

# State and Local Regulation of Tobacco Products—A Scattershot Approach: “Policy Lab” or Policy Gone Wrong?

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## ABSTRACT

In the United States, the tobacco industry, already one of the most heavily regulated industries in the world, is subject to a panoply of varied laws and regulations at state, county, and city levels relating to taxes, pricing, packaging, flavors, and licensing, among other requirements. These laws and regulations often (and appropriately) vary by product type but lack any measure of uniformity between jurisdictions. Despite increasing regulation of tobacco products at the federal level, there is still a challenging patchwork of inconsistent laws across state and local lines, making compliance an enormously challenging task. Such inconsistency also creates consumer confusion and enables economic gamesmanship based on geography. Although preemption clauses at the federal and state level were ostensibly adopted to address potential discrepancies, these clauses have failed to address these concerns. In this Article, we examine two specific areas of tobacco product regulation at the state and local level—cigar pack-size/pricing restrictions and flavor bans. We discuss the varying approaches taken by states and localities on these issues, sometimes resulting in the invalidation of ordinances by federal and state courts. Finally, the Article explores approaches to the regulation of tobacco products that would promote what should be an important aim of regulation—to allow responsible businesses selling a legal product to exist in the marketplace while continuing the effort to further reduce youth usage of all tobacco products.

## INTRODUCTION

State and local governments are often referred to as the “policy labs” of regulation, as they are places where new policies can be enacted with less pushback and proverbial “red tape” than at the federal level. With respect to the tobacco industry, the smallest towns and the largest states in the country act as these “policy labs” for a variety of tobacco laws—ranging from restrictions on the concentration of nicotine in a disposable cartridge for sale at retail, to how many feet must be between a tobacco advertisement on an outdoor billboard and a school.<sup>1</sup> These laws vary by town, county,

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<sup>1</sup> See, e.g., IND. CODE § 7.1-7-5-1.1(c) (2022) (restricting concentration of nicotine in e-liquids legal for retail sale); CAL. BUS. & PROF. CODE § 22961 (West 2022) (restricting advertising of tobacco products on outdoor billboards within 1,000 feet of schools or public playgrounds).

and state across the country—and by product category—with some jurisdictions having incredibly stringent restrictions, and others having none.

Perhaps more than in any other industry, tobacco products are subject to disparate state and local laws and regulations, which can have a strong impact on both industry and consumers. It was not until 2009, with passage of the Family Smoking Prevention and Tobacco Control Act (Tobacco Control Act or TCA), that a set of uniform federal restrictions were first imposed for a subset of products,<sup>2</sup> and not until 2016 that this extended to all tobacco products.<sup>3</sup> Due to this, the states and local jurisdictions had decades to act as “policy labs,” and much can be learned from their efforts. This Article explores those issues and is structured as follows:

- **First**, the Article discusses the impact of the TCA on state and local regulation of tobacco products and discusses the importance of preemption provisions in federal legislation of a mature industry.
- **Second**, the Article explores two case studies as prime examples of where state and local regulations have created a varied patchwork of laws posing significant compliance hurdles and legal concerns: 1) the regulation of cigar minimum pack sizes and pricing; and 2) regulations of characterizing flavors in tobacco products.
- **Third**, the Article identifies multiple other areas where tobacco products are disparately regulated at the state and local level.
- **Fourth**, the Article discusses the consequences that a patchwork of state and local laws and regulations can have on the tobacco industry and consumers.

#### A. *The TCA and Its Modified Preemption Provision*

On June 22, 2009, the TCA was signed into law.<sup>4</sup> Prior to that time, tobacco products were primarily regulated at the state and local level. Upon the passage of the TCA, cigarettes, smokeless tobacco, and roll-your-own tobacco were immediately subject to a myriad of federal restrictions. The TCA immediately subjected these product categories to various restrictions, including a ban on cigarettes with any characterizing artificial or natural flavors, herbs, or spices (with the exception of menthol or tobacco).<sup>5</sup> In addition, “new” tobacco products not commercially marketed as of February 15, 2007 became subject to extensive pre-market requirements.<sup>6</sup>

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<sup>2</sup> Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009) (codified at 21 U.S.C. § 301, et seq.) [hereinafter Tobacco Control Act].

<sup>3</sup> *Id.*; Deeming Tobacco Products to be Subject to the Federal Food, Drug, and Cosmetic Act, as Amended by the Family Smoking Prevention and Tobacco Control Act; Restrictions on the Sale and Distribution of Tobacco Products and Required Warning Statements for Tobacco Products, 81 Fed. Reg. 28,973 (May 10, 2016) (codified at 21 C.F.R. §§ 1100, 1140, 1143) [hereinafter Deeming Rule]. FDA sought to regulate the tobacco industry in 1996, but this effort was overturned by the Supreme Court upon finding that Congress had not, at the time, granted FDA such authority. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000); *see also* Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396 (Aug. 28, 1996) (codified at 21 C.F.R. Parts 801, 803, 804, 807, 820, 897).

<sup>4</sup> Tobacco Control Act, *supra* note 2.

<sup>5</sup> 21 U.S.C. § 387g(a)(1)(A).

<sup>6</sup> *Id.* § 387j(a)(1).

Beyond those specific products, the TCA gave the Food and Drug Administration (FDA) the authority to regulate “any other tobacco products that the Secretary by regulation deems to be subject to this Chapter.”<sup>7</sup>

On May 10, 2016, FDA exercised such authority when it published “Deeming Tobacco Products to be Subject to the Federal Food, Drug, and Cosmetic Act, as Amended by the Family Smoking Prevention and Tobacco Control Act; Restrictions on the Sale and Distribution of Tobacco Products and Required Warning Statements for Tobacco Products.”<sup>8</sup> Under the Deeming Rule, FDA deemed all tobacco products, as defined under the TCA,<sup>9</sup> as subject to the TCA.<sup>10</sup> This brought cigars, pipe tobacco, electronic nicotine delivery systems, and other classes of tobacco products under the auspices of the TCA.<sup>11</sup>

Therefore, as of 2016, the federal government had primary authority over the regulation of tobacco products throughout the country. The TCA, however, contains a fairly limited preemption provision, which preserves the authority of states and localities to enact laws and regulations pertaining to tobacco products that are in addition to, or more stringent than, what the TCA covers.<sup>12</sup> This includes “law[s], rule[s], regulation[s], or other measure[s] relating to or prohibiting the sale, distribution, possession, exposure to, access to, advertising and promotion of, or use of tobacco products.”<sup>13</sup>

21 U.S.C. § 387p(2)(A) restricts the above preservation provision, providing that states cannot “establish or continue in effect with respect to a tobacco product any requirement which is different from, or in addition to, any requirement under [the TCA] relating to tobacco product standards, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards, or modified risk

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<sup>7</sup> *Id.* § 387a(b) (“This chapter shall apply to all cigarettes, cigarette tobacco, roll-your-own tobacco, and smokeless tobacco and to any other tobacco products that the Secretary by regulation deems to be subject to this chapter.”).

<sup>8</sup> Deeming Rule, *supra* note 3.

<sup>9</sup> 21 U.S.C. § 321(rr)(1) (defining “tobacco product” as “any product made or derived from tobacco that is intended for human consumption, including any component, part, or accessory of a tobacco product (except for raw materials other than tobacco used in manufacturing a component, part, or accessory of a tobacco product)”).

<sup>10</sup> 21 C.F.R. § 1100.1 (2022).

<sup>11</sup> *Id.* Products made from synthetic nicotine as opposed to nicotine derived from tobacco were not originally covered by the definition of “tobacco product” in the TCA. On March 15, 2022, President Biden signed into law a bill that provides FDA authority over regulation of synthetic nicotine products. Consolidated Appropriations Act 2022, Pub. L. No. 117-103, 136 Stat. 49. While there is a distinction between tobacco-derived nicotine products and synthetic nicotine products, the result of this law is that FDA now has authority over both.

<sup>12</sup> 21 U.S.C. § 387p(a)(1) (“[N]othing in this subchapter, or rules promulgated under this subchapter, shall be construed to limit the authority of a Federal agency (including the Armed Forces), a *State or political subdivision of a State*, or the government of an Indian tribe to enact, adopt, promulgate, and enforce any law, rule, regulation, or other measure with respect to tobacco products that is in addition to, or more stringent than, requirements established under this subchapter, including a law, rule, regulation, or other measure relating to or prohibiting the sale, distribution, possession, exposure to, access to, advertising and promotion of, or use of tobacco products by individuals of any age, information reporting to the State, or measures relating to fire safety standards for tobacco products. No provision of this subchapter shall limit or otherwise affect any State, tribal, or local taxation of tobacco products.” (emphasis added)).

<sup>13</sup> *Id.*

tobacco products.” However, these exemptions to the non-preemption provision do not restrict states and localities from enacting tobacco laws in other areas.

While states and localities may have passed laws and regulations prior to the passage of the TCA that could have been specifically preserved by the text of the TCA, this limited preemption provision casts an incredibly wide net over what states and localities are permitted to continue regulating, which is evidenced by the varied and disparate tobacco laws that have been enacted throughout the country at every level since 2009 and 2016. This approach to regulating, some examples of which will be discussed in this Article, makes for difficulties in understanding the framework of the various laws and obstacles to complying with them. Further, it sends no clear message to consumers regarding these products or their status.

### *B. State and Local Regulation of Cigars—Minimum Pack Sizes and Pricing*

One area not regulated at the federal level is minimum pack sizes for cigars. The TCA regulates minimum pack sizes for cigarettes—prohibiting the sale of cigarettes in packs less than twenty—but does not do so for cigars.<sup>14</sup> This has unfortunately led to inconsistent regulatory efforts at the state and local level.

To begin, the regulation of cigars at the state and local level often depends on the type of cigar at issue—i.e., whether it is a “little” cigar, a “large” cigar, or a “premium” cigar. For example, some states tax products meeting the definition of “little cigars” at the same rate as cigarettes, while other states do not.<sup>15</sup> To add a further layer of confusion, some states that tax “little cigars” as cigarettes define little cigars *separately* and apply the same tax rate to this category of product,<sup>16</sup> while others simply define cigarettes more broadly so that the definition includes a traditional “little cigar.”<sup>17</sup>

States and localities—both before and after the TCA became applicable to cigar products—have increasingly endeavored to impose minimum pack sizes and pricing restrictions on cigar products, with the extent and success of such efforts ranging by jurisdiction.<sup>18</sup> Below, we analyze in chronological order some prominent examples:

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<sup>14</sup> 21 C.F.R. § 1140.14(a)(4) (2022) (“No retailer may break or otherwise open any cigarette or smokeless tobacco package to sell or distribute individual cigarettes or a number of unpackaged cigarettes that is smaller than the quantity in the minimum cigarette package size defined in § 1140.16(b), or any quantity of cigarette tobacco or smokeless tobacco that is smaller than the smallest package distributed by the manufacturer for individual consumer use[.]”).

<sup>15</sup> “Little cigars” are defined in Federal Tax Code as cigars “under three pounds per thousand.” 26 U.S.C. § 5702. This definition, however, applies only for federal, and not state, tax classification purposes. While states have the authority to define little cigars as cigarettes and tax them as such, they do not have legal authority to subject these products to obligations under the Master Settlement Agreement (MSA). States’ MSAs impose restrictions on tobacco company’s marketing practices and regulates certain advertising.

<sup>16</sup> States that tax “little cigars” at the same rate as cigarettes include: (1) Iowa, IOWA CODE § 453A.43(1)(d) (2022); (2) Rhode Island, 44 R.I. GEN. LAWS ANN. § 44-20.2-2 (West 2022); and (3) Vermont, VT. STAT. ANN. tit. 32, § 7771(a), (d) (West 2022).

<sup>17</sup> States that define cigarettes to include “little cigars” include: (1) Connecticut, CONN. GEN. STAT. § 12-285(b)(1) (2022); (2) Florida, FLA. STAT. § 210.01(1) (2022); (3) Massachusetts, MASS. GEN. LAWS ch. 64C, § 1 (2022); and (4) New Hampshire, N.H. REV. STAT. ANN. § 78:1 (I), (V) (2022).

<sup>18</sup> Varied state and local regulation of cigar pack sizes and pricing was recently also explored in Preventive Medicine Reports. See Jessica L. King Jensen, Cristine D. Delnevo, Julie W. Merten, Brooke Torton & Sunday Azagba, *A Synthesis of Local Cigar Pack Policies in the US*, 28 PREVENTIVE MED. REPS. 101865 (2022).

### 1. *Philadelphia, Pennsylvania*

Philadelphia made an early effort to impose minimum pack size limitations on cigars. After this limitation was challenged in state court, the Pennsylvania Supreme Court ultimately held that it was preempted under Pennsylvania law.<sup>19</sup>

On January 23, 2007, the Philadelphia City Council enacted an ordinance (hereinafter, the “First Philadelphia Ordinance”), which was intended to “add new provisions to prohibit the sale, from certain retail establishments, of ‘blunts,’ ‘loosies,’ cigarette papers, cigars, and other items that may be otherwise legal but that are commonly used as drug paraphernalia, under certain terms and conditions.”<sup>20</sup> The First Philadelphia Ordinance set out a number of new restrictions on tobacco products, including a prohibition on the sale or purchase of cigars and other tobacco products in quantities fewer than three.<sup>21</sup>

Within a week of the First Philadelphia Ordinance being enacted, Holt’s Cigar Company, Inc. (a Philadelphia retailer) and other tobacco industry members filed a lawsuit against the City of Philadelphia, seeking an injunction against its enforcement and a judgment declaring it to be preempted by Pennsylvania’s Controlled Substance, Drug, Device and Cosmetic Act.<sup>22</sup> The Supreme Court of Pennsylvania ultimately held that the minimum cigar pack size provision, as well as all other challenged portions of the First Philadelphia Ordinance, were preempted.<sup>23</sup>

This early attempt at locally regulating minimum cigar pack sizes—restricting cigars from being sold in packs less than three—serves as a prime example of the issues with inconsistent state and local regulation. This is but one example where a locality attempted to act as a “policy lab” and enacted stringent restrictions on cigar products’ pack sizes, only for the First Philadelphia Ordinance to be preempted for conflicting with state law.

### 2. *Prince George’s County, Maryland*

Another notable local effort to regulate the pack sizes of cigars was in Prince George’s County, Maryland. In 2008 and 2009, Prince George’s Council passed subsequent ordinances that were codified, as relevant here, in Sections 12-201 through 12-204 of the County Code.<sup>24</sup> Among other provisions, these ordinances prohibited retailers, wholesalers, or agents or employees thereof from the purchase, sale, distribution, or gift of individual or “unpackaged” cigars,<sup>25</sup> with the term “unpackaged

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<sup>19</sup> *Holt’s Cigar Co., Inc. v. City of Philadelphia*, 952 A.2d 1199, 1201 (Pa. Commw. Ct. June 23, 2008), *aff’d in part, rev’d in part*, 10 A.3d 902, 906 (Pa. 2011).

<sup>20</sup> City Council, City of Philadelphia, Bill No. 060345–AAA (Pa. 2007).

<sup>21</sup> *Id.* at 2.

<sup>22</sup> *Holt’s Cigar Co., Inc.*, 952 A.2d at 1201. The Court of Common Pleas of Pennsylvania agreed and held that the First Philadelphia Ordinance was unenforceable because it was preempted by Pennsylvania state law, and the Commonwealth Court of Pennsylvania affirmed that the portion of the First Philadelphia Ordinance related to minimum cigar pack size requirements was preempted. *Holt’s Cigar Co., Inc. v. City of Philadelphia*, No. 3674, 2007 WL 5843696 (Pa. Com. Pl. Mar. 9, 2007).

<sup>23</sup> *Holt’s Cigar Co., Inc.*, 10 A.3d at 914.

<sup>24</sup> Prince George’s County Ordinance CB-47-2008 (Nov. 24, 2008); Prince George’s County Ordinance CB-6-2009 (Apr. 15, 2009).

<sup>25</sup> PRINCE GEORGE’S COUNTY, MD., CODE § 12-204(a) (2009), *invalidated by* Altadis U.S.A., Inc. v. Prince George’s County, 65 A.3d 118, 125 (Md. 2013).

cigars” defined as “any cigar or cigar product not contained within a sealed original package of at least five (5) cigars or cigar products.”<sup>26</sup> This minimum pack-size requirement for cigars had certain exceptions, such as that 1) it did not apply to cigars with a wholesale price of more than \$2.00 or a retail price of more than \$2.50; and 2) it did not apply to the sale of any cigar sold on the premises of an adult-only retail tobacco establishment that derived at least 75% of its revenues, measured by average daily receipts, from the sale of non-cigarette tobacco products.<sup>27</sup> Further, it did not apply to cigars “[m]ade by one person engaged in the business of distributing cigars to another person engaged in the business of distributing cigars,” or to the sale or other distribution of cigars if it was for resale or redistribution outside of the county.<sup>28</sup>

Like in Philadelphia, these ordinances were challenged in court, here in the Circuit Court for Prince George’s County.<sup>29</sup> Altadis U.S.A., Inc. and other plaintiffs sued the county, arguing that the ordinances were invalid as preempted by Maryland law.<sup>30</sup> The Court of Appeals of Maryland ultimately held that Maryland state law preempted both ordinances.<sup>31</sup>

The Court of Appeals explained that Title 16.5 of Maryland’s state code regulated the same subject matter as the ordinances, namely the required packaging of cigars for sale to consumers.<sup>32</sup> The court noted that there was a “tension” between the state and local law because state law permitted sales of up to twenty cigars to consumers, but the Prince George’s County ordinances prohibited the sale of single cigars unless the sale was “for very expensive cigars or unless the seller derives 75% of its revenues from the sale of non-cigarette tobacco products.”<sup>33</sup>

The attempt in Prince George’s County, Maryland is an example near identical to that made by the City of Philadelphia, where a locality’s effort to regulate minimum cigar pack sizes conflicted with state law and was ultimately rejected by the state’s highest court.

### 3. Boston, Massachusetts

In 2012, Boston became one of the first major cities after Philadelphia to impose pack size restrictions on cigars.<sup>34</sup> Unlike in Philadelphia, however, the effort in Boston was successful and had a domino effect throughout the state.

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<sup>26</sup> PRINCE GEORGE’S COUNTY, MD., CODE, § 12-201(a)(8) (2009), *invalidated by Altadis U.S.A., Inc.*, 65 A.3d.

<sup>27</sup> PRINCE GEORGE’S COUNTY, MD., CODE § 12-204(b)(1), (2) (2009) (subsequent history omitted).

<sup>28</sup> PRINCE GEORGE’S COUNTY, MD., CODE § 12-204(b)(3) (2009) (subsequent history omitted).

<sup>29</sup> A similar ordinance prohibiting sale of cigars in packs less than five was passed in Baltimore around the same time. See BALT. CITY HEALTH DEP’T, *Banning the Sale of Single, Cheap Cigars in Baltimore City* (May 28, 2008). This ordinance was also separately challenged in court, but after the Prince George’s County ordinance was decided by the Maryland Court of Appeals, Baltimore withdrew its ordinance. See *Altadis U.S.A., Inc. v. Mayor and City Council of Baltimore*, No. 24-C-09-007715 (Circuit Ct., Balt. City, Md).

<sup>30</sup> *Altadis U.S.A., Inc.*, 65 A.3d at 125.

<sup>31</sup> *Id.*

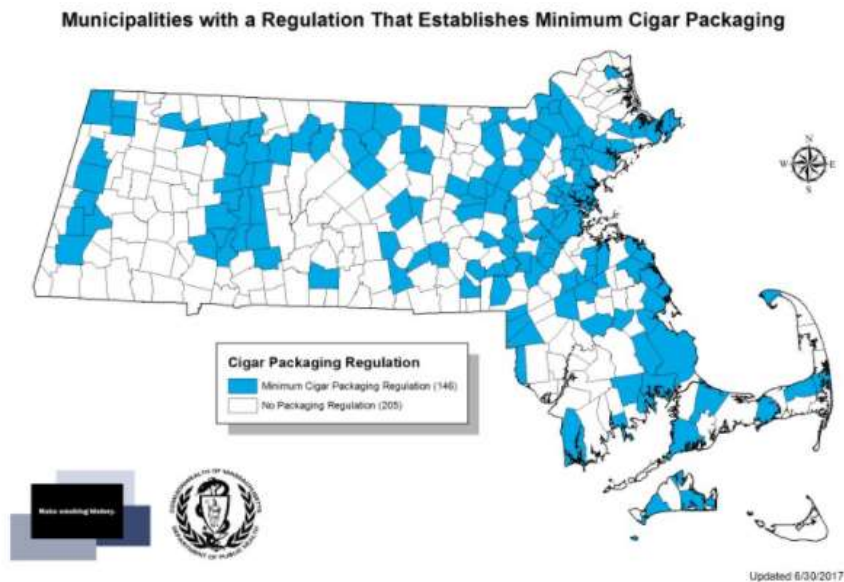
<sup>32</sup> *Id.* at 124–25.

<sup>33</sup> *Id.*

<sup>34</sup> Boston, Mass., *A Regulation Limiting Tobacco and Nicotine Access by Youth* (amended Dec. 1, 2011) (as originally proposed and on file with the City Clerk).

In 2012, the Boston City Council passed an ordinance titled “A Regulation Limiting Tobacco And Nicotine Access By Youth.”<sup>35</sup> Under the ordinance, “[n]o retailer, retail establishment, or other individual or entity shall sell or distribute or cause to be sold or distributed a cigar unless the cigar is contained in an original package of at least four (4) cigars.”<sup>36</sup> The ordinance does not apply to “the sale or distribution of any cigar having a wholesale price of more than two dollars (\$2.00) or a retail price of more than two dollars and fifty cents (\$2.50) as adjusted from time to time to reflect inflation in accordance with the Consumer Price Index,” which indicates that the ordinance was only intended to impose pack size restrictions on cigars of a certain price point.<sup>37</sup>

The foregoing ordinance was the first of its kind to precipitate state-wide change, with municipalities throughout the state enacting their own versions despite there being no cigar pack-size regulation at the state level.<sup>38</sup> Since 2012, it is estimated that 151 municipalities in Massachusetts have enacted minimum cigar pack-size and/or pricing regulations.<sup>39</sup> A map made available by the Massachusetts Department of Public Health displays the municipalities known to have established minimum cigar pack-size restrictions, which visibly demonstrates a lack of cohesion between jurisdictions<sup>40</sup>:



<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> See Lindsay Kephart, Glory Song, Patricia Henley & W.W. Sanouri Ursprung, *Single Cigar Price and Availability in Communities With and Without a Cigar Packaging and Pricing Regulation*, 16 PREVENTING CHRONIC DISEASE (June 20, 2019).

<sup>39</sup> *Id.* at 2.

<sup>40</sup> *Cigar Packaging Regulation*, MASS. DEP'T OF PUB. HEALTH, <https://makesmokinghistory.org/my-community/local-priority-policies/cigar-packaging-regulation/> (last updated June 30, 2017).

Whether there is a cigar minimum pack-size and/or pricing requirement can vary from one block to the next, which is a recipe for a compliance nightmare. Further, the foregoing inconsistencies may influence business decisions, such as where a potential business owner may elect to start a business, as some may prefer a municipality with lesser restrictions.

#### 4. *California*

Like Massachusetts, California has no statewide law imposing minimum pack-size restrictions on cigars. But, again like Massachusetts, it has a hoard of municipal and county provisions across the state governing the regulation of minimum pack sizes on cigars in a variety of ways.

As one example, Contra Costa County, California (near San Francisco) imposes minimum pack sizes for cigars and little cigars: “Little cigars” must be sold in a package of at least ten cigars, and other cigars must also be sold in a package of at least ten cigars unless the cigar has an individual price of at least \$5.<sup>41</sup> Closer to Los Angeles, the City of Oxnard prohibits the sale of little cigars in packages less than twenty, and other cigars in packages less than six, unless the cigar *or* little cigar is individually priced at \$5 or more.<sup>42</sup> This is in contrast to Contra Costa County, where the “five dollar exception” does not apply to little cigars, no matter how they are priced. In Los Angeles County, the County Code prohibits the sale of little cigars or cigarillos individually or in packages less than twenty but does not otherwise restrict the packaging size of larger cigars, unlike Contra Costa and Oxnard.<sup>43</sup>

This comparison of only *three* jurisdictions in California reveals that the requirements are inconsistent. These kinds of requirements continue to be enacted across California and have become increasingly problematic for the cigar industry, with some jurisdictions apparently attempting to regulate entire product categories out of existence. For example, in December 2020, San Diego County passed an ordinance that sets a minimum pack size for cigars of six cigars per package, unless the cigar sells for \$10 or more per cigar (including taxes and fees).<sup>44</sup> Separate from this minimum packaging restriction, the ordinance prohibits retailers from selling cigars in a package at a price that is less than \$5 per cigar.<sup>45</sup> In other words, a consumer purchasing any package of cigars must spend a minimum of \$30 (a minimum of \$5 per cigar, multiplied by a minimum pack size of six cigars). The ordinance also prohibits the sale of little cigars in packages less than twenty and requires a pack of twenty to sell for no less than \$10 per package.<sup>46</sup>

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<sup>41</sup> CONTRA COSTA COUNTY, CAL., CODE § 445-6.010 (2022). The code defines a “little cigar” as “any roll of tobacco other than a cigarette wrapped entirely or in part in tobacco or any substance containing tobacco and weighing no more than three pounds per thousand,” and “includes, but is not limited to, any tobacco product known or labeled as ‘small cigar’ or ‘little cigar.’” *Id.* § 445-2.006(i).

<sup>42</sup> OXNARD, CAL., CODE § 11-375(D) (2022).

<sup>43</sup> L.A. COUNTY, CAL., CODE OF ORDINANCES, § 11.35.070(F) (2022). The Los Angeles County Code defines “little cigars” and “cigarillo” as “any roll of tobacco other than a cigarette wrapped entirely or in part in tobacco or any substance containing tobacco and weighing no more than three pounds per thousand units.” *Id.* § 11.35.020(E), (M).

<sup>44</sup> SAN DIEGO COUNTY, CAL., CODE § 21.2605(d)(1) (2022).

<sup>45</sup> *Id.* § 21.2605(e)(2).

<sup>46</sup> *Id.* § 21.2605(d)(2), (e)(3).



How are consumers to interpret that one locality has a \$5 per cigar limit on what qualifies for a minimum pack size, but another has a \$10 floor? Are consumers meant to draw a conclusion regarding the risk of the product from this disparate regulation? Or are they simply to be thankful their favorite cigar shop operates in the locality with the lower price limitation so it will stay in business?

The above-discussed varied restrictions in California create compliance hurdles with inconsistent product standards across the state, because the packaging sizes that can be legally sold increasingly vary by zip code. They also show the rising danger of localities using package size and pricing regulations to effectively upend the sale of certain products altogether by making the purchase of certain products prohibitively expensive.

### 5. *New York City*

New York City has minimum price floors for cigars, little cigars, and other tobacco products.<sup>47</sup> New York City law requires that cigars sold individually be at least \$8 and that cigars sold in packages be priced by multiplying the number of cigars in the package by \$1.75, and then adding \$6.75.<sup>48</sup> As for little cigars, they must be sold in packages of twenty and be priced at least \$10.95 per pack.<sup>49</sup> Therefore, while New York City does not have minimum package size requirements for regular cigars, it implements a pricing scheme that makes it impossible (as a practical matter) to sell any cigar other than those at extremely high price points. Unlike some localities in Massachusetts and California discussed above that focused on pack size to raise prices for cigars, New York City has focused on price floors for cigar products, adding yet another layer of regulatory inconsistency and confusion across the country.

### 6. *Minnesota*

Minnesota is another state where localities have implemented minimum pricing and pack size requirements for cigars, though it does not yet appear to be as widespread throughout the state like in Massachusetts and California. By way of example, the City of St. Paul prohibits the sale or distribution of cigars in packs of three or fewer that cost less than two dollars and sixty cents (\$2.60) per cigar and cigars in packs of more than four that cost less than ten dollars and forty cents (\$10.40) per package.<sup>50</sup>

Maplewood, Minnesota prohibits the sale of “loosies,” which are defined as “a single or individually packaged cigar or cigarette, or any other tobacco product that has been removed from its packaging and sold individually.”<sup>51</sup> The term “loosies” does not include individual cigars with a retail price, before any sales taxes, of more than \$2.60 per cigar.<sup>52</sup> In Brooklyn Center, Minnesota, the City Code states that “[i]t shall be a violation . . . for any retail establishment to sell, offer for sale, or distribute a single cigar unless the cigar is sold in an original package of at least five cigars.”<sup>53</sup> But Brooklyn Center has slightly different exceptions to its minimum pack size

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<sup>47</sup> N.Y.C., N.Y., ADMIN. CODE § 17-176.1(d) (2022).

<sup>48</sup> *Id.* § 21.2605(d)(3).

<sup>49</sup> *Id.* §§ 17-704(c), 17-176.1(d)(2).

<sup>50</sup> ST. PAUL, MINN., LEGIS. CODE § 324.07(e) (2022).

<sup>51</sup> MAPLEWOOD, MINN., CODE OF ORDINANCES §§ 14-1375, 14-1372, 1375 (2022).

<sup>52</sup> *Id.* § 14-1372.

<sup>53</sup> BROOKLYN CENTER, MINN., CODE OF ORDINANCES § 23-105(2) (2022).

requirements than its Minnesota counterparts. In Brooklyn Center, the restriction does not apply to single cigars with a retail sales price of at least \$2.10 before sales tax (in contrast to the others' \$2.60 floor).<sup>54</sup> Further, Brooklyn Center's ordinance expressly applies to cigars that have price promotions or discounts,<sup>55</sup> whereas the St. Paul and Maplewood ordinances do not expressly address if or how coupons and/or price promotions impact application of the ordinances.

### 7. Oregon

Oregon is one of the most recent states to impose minimum pack size requirements on cigar products. Effective January 1, 2020, little cigars (those weighing three pounds or less per 1,000 units) are deemed cigarettes for purposes of the state's minimum pack size requirements for cigarettes, which requires cigarettes (and now little cigars) to be sold in a package of at least twenty cigarettes.<sup>56</sup> This new law in Oregon is perhaps a step in the right direction, in that there is now state-level regulation that can serve to preempt scattered local regulations to the extent they already exist or come into creation. State-level regulation, such as in Oregon, while still difficult and subject to creating a sea of inconsistent laws, is more manageable and appropriate than requiring the industry to track hundreds of municipal and county restrictions for cigar pack sizes all over the country. Further, if the justification for these minimum pack size regulations is to in some manner influence consumer behavior, data has shown that consumers will simply travel to a different jurisdiction to obtain the products they want rather than cease to purchase them.<sup>57</sup> Disparate local regulations create a compliance challenge for industry and do not serve to advance a public health interest, but instead create consumer confusion.<sup>58</sup>

### C. State and Local Regulations of Characterizing Flavors in Tobacco Products

Flavors have been used in tobacco products for decades, with the first trademark for flavored cigars dating back to 1895.<sup>59</sup> In 2008, Maine became the first state to attempt to ban flavors in cigars. Thereafter, various other municipalities, counties, and states took up the idea of a "flavor ban" on tobacco products. While each attempt is conceptually similar—an effort to ban products that contain characterizing flavors—each is substantively unique. Some bans apply only to cigars or vapor products, others apply more widely to all types of tobacco products. Some bans include menthol as a characterizing flavor, others do not. Some bans apply only in non-tobacco stores, others apply anywhere. Some bans apply to synthetic nicotine products, others do not. Despite a more recent guidance document issued by FDA on flavored e-cigarette

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> OR. REV. STAT. ANN. § 431A.175(2)(g) (2022).

<sup>57</sup> See *Comments on Tobacco Product Standard for Menthol in Cigarettes*, TAX FOUND. (May 18, 2022), <https://taxfoundation.org/fda-ban-menthol-cigarettes/> [hereinafter TAX FOUND., *Comments*].

<sup>58</sup> See MASS. MULTI-AGENCY ILLEGAL TOBACCO TASK FORCE, ANNUAL REPORT OF MULTI-AGENCY ILLEGAL TOBACCO TASK FORCE (Mar. 1, 2022), <https://www.mass.gov/doc/task-force-fy22-annual-report/download>; TAX FOUND., *Comments*, *supra* note 57.

<sup>59</sup> *CAA Policy Positions*, CIGAR ASS'N OF AM., <https://www.cigarassociation.org/federal-policy/> (last accessed Mar. 25, 2022).

cartridge-based products (other than tobacco or menthol),<sup>60</sup> which created opportunity for uniformity in that narrow product category, the state and local restrictions seeking to prohibit or restrict the sale of flavored tobacco products continue unabated. Just like the issue with minimum pack size/pricing restrictions for cigars, flavor restrictions that vary from state to state, or even from zip code to zip code, pose significant concerns.

The flavor bans analyzed below are only a very limited sampling of state and local restrictions on flavored tobacco products. For example, we do not include discussion of flavor bans in states and localities that only affect certain products, such as in New Jersey; Chicago, Illinois; and Boulder, Colorado.<sup>61</sup> Nor does it account for the rush of “emergency flavor bans” that took place in the fall of 2019 for e-cigarette products,<sup>62</sup> nearly all of which were struck down by the courts. Further, at the time of this writing, proposed flavor bans have been introduced in some state and local legislatures.<sup>63</sup>

### *I. Maine*

In 2008, Maine became the first state to ban a subset of flavored tobacco products when a bill was passed prohibiting the sale of flavored cigars, unless they had been on the market prior to 1985.<sup>64</sup> The law was poorly drafted and hastily implemented and was subsequently repealed in large part. The law was impractical to administer, and, after being repeatedly amended, it was ultimately repealed except for its current application to cigars that weigh less than three pounds per thousand.<sup>65</sup> The law currently states that “a person may not sell or distribute or offer to sell or distribute in this State any flavored cigar unless the cigar is a premium cigar.”<sup>66</sup> Maine defines “premium cigar” broadly so that it effectively captures all cigars other than “little

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<sup>60</sup> U.S. FOOD & DRUG ADMIN., ENFORCEMENT PRIORITIES FOR ELECTRONIC NICOTINE DELIVERY SYSTEM (ENDS) AND OTHER PREMARKET PRODUCTS ON THE MARKET WITHOUT PREMARKET AUTHORIZATION—GUIDANCE FOR INDUSTRY (Apr. 2020), <https://www.fda.gov/regulatory-information/search-fda-guidance-documents/enforcement-priorities-electronic-nicotine-delivery-system-ends-and-other-deemed-products-market>. In April 2022, FDA also issued two proposed product standards 1) to ban menthol in cigarettes; and 2) to prohibit characterizing flavors (an undefined term) in cigars. At the writing of this Article, public comments on these proposed rules have closed but FDA has not published final rules. See Tobacco Product Standard for Characterizing Flavors in Cigars, 87 Fed. Reg. 26,396 (May 4, 2022); Tobacco Product Standard for Menthol in Cigarettes, 87 Fed. Reg. 26,454 (May 4, 2022).

<sup>61</sup> See, e.g., BOULDER, CO., MUNICIPAL CODE § 6-4.5-2(c) (2020); N.J. STAT. ANN. § 2A:170-51.12; CHICAGO MUN. CODE, § 4-64-355.

<sup>62</sup> See, e.g., MICH. DEP’T OF HEALTH & HUM. SERVS., PROTECTION OF YOUTH FROM NICOTINE PRODUCT ADDICTION: EMERGENCY RULES (filed with Mich. Sec. of State on Sept. 18, 2019); see also Press Release, N.Y. State Dep’t of Health, New York State Department of Health Announces Statewide Ban of Flavored Nicotine Vapor Products Takes Effect Today (May 18, 2020), [https://health.ny.gov/press/releases/2020/2020-05-18\\_fl\\_nicotine\\_vapor\\_products\\_ban.htm](https://health.ny.gov/press/releases/2020/2020-05-18_fl_nicotine_vapor_products_ban.htm).

<sup>63</sup> Most recently, a flavor ban was passed by the state legislature in Hawaii but was the subject of veto by Governor Ige. See Press Release, Governor of the State of Hawai’i, Office of the Governor News Release: Governor Announces Intent to Veto List (June 27, 2022), <https://governor.hawaii.gov/newsroom/office-of-the-governor-news-release-governor-ige-announces-intent-to-veto-list/#:~:text=Bill%20Description%3A%20Bans%20the%20sale,certain%20FDA%20approved%20tobacco%20products> (providing a rationale for the intended veto of “HB1570: Relating to the Youth Vaping Epidemic”).

<sup>64</sup> S.P. 0475, 123rd Leg., 1st Reg. Sess. (Me. 2008).

<sup>65</sup> The ban currently applies to all flavored cigars except those that weigh more than three pounds per 1,000 and are wrapped in whole tobacco leaf. ME. REV. STAT. ANN. tit. 22, § 1560-D(2), (1)(E-1) (2021).

<sup>66</sup> ME. REV. STAT. ANN. tit. 22, § 1560-D(2) (2021).

cigars” as they are defined under the Federal Tax Code.<sup>67</sup> Maine defines a flavored cigar as “a cigar or any component part of the cigar” (tobacco, filter, and paper) “that contains a constituent that imparts a characterizing flavor.”<sup>68</sup> A “characterizing flavor” is defined as “a distinguishable taste or aroma of candy, chocolate, vanilla, fruit, berry, nut, herb, spice, honey or an alcoholic drink that is imparted to tobacco or tobacco smoke either prior to or during consumption” and “does not include a taste or aroma from tobacco.”<sup>69</sup> Under the statute, a cigar is “deemed to have a characterizing flavor if the cigar is advertised or marketed as having or producing the taste or aroma of candy, chocolate, vanilla, fruit, berry, nut, herb, spice, honey or an alcoholic drink.”<sup>70</sup>

Localities in Maine have recently started enacting more restrictive flavor bans than the state ban. For example, in February 2022, Portland, Maine passed a flavored tobacco products ban, which took effect on June 1, 2022.<sup>71</sup> Portland’s ordinance defines tobacco products to include not only products made of or derived from tobacco, but also products made of or derived from synthetic nicotine.<sup>72</sup> Separate from these local regulations springing up, legislators are pushing forward to once again propose a broader flavored tobacco products ban statewide.<sup>73</sup>

## 2. *Philadelphia, Pennsylvania*

In 2007, the City Council for the City of Philadelphia passed the First Philadelphia Ordinance seeking to impose cigar pack size restrictions (discussed above). The First Philadelphia Ordinance also imposed a ban on the retail sale of certain flavored tobacco products. The First Philadelphia Ordinance outlawed the sale of “any flavored tobacco item” except for loose tobacco, snuff, chewing tobacco, dipping tobacco, or pipe tobacco.<sup>74</sup> As discussed above, the First Philadelphia Ordinance was ultimately struck down by the Supreme Court of Pennsylvania on the grounds that it was entirely preempted by Pennsylvania’s Controlled Substance, Drug, Device and Cosmetic Act.<sup>75</sup>

In 2019, Philadelphia’s City Council tried again, passing Ordinance 180457 (hereinafter, the “Second Philadelphia Ordinance”), making it unlawful to sell cigars or roll-your-own tobacco that impart a characterizing flavor except in a limited number of tobacco businesses.<sup>76</sup> The Second Philadelphia Ordinance defined a “characterizing

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<sup>67</sup> Federal law defines “little” or “small” cigars as those cigars under three pounds per thousand. 26 U.S.C. § 5702. Due to the change in tax rates in 2009 that created parity between the little cigar tax rate and the cigarette rate, the little cigar category is incredibly small. Maine’s definition of a premium cigar is incredibly broad, as while there is no federally established definition of “premium cigar,” nearly all iterations of a definition require that the cigar be hand-rolled and weigh over six pounds per thousand.

<sup>68</sup> ME. REV. STAT. ANN., tit. 22 § 1560-D(1)(D) (2021).

<sup>69</sup> *Id.* § 1560-D(1)(A).

<sup>70</sup> *Id.*

<sup>71</sup> PORTLAND, ME., CITY CODE § 17-98 (2022).

<sup>72</sup> *Id.* § 17-71.

<sup>73</sup> See *Maine Legislation Seeks to End Sale of Flavored Tobacco Products*, NEWS CENTER MAINE, (Jan. 7, 2022), <https://www.newscentermaine.com/article/news/politics/maine-politics/maine-legislation-seeks-to-end-sale-of-flavored-tobacco-products-politics-teens/97-0f029f76-6355-4152-9cde-3ae0da92a440>.

<sup>74</sup> City Council, City of Philadelphia, Bill No. 060345–AAA (Pa. 2007).

<sup>75</sup> *Holt’s Cigar Co., Inc. v. City of Philadelphia*, 10 A.3d 902, 904 (Pa. 2011).

<sup>76</sup> City Council, City of Philadelphia, Bill No. 180457 (Pa. 2019).

flavor” 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 by product produced by the Tobacco Product” and includes, but is not limited to, “any taste or aroma relating to fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, mint, wintergreen, herb, or spice.”<sup>77</sup> This Second Philadelphia Ordinance was, yet again, a failure for council members. The Second Philadelphia Ordinance was immediately challenged and the District Court for the Eastern District of Pennsylvania issued a preliminary injunction enjoining its enforcement in November 2020.<sup>78</sup> Specifically, the court determined that Section 301 of Title 53 of Pennsylvania’s Statutes and Consolidated Statutes, which expressly preempts “any local ordinance or rule concerning the subject matter of 18 Pa.C.S. § 6305,” preempted the Second Philadelphia Ordinance on the basis that both the Second Philadelphia Ordinance and Section 6305 concern “youth access to tobacco.”<sup>79</sup>

In November 2021, the United States Court of Appeals for the Third Circuit affirmed the District Court’s decision:

[T]he Ordinance deploys a regulation aimed at stopping youth from accessing tobacco that is not sanctioned by state law. Phila., Pa., Code § 9-639. Whereas flavored tobacco products would otherwise be available for purchase in stores where minors could lawfully purchase products like gum, candy, and soda (and could seek illicit access to tobacco), the Ordinance ensures that such products will be available only in places where minors may not enter.<sup>80</sup>

Finally, on March 8, 2022, the Eastern District of Pennsylvania issued a permanent injunction against enforcement of the Second Philadelphia Ordinance.<sup>81</sup>

### 3. *Rhode Island*

In 2012, the City of Providence adopted two ordinances concerning the sale of tobacco products, one related to price reductions on tobacco products (which we do not discuss here) and one restricting the sale of flavored tobacco products. The ordinance restricting the sale of flavored tobacco products broadly implicates “any product containing tobacco or nicotine” and includes “cigars, pipe tobacco, snuff, chewing tobacco, dipping tobacco, . . . and electronic cigarette cartridges,” but excludes cigarettes.<sup>82</sup> The ordinance provides that “[i]t shall be unlawful for any person to sell or offer for sale any flavored tobacco product to a consumer, except in a smoking bar,” and defines a “flavored tobacco product” as “any tobacco product or any component part thereof that contains a constituent that imparts a characterizing

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<sup>77</sup> *Id.*

<sup>78</sup> *Cigar Ass’n of Am. v. City of Philadelphia*, 500 F. Supp. 3d 428 (E.D. Pa. 2020).

<sup>79</sup> *Id.* at 430–31.

<sup>80</sup> *Cigar Ass’n of Am., Inc. v. City of Philadelphia*, No. 20-3519, 2021 WL 5505406, at \*4 (3d Cir. Nov. 24, 2021).

<sup>81</sup> *Cigar Ass’n of Am., Inc. v. City of Philadelphia*, No. 2:20-CV-03220-GEKP (E.D. Pa. Mar. 8, 2022), ECF No. 33.

<sup>82</sup> PROVIDENCE, R.I., CODE OF ORDINANCES § 14-308 (2022).

flavor.”<sup>83</sup> The definition of “characterizing flavor” excludes “tobacco, menthol, mint or wintergreen.”<sup>84</sup>

A group of plaintiffs challenged the ordinance in the District Court for the District of Rhode Island, arguing, among other things, that 1) the ordinance prohibited manufacturers and retailers from describing the taste or aroma of certain tobacco products to consumers, thereby violating the First Amendment; and 2) the ordinance was preempted by the TCA because the ordinance attempts to establish local requirements that are “different from” and “in addition to” federal requirements related to tobacco product standards and tobacco product labeling.<sup>85</sup> The District Court disagreed and held that the ordinance did not violate the plaintiffs’ First Amendment rights and was not preempted by the TCA.<sup>86</sup> The United States Court of Appeals for the First Circuit affirmed the District Court’s decision, upholding the ordinance.<sup>87</sup>

Since the adoption of the Providence ordinance, the Rhode Island Department of Health promulgated a regulation imposing a more limited flavor ban on electronic nicotine delivery systems. In 2020, Rhode Island began prohibiting the sale of “flavored electronic nicotine-delivery system products to consumers within the State of Rhode Island.”<sup>88</sup> The regulation provides specific examples of “characterizing flavor[s],” which include tastes or aromas relating to “fruit, mint, menthol, wintergreen, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, herb or spice.”<sup>89</sup> Notably, and contrary to the ordinance discussed above, mint, menthol, and wintergreen are expressly identified as examples of characterizing flavors.

In other words, a Rhode Island regulation, applicable state-wide to electronic nicotine delivery systems, defines “characterizing flavor” differently than an ordinance in Rhode Island’s largest city and applies the sale restriction to different product categories. This presents industry, and retailers in particular, with significant difficulty in understanding what products can be sold where.

#### 4. *New York City*

On October 28, 2009, New York City’s Department of Health promulgated its first flavored tobacco regulation.<sup>90</sup> The regulation made it unlawful for any person to sell or offer for sale “any flavored tobacco product except in a tobacco bar.”<sup>91</sup> The regulation applied only to “flavored tobacco products,” defined as “any tobacco product or any component thereof that contains a constituent that imparts a characterizing flavor” other than menthol, mint, and wintergreen.<sup>92</sup> The regulation provided specific examples of “characterizing flavor[s],” which included tastes or

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<sup>83</sup> *Id.* §§ 14-308, 14-309.

<sup>84</sup> *Id.* § 14-308.

<sup>85</sup> *Nat’l Ass’n of Tobacco Outlets, Inc. v. City of Providence*, No. 12-CV-00096-ML-LDA, 2012 WL 6128707, at \*4, \*11 (D.R.I. Dec. 10, 2012).

<sup>86</sup> *Id.*

<sup>87</sup> *Nat’l Ass’n of Tobacco Outlets, Inc. v. City of Providence*, 731 F.3d 71 (1st Cir. 2013).

<sup>88</sup> 216 R.I. CODE R § 50-15-6.10 (2022).

<sup>89</sup> *Id.* § 50-15-6.3.

<sup>90</sup> N.Y.C., N.Y. ADMIN. CODE. §§ 17-713 *et seq.* (2009) (amended and superseded).

<sup>91</sup> *Id.* § 17-715.

<sup>92</sup> *Id.* § 17-713.

aromas relating to any fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, herb, or spice.<sup>93</sup>

The regulation was met with a lawsuit in which plaintiffs argued, similar to the arguments made in the challenge to the City of Providence's ordinance discussed above, that the regulation was preempted by the TCA.<sup>94</sup> The District Court for the Southern District of New York denied the plaintiffs' request for a preliminary injunction, holding that the TCA did not preempt the regulation. Among other things, the District Court relied on the TCA's limited preemption provision in finding that there was no federal preemption:

The [TCA's] preservation clause plainly contemplates local regulations restricting and/or banning the sale of subclasses of tobacco products (such as flavored tobacco products)—it explicitly refers broadly to all “tobacco products.” . . . Thus, the preservation clause instructs this Court not to interpret any of the Act's provisions as preventing a city from “prohibiting” (or otherwise restricting) the “sale” of tobacco products . . . even though the FDA *could* regulate the “sale” of such products at some future date.<sup>95</sup>

The District Court later granted New York City summary judgment and dismissed the action,<sup>96</sup> which the United States Court of Appeals for the Second Circuit affirmed thereafter.<sup>97</sup> The practical application of the regulation's definition of “flavored tobacco product” is that it has prohibited descriptors on packaging.<sup>98</sup> Since this decision, New York City has expanded its flavor ban regulation to expressly address flavored electronic cigarettes and flavored e-liquids.<sup>99</sup> While the flavor ban as to tobacco products (i.e., excluding electronic cigarettes and e-liquids) does not currently extend to menthol, mint, or wintergreen products, there is a continued push by various legislators to expand the law to do so.

### 5. *Massachusetts*

In 2019, Massachusetts became the first state to pass a statewide flavor ban on the sale of all flavored tobacco products, including menthol cigarettes. The law, which became effective in 2020, states that:

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<sup>93</sup> *Id.*

<sup>94</sup> See *U.S. Smokeless Tobacco Mfg. Co., LLC v. City of New York*, 703 F. Supp. 2d 329 (S.D.N.Y. 2010).

<sup>95</sup> *Id.* at 343–44 (emphasis in original).

<sup>96</sup> *U.S. Smokeless Tobacco Mfg. Co., LLC v. City of New York*, No. 09-CV-10511-CM, 2011 WL 5569431, at \*7 (S.D.N.Y. Nov. 15, 2011).

<sup>97</sup> *U.S. Smokeless Tobacco Mfg. Co., LLC v. City of New York*, 708 F.3d 428 (2d Cir. 2013).

<sup>98</sup> The regulation states that a “flavored tobacco product” is “any tobacco product that imparts a characterizing flavor other than menthol, mint and wintergreen. A public statement or claim made or disseminated by the manufacturer of a tobacco product, or by any person authorized or permitted by the manufacturer to make or disseminate public statements concerning such tobacco product, that such tobacco product has or produces a characterizing flavor, other than menthol, mint and wintergreen, shall constitute presumptive evidence that the tobacco product is a flavored tobacco product.” N.Y.C., N.Y., ADMIN. CODE, § 17-713 (2020).

<sup>99</sup> N.Y.C., N.Y., ADMIN. CODE § 17-715 (2020).

No person, retailer or manufacturer shall sell, distribute, cause to be sold or distributed, offer for sale any flavored tobacco product or tobacco product flavor enhancer in any retail establishment, online or through any other means to any consumer in the commonwealth; provided, however, that this subsection shall not apply to the sale or distribution by a smoking bar[.]<sup>100</sup>

The law defines “characterizing flavor” as including, but not being limited to, “a taste or aroma relating to any fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, menthol, mint, wintergreen, herb or spice.”<sup>101</sup> However, the definition caveats that a tobacco product will not be determined to have a characterizing flavor “solely because of the provision of ingredient information or the use of additives or flavorings that do not contribute to the distinguishable taste or aroma of the product.”<sup>102</sup>

Prior to this 2019 statewide law, however, there were already inconsistent local flavor regulations throughout the state in hundreds of other localities, many of which exempted menthol, mint, and wintergreen products. As of December 2019, there were well over 100 localities with flavored tobacco regulations that included some sort of exemption for a variety of menthol products.<sup>103</sup> The only benefit of the Massachusetts law is that now companies have a more uniform statewide law to look to as a starting point.<sup>104</sup> The neutral and negative impacts of this law, though, are that 1) consumer behavior does not appear to have changed in terms of smoking rates; and 2) consumers are likely to simply drive to other states to purchase their flavored tobacco products as evidenced by the dramatic increase in excise tax revenues in neighboring states.<sup>105</sup> This has, not surprisingly, proven to hurt Massachusetts retailers and Massachusetts tax revenues.<sup>106</sup>

## 6. *California*

The landscape in California developed very similarly to Massachusetts—i.e., a state-level effort at a flavor ban after years and years of inconsistent and varied flavor regulations at the city and county level. It is estimated that there are well over 100 individual local flavor regulations throughout California.<sup>107</sup> Some of the jurisdictions’ bans are fairly comprehensive, such as in Los Angeles County and San Diego County. In Los Angeles County, it is prohibited to sell “any flavored tobacco product or any component, part, or accessory intended to impart, or imparting a characterizing flavor in any form, to any tobacco product or nicotine delivery device, including electronic

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<sup>100</sup> MASS. GEN. LAWS ANN. ch. 270 § 28 (West 2019).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> See TRUTH INITIATIVE, LOCAL FLAVORED TOBACCO POLICIES (Dec. 31, 2019), <https://truthinitiative.org/sites/default/files/media/files/2020/04/Local-flavored-tobacco-policies.pdf>.

<sup>104</sup> The Massachusetts law requires manufacturers to provide certifications to retailers regarding which products are legal for sale in the state, so in theory there is a level playing field of which products are legal for sale in the state.

<sup>105</sup> See Ulrik Boesen, *Massachusetts Flavored Tobacco Ban: No Impact on New England Sales*, TAX FOUND. (Feb. 3, 2022), <https://taxfoundation.org/massachusetts-flavored-tobacco-ban-sales-jama-study/>.

<sup>106</sup> *Id.*

<sup>107</sup> See TRUTH INITIATIVE, *supra* note 103.



smoking devices.”<sup>108</sup> The term “characterizing flavor” includes, among others, mint, menthol, and wintergreen.<sup>109</sup> San Diego County has a similar, but slightly different, flavor ban—exempting loose leaf tobacco and premium cigars.<sup>110</sup> Other jurisdictions have a more limited ban, exempting menthol products from the ban, such as in Cloverdale, California. In Cloverdale:

No tobacco retailer shall sell a tobacco product containing, as a constituent or additive, an artificial or natural flavor (*other than tobacco or menthol*) or an herb or spice, including strawberry, grape, orange, clove, cinnamon, pineapple, vanilla, coconut, licorice, cocoa, chocolate, cherry, or coffee, that is a characterizing flavor of the tobacco product or smoke produced by the tobacco product.<sup>111</sup>

In 2020, California passed a statewide flavor ban of tobacco products, including menthol cigarettes. This statewide flavored tobacco product ban followed the numerous city and county level bans, some just discussed. Under the ban, “[a] tobacco retailer, or any of the tobacco retailer’s agents or employees, shall not sell, offer for sale, or possess with the intent to sell or offer for sale, a flavored tobacco product or a tobacco product flavor enhancer.”<sup>112</sup> While the ban extends to menthol products, it exempts loose leaf tobacco and premium cigars.<sup>113</sup> The flavor ban has been suspended pending the outcome of a referendum challenging the law, which will be on the ballot in the November 8, 2022 statewide general election.<sup>114</sup> Until that time, it cannot be enforced. For now, manufacturers and retailers are still navigating a maze of county and city ordinances.

In California, the county flavor bans are particularly problematic because some only apply to “unincorporated areas” of the county, while others apply to the entire county, leaving even more room for confusion, and some retailers within a county that are covered by the bans and others that are not. This simply moves revenue from one geographic location to another, but does not change consumer behavior, as consumers will just buy products from nearby localities without bans. Further, city ordinances that precede county ordinances might still be part of a city’s code, even if they are less restrictive than a newer county ordinance.

### 7. *Edina, Minnesota*

Another example of a local flavor ban is in Edina, Minnesota. On June 16, 2020, the City of Edina adopted an ordinance providing that “[n]o person shall sell or offer for sale any flavored tobacco products.”<sup>115</sup> The ordinance defines “flavored tobacco

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<sup>108</sup> L.A. COUNTY, CAL., CODE OF ORDINANCES § 11.35.070(E) (2019).

<sup>109</sup> *Id.* § 11.35.020(C).

<sup>110</sup> SAN DIEGO COUNTY, CAL., CODE, § 21.2604(c) (2021) (“This section shall not apply to loose leaf tobacco or premium cigars.”).

<sup>111</sup> CLOVERDALE, CAL., MUNICIPAL CODE § 8.08.070(A) (2017) (emphasis added).

<sup>112</sup> See Cal. Senate Bill No. 793, Chapter 34 (2020) (codified at CAL. HEALTH & SAFETY CODE § 104559.5(b)(1)).

<sup>113</sup> *Id.* § 104559.5(e).

<sup>114</sup> Cal. Proposition 31, Referendum on 2020 Law That Would Prohibit the Retail Sale of Certain Flavored Tobacco Products (2022).

<sup>115</sup> Edina, Minn., Ordinance No. 2020-08 (codified at EDINA, MINN., CITY CODE § 12-257).

product” as “including, but not limited to, any taste or smell relating to menthol, mint, wintergreen, chocolate, cocoa, vanilla, honey, fruit, or any candy, dessert, alcoholic beverage, herb or spice.”<sup>116</sup> R.J. Reynolds Tobacco Company, along with other plaintiffs, sued the City of Edina, arguing that the ordinance was both expressly and impliedly preempted by federal law. The district court held that the ordinance fell within the TCA’s savings clause and therefore was not expressly preempted.<sup>117</sup> The court further held that the ordinance was not impliedly preempted either.<sup>118</sup> The decision is currently on appeal before the Court of Appeals of the United States for the Eighth Circuit.

#### *D. Other Areas of Disparate Regulation for Tobacco Products*

The two case study examples above—minimum pack size/pricing restrictions on cigars and regulation of flavored tobacco products—serve only to demonstrate the tip of the iceberg of disparate tobacco regulation. There are multiple other areas that are riddled by inconsistent state and local legislation for tobacco products, including the following:

- **Coupon and Price Promotion Restrictions:** Coupon and price promotion regulations on tobacco products is another area where there are disparate and varied state and local regulations. For example, Arkansas and Hawaii (and other states) have restrictions on where tobacco product coupons can be disseminated.<sup>119</sup> Massachusetts and New Jersey, on the other hand, have broader wholesale restrictions against the use of coupons on tobacco products.<sup>120</sup> Getting more granular, at the local level, there are restrictions on tobacco product coupon and price promotion practices in various cities and counties—despite no statewide restrictions—such as in Chicago, Illinois;<sup>121</sup> Washington County, Oregon;<sup>122</sup> and St. Paul, Minnesota.<sup>123</sup> Further, some of these restrictions only apply to certain product categories or certain locations.
- **Nicotine Ceilings:** Maximum nicotine content in vapor products is becoming another area with inconsistent regulations at the state or local level. For example, in Indiana, it is unlawful to sell an e-liquid that contains more than seventy-five (75) milligrams per milliliter of nicotine.<sup>124</sup> In Massachusetts, on the other hand, it is unlawful to sell an electronic nicotine delivery system with nicotine content greater than thirty-five (35) milligrams per milliliter, but there is an

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<sup>116</sup> *Id.*

<sup>117</sup> *R.J. Reynolds Tobacco Co. v. City of Edina*, 482 F. Supp. 3d 875, 882 (D. Minn. 2020).

<sup>118</sup> *Id.* at 886.

<sup>119</sup> ARK. CODE § 5-27-227(f) (2021); HAW. REV. STAT. § 328J-17 (2022).

<sup>120</sup> 105 MASS. CODE REGS. § 665.025 (2022); N.J. STAT. ANN., § 2A:170-51.11 (2020).

<sup>121</sup> CHICAGO, ILL., MUNICIPAL CODE § 4-64-820 (2022).

<sup>122</sup> WASHINGTON, OR., MUNICIPAL CODE, Appendix B Ch. 2, § 2.030 (Nov. 2, 2021).

<sup>123</sup> ST. PAUL, MINN., LEGISLATIVE CODE § 324.07 (2021).

<sup>124</sup> IND. CODE ANN., § 7.1-7-5-1.1 (West 2022).

exemption for retail tobacco stores or smoking bars.<sup>125</sup> More locally, Philadelphia also has a law prohibiting the sale of specific tobacco products in certain retail spaces if the nicotine levels exceed certain limits.<sup>126</sup>

- **Prohibitions on Remote Sales:** Certain states restrict access to how consumers can purchase tobacco products. For illustration, New York and Oregon prohibit e-cigarettes to be sold online or through the mail;<sup>127</sup> Utah prohibits the sale of all tobacco products to consumers over the internet or through the mail;<sup>128</sup> and in South Dakota, only “cigars” can be sold over the internet or through the mail.<sup>129</sup> “Cigars” are defined as “any individual roll of tobacco that has a wrapper or cover consisting only of tobacco.”<sup>130</sup>

#### *E. Why Is This a Problem, and What is the Answer?*

The problem is obvious and cannot be overstated. States and localities have been serving as policy labs (both before and after passage of the TCA and implementation of the Deeming Rule), enacting, enforcing, defending, and litigating disparate and varying legislation and regulations in the realm of tobacco products. This imposes on the tobacco industry the herculean task of keeping up with a minimum of fifty and up to hundreds of specific and variable requirements related to flavors, packaging, taxes, advertising, promotions, mail order sales, licensing, and the list goes on. This is all in addition to complying with laws at the federal level, to the extent they exist, from FDA and other federal agencies such as the Alcohol and Tobacco Tax and Trade Bureau, U.S. Customs and Border Protection, and others.

Even tasked with the best executives, lawyers, and lobbyists, it is incredibly difficult to manage the advertising, sale, and distribution of product portfolios if there is no measure of consistency in how products are treated and regulated throughout the country. This impacts the business on every level, from supply chain logistics to business planning. The purpose of regulation is to set principles and rules so that an industry can know how it is to behave in the marketplace. In the current landscape, this cannot be said for the tobacco industry because the disparity in regulations undermines this very concept.

Distinct from the practical difficulty in keeping track of such varied regulations, there is also the problem that, as proven by the case studies herein, when state and local legislators act as “policy labs,” it puts the onus on industry to ensure the state and localities are legislating within the bounds of their established authority. While the challenges have often been successful, it is nonetheless a heavy price to pay. It has become the industry’s burden to spend time and money ensuring that state and local legislatures act within their actual authority. Further, many times these “policy lab” actions do nothing but shift sales outside of one jurisdiction, sending them to another,

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<sup>125</sup> MASS. GEN. LAWS ANN. c. 270, § 29(b) (West 2022).

<sup>126</sup> PHILA., PA., MUNICIPAL CODE, § 9-638(3) (2022).

<sup>127</sup> N.Y. PUB. HEALTH LAW § 1399-LL (McKinney 2022); OR. REV. STAT. § 180.441 (West 2022).

<sup>128</sup> UTAH CODE ANN. §§ 59-14-509; 59-14-808 (West 2022).

<sup>129</sup> S.D. CODIFIED LAWS §§ 10-50-99; 10-50C-4 (2022).

<sup>130</sup> S.D. CODIFIED LAWS § 10-50C-1 (2022).

and cause confusion amongst consumers as to what the policy goal is. The recently vetoed flavor ban in Denver, Colorado is a perfect example of restraint winning the day in local legislation. In Denver, the City Council passed legislation to ban all flavored tobacco products in the city, but Mayor Hancock vetoed it, saying “We can work on this in a more collaborative way and we can also move to enhance our existing regulatory framework, in addition to pursuing a broader strategy by acting state-wide or at least regionally.”<sup>131</sup> Mayor Hancock recognized that disparate regulation does not benefit anyone—industry or consumers.

While the problem is easy to identify, the answer is less obvious. The starting point, however, must be uniformity in the law. Critically though, such uniformity—however it materializes—must be properly driven by policy-oriented goals that are supported by research. For example, in achieving some sense of utopian uniformity, there should still be disparity between how different classes and subclasses of tobacco products are treated. A cigarette is different than a premium cigar, and an electronic cigarette is different from pipe tobacco. If the tobacco/nicotine products industry is going to be regulated, it should be like any other—with science-based, product-based decisions and laws. But it should also be regulated in a manner that promotes compliance and uniform behaviors in the industry and does not lead to consumer confusion or economic gamesmanship based on geography.

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<sup>131</sup> Press Release, City and County of Denver, Mayor Hancock Vetoes CB21-1182 (Dec. 10, 2021), <https://www.denvergov.org/Government/Agencies-Departments-Offices/Agencies-Departments-Offices-Directory/Mayors-Office/News/2021/Mayor-Hancock-vetoes-CB21-1182>.