



## Preemption Leads to Health Disparities

### *Constraint on local decisions*

Preemption is when the authority of one level of government to regulate an issue is limited by a higher level of government.<sup>i</sup> This means that when local jurisdictions want to pass legislation to strengthen requirements, a state law may preempt, or not allow local legislation on the matter. Statewide policies that set a minimum standard of equal protection (floor) allow communities to adopt stronger, tailored policies that reflect their community needs and values. One-size-fits-all policies can constrain local communities from innovating and taking needed action that decreases health disparities.

Preemption is a practice that can slow or stop community solutions addressing a wide range of health and social issues including tobacco, food, alcohol and climate change.<sup>ii</sup>

### *Preemption and tobacco policies*

Traditionally, the strongest and most innovative tobacco control policies have emerged from local communities before being adopted at the state or federal level. This is critical to quickly and effectively respond to emerging tobacco industry practices and new products.

**Healthy People 2020** objective TU-16.2 calls for eliminating state laws that preempt any type of local tobacco control law.<sup>iii</sup>

The Centers for Disease Control and Prevention (CDC) have stated that local communities should retain the right to impose additional measures on the sale, purchase, use, or promotion of tobacco products and inhalant delivery systems.<sup>iv</sup>

The tobacco industry pursues preemption to weaken, impede or defeat tobacco control efforts. This is evidenced by a quote from tobacco company internal documents: “By introducing preemptive statewide legislation we can shift the battle away from the community level back to the state legislatures where we are on stronger ground.” -*Tina Walls, Philip Morris, July 8, 1994.*<sup>v</sup>

### Health organizations against preemption

- ❖ Institute of Medicine
- ❖ Centers for Disease Control and Prevention (CDC)
- ❖ National Institutes of Health
- ❖ American Cancer Society
- ❖ American Heart Association
- ❖ American Lung Association
- ❖ Americans for Nonsmokers' Rights
- ❖ Robert Wood Johnson Foundation
- ❖ Yale Rudd Center for Food Policy & Obesity



Preemption often results in health and social norm disparities between states where local authorities have the ability to adopt policies and states where local authorities are preempted from enacting such policies.

The Oregon Indoor Clean Air Act (ICAA) no longer includes preemption and is an example of a law that allows local communities to respond to the needs of their community. Since preemption was lifted, the City of Corvallis and Multnomah County have enacted stronger smoke free workplace laws than the state law. Both ordinances include electronic cigarettes as part of their smoke free workplace laws.

### *Emerging tobacco policies*

Many promising retail policies are pioneering and have yet to be widely implemented. Statewide retail licensure that sets a floor—rather than a ceiling—allows local communities to continue to explore and innovate.

The federal law governing point-of-sale, The Family Smoking Prevention and Tobacco Control Act (TCA), expressly preserves state and local government authority to go beyond federal law in regulating key areas of tobacco point-of-sale practices, including the sale of flavored tobacco, minimum age of purchase, retailer density and location, free samples, minimum pack sizes, and coupon redemption.

Enacting policies at the local level is one of the best ways to make progress in tobacco control. Statewide tobacco and inhalant delivery system retail licensure is an opportunity to create a clear framework that allows local communities to build upon existing protections to address issues that are important to them.

### **Example of anti-preemption language for legislation**

*“This section does not prohibit the governing body of a local government from adopting additional licensing requirements for the retail sale of tobacco products or inhalant delivery systems, or from adopting ordinances or rules that further restrict the retail sale of tobacco products or inhalant delivery systems.”*

<sup>i</sup> National Policy & Legal Analysis Network (NPLAN) and Public Health Law Center. The Consequences of Preemption for Public Health Advocacy (2010). Available at

<http://www.publichealthlawcenter.org/sites/default/files/resources/nplan-fs-consequences-2010.pdf>

<sup>ii</sup> Pertschuk, M, Pomeranz, JL, Aoki, JR, Larkin, MA, Paloma, M. Assessing the Impact of Federal and State Preemption in Public Health: A Framework for Decision Makers. J Public Health Management Practice. 2012; 00(00): 00-00. Accessed May 18, 2015. Available at: <http://grassrootschange.net/wp-content/uploads/2013/01/AR-Pertschuk-Preemption-Framework-1.pdf>

<sup>iii</sup> US Department of Health and Human Services. Healthy people 2020. Tobacco use. Washington, DC: US Department of Health and Human Services; 2010. Accessed May 5, 2015. Available at <http://www.healthypeople.gov/2020/topics-objectives/topic/tobacco-use/objectives>.

<sup>iv</sup> Centers for Disease Control and Prevention (CDC). State preemption of local tobacco control policies restricting smoking, advertising, and youth access—United States, 2000-2010. MMWR Morb Mortal Wkly Rep. 2011;60(33):1124-7. Available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6033a2.htm>

<sup>v</sup> Bates No: 2041183751/3790