SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH OF MASSACHUSETTS
No. SJC-13434

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

v.

TOWN OF BROOKLINE & OTHERS,
Defendants/Appellees.

ON APPEAL FROM ALLOWANCE OF MOTION TO DISMISS
BY THE NORFOLK SUPERIOR COURT

ORDER TRANSFERRED, SUA SPONTE, TO
THE SUPREME JUDICIAL COURT

AMICUS BRIEF OF MEDICAL, PUBLIC HEALTH, AND COMMUNITY GROUPS IN SUPPORT OF APPELLEES

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I. STATEMENT OF INTERESTS OF THE *AMICI CURAIE*[1]

Amici are the following national, state, and local public health, medical, and community organizations: American Cancer Society Cancer Action Network, American Lung Association, Campaign for Tobacco-Free Kids, Institute for Health and Recovery, Massachusetts Chapter of the American Academy of Pediatrics, Massachusetts Health Officers Association, Massachusetts Medical Society, Massachusetts PTA, Parents Against Vaping e-cigarettes, Public Health Law Center, Tobacco Free Mass, and Truth Initiative Foundation.

As is evident from the description of the *amici* included in the Addendum to this brief, each of these groups works, on a daily basis, to reduce the devastating health harms of tobacco products. *Amici* include physicians and other health care providers who counsel

[1] Pursuant to Mass. R. App. P. 17, *amici* state that: no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; no person, other than *amici* or its counsel, contributed money that was intended to fund preparing or submitting this brief; and none of the *amici* nor their counsel represents or has represented one of the parties to the present appeal in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

their young patients and their parents about the hazards of tobacco use, organizations with formal programs to urge users to quit, and groups representing parents and families struggling to free young people from nicotine addiction. Each of these *amici* has a direct and immediate interest in preserving municipal authority to regulate tobacco products, as well as expertise in the significant role that local authority has played in creating effective tobacco control policies, many of which were later adopted at the state and/or federal levels. Thus, *amici* are particularly well suited to inform the Court of the substantial public health benefits that are associated with preserving local tobacco control authority, including with respect to the Brookline By-Law.

II. ISSUES PRESENTED

In June 2023, this Court invited *amicus* briefs on the following issue:

1. Whether a municipality's by-law prohibiting the sale of tobacco or e-cigarettes to any person born on or after January 1, 2000, is preempted by G.L. c. 270, § 6(b), because it "relate[s] to the minimum sales age to purchase tobacco," and is "inconsistent, contrary

or conflicting" with the minimum age for purchasing such products contained in the statute.

III. INTRODUCTION AND SUMMARY OF ARGUMENT

As the U.S. Supreme Court has observed, "Tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States." FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 161 (2000). Indeed, today use of tobacco products is the leading cause of preventable death in the United States, resulting in 480,000 deaths per year. U.S. DEP'T OF HEALTH & HUMAN SERVS. ("HHS"), The Health Consequences of Smoking–50 Years of Progress: A Report of the Surgeon General, Executive Summary, at 2 (2014), https://www.hhs.gov/sites/default/files/consequences-smoking-exec-summary.pdf. Ninety percent of adult smokers begin smoking in their teens, HHS, The Health Consequences of Smoking – 50 Years of Progress: A Report of the Surgeon General, 708 (2014), https://www.ncbi.nlm.nih.gov/books/NBK179276/pdf/Bookshelf_NBK179276.pdf, a fact the tobacco industry has long understood. As the U.S. Court of Appeals for the D.C. Circuit recently noted, "Businesses seeking to make a profit selling tobacco products . . . face powerful

economic incentives to reach younger customers." Prohibition Juice Co. v. FDA, 45 F.4th 8, 12 (D.C. Cir. 2022).

By enacting a By-Law prohibiting the sale of tobacco products[2] to persons born on or after January 1, 2000, Brookline has developed an innovative policy aimed at protecting not only today's youth, but generations to come, from the scourge of tobacco products that lure millions into a lifetime of addiction and contribute so significantly to disease and death. The Superior Court was correct in holding that the Brookline By-Law is not preempted by the state minimum sales age law, but rather augments the protection afforded by the state law. Indeed, the By-Law is in harmony with the long and rich tradition in Massachusetts of local action to protect public health – particularly with respect to the health harms of tobacco – a tradition that has allowed local governments to act as laboratories for effective protective measures against tobacco-related disease that have yielded significant public health benefits in this State for many years.

[2] This brief uses the term "tobacco product" to mean all products containing tobacco or nicotine, including cigarettes and e-cigarettes.

IV. ARGUMENT

A. Brookline's By-Law Augments the Protections of the 2018 Act and Is Not Preempted by It.

In 2018, the Town of Brookline enacted a local by-law prohibiting the sale of tobacco products in Brookline to individuals born after January 1, 2000 (the "By-Law"). Count I of the Appellants' Complaint alleges that St. 2018, c. 157 ("An Act Protecting Youth from the Health Risks of Tobacco and Nicotine Addiction") (the "2018 Act"), which raises the statewide minimum age for the purchase of tobacco products to 21, preempts the By-Law. That assertion is incorrect because the By-Law is not "inconsistent with", and therefore not preempted by, the 2018 Act.

The 2018 Act provides:

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

St. 2018, c. 157, § 22 (emphasis added). The Appellants' claim rests on the first clause of the first sentence of this provision. The Appellants, however, fail to acknowledge the proviso that immediately follows that clause, and the final sentence of the provision. Both are critical to understanding the nature of the preemption that the Legislature intended.

First, the Brookline By-Law is not "inconsistent with, contrary to, or conflicting with," the 2018 Act. The Act sets a floor for the minimum sales age to purchase tobacco products. It does not preclude restrictions like the Brookline By-Law which, as the Superior Court noted, "places **additional** restrictions on the sale of tobacco products within the Town by imposing, over the course of years, a complete prohibition on the sale of such products to all persons, not just those under the age of twenty-one." Memorandum of Decision and Order on Defendants' Rule 16(b)(6) Motion to Dismiss (Oct. 17, 2022) (R.A. 140150) (emphasis added) As the Superior Court correctly found below, where a local bylaw "augments" state law, there is no inconsistency. Take Five Vending, Ltd. v. Town of Provincetown, 415 Mass. 741, 747 (1993); see Tri-Nel Management, Inc. v. Board of Health of Barnstable, 433 Mass. 217, 225 (2001)

(where local tobacco restrictions went beyond "minimum Statewide restrictions," the local ban "furthers, rather than frustrates," the intent of the state law and is not preempted). This is especially true where a statute sets a *minimum* standard, as the 2018 Act does, in which case localities are "free to adopt more stringent controls." Lovequist v. Conservation Comm'n of Town of Dennis, 379 Mass. 7, 15 (1979), quoting Golden v. Selectmen of Falmouth, 358 Mass. 519, 526 (1970).

Second, were there any doubt as to whether the By-Law was inconsistent with the 2018 Act, the proviso in the first sentence answers that question. That proviso protects against preemption "any inconsistent, contrary or conflicting local law in effect on December 30, 2018 that prohibits the sale of tobacco products to persons *under* the age of 19, 20, or 21 as applied to persons who attained the age of 18 before December 31, 2018." (emphasis added). This illustrates the Legislature's definition of an "inconsistent, contrary or conflicting local law" — one that provides a lower minimum age than 21. The Legislature declined to define "inconsistent, contrary, or conflicting" to include local laws that provide higher minimum ages, or that otherwise limit tobacco sales based on the purchaser's birth date.

"[W]here the Legislature has employed specific language in one paragraph, but not in another, the language should not be implied where it is not present." Souza v. Registrar of Motor Vehicles, 462 Mass. 227, 232 (2012), quoting Commonwealth v. Galvin, 388 Mass. 326, 330 (1983). If the Legislature desired to preempt local laws that provided a higher minimum age than 21, it would have said so.

Third, the final sentence of the preemption provision again confirms that the Legislature intended a narrow, rather than a broad, scope of preemption. The Legislature provided that, other than the limited preemption noted in the first sentence, cities and towns may enact "any" local law "that limits or prohibits the purchase of tobacco products."[3]

The Legislature's choice of a narrow preemption provision is in keeping with the longstanding tradition in the Commonwealth of granting local municipalities the broadest range of authority to protect the public health. Tri-Nel Management, Inc., 433 Mass. at 225-226

[3] The limited scope of this preemption stands in stark contrast with the statutory scheme in Town of Wendell v. Attorney General, 394 Mass. 518 (1985), relied on by *amici* American Snuff Company, LLC, under which pesticides were regulated uniformly and comprehensively on a statewide basis by design.

("[T]he Legislature has made the policy decision that public health matters affecting local communities may be the subject of reasonable municipal regulations . . . the appropriateness of this delegation is rooted in the legal history of this Commonwealth.").

This is because local protection of public health is at the core of municipal police power and obligations. More than a century before the Massachusetts state constitution was amended by Art. LXXXIX (the Home Rule Amendment) to give cities and towns broad discretion to govern themselves on most matters, this Court declared "[t]he great object of the city is to preserve the health of the inhabitants." In re Vandine, 6 Pick. 187, 191 (1828). Three years later, the Court affirmed the principle that it was "not only the right but the duty of the city government . . ., so far as they may be able, to remove every nuisance which may endanger the health of the citizens. And they have necessarily the power of deciding in what manner this shall be done, and their decision is conclusive, unless they transcend the powers conferred on them by the city charter." Baker v. Boston, 12 Pick. 184, 192-193 (1831).

This understanding of the core function of the municipality has led this Court to afford municipal

health and safety regulations a "heavy presumption of validity," even in the face of seemingly pervasive state and federal preemption, and even asserted national security interests. Arthur D. Little, Inc. v. Comm'r of Health & Hosps. of Cambridge, 395 Mass. 535, 546 (1985) ("[L]aws designed to protect public health and welfare" have been declared "of a 'particular, immediate and perpetual concern' to any municipality"), citing E. McQuillin, Municipal Corporations § 24.01 (3d ed. 1980)).

The preemption provision of the 2018 Act must be read expansively with this long history of local regulation to protect public health in mind. As explained in more detail in Section IV.B. infra, this history is particularly strong on issues related to tobacco use, in which the Courts of this State have confirmed the importance of allowing localities to experiment with a wide range of policies to mitigate the effects of tobacco use, the most deadly and pernicious "nuisance which may endanger the health of the citizens". Baker, 12 Pick. at 188.

B. Preserving Municipal Authority to Regulate Tobacco Products is Critical for Public Health.

Massachusetts has long been home to some of the strongest and most innovative tobacco control laws in the country. It has largely been a bottom-up effort, with municipalities, functioning as policy laboratories, leading the way. For example, before they were later enacted at the state and/or federal levels, Massachusetts municipalities had enacted laws raising the minimum sales age for tobacco products from 18 to 21, requiring smoke-free workplaces, and restricting the sale of flavored tobacco products to reduce their appeal to young people. Local policy experimentation has generated significant public health benefits for the citizens of this Commonwealth.

Thus, as explained more fully below, strong policy reasons militate against interpreting state law as preempting local tobacco control laws like the Brookline By-Law. It is critical that Brookline and other municipalities continue to have the authority to enact innovative laws aimed at protecting the public health, including from tobacco-related death and disease. Cf. Tri-Nel Mgmt., Inc., 433 Mass. at 222 ("[W]e have previously recognized the ill effects of tobacco use,

particularly when it involves minors, as a legitimate municipal health concern justifying municipal regulation of tobacco products."). Such local authority will lead to more effective and life-saving policies at all levels of government.

1. Municipalities as Policy Laboratories

Justice Brandeis famously referred to the states as "laborator[ies]," that "if its citizens choose," can experiment with novel policies "without risk to the rest of the country." New State Ice Co. v. Liebmann, 285 U.S. 263, 311 (1932) (Brandeis J., dissenting). Such reasoning applies with equal and perhaps greater force to localities due to their sheer number. Municipalities' relatively small scale and streamlined lawmaking process make them the ideal jurisdictions to develop innovative public health policies. See generally Paul A. Diller, Why Do Cities Innovate in Public Health? Implications of Scale and Structure, 91 WASH. U. L. REV. 1219 (2014).

As one commentator put it, "If the fifty states are laboratories for public policy formation, then surely the . . . [many more] . . . municipalities provide logarithmically more opportunities for innovation, experimentation and reform." Richard Briffault, Home Rule and Local Political Innovation, 22 J.L. & POL. 1, 31

(2006). Local experimentation allows the public and policymakers at all levels to assess the benefits, burdens, and gaps of a law on a small scale and use that information to decide whether they should replicate or build upon the law in their municipality, state, or even at the federal level. "Refining policies at the local level" also "helps . . . minimise [sic] negative outcomes and build social acceptance." John A. Francis et al., Policy-Driven Tobacco Control, 19 (Supp. 1) TOBACCO CONTROL i16, i19 (2010), https://tobaccocontrol.bmj.com/content/19/Suppl_1/i16. While no jurisdiction may have the perfect solution, each attempt helps it and other jurisdictions understand what is effective in solving complex public health problems. See Marquan Robertson, Preference-Based Federalism, 54 ST. MARY'S L.J. 805, 833 (2023).

Municipalities' streamlined lawmaking process also promotes public health innovation. Compared to the bicameral legislatures in most state governments (and at the federal level), municipalities' unicameral city council or town meeting structure creates fewer opportunities for lobbyists and interest groups to upend policy experiments. See Erin A. Scharff, Hyper Preemption: A Reordering of the State-Local

Relationship?, 106 Geo. L.J. 1469, 1492 (2018). With respect to tobacco control laws specifically, it has been recognized that "the tobacco industry and its allies tend to have far more sway with state legislators than they do with local elected officials," underscoring the public health importance — and sometimes necessity — of acting at the local level. Micah L. Berman, Raising the Tobacco Sales Age to 21: Surveying the Legal Landscape, 131 PUB. HEALTH REPS. 378, 380 (2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4765989/pdf/phr131000378a.pdf.

2. Local Policy Experimentation Has Led to Impactful State and Federal Tobacco Control Laws

To see the impact of local experimentation, particularly in Massachusetts, one need only look at the state and federal tobacco control laws that were modeled after prior municipal ordinances. This list includes significant state and federal tobacco control laws.

a. Minimum Sales Age

Indeed, the very state law that Appellants now claim is preemptive is the result of local experimentation. In 2005, Needham became the first jurisdiction in the country to raise the minimum age for sales of tobacco products from 18 to 21. Jonathan P.

Winickoff et al., Tobacco 21—An Ideas Whose Time Has Come, 370 NEW. ENG. J. MED. 295, 296 (2014), https://www.nejm.org/doi/pdf/10.1056/nejmp1314626. The impact was dramatic. From 2006 to 2010, the youth smoking rate in Needham fell by 48% (from 12.9% to 6.7%), nearly triple the decline seen in surrounding communities (14.9% to 12.4%). Id. Other jurisdictions took note and enacted their own laws. Between 2012 and 2018, roughly 175 towns in Massachusetts raised the minimum sales age, Matthew J. Reynolds et al., The Emergence of the Tobacco 21 Movement from Needham, Massachusetts, to Throughout the United States (2003-2019), 109 AM. J. PUB. HEALTH 1540, 1546 (2019), https://pubmed.ncbi.nlm.nih.gov/31536403/#full-view-affiliation-1, before the state in late 2018 implemented the same policy. An Act Protecting Youth from the Health Risks of Tobacco and Nicotine Addiction, 2018 Mass. Legis. Serv. c. 157 § 9 (codified as G.L. c. 270 § 6(b)). In December 2019, President Trump signed a federal law raising the minimum sales age to 21. Further Consolidated Appropriations Act, 2020, Pub L. 116-94, Div. N, Tit. I, Subtit. E, § 603(a), 133 Stat. 2534, 3123 (2019) (codified at 21 U.S.C. § 387f(d)(5)).

Prior to the federal increase, 19 states and the District of Columbia had already adopted laws raising the minimum age of sale from 18 to 21. Campaign for Tobacco-Free Kids, States and Localities That Have Raised the Minimum Legal Sale Age for Tobacco Products to 21, at 1, https://assets.tobaccofreekids.org/content/what_we_do/state_local_issues/sales_21/states_localities_MLSA_21.pdf. Many of these state policies were preceded by extensive action at the city and county level, with over 540 cities and counties having passed such laws before the federal law was enacted. Id. For example, in New York, New Jersey and Ohio, at least 25 local laws raising the age of sale had passed prior to their state laws, and in Illinois, at least 40 local laws were passed prior to its state law. Id. at 2, 4-5.

b. Smoke-Free Laws

In 2004, Massachusetts enacted a state law that banned smoking in enclosed workplaces with one or more employees, including restaurants and bars. An Act Improving Public Health in the Commonwealth, 2004 Mass. Legis. Serv. c. 137 § 2 (codified as G.L. c. 270, § 22). Here again, the state law came about only after localities had already acted. Prior to adoption of the

state law, more than 60 cities and towns in the state had enacted some form of workplace smoke-free protections. American Nonsmokers' Rights Foundation, Chronological Table of U.S. Population Protected by 100% Smokefree State or Local Laws (July 1, 2023), http://no-smoke.org/wp-content/uploads/pdf/EffectivePopulationList.pdf; Melanie S. Dove et al., The Impact of Massachusetts' Smoke-Free Workplace Laws on Acute Myocardial Infarction Deaths, 100 AM. J. PUB. HEALTH 2206, 2208 (2010), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2951939/pdf/2206.pdf. These laws have saved lives. An assessment of the Massachusetts state smoke-free law found that the law was associated with an estimated 270 fewer deaths per year caused by acute myocardial infarction alone. Id. More broadly, the 2020 Surgeon General's Report, Smoking Cessation: A Report of the Surgeon General, found that there is sufficient evidence "to infer that smoke-free policies reduce smoking prevalence, reduce cigarette consumption, and increase smoking cessation." U.S. DEP'T OF HEALTH & HUMAN SERVS., Smoking Cessation: A Report of the Surgeon General, at 11 (2020), https://www.hhs.gov/sites/default/files/2020-cessation-sgr-full-report.pdf. The U.S. Centers for

Disease Control and Prevention ("CDC") has also concluded that smoke-free laws "help improve the health of workers and the general population" and "also can make it easier for people who smoke to quit, reducing their risk of disease." CDC, Smokefree Policies Improve Health (Nov. 30, 2021), https://www.cdc.gov/tobacco/secondhand-smoke/protection/improve-health.htm.

California, which was the first state to enact a smoke-free law and is considered a leader in the movement, followed a similar path of local smoke-free laws preceding — and spurring — state action. See, e.g., UNDO, How California Led the Country to Ban Workplace Smoking (Apr. 11, 2022), https://www.undo.org/disease/california-ban-workplace-smoking; Sheryl Magzamen et al., Print media coverage of California's smokefree bar law, 10 TOBACCO CONTROL 154 (2001), https://tobaccocontrol.bmj.com/content/10/2/154. In 1990, Lodi, California became the first city in the country to pass an ordinance that incorporated 100% smoke-free restaurants and San Louis Obispo, California adopted the nation's first smoke-free bar law. By 1994, California had over 100 local smoke-free restaurant

policies. Francis et al., supra at 21, at 17. The momentum led California to enact the California Smokefree Workplace Law in 1995, prohibiting smoking in public and private workplaces and restaurants, which was expanded to bars, taverns, and gaming rooms in 1998 to create the first statewide smoke-free bar law. Id. Presently, 28 states (including Massachusetts) and the District of Columbia have enacted comprehensive smoke-free laws, Campaign for Tobacco-Free Kids, U.S. State and Local Issues: Smoke-Free Laws (last updated July 1, 2023), https://www.tobaccofreekids.org/what-we-do/us/smoke-free-laws, as have more than 1100 municipalities. Americans Nonsmokers' Rights Foundation, Municipalities with Local 100% Smokefree Laws, at 39 (last updated July 1, 2023), https://no-smoke.org/wp-content/uploads/pdf/100ordlisttabs.pdf.

c. Flavored Tobacco Product Sales Restrictions

In November 2019, Massachusetts became the first state to restrict the sale of all flavored tobacco products, which have long been marketed by the industry to appeal to young people. An Act Modernizing Tobacco Control, 2019 Mass. Legis. Serv. C. 133 § 25 (codified

as G.L. c. 270 § 28(b)).[4] This policy was added to state law only after scores of local jurisdictions in the state had adopted their own laws restricting flavored tobacco product sales. By the fall of 2019, over 160 municipalities had enacted laws limiting the sale of flavored tobacco products, although many included exceptions for adult-only establishments, mint, menthol, and wintergreen products, or both. Massachusetts Experience, note 4, supra. State law built on and strengthened these earlier local efforts by eliminating the exceptions for any non-tobacco-flavored products. The state law has resulted in sharp declines in youth tobacco use. According to preliminary data from the Massachusetts Youth Health Survey, from 2019 to 2021, youth e-cigarette use declined from 32% to 17.6%, cigarette smoking from 4.3% to 2.9%, and cigar smoking from 4.7% to 2.0%. MASS. DEP'T OF PUBLIC HEALTH, Illegal Tobacco Task Force, Evaluation of an Act Modernizing

[4] Campaign for Tobacco-Free Kids, Impact of Restricting the Sale of Flavored Tobacco Products: The Massachusetts Experience, at 1 (July 3, 2023), https://assets.tobaccofreekids.org/factsheets/0421.pdf ("*Massachusetts Experience*"). The law immediately prohibited the sale of flavored e-cigarettes; the ban on sales of all other flavored tobacco products, including menthol cigarettes and flavored cigars, took effect in June 2020. 2019 Mass. Legis. Serv. c. 133 § 28.

Tobacco Control: Overview and Preliminary Results, at 36 (Sept. 28, 2022), https://www.mass.gov/doc/illegal-tobacco-task-force-public-meeting-fifty-one-minutes/download.

Jurisdictions outside of Massachusetts also took notice. New Jersey, New York, Rhode Island, and California now all prohibit the sale of at least one category of flavored tobacco products — flavored e-cigarettes, menthol cigarettes, or flavored cigars — as do hundreds of localities. Campaign for Tobacco-Free Kids, States & Localities that Have Restricted the Sale of Flavored Tobacco Products (July 27, 2023), https://assets.tobaccofreekids.org/factsheets/0398.pdf . Moreover, in May 2022, the United States Food and Drug Administration issued proposed rules to prohibit menthol as a characterizing flavor in cigarettes (the only flavor currently permitted in cigarettes under federal law) and to eliminate all characterizing flavors in cigars. Tobacco Product Standard for Menthol in Cigarettes, 87 Fed. Reg. 26,454 (proposed May 4, 2022); Tobacco Product Standard for Characterizing Flavors in Cigars, 87 Fed. Reg. 26,396 (proposed May 4, 2022).

As with Massachusetts, local restrictions on the sale of flavored tobacco products played a key role in

the eventual passage of California's statewide law. In June 2018, San Francisco voters upheld the first comprehensive prohibition on sales of flavored tobacco products in the country. Doris G. Gammon et al., Implementation of a Comprehensive Flavoured Tobacco Product Sales Restriction and Retail Tobacco Sales, 31 TOBACCO CONTROL e104, e104 (2022), https://tobaccocontrol.bmj.com/content/tobaccocontrol/31/e2/e104.full.pdf. Cities and counties across California, including Los Angeles, Oakland and Sacramento, followed suit, helping to build momentum for a statewide law. Campaign for Tobacco-Free Kids, supra at 29, at 1-2. Prior to a November 2022 ballot referendum in which California voters upheld a state law prohibiting the sale of most flavored tobacco products, California Prohibits Retailers from Selling Flavored Tobacco Products, CAL. DEP'T OF PUB. HEALTH, https://www.cdph.ca.gov/Programs/CCDPHP/DCDIC/CTCB/Pages/CAFlavorTobaccoLaw.aspx, over 135 California cities and counties had passed laws restricting the sale of flavored tobacco products. Campaign for Tobacco-Free Kids, supra at 29, at 1-2.

d. Tobacco-Free Pharmacies

In 2008, Boston became the first jurisdiction in Massachusetts and the second in the country to prohibit the sale of tobacco products in pharmacies. CTR. FOR PUB HEALTH SYS. SCI., Regulating Pharmacy Tobacco Sales: Massachusetts; Innovative Point-of-Sale Policies: Case Study #2, at 7 (2014), http://tobaccopolicycenter.org/wp-content/uploads/2017/11/550.pdf. Boston's law created substantial momentum and, over the next 6 years, more than 100 other Massachusetts localities adopted their own tobacco-free pharmacy laws. MUN. TOBACCO CONTROL TECH. ASSISTANCE PROGRAM, Local Summary on Tobacco Sales Bans in Pharmacies, at 4 (Dec. 15, 2014), https://www2.cambridgema.gov/CityOfCambridge_Content/documents/Wilson%2015.pdf. Then, in 2018, the State enacted a tobacco-free pharmacy law. An Act Protecting Youth from the Health Risks of Tobacco and Nicotine Addiction, 2018 Mass. Legis. Serv. c. 157 § 8 (codified as G.L. c. 112, § 61A). These laws have proven very effective at reducing tobacco retailer density, which studies have shown is associated with lower tobacco use rates. See, e.g., Joseph G. L. Lee et al., Associations of Tobacco Retailer Density and Proximity with Adult

Tobacco Use Behaviours and Health Outcomes: A Meta-Analysis, 31 TOBACCO CONTROL e189, e192 (2022), https://pubmed.ncbi.nlm.nih.gov/34479990/. Researchers concluded that prior to the enactment of the state law, the reduction of tobacco retailers in Massachusetts cities with tobacco-free pharmacy laws was 3.18 times as great as the reduction in cities without such laws. Yue Jin et al., Tobacco-Free Pharmacy Laws and Trends in Tobacco Retailer Density in California and Massachusetts, 106 AM. J. PUB. HEALTH 679, 683 (2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4986051/.

In sum, municipal policy experimentation has led to the subsequent enactment of some of the most impactful tobacco control laws at the state and federal levels. Massachusetts' municipalities in particular have led the way in enacting innovative policies, and such efforts have resulted in public health gains for the state. Massachusetts has one of the lowest smoking rates[5] and

[5] Massachusetts has the sixth lowest adult cigarette smoking rate in the country. Campaign for Tobacco-Free Kids, Key State-Specific Tobacco-Related Data and Rankings (Aug. 1, 2023), https://assets.tobaccofreekids.org/factsheets/0176.pdf .

some of the lowest related health outcomes[6] in the country. Based on the historical success of local tobacco control laws and the value of testing innovative policies on a small scale to assess the policies' effectiveness, this Court should recognize the strong public health justification for preserving municipalities' authority to experiment with bold tobacco-control policies like the Brookline By-Law.

[6] Massachusetts has the third lowest heart disease mortality rate in the country and the second lowest chronic obstructive pulmonary disease prevalence rate in the country. CDC, Heart Disease Mortality by State (Feb. 25, 2022), https://www.cdc.gov/nchs/pressroom/sosmap/heart_disease_mortality/heart_disease.htm; CDC, State-level Estimates of COPD, https://www.cdc.gov/copd/data-and-statistics/state-estimates.html (July 11, 2022).

V. CONCLUSION

For the foregoing reasons, this Court should uphold the Superior Court's dismissal of the Complaint on preemption grounds.

American Cancer Society Cancer Action Network, American Lung Association, Campaign for Tobacco-Free Kids, Institute for Health and Recovery, Massachusetts Chapter of the American Academy of Pediatrics, Massachusetts Health Officers Association, Massachusetts Medical Society, Massachusetts PTA, Parents Against Vaping e-cigarettes, Public Health Law Center, Tobacco Free Mass, and Truth Initiative Foundation,

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ADDENDUM

DESCRIPTION OF AMICI

1. American Cancer Society Cancer Action Network: The American Cancer Society Cancer Action Network (ACS CAN) is the American Cancer Society's nonprofit, nonpartisan advocacy affiliate. ACS CAN supports each level of government's ability to implement policies to protect the public's health. To reduce suffering and death from cancer effectively, local governments must have the authority to pass public health policies that are as strong or stronger than state and federal laws.

2. American Lung Association: The American Lung association is the nation's oldest voluntary health organization working to save lives by improving lung health and preventing lung disease. The American Lung Association has long been active in research, education and public policy advocacy regarding the adverse health effects caused by tobacco use. This includes supporting local authority to pass tobacco control policies stronger than state law.

3. Campaign for Tobacco-Free Kids: The Campaign for Tobacco-Free Kids is a leading force in the fight to reduce tobacco use and its deadly toll in the United States and around the world. The Campaign envisions a future free of the death and disease caused by tobacco,

and it works to save lives by advocating for public policies that prevent kids from using tobacco products, help smokers quit, and protect everyone from secondhand smoke.

4. Institute for Health and Recovery: The Institute for Health and Recovery (IHR) is a statewide, nonprofit organization that focuses on addressing and eradicating inequities in our healthcare, economic, and justice systems by developing and providing specialized trauma-informed services through collaborative models of practice. These strength-based and evidence-based continuum of care models are designed for families, individuals, youth, and pregnant and parenting individuals affected by alcohol, tobacco/nicotine, other substance use, violence/trauma, mental health challenges, and other health issues. IHR provides training, consultation, technical assistance, and curriculum development for local, state, and national organizations to improve the integration of best practices and policies into prevention and treatment programs to continue to promote resiliency and recovery for individuals and communities.

5. Massachusetts Chapter of the American Academy of Pediatrics: The Massachusetts Chapter of the American

Academy of Pediatrics (MCAAP) represents more than 1,600 primary care pediatricians, pediatric medical subspecialists, and pediatric surgical specialists in the Commonwealth. The MCAAP is committed to the attainment of optimal physical, mental and social health for all infants, children, adolescents, and young adults; and it is to this end that the members of the academy dedicate their efforts and resources.

6. Massachusetts Health Officers Association: Massachusetts Health Officers Association leads, supports and advocates for the delivery of statutory and foundational public health services across every municipality in the Commonwealth of Massachusetts. We inform, educate and empower our members to ensure healthy communities for all.

7. Massachusetts Medical Society: The Massachusetts Medical Society (MMS) is the statewide professional association for all physicians and medical students, supporting more than 25,000 members. A trusted leadership voice in health care, the MMS advocates for the shared interests of patients and our profession and takes an authoritative role in the development of health care policy in Massachusetts and nationally. We work in support of public health, provide expert advice on

physician practice management, address issues of physician well-being, and promote medical education, training, research, and the continuing education of physicians and other healthcare professionals.

8. Massachusetts PTA: Massachusetts PTA, a registered 501(c)(3) nonprofit association, is Massachusetts's largest and oldest child advocacy organization. We work to ensure that children are healthy, safe and well-educated so that every child can realize their full potential. We educate youth and their parents on the hazards of tobacco use and support measures aimed at protecting our children and youth from the threat of tobacco.

9. Parents Against Vaping e-cigarettes: Parents Against Vaping e-cigarettes (PAVe) was founded by three moms in 2018 as a grassroots response to the youth vaping epidemic. PAVe, a volunteer-powered education and advocacy nonprofit, is the first and only national parent voice in the fight against youth tobacco use and the predatory behavior of the tobacco industry.

10. Public Health Law Center: The Public Health Law Center is a public interest legal resource center dedicated to improving health through the power of law and policy, grounded in the belief that everyone

deserves to be healthy. Located at the Mitchell Hamline School of Law in Saint Paul, Minnesota, the Center helps local, state, national, Tribal, and global leaders promote health by strengthening public policies. For over twenty years, the Center has worked with public officials and community leaders to develop, implement, and defend effective public health laws and policies, including those designed to reduce commercial tobacco use, improve the nation's diet, encourage physical activity, protect the nation's public health infrastructure, and promote health equity.

11. Tobacco Free Mass: Tobacco Free Mass (TFM) is an independent coalition supported by our members and sponsors. We advocate for funding and policies that support tobacco prevention and cessation. Originally known as The Coalition for a Healthy Future, Tobacco Free Mass was formed in 1991. We work to increase awareness of tobacco issues, help tobacco and nicotine users quit, prevent young people from starting, and ensure that no one is exposed to secondhand smoke or e-cigarette aerosol.

12. Truth Initiative Foundation: Truth Initiative Foundation, d/b/a Truth Initiative, is a 501(c)(3) Delaware corporation created in 1999 out of a 1998 master

settlement agreement that resolved litigation brought by 46 states, five U.S. territories, and the District of Columbia against the major U.S. cigarette companies. Truth Initiative studies and supports programs in the United States to reduce youth tobacco use and to prevent diseases associated with tobacco use.

MASS. R. APP. P. 16(k) CERTIFICATION

Pursuant to Mass. Rule App. P. 16(k), I certify that this document complies with the rules of court that pertain to the filing of appellate briefs. Compliance with the length limit was ascertained by using Courier 12 font, not exceeding 10.5 characters per inch, on less than 35 pages.

/s/ Christina S. Marshall
Christina S. Marshall

MASS. R. APP. P. 13(e) CERTIFICATE OF SERVICE

I certify under the penalties of perjury that on October 16, 2023, I caused a true and correct copy of this Amicus Brief of Medical, Public Health, and Community Groups In Support of Appellees to be served by electronic mail on the following attorneys in this matter before the Supreme Judicial Court, No. SJC-13434:

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