Environmental Quality Board.

(a) General rule.–The Environmental Quality Board shall adopt regulations as necessary to implement this chapter, to include the establishment of:

(1) Testing or analysis to be conducted by an environmental laboratory.

(2) Allowable fees for environmental laboratories.

(3) Requirements for education, training and experience of laboratory supervisors.

(4) Criteria and procedures to be used by the department to accredit environmental laboratories, which may include proficiency test samples and onsite audits.

(b) Accreditation.–An environmental laboratory shall be accredited pursuant to this chapter and in compliance with the provisions of this chapter in order to generate the data and perform analysis to be used to comply with an environmental statute.

(c) General certificate program.–The Environmental Quality Board may adopt regulations that establish a general certificate of accreditation program or certificates of accreditation by rule.

(d) Unique needs.–To the extent possible, the Environmental Quality Board shall establish requirements and procedures that address the unique needs of small businesses, municipalities, municipal authorities and in-house laboratories.

§ 4106. Requirements of certificate of accreditation.

(a) Forms.–Applications, certificates and other documents shall be in a form prescribed by the department.

(b) General requirements.–An environmental laboratory shall have the staff, management structure, equipment, quality assurance and quality control procedures and recordkeeping procedures necessary to ensure that the environmental laboratory generates valid and accurate test results in accordance with all conditions of accreditation and this chapter.

(c) Laboratory supervisor.–Testing, analysis and reporting of data by an accredited laboratory shall be under the direct supervision of a laboratory supervisor. The laboratory supervisor shall certify that each test or analysis is accurate and valid and that the test or analysis was performed in accordance with all conditions of accreditation. The department may disqualify a laboratory supervisor who is responsible for the submission of inaccurate test or analysis results.

(d) Access to records and data.–An accredited laboratory shall provide the department with access to inspect records and data maintained under this chapter and to conduct tests and sampling related to inspections.

§ 4107. Interim requirements.

(a) Registration.–All environmental laboratories shall register with the department by December 31, 2002, on a registration form prepared by the department. An environmental laboratory which begins testing or analysis of environmental samples after this date shall register with the department before beginning operations.

(b) Time for application.–All environmental laboratories shall apply for accreditation within six months after the Environmental Quality Board establishes an accreditation requirement by regulation for a type of laboratory. The submission of an application shall provide interim authorization to continue operations until the department takes final action on the application.

(c) NELAP accreditation.–An environmental laboratory may apply to the department for NELAP accreditation after the department is approved as an accrediting authority by NELAP. The department may grant NELAP accreditation to a laboratory that meets the requirements of this chapter and the most current version of the NELAC standards that are hereby incorporated by reference.

(d) Temporary fees.–Until regulations are promulgated under this chapter, the following fees shall be charged:

(1) Five thousand dollars for the processing of an application for NELAP accreditation.

(2) Fifty dollars for the processing of an application for registration.

§ 4108. Advisory committee.

The secretary shall appoint a Laboratory Accreditation Advisory Committee to provide technical assistance under this chapter. The committee shall consist of 13 members, including the following:

(1) One representative of a municipal authority.

(2) One representative from a commercial environmental laboratory.

(3) One representative from an industrial environmental laboratory.

(4) One representative from an academic laboratory.

(5) One representative from a small environmental laboratory.

(6) One environmental engineer.

(7) One member of an association of community water supply systems.

(8) One member of an association of wastewater systems.

(9) One member with technical expertise in the testing and analysis of environmental samples.

(10) Four members of the general public.

§ 4109. Unlawful conduct.

(a) General rule.–It shall be unlawful for a person to violate or to cause or assist in the violation of this chapter, to fail to comply with an order or condition of accreditation within the time specified by the department or to hinder, obstruct, prevent or interfere with the department in the performance of its duties under this chapter.

(b) Refusal of accreditation.–The department may refuse to issue a certificate of accreditation to an environmental laboratory which has demonstrated a lack of intention or ability to comply with this chapter or engaged in unlawful conduct or which has an employee, officer, contractor, agent or other person set forth in regulation who has engaged in unlawful activity under this chapter unless the applicant demonstrates to the satisfaction of the department that the unlawful conduct is being or has been corrected.

(c) Denial of access.–It shall be unlawful for an accredited laboratory or other person subject to regulation under this chapter to deny the department access to make inspections and conduct tests or sampling, including the examination and copying of books, papers, records and data pertinent to any matter under investigation pursuant to this chapter. Failure to provide the department with access shall result in the immediate suspension of any accreditation of the laboratory. Upon notice from the department, the laboratory shall immediately cease testing or analysis of environmental samples. The department may revoke an accreditation for failure to provide the department with access to make inspections and conduct tests or sampling, including the examination and copying of books, papers, records and data pertinent to any matter under investigation pursuant to this chapter.

(d) Notice.–The environmental laboratory shall notify each of its customers in writing within 72 hours of receipt of the department's notice if the department suspends or revokes in whole or in part a certificate of accreditation. The notice shall be on a form and in a manner approved by the department.

§ 4110. Penalties.

(a) Criminal penalties.–

(1) A person who knowingly, willfully or recklessly misrepresents that a test or an environmental sample is accurate or was performed in accordance with procedures authorized pursuant to this chapter commits a misdemeanor of the third degree and, upon conviction, shall be subject to a fine of not less than $1,250 nor more than $12,500 or to imprisonment for a period of not more than one year, or both, for each separate offense.

(2) A person who knowingly, willfully or recklessly performs or reports an inaccurate test or analysis of an environmental sample commits a misdemeanor of the third degree and shall, upon conviction, be subject to a fine of not less than $1,250 nor more than $12,500 or to imprisonment for a period of not more than one year, or both, for each separate offense.

(3) A person who knowingly, willfully or recklessly misrepresents that an environmental laboratory holds a certificate of accreditation under this chapter commits a misdemeanor of the third degree and shall, upon conviction, be subject to a fine of not less than $1,250 nor more than $12,500 or to imprisonment for a period of not more than one year, or both, for each separate offense.

(b) Administrative penalties.–

(1) In addition to any other remedy available at law or equity, the department may assess an administrative penalty for a violation of this chapter. The penalty may be assessed whether or not the violation was willful or negligent. When determining the amount of the penalty, the department shall consider the willfulness of the violation, the damage or injury or threat of damage or injury to public health or the environment, the costs to the department for investigation and enforcement, the economic benefit of the violation to the person and other related factors. The department shall inform the person of the amount of the penalty. The administrative penalty shall not exceed $5,000 per day per violation.

(2) Every day a violation continues shall be a separate violation.

(3) The amount of the penalty assessed after a hearing before the Environmental Hearing Board or after waiver of the right to appeal the assessment shall be payable to the Commonwealth and collectable in any manner provided at law for collection of debts. If any person liable to pay any such penalty neglects or refuses to pay the penalty after demand, the amount of the penalty, together with interest and cost that may accrue, shall constitute a judgment in favor of the department upon the property of such person from the date it has been entered and docketed of record by the prothonotary of the county in which the property is situated. The department may at any time transmit to the prothonotaries of any county in which the person holds property certified copies of all such judgments, and it shall be the duty of each prothonotary to enter and docket the judgment of record in his or her office and to index the judgment as judgments are indexed, without requiring the payment of costs by the department.

(c) Concurrent penalties.–Penalties and other remedies under this chapter shall be concurrent and shall not prevent the department from exercising any other available remedy at law or equity.

(d) Rebuttable presumption.–Failure of an environmental laboratory or laboratory supervisor to maintain adequate records or proficiency test samples as required creates a rebuttable presumption that the test or analysis was not conducted as required.

(e) Falsifying results.–It shall be unlawful to falsify the results of testing or analysis of environmental samples or to violate the provisions of 18 Pa.C.S. § 4903 (relating to false swearing) or 4904 (relating to unsworn falsification to authorities) in the context of the submission of the results of testing and analysis of environmental samples under an environmental statute.

§ 4111. Records.

Records required under this chapter shall be maintained for five years unless otherwise specified in regulation.

§ 4112. Whistleblower protection.

An employee of an environmental laboratory covered by this chapter shall be deemed to be an employee under the act of December 12, 1986 (P.L.1559, No.169), known as the Whistleblower Law, in regard to good faith reports of potential violations of this chapter. Environmental laboratories covered by this chapter shall be deemed to be an employer under the Whistleblower Law in regard to good faith reports of potential violations of this chapter.

§ 4113. Continuation of existing rules and regulations.

All existing rules and regulations promulgated pursuant to any environmental statute remain in full force and effect until superseded and repealed by the rules and regulations promulgated pursuant to this chapter.

Section 2. The act of April 2, 2002 (P.L.225, No.25), known as the Environmental Laboratory Accreditation Act, is repealed.

Section 3. The addition of 27 Pa.C.S. Ch. 41 is a continuation of the act of April 2, 2002 (P.L.225, No.25), known as the Environmental Laboratory Accreditation Act. The following apply:

(1) All actions taken under the Environmental Laboratory Accreditation Act are valid under 27 Pa.C.S. Ch. 41.

(2) Orders and determinations, which were made under the Environmental Laboratory Accreditation Act and which are in effect on the effective date of section 2 of this act shall remain valid until vacated or modified under 27 Pa.C.S. Ch.41.

(3) Regulations which were promulgated under the Environmental Laboratory Accreditation Act and which are in effect on the effective date of section 2 of this act shall remain valid until amended under 27 Pa.C.S. Ch. 41.

(4) Except as set forth in paragraph (5), any difference in language between 27 Pa.C.S. Ch. 41 and the Environmental Laboratory Accreditation Act is intended only to conform to the style of the Pennsylvania Consolidated Statutes and is not intended to change or affect the legislative intent, judicial construction or administration and implementation of the Environmental Laboratory

Accreditation Act.

(5) Paragraph (4) does not apply to the following provisions:: (i) : (ii)

Section 4. This act shall take effect immediately.

On the question,

Will the Senate agree to the amendment?

It was agreed to.

Without objection, the bill, as amended, was passed over in its order at the request of Senator BRIGHTBILL.

HB 2322 CALLED UP

HB 2322 (Pr. No. 4093) -- Without objection, the bill, which previously went over in its order temporarily, was called up, from page 7 of the Third Consideration Calendar, by Senator BRIGHTBILL.

BILL OVER IN ORDER

HB 2322 -- Without objection, the bill was passed over in its order at the request of Senator BRIGHTBILL.

SPECIAL ORDER OF BUSINESS SUPPLEMENTAL CALENDAR No. 7

BILL ON THIRD CONSIDERATION AND FINAL PASSAGE

HB 590 (Pr. No. 4134) -- The Senate proceeded to consideration of the bill, entitled:

An Act amending the act of August 5, 1941 (P.L.752, No.286), known as the Civil Service Act, further providing for the commissioner's salary and meeting times; providing for delegation of authority to the director; further providing for residency and for recordkeeping requirements; eliminating the certification of payrolls; requiring the commissioners to submit an annual report; revising the records retention period; deleting citizenship and oath requirements; further providing for the filling of vacancies; requiring citizenship to be the deciding factor in a case of equal qualifications; eliminating certain requirements for promotion without examination; further providing for the distribution of public notice of examinations and requirements for maintaining eligibility lists and for the procedure for certain eligibles who waive consideration for a promotion, for procedures for filling a position, for the requirements of the probationary period; providing for the expansion of the authority of the director to approve temporary assignments; eliminating certain performance standards; requiring probationary performance evaluations and evaluation forms; further providing for a period of removal from eligibility lists; authorizing the commissioner to impose penalties; and providing copies and notices to the director.

Considered the third time and agreed to,

And the amendments made thereto having been printed as required by the Constitution,

On the question,

Shall the bill pass finally?

The yeas and nays were taken agreeably to the provisions of the Constitution and were as follows, viz:

YEA-50

Armstrong	Greenleaf	Mowery	Tartaglione
Bell	Helfrick	Murphy	Thompson
Bodack	Holl	Musto	Tomlinson
Boscola	Hughes	O'Pake	Wagner
Brightbill	Jubelirer	Orie	Waugh
Conti	Kasunic	Piccola	Wenger
Corman	Kitchen	Punt	White, Donald
Costa	Kukovich	Rhoades	White, Mary Jo
Dent	LaValle	Robbins	Williams, Anthony H.
Earll	Lemmond	Scarnati	Williams, Constance
Erickson	Logan	Schwartz	Wozniak
Fumo	Madigan	Stack	
Gerlach	Mellow	Stout	

NAY-0

A constitutional majority of all the Senators having voted "aye," the question was determined in the affirmative.

Ordered, That the Secretary of the Senate return said bill to the House of Representatives with information that the Senate has passed the same with amendments in which concurrence of the House is requested.

UNFINISHED BUSINESS CONGRATULATORY RESOLUTIONS

The PRESIDENT laid before the Senate the following resolutions, which were read, considered, and adopted by voice vote:

Congratulations of the Senate were extended to Bushkill Park of Forks Township and to the Nazareth Rotary Club by Senator Boscola.

Congratulations of the Senate were extended to William David Sands, Sr., and to Gerald Balchis by Senator Conti.

Congratulations of the Senate were extended to Ernest Kaiser by Senator Dent.

Congratulations of the Senate were extended to Mr. and Mrs. Myron Howanec by Senator Helfrick.

Congratulations of the Senate were extended to Kennametal, Inc., of Bedford, by Senator Jubelirer.

Congratulations of the Senate were extended to Dr. Kenneth Quickel and to Florence M. Rice by Senator Mowery.

Congratulations of the Senate were extended to the Moon Area Boys' Varsity Baseball Team by Senator Murphy.

Congratulations of the Senate were extended to Mr. and Mrs. Harry J. Brunner, Mr. and Mrs. Ralph Sloan, Leslie Pinkerton and to Elizabeth Graf by Senator Orie.

Congratulations of the Senate were extended to South Franklin Township Volunteer Fire Department by Senator Stout.

Congratulations of the Senate were extended to Mr. and Mrs. Tom Lee by Senator D. White.

Congratulations of the Senate were extended to Mr. and Mrs. Anthony Cherico by Senator M.J. White.

Congratulations of the Senate were extended to Sidney Ginsburg by Senator C. Williams.

SENATE RESOLUTION ADOPTED

Senators MELLOW, WAGNER, O'PAKE, FUMO, MUSTO, STOUT, KASUNIC, BODACK, BOSCOLA, COSTA, HUGHES, KITCHEN, KUKOVICH, LAVALLE, LOGAN,

SCHWARTZ, STACK, TARTAGLIONE, A. WILLIAMS, C. WILLIAMS, WOZNIAK, GERLACH, BELL, DENT, ROBBINS, PICCOLA, RHOADES, THOMPSON, HELFRICK, GREENLEAF, ARMSTRONG, WAUGH, MURPHY, TOMLINSON, ERICKSON, SCARNATI, EARLL, BRIGHTBILL, LEMMOND, JUBELIRER, PUNT, HOLL, ORIE, MOWERY, WENGER, MADIGAN, CONTI, M. WHITE, CORMAN and D. WHITE, by unanimous consent, offered **Senate Resolution No. 262**, entitled:

A Resolution encouraging citizens of this Commonwealth to light candles on September 11, 2002, at the time of the first attack on September 11, 2001.

On the question,
Will the Senate adopt the resolution?

The PRESIDENT. The Chair recognizes the gentleman from Allegheny, Senator Wagner.

Senator WAGNER. Mr. President, the resolution in front of us is a resolution that may not seem timely, but it is because at the end of this week we will not reconvene until sometime in mid-September. And as all of us know, a very important day in American history, September 11, 2002, will occur prior to this Senate formally reconvening in these Chambers. The purpose of the resolution is to identify that day in American history and to ask Pennsylvanians to devote very special attention to that day, and in the process, to light a candle for freedom.

Mr. President, as many people in this Chamber and in this building know, today, Wednesday, we had in the rear of the Capitol a caravan that is crossing America. That caravan had a portion of the World Trade Center, a piece of the steel of the World Trade Center that was part of that caravan. In addition, there was a fire truck, a demolished fire truck from the community of Queens in New York City. For anyone who witnessed that caravan today, it was extremely emotional.

This resolution reminds us of a very important day that will be coming forth on September 11, 2002, and we are going to be asking each and every Pennsylvanian to light a candle for freedom on the morning of that day.

Thank you very much.

And the question recurring,
Will the Senate adopt the resolution?

A voice vote having been taken, the question was determined in the affirmative.

HOUSE MESSAGES

SENATE BILL RETURNED WITH AMENDMENTS

The Clerk of the House of Representatives returned to the Senate **SB 589**, with the information the House has passed the same with amendments in which the concurrence of the Senate is requested.

The PRESIDENT. Pursuant to Senate Rule XIV, section 5, this bill will be referred to the Committee on Rules and Executive Nominations.

HOUSE CONCURS IN SENATE AMENDMENTS TO HOUSE AMENDMENTS TO SENATE BILLS

The Clerk of the House of Representatives informed the Senate that the House has concurred in amendments made by the Senate to House amendments to **SB 212, 820** and **955**.

HOUSE CONCURS IN SENATE BILLS

The Clerk of the House of Representatives returned to the Senate **SB 1417** and **1429**, with the information the House has passed the same without amendments.

HOUSE CONCURS IN SENATE AMENDMENTS TO HOUSE BILLS

The Clerk of the House of Representatives informed the Senate that the House has concurred in amendments made by the Senate to **HB 751** and **2530**.

BILLS SIGNED

The PRESIDENT (Lieutenant Governor Robert C. Jubelirer) in the presence of the Senate signed the following bills:

SB 33, SB 212, SB 380, SB 820, SB 955, SB 1109, SB 1417, SB 1429, HB 751 and **HB 2530**.

ANNOUNCEMENTS BY THE SECRETARY

The following announcements were read by the Secretary of the Senate:

SENATE OF PENNSYLVANIA

COMMITTEE MEETINGS

WEDNESDAY, JUNE 26, 2002

1:30 P.M.	APPROPRIATIONS (to consider House Bills No. 2100 and 2126)	Room 461 Main Capitol
1:45 P.M.	RULES AND EXECUTIVE NOMINATIONS (to consider Senate Bills No. 974 and 1366; and certain executive nominations)	Rules Cmte. Conf. Rm.

THURSDAY, JUNE 27, 2002

11:00 A.M.	COMMUNICATIONS AND HIGH TECHNOLOGY (to consider Senate Bill No. 1403)	Room 461 Main Capitol
1:30 P.M.	APPROPRIATIONS (to consider Senate Bill No. 1486; and House Bills No. 767, 900, 927, 928, 1952 and 1995)	Room 461 Main Capitol
1:45 P.M.	RULES AND EXECUTIVE NOMINATIONS (to consider Senate Bills No. 589, 630 and 1045; House Bill No. 599; and certain executive nominations)	Rules Cmte. Conf. Rm.

The PRESIDING OFFICER (Senator Noah W. Wenger) in the Chair.

The PRESIDING OFFICER. The Senate will come to order.

SPECIAL ORDER OF BUSINESS SUPPLEMENTAL CALENDAR No. 9

BILL REREPORTED FROM COMMITTEE AS AMENDED ON THIRD CONSIDERATION AND FINAL PASSAGE

HB 1501 (Pr. No. 4136) -- The Senate proceeded to consideration of the bill, entitled:

An Act amending Titles 18 (Crimes and Offenses) and 53 (Municipalities) of the Pennsylvania Consolidated Statutes, further providing for sale of tobacco; defining "bidis" or "beedies"; prohibiting the sale of bidis; and providing for placement of tobacco vending machines and for preemption.

Considered the third time and agreed to,
And the amendments made thereto having been printed as required by the Constitution,

On the question,
Shall the bill pass finally?

The yeas and nays were taken agreeably to the provisions of the Constitution and were as follows, viz:

YEA-45

Armstrong	Helfrick	Murphy	Thompson
Boscola	Holl	Musto	Tomlinson
Brightbill	Hughes	O'Pake	Wagner
Conti	Jubelirer	Orie	Waugh
Corman	Kasunic	Piccola	Wenger
Costa	Kitchen	Punt	White, Donald
Dent	LaValle	Rhoades	White, Mary Jo
Earll	Lemmond	Robbins	Williams, Anthony H.
Erickson	Logan	Scarnati	Wozniak
Fumo	Madigan	Stack	
Gerlach	Mellow	Stout	
Greenleaf	Mowery	Tartaglione	

NAY-5

Bell	Kukovich	Williams, Constance
Bodack	Schwartz	

A constitutional majority of all the Senators having voted "aye," the question was determined in the affirmative.

Ordered, That the Secretary of the Senate return said bill to the House of Representatives with information that the Senate has passed the same with amendments in which concurrence of the House is requested.

SPECIAL ORDER OF BUSINESS SUPPLEMENTAL CALENDAR No. 8

BILL ON THIRD CONSIDERATION AND FINAL PASSAGE

HB 2044 (Pr. No. 4135) -- The Senate proceeded to consideration of the bill, entitled:

An Act amending Title 27 (Environmental Resources) of the Pennsylvania Consolidated Statutes, consolidating the Environmental Laboratory Accreditation Act; and making repeals.

Considered the third time and agreed to,
And the amendments made thereto having been printed as required by the Constitution,

On the question,
Shall the bill pass finally?

The yeas and nays were taken agreeably to the provisions of the Constitution and were as follows, viz:

YEA-50

Armstrong	Greenleaf	Mowery	Tartaglione
Bell	Helfrick	Murphy	Thompson
Bodack	Holl	Musto	Tomlinson
Boscola	Hughes	O'Pake	Wagner
Brightbill	Jubelirer	Orie	Waugh
Conti	Kasunic	Piccola	Wenger
Corman	Kitchen	Punt	White, Donald
Costa	Kukovich	Rhoades	White, Mary Jo
Dent	LaValle	Robbins	Williams, Anthony H.
Earll	Lemmond	Scarnati	Williams, Constance
Erickson	Logan	Schwartz	Wozniak
Fumo	Madigan	Stack	
Gerlach	Mellow	Stout	

NAY-0

A constitutional majority of all the Senators having voted "aye," the question was determined in the affirmative.

Ordered, That the Secretary of the Senate return said bill to the House of Representatives with information that the Senate has passed the same with amendments in which concurrence of the House is requested.

RECONSIDERATION OF HB 1501

The PRESIDING OFFICER. The Chair recognizes the gentleman from Allegheny, Senator Wagner.

Senator WAGNER. Mr. President, I move that we reconsider the vote by which House Bill No. 1501 passed finally.

On the question,
Will the Senate agree to the motion?

A voice vote having been taken, the question was determined in the affirmative.

And the question recurring,
Shall the bill pass finally?

The yeas and nays were taken agreeably to the provisions of the Constitution and were as follows, viz:

YEA-44

Armstrong	Greenleaf	Mowery	Stout
Boscola	Helfrick	Murphy	Tartaglione
Brightbill	Holl	Musto	Thompson
Conti	Jubelirer	O'Pake	Tomlinson

Corman	Kasunic	Orie	Wagner
Costa	Kitchen	Piccola	Waugh
Dent	LaValle	Punt	Wenger
Earll	Lemmond	Rhoades	White, Donald
Erickson	Logan	Robbins	White, Mary Jo
Fumo	Madigan	Scarnati	Williams, Anthony H.
Gerlach	Mellow	Stack	Wozniak

NAY-6

Bell	Hughes	Schwartz
Bodack	Kukovich	Williams, Constance

A constitutional majority of all the Senators having voted "aye," the question was determined in the affirmative.

Ordered, That the Secretary of the Senate return said bill to the House of Representatives with information that the Senate has passed the same with amendments in which concurrence of the House is requested.

ADJOURNMENT

The PRESIDING OFFICER. The Chair recognizes the gentleman from Lebanon, Senator Brightbill.

Senator BRIGHTBILL. Mr. President, I move that the Senate do now adjourn until Thursday, June 27, 2002, at 2 p.m., Eastern Daylight Saving Time.

The motion was agreed to by voice vote.

The Senate adjourned at 10:19 p.m., Eastern Daylight Saving Time.

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-3519

CIGAR ASSOCIATION OF AMERICA, INC.; ITG CIGARS, INC.; SWEDISH MATCH NORTH AMERICA, LLC; SWISHER INTERNATIONAL, INC.,

Plaintiff-Appellees,

V.

CITY OF PHILADELPHIA; COMMISSIONER PHILADELPHIA DEPARTMENT OF PUBLIC HEALTH

Defendant-Appellants.

APPENDIX VOLUME 1 (pp. 1-20)

Appeal of the November 13, 2020 Order granting Plaintiffs' Motion for a Preliminary Injunction, issued by the United States District Court for the Eastern District of Pennsylvania, the Honorable Gene E. K. Pratter, at No. 20-cv-03220.

CITY OF PHILADELPHIA LAW DEPARTMENT
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Dated: February 24, 2021

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIGAR ASSOCIATION OF AMERICA, INC., ITG CIGARS, INC. AND SWEDISH MATCH NORTH AMERICA, LLC, **Plaintiffs,** **V.** **CITY OF PHILADELPHIA AND THOMAS FARLEY** **Defendants.**	**CIVIL ACTION** **Case Number** **2:20-cv-03220-GEKP**

NOTICE OF APPEAL

Notice is hereby given that Defendants, the City of Philadelphia and Thomas Farley, appeal from the November 13, 2020 Order and Opinion enter by the Honorable Gene E.K. Pratter, United States District Court for the Eastern District of Pennsylvania, granting Plaintiffs' Motion for a Preliminary Injunction and enjoining enforcement of Philadelphia Ordinance No. 180457. See 28 U.S.C. § 1292(a)(1) (providing for interlocutory appeal of order granting injunction).

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Dated: December 11, 2020

CERTIFICATE OF SERVICE

I, Danielle Walsh, hereby certify that I caused to be served today one copy of the foregoing **Notice of Appeal** upon the persons and in the manner indicated below:

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Dated: December 11, 2020

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIGAR ASSOCIATION OF AMERICA *et al.*,	:	**CIVIL ACTION**
Plaintiffs	:	
	:	
v.	:	
	:	
CITY OF PHILADELPHIA *et al.*,	:	**No. 20-3220**
Defendants	:	

ORDER

AND NOW, this 13th day of November, 2020, it is **ORDERED** that Plaintiffs' Motion for a Preliminary Injunction (Doc. No. 1-2) is **GRANTED** for the reasons set forth in the accompanying Memorandum. Defendants and their directors, officers, agents, servants, employees, attorneys, and all other persons or entities in active concert or participation with them are enjoined from enforcing Ordinance 180457.[1]

BY THE COURT:

GENE E.K. PRATTER
UNITED STATES DISTRICT JUDGE

[1] *See* Fed. R. Civ. P. 65(d)(2).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIGAR ASSOCIATION OF AMERICA *et al.*,	:	**CIVIL ACTION**
Plaintiffs	:	
	:	
v.	:	
	:	
CITY OF PHILADELPHIA *et al.*,	:	**No. 20-3220**
Defendants	:	

MEMORANDUM

PRATTER, J. NOVEMBER 13, 2020

Plaintiffs in this case seek a preliminary injunction against the City of Philadelphia, enjoining it from enforcing Ordinance 180457. The Ordinance prohibits all sale of flavored tobacco products, with minor exceptions. Plaintiffs argue that the Ordinance is preempted by Pennsylvania law. The Court agrees. Youth access to tobacco is indeed a matter of grave concern. But the General Assembly already considered this, weighed the options, and chose the course it would chart for the Commonwealth of Pennsylvania. It also chose to preempt municipalities from making a detour. The Court and the City of Philadelphia are therefore bound to stay on the path set by the General Assembly.

Because Plaintiffs have demonstrated a likelihood of success on the merits, would be irreparably harmed absent an injunction, and because the balance of the equities and the public interest weigh in favor of an injunction, the Court grants Plaintiffs' motion for a preliminary injunction.

I. Background

This case concerns a preliminary injunction against the City of Philadelphia from enforcing Ordinance 180457. One of the Ordinance's stated purposes is to reduce the consumption of tobacco products by minors. Pennsylvania law already prohibits the sale of tobacco to minors. But the City concluded that existing measures were somehow insufficient, citing a variety of statistics. The City observed a sharp increase in the use of flavored tobacco products. According to the City, 81% of youth who have used tobacco report starting with a flavored tobacco product. This problem is even more marked in low-income and minority neighborhoods. 29% of Philadelphians at or below the poverty line smoke, compared to 19% of those living above the poverty line. 23% of African Americans in Philadelphia smoke, compared with 17% of white residents.

The City passed the Ordinance to combat these threats to the public health. The Ordinance prohibits the sale of tobacco products with "characterizing flavors," which is defined as any "taste or aroma[] other than the taste or aroma of tobacco." The Ordinance includes a narrow exception for "Tobacco Products Distribution Businesses," defined as businesses that derive 90% or more of their sales from tobacco products and do not sell food.

Plaintiffs, a group of cigar manufacturers, importers, and distributers, filed a complaint in the Philadelphia Court of Common Pleas seeking declaratory and injunctive relief, as well as money damages. The City chose to remove the complaint to the Eastern District of Pennsylvania. Plaintiffs then moved this Court for a preliminary injunction.

Plaintiffs originally argued that the Ordinance violates Plaintiffs' right to substantive due process, that the Ordinance was unconstitutionally vague, and that the Ordinance was preempted.

Plaintiffs have since dropped their federal constitutional claims for purposes of this preliminary injunction, and rely only on their preemption arguments.

II. Discussion

Preliminary injunctions are an equitable remedy, the granting of which "rests in the sound judicial discretion of the trial court." *Calabrese v. Local 69 of United Ass'n of Journeymen & Apprentices of Plumbing & Pipe Fitting Indus. of U. S. & Can.*, 312 F.2d 256, 256 (3d Cir. 1963) (quoting *Joseph Bancroft & Sons Co. v. Shelley Knitting Mills, Inc.*, 268 F.2d 569, 573 (3d Cir. 1959)). A preliminary injunction is an "extraordinary remedy" that never issues as of right. *Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004). Rather, the party seeking the injunction must demonstrate that they meet the familiar four-factor test: "(1) a likelihood of success on the merits; (2) that it will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief." *Id.* The Court considers each of these factors in turn.

A. Likelihood of Success on the Merits

Plaintiffs argue that two Pennsylvania statutes preempt the Ordinance: 53 Pa. C.S. § 301 ("§ 301") and Act No. 2018-42, Section 232-A ("Act 42"), codified at 72 P.S. § 232-A. The Court will first consider § 301 preemption.

Section 301 expressly preempts "any local ordinance or rule concerning the subject matter of 18 Pa.C.S. § 6305." Section 6305, in turn, contains five prohibitions which all relate to tobacco: (1) "sell[ing] a tobacco product to any minor;" (2) "furnish[ing], by purchase, gift or other means, a tobacco product to a minor;" (3) "locat[ing] or plac[ing] a vending machine containing a tobacco product in a location accessible to minors;" (4) "display[ing] or offer[ing] a cigarette for sale out of a pack of cigarettes;" or (5) "display[ing] or offer[ing] for sale tobacco products in any manner

which enables [a customer] . . . to physically handle tobacco products prior to purchase unless the tobacco products are located within the line of sight or under the control of a cashier or other employee during business hours, except[ing] . . . retail stores which derive 75% or more of sales revenues from tobacco products." 18 Pa. C.S. § 6305.

To determine whether § 301 preempts the Ordinance, the Court must answer two questions. First, what is the "subject matter" of § 6305? Second, does the Ordinance "*concern* [this] subject matter"? Because § 6305's subject matter is "youth access to tobacco," and the Ordinance concerns youth access to tobacco, Plaintiffs have demonstrated a likelihood of success on the merits of § 301.

i. Section 6305's Subject Matter

The parties disagree about what § 6305's subject matter is. Pointing to § 6305's repeated reference to minors, Plaintiffs argue that its subject is "youth access to tobacco." The City responds that its subject matter is just the five narrow areas it expressly regulates, namely, selling tobacco to a minor, giving tobacco to a minor, selling tobacco in vending machines accessible to minors, selling loose cigarettes, and allowing customers to handle tobacco before purchase.

But this substantive discussion is preceded by a disagreement regarding the appropriate amount of deference owed to the City. The City argues that "caselaw demands that the Court construe any ambiguities in favor of municipal power and against preemption, thus calling for the narrowest reading of preemption that the statutory language allows." (Doc. No. 9 at 43.) This is incorrect. The City confuses the standards for implied preemption and express preemption.

In implied preemption cases, courts resolve all "ambiguities regarding [local] authority [] in favor of the municipality." *Nutter v. Dougherty*, 938 A.2d 401, 414 (Pa. 2007). For a court to find implied preemption, "the General Assembly must clearly evidence its intent to preempt."

Hoffman Min. Co., Inc. v. Zoning Hearing Bd. of Adams Twp., Cambria Cty., 32 A.3d 587, 593 (Pa. 2011).

But this is an express preemption case, because the General Assembly *has* "clearly evidence[d] its intent to preempt." *Hoffman*, 32 A.2d at 593. The only question here is the scope of preemption. *See JoJo Oil Co. v. Dingman Twp. Zoning Hearing Bd.*, 77 A.3d 679, 690 (Pa. Commw. Ct. 2013) ("When examining an express preemption clause, the task of statutory construction must in the first instance focus on the plain wording of the express preemption clause, which necessarily contains the best evidence of the legislature's preemptive intent."). In determining the scope of preemption, the Court must examine the range of plausible interpretations and choose the one that is most probable, not the reading most favorable to the municipality that just crosses the threshold of plausibility.[1]

The best reading of the statute is the one urged by the Plaintiffs. The Court cannot credit the City's argument that the "subject matter" of § 6305 is only the five narrow areas directly regulated by the statute. The word "subject" signals a higher level of abstraction than the thing it is a subject of. For example, addition and subtraction would be said to fall under the general subject of "mathematics." "The Old Man and the Sea" by Ernest Hemmingway and "The Martian" by Andy Weir take place on different planets, but both could be said to share a subject: Humanity

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[1] None of the cases cited by the City contradict this view. The language the City quotes from *Hoffman* is in the context of a discussion of field preemption. *See* 32 A.3d at 593 ("However, the mere fact that the General Assembly has enacted legislation in a field does not lead to the presumption that the state has precluded all local enactments in that field; rather, the General Assembly must clearly evidence its intent to preempt."). While *Hoffman* did separately consider express preemption, at that stage the court simply looked to the plain meaning of the preemption provision, and never suggested that it was construing the statute any more broadly or narrowly than the plain meaning required. *See id.* at 600-01. *Nutter* did not consider express preemption at all, only field and conflict preemption. *See Nutter* at 411 ("Appellants . . . do not suggest that the General Assembly expressly signaled its preemptive intent . . . ."). And *Delaware County* never mentioned preemption, but instead considered the scope of a municipality's powers under the Home Rule Charter. *See Delaware Cty. v. Middletown Twp.*, 511 A.2d 811, 813-14 (Pa. 1986).

vs. Nature. Dictionary definitions confirm the view that the word "subject" has a connotation closer to "theme" than "content." *See* Subject, Shorter Oxford English Dictionary (6th ed. 2007) ("The matter or theme dealt with by an art or science; . . . The theme of a literary composition."); Subject, Black's Law Dictionary (11th ed. 2019) ("The matter of concern over which something is created . . . Also termed . . . *subject matter*." (emphasis in original)).

But these definitions give, at best, vague guidance for *how* to sift the various subsections of a statute to discern its subject. The Court is guided by the venerated canon that "similar statutes are to be construed similarly (also known by its Latin label of *in pari materia*)." *Lafferty v. St. Riel*, 495 F.3d 72, 82 (3d Cir. 2007).

A similar Pennsylvania statute including the phrase "concerning the subject matter of" was interpreted in the case of *Mitchell's Bar*, and its analysis is instructive. *See Mitchell's Bar & Rest., Inc. v. Allegheny Cty.*, 924 A.2d 730, 737 (Pa. Commw. Ct. 2007). In that case, the General Assembly had considered how to address the dangers of indoor smoking, and chose to address it by passing a statute (§ 10.1) which required some restaurants to create smoking and non-smoking areas. In circumstances somewhat analogous to this case, Allegheny County found that solution incomplete, and completely banned indoor smoking in any place open to the general public, including restaurants. *Id.* at 734-35. The plaintiffs in that case argued that the ban was invalid because the General Assembly had passed statute preempting "any local ordinance or rule concerning the subject matter of section[] . . . 10.1 of this act." *Id.* at 737 (quoting 35 Pa. C.S. § 1235.1(a) (repealed 2008)). That court faced the same dilemma at issue here: how to define § 10.1's subject matter.

The *Mitchell's Bar* court derived § 10.1's subject by looking to its title, purpose, and text. Section 10.1 was titled the "Clean Indoor Air Act," and it included an announcement of its purpose

in the text of the statute itself. That stated purpose was "to protect the public health and to provide for the comfort of all parties by regulating and controlling smoking in certain public places and at public meetings and in certain workplaces." *Id.* at 733 (quoting 35 P.S. § 1230.1(a)). Section 10.1 accomplished this purpose by requiring restaurants with more than 75 seats to create smoking and nonsmoking areas and to take steps to prevent smoking in the nonsmoking areas. *Id.* It required restaurants with fewer than 75 seats to either do the same, or post notice that it had no nonsmoking space. *Id.* It also created a $50.00 fine for each violation. 35 P.S. § 1235.1(h).

Having examined § 10.1's text, title, and purpose, the court concluded that § 10.1's subject matter was "indoor smoking in restaurants." *Mitchell's Bar*, 924 A.2d at 737. The court did not detail how it reached this conclusion. But what is most useful here is to note what the court did *not* do. It did not state that § 10.1's subject matter was "requiring restaurants with more than 75 seats to create nonsmoking areas," "requiring restaurants with fewer than 75 seats to either create nonsmoking areas or post a notice," and "punishing violators with a $50.00 fine." Rather, it defined the subject matter at a high enough level of generality to succinctly communicate its essence, but also a low enough level of generality to remain tethered to the specific provisions of each subsection. Said another way, the court considered the statute's "subject matter" to be the thematic thread that bound each element of the statute together. *See also Consolidated Rail Corp. v. Penn. Pub. Utility Comm'n*, 536 F. Supp. 653, 657-58 (E.D. Pa. 1982) (federal rule regulating speed recorders had a subject matter of "speed control"). The Court will seek to do the same with § 6305.

But before construing § 6305's subject matter, the Court notes that where the General Assembly expressly intends to preempt local action on only the exact, limited matters contained in a statute, it has used very different language than the language present in § 301 or the statute in

Mitchell's Bar. Instead, the General Assembly has accomplished this task by passing a statute that preempts only "regulations, codes, statutes, or ordinances" that "regard[] the matters expressly set forth in this act." 72 P.S. § 2306. Thus, had the General Assembly wished to preempt only the five narrow areas in § 6305, it could and presumably would have used similar language. Courts often reject an interpretation of a statute where the legislature has elsewhere used different language to reach that result. *See Admiral Ins. Co. v. L'Union des Assurances de Paris Incendie* Accidents, 758 F. Supp. 293, 295 (E.D. Pa. 1991) (rejecting an interpretation where the legislature "knows how to say" that concept by using different language); *Germantown Cab Co. v. Phila. Parking Auth.*, 36 A.3d 105, 114 (Pa. 2012) (same). The General Assembly knows how to preempt only the areas expressly covered in another section, but chose not to do that in § 301.

The Court will adopt the approach used in *Mitchell's Bar* and will construe § 6305's subject matter by looking to its text and, to a lesser extent, its title.[2] Even a cursory review of the text of § 6305 shows that the common thread that binds the statute together is preventing youth access to tobacco. Section 6305(a) creates five separate offenses. Three out of the five mention minors explicitly. *See* 18 Pa. C.S. § 6305(a)(1-2), (4). The fourth prevents customers from holding tobacco products prior to purchase, with some exceptions. *Id.* § 6305(a)(6). This provision plainly serves to reinforce the other provisions by making shoplifting tobacco products by minors more difficult. The City has articulated no other function for § 6305(a)(6), and the Court can envision none.[3] The fifth, which bans the sale of loose cigars, is admittedly more difficult to classify. *See* § 6305(a)(5). While this subsection does not mention minors, the City has previously taken the

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[2] Unlike the statute in *Mitchell's Bar*, § 6305 contains no express provision summarizing its purpose, so the Court must derive its subject matter from the text and title of the statute.

[3] After all, § 6305(a)(6) could not be said to intend to prevent shoplifting generally, as retail stores have every incentive to do that on their own.

position that a ban on loose cigars was aimed at preventing the sale of tobacco products to minors. *See* Brief for Appellants at 15, *Holt's Cigar Co. v. City of Phila.*, 10 A.3d 902 (Pa. 2011) (No. 149 EM 2010), 2009 WL 6498608 ("[T]he City passed the Ordinance [banning the sale of loose cigars] to prevent the sale of tobacco products to minors."). But even if subsection (a)(5) could not be said to have "youth access to tobacco" as its subject, that would not help the City's case here because the alternative would be construing § 6305's subject matter even more broadly to "tobacco use" or even "tobacco and illicit drug use." *See id.* This broad construction is of course reinforced by § 6305's title, which is "[s]ale of tobacco products." But because the majority of § 6305(a) focuses on sale of tobacco to youth specifically, the Court concludes that "youth access to tobacco" is a more accurate summation of the statute's subject matter. And ultimately, this decision is immaterial because the Ordinance would be preempted under either construction.

While both parties focus exclusively on subsection (a), that is only a small part of § 6305. The Court must look to the entirety of § 6305 to ascertain its subject. A complete examination of the provision confirms that its subject matter is "youth access to tobacco." Subsection (a.1) makes it a violation for minors to purchase or attempt to purchase tobacco, or to represent themselves as being eligible to purchase tobacco. Subsection (c) requires the government to notify a parent or guardian whose child has been charged with an offense, and to notify an employer that its employee sold tobacco products to a minor in the course of his or her employment. Subsection (f)(1)(i) creates an affirmative defense for retailers who, among other things, check for photo identification for persons who appear to be 25 years old or younger. Finally, subsection (g) allows the Department of Health to conduct compliance checks by hiring minors to attempt to buy tobacco

from retailers. In sum, § 6305 creates a comprehensive focused scheme, and its subsections work together to combat a common subject matter: youth access to tobacco.[4]

ii. Whether the Ordinance "concerns" youth access to tobacco

The City also argues that even if § 6305's subject is "youth access to tobacco," the Ordinance is not preempted because it regulates everyone's access to flavored tobacco, not just youth. While the City concedes that combatting youth access to tobacco was *one* of the purposes that motivated adoption of the Ordinance, it argues that what matters "is what the Ordinance *does*, not its purpose." (Doc. No. 9 at 46.)

To begin with, what in fact is at issue is neither what the Ordinance does nor its purpose. Section 301 asks a subtly different question: whether the Ordinance "*concern[s]* the subject matter of . . . § 6305." 53 Pa. C.S. § 301 (emphasis added). The Court has already discussed the fact that "subject matter" has a broad definition. So does the word "concern." *See* Concern, Oxford English Dictionary (3d ed. 2015) ("To refer or relate to; to be about."). Section 301 thus layers one broad term on top of another. As a result, for Plaintiffs to show that the Ordinance concerns the subject matter of § 6305, they need only show that it is about or relates to youth access to tobacco. *Cf. Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47-48 (1987) (statute expressly preempting state laws that "relate to" employee benefit plans "was given its broad common-sense meaning," meaning having a "connection with or reference to such a plan" (quoting *Metropolitan Life Ins. Co. v.*

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[4] Because the Court finds that that the plain language of § 301 and § 6305 resolve the matter, it is unnecessary to resort to legislative history to infer the legislature's intent. *See Allegheny Cty. Sportsmen's League v. Rendell*, 860 A.2d 10, 21 (Pa. 2004) (noting that if "the words of the statute are not explicit, the intention of the General Assembly may be ascertained by considering, among other matters: . . . [t]he contemporaneous legislative history" (quoting 1 Pa. C.S. § 1921(c)). And even if the Court wished to consult legislative history, that history suggests only that Senator Mowery wished to leave open regulation of tobacco advertising, which not consider today. *See* Legislative Journal (Senate), June 26, 2002, No. 48, at 2018. The Court will not abandon the best reading of a statute in the face legislative history that is ambiguous at best, and otherwise harmful to the City's position.

Massachusetts, 471 U.S. 724, 739 (1985)); *United Transp. Union v. Pa. Pub. Util. Comm'n*, 68 A.3d 1026, 1036-37 (Pa. Commw. Ct. 2013) (it was "not necessary for the federal regulation to be identical to the state law or order for preemption to apply" where statute preempted matters "relating to" the subject matter of another statute).

The City argues that the Ordinance does not concern youth access to tobacco because it bans the sale of flavored tobacco products to *anyone*. For purposes of this argument, the Court assumes that the City is correct in labeling the Ordinance's subject as the sale of tobacco generally, not sale of tobacco to minors. But even granting this, the Ordinance is preempted. The City admits that the Ordinance directly regulates youth access to tobacco. Just because it also regulates adult access to tobacco does not save it from preemption in this instance.

Anticipating this problem, the City pushes back by invoking the straw man of the "illogical conclusion that the City can properly ban the sale of flavored tobacco to adults but must allow the sale of flavored products to children." (Doc. No. 9 at 46.) The Court leaves to one side the question of whether the General Assembly could ever pass a statute banning the sale of flavored tobacco to adults while leaving it freely available to children, and whether this hypothetical statute would have a sufficient rational basis to withstand judicial scrutiny. It is not illogical to conclude that a statute precluding ordinances concerning youth access to tobacco would preclude a statute that covers this area and more. It *is* illogical to assume that an ordinance admittedly covering a preempted subject matter could avoid preemption merely because a municipality included some amount of non-preempted material as well. This approach would defang every express preemption statute. Unsurprisingly, the City cites no precedent for this position, and this Court has not found any.

Because the Ordinance concerns youth access to tobacco, it is preempted by § 301 and Plaintiffs have demonstrated a likelihood of success on the merits.[5]

B. Irreparable Harm

Preliminarily, the parties contest whether Pennsylvania or federal law governs the standard for evaluating irreparable harm. Under Pennsylvania law, there is "per se" irreparable harm if a preempted ordinance is enforced. Plaintiffs argue that, under this rule, a preliminary injunction would automatically issue if they can prove a likelihood of success on the merits. But this argument is incorrect, because the factors federal courts weigh in deciding whether to grant a preliminary injunction, including the irreparable harm factor, are governed by federal law. *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 799 (3d Cir. 1989) (even where "the right upon which [a] cause of action is based is state-created, Rule 65(a) of the Federal Rules of Civil Procedure contemplates a federal standard as governing requests addressed to federal courts for preliminary injunctions"). *See also Quaker Chem. Corp. v. Varga*, 509 F. Supp. 2d 469, 478 n.8 (E.D. Pa. 2007) (expressly refusing to apply Pennsylvania law of *per se* irreparable harm and finding that the question of irreparable harm was governed by federal law); *Viad Corp. v. Cordial*, 299 F. Supp. 2d 466, 481 (W.D. Pa. 2003) (noting that "federal law governs the standards for injunctive relief, including the irreparable harm requirement"). State law is only relevant to the prong addressing the likelihood of success on the merits.

The Court will rely on the federal irreparable harm standard. "The irreparable harm requirement is met if a plaintiff demonstrates a significant risk that he or she will experience harm that cannot adequately be compensated after the fact by monetary damages." *Adams v. Freedom*

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[5] Because Plaintiffs have prevailed under their § 301 argument, the Court does not address their alternate grounds for relief.

Forge Corp., 204 F.3d 475, 484-85 (3d Cir. 2000). As the City concedes, money damages against the City would not be available on Plaintiffs' preemption claims, because the City is entitled to immunity under the Eleventh Amendment. *See, e.g.*, *Temple Univ. v. White*, 941 F.2d 201, 214 (3d Cir. 1991). The City's primary response to this is that even if money damages would constitute irreparable harm, Plaintiffs' damages argument is too speculative. While this objection has some initial merit, the Court is not persuaded because Plaintiffs have introduced an expert whose report contains enough information to demonstrate that there is a "significant risk" that Plaintiffs will be harmed. *Adams*, 204 F.3d at 484.

In order to establish irreparable harm, Plaintiffs largely rely on the opinion of Dr. Peter Angelides, who holds a Doctorate of Philosophy in Economics from the University of Minnesota. Dr. Angelides also has a wealth of experience in preparing a variety of economic, fiscal, and market studies. Dr. Angelides's report seeks to determine how much tax revenue is implicated by the Ordinance at both the city and state levels. To accomplish this, Dr. Angelides first analyzed how many "Tobacco Products Distribution Businesses" there are at present. The Ordinance exempts these companies from the sales ban, and as a result Dr. Angelides assumes that tax revenues from these businesses would be unaffected. Second, Dr. Angelides calculated the reduction in state and city taxes by estimating the sales value of cigars that have not yet been listed by the City as unrestricted, and multiplying sales of those cigars by the applicable tax rates. Dr. Angelides concludes that the Ordinance will implicate nearly $70 million dollars of cigar sales annually, causing the City to lose $5.3 million dollars in tax revenues per year, while the state loses $4.2 million.

But the loss of tax revenues is irrelevant at this stage. Only damage to Plaintiffs matters for this prong. *See, e.g.*, *Cruz-Gonzalez on behalf of D.M.S.C. v. Kelly*, No. CV 16-5727, 2017

WL 3390234, at *6 (E.D. Pa. Aug. 7, 2017) ("[I]njunctive relief requires a showing of irreparable harm *to the movant* if the injunction is denied." (emphasis added)). Plaintiffs' best evidence of irreparable harm *to them*, then, is Dr. Angelides's calculation that the Ordinance would implicate $70 million dollars of cigar sales annually.

The City responds that this estimate is untrustworthy and speculative for several reasons. First, the City argues that Dr. Angelides assumes that the number of "tobacco distribution businesses" will remain constant. Second, Dr. Angelides assumes that many consumers of flavored tobacco will not simply use unflavored tobacco as a substitute. Third, Dr. Angelides assumes that customers will not leave the City of Philadelphia and purchase flavored cigars elsewhere. Fourth, Dr. Angelides assumes that the City's list of unrestricted cigars will not grow as companies like Swisher submit additional cigars for testing.

These objections to Dr. Angelides' report are powerful. Perhaps if this were a *Daubert* motion, the City's objections would carry the day. But at this stage, the Court concludes that Plaintiffs have done just enough to demonstrate irreparable injury absent preliminary injunctive relief. Dr. Angelides' report shows that approximately $70 million in cigar sales are implicated by the Ordinance. And while the exact *magnitude* of damage to Plaintiffs may be speculative, the *likelihood* of damage is not. Both parties concede that Plaintiffs will not be able to recover money damages against the City based on their preemption claims.[6] Thus, even if Plaintiffs sales decrease by an amount lower (even far lower) than estimated by Dr. Angelides, those damages will still constitute irreparable injury because of the City's Eleventh Amendment immunity. *See, e.g.*,

[6] At this stage, the Court does not consider the import of Plaintiffs' other claims under the United States Constitution. The City argues that damages are not irreparable because Plaintiffs may be able to recover damages on these other claims. But those claims are not at issue here, and the Court cannot assume that damages will be available for claims whose merits have not been tested or briefed.

Temple Univ., 941 F.2d at 214. Because the Court is convinced that Plaintiffs will suffer at least some harm that cannot be compensated through an award of money damages, Plaintiffs have satisfied this element.[7]

C. Balance of the Harms and the Public Interest

Finally, the balance of the equities and the public interest both weigh in favor of an injunction. "The comparison of harm to the Government as opposed to the harm to Petitioners turns most on matters of public interest because these considerations 'merge when the Government is the opposing party.'" *Marland v. Trump*, No. CV 20-4597, 2020 WL 6381397, at *13 (E.D. Pa. Oct. 30, 2020) (quoting *Hope v. Warden York Cty. Prison*, 972 F.3d 310, 332 (3d Cir. 2020)). Because the Government's interest is presumed to align with the public interest, the Court will focus its analysis on whether the public interest would be advanced by an injunction.

Weighing the Plaintiffs' interest in conducting their lawful business against the City's interest in combatting the negative health outcomes associated with smoking tobacco would be difficult indeed. Balancing incommensurable harms is always fraught, particularly in the posture at bar where the parties had only limited time to prepare testimony from appropriate experts.

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[7] Plaintiffs also rely on the declaration of Karen Saber, Vice President of Business Analytics and Strategic Sales Innovation at Plaintiff Swisher. Ms. Saber's declaration relies on Dr. Angelides' report, and further notes that potentially restricted cigars represent 59% of all Swisher Cigars sold in Philadelphia. Ms. Saber goes on to assert that the Ordinance will impair Swisher's goodwill and relationships with distributors and customers. Because Dr. Angelides' report creates a sufficient record for irreparable harm, it is unnecessary to discuss Ms. Saber's declaration at length. However, the Court notes that any probative value of the declaration is muted by the fact that it offers nothing more than Ms. Saber's *ipse dixit* that Swisher's business relationships would be harmed. Plaintiffs filed a belated "Supplemental Proposed Findings of Fact and Conclusions of Law" that, in part, attempted to rehabilitate Ms. Saber's declaration, stating that she is "well-qualified to offer her opinion testimony regarding the impact of the Ordinance." (Doc. No. 25 at 4.) But the Court puts little weight on Ms. Saber's declaration because she does not state *how* her qualifications lead her to believe that Swisher's business interests would be harmed by the Ordinance absent an injunction.

But such a balancing is unnecessary. "[T]he government 'cannot suffer harm from an injunction that merely ends an unlawful practice or reads a statute as required.'" *Marland*, 2020 WL 6381397, at *13 (alteration in original) (quoting *TikTok Inc. v. Trump*, No. 1:20-CV-02658 (CJN), 2020 WL 5763634, at *1 (D.D.C. Sept. 27, 2020)). Courts will not second-guess the legislature's determination that compliance with a valid statute is in the public interest.[8] This is especially true where, as here, a preliminary injunction would merely preserve the status quo. *See, e.g.*, *Kos Pharms., Inc.*, 369 F.3d at 708 ("[O]ne of the goals of the preliminary injunction analysis is to maintain the status quo, defined as the last, peaceable, noncontested status of the parties." (alteration in original) (quoting *Opticians Ass'n of Am. v. Indep. Opticians of Am.*, 920 F.2d 187, 197 (3d Cir. 1990)); *Pennsylvania v. DeJoy*, No. CV 20-4096, 2020 WL 5763553, at *40 (E.D. Pa. Sept. 28, 2020). The General Assembly has determined that it is in the public interest to preempt enactments like the Ordinance at issue in this case. This Court will not second-guess that judgment.

CONCLUSION

For the foregoing reasons, the Court grants Plaintiffs' motion for a preliminary injunction. An appropriate order follows.

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[8] In fact, many courts have concluded that likelihood of success on the merits also obviates the need to prove irreparable harm, not unlike Pennsylvania's "per se" irreparable harm rule. *See, e.g.*, *United States v. Ingersoll-Rand Co.*, 218 F. Supp. 530, 544-45 (W.D. Pa. 1963), *aff'd*, 320 F.2d 509 (3d Cir. 1963) ("The Congressional pronouncement in § 7 embodies the irreparable injury of violations of its provisions. No further showing need be made . . . ."); *Temple*, 941 F.2d at 231-14. But this rule has been called into question. *See Pa. Transp. Auth. v. Pa. Pub. Util. Comm'n*, 210 F. Supp. 2d 689, 726 (E.D. Pa. 2002), *aff'd sub nom. Nat'l R.R. Passenger Corp. v. Pennsylvania Pub. Util. Comm'n*, 342 F.3d 242 (3d Cir. 2003) ("[I]n light of conflicting authority as to the proper standard, the Court will proceed with the traditional irreparable harm analysis."); *NRDC v. Texaco Ref. & Mktg., Inc.*, 906 F.2d 934, 937 (3d Cir. 1990) (district court erroneously presumed irreparable harm based on violation of the Clean Air Act); *Freedom Holdings, Inc. v. Spitzer*, 447 F. Supp. 2d 230, 248 (S.D.N.Y. 2004), *aff'd*, 408 F.3d 112 (2d Cir. 2005) (applying the "normal principles of equity" to motion for a preliminary injunction for alleged violations of the Clayton Act). Because the Court has concluded that Plaintiffs have established irreparable harm, it is unnecessary to determine whether that rule applies here.

BY THE COURT:

20-3220

GENE E.K. PRATTER
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I, Kelly Diffily, hereby certify that I caused to be served a true and correct copies of the foregoing **Brief for Appellants and Appendix Volume 1** upon the person(s) and in the manner indicated below:

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Dated: February 24, 2021