

COMMONWEALTH OF KENTUCKY
SUPREME COURT
2003-SC-000990-I
2003-SC-000978-T

LEXINGTON-FAYETTE COUNTY
FOOD AND BEVERAGE ASSOCIATION,

APPELLANT

v.

AMICUS CURIAE BRIEF OF THE AMERICAN
MEDICAL ASSOCIATION, THE KENTUCKY
MEDICAL ASSOCIATION, AMERICANS FOR
NONSMOKERS' RIGHTS AND THE TOBACCO CONTROL
LEGAL CONSORTIUM IN SUPPORT
OF APPELLEES

LEXINGTON-FAYETTE URBAN COUNTY
GOVERNMENT, et al.,

APPELLEES

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CERTIFICATION

I hereby certify that on this ____ day of January, 2004, a true and correct copy of the foregoing was served by first class mail, U.S. postage prepaid, to: George M. Geoghagen, III, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601-9230, Clerk, Fayette Circuit Court, Robert F. Stephens Courthouse, 120 N. Limestone Street, Lexington, KY 40507, John W. Walters and Michael T. Davis, Golden & Walters, PLLC, Corporate Plaza, 771 Corporate Drive, Suite 905, Lexington, KY 40503, Leslye M. Bowman and Theresa L. Holmes, Lexington-Fayette Urban County Government, 200 E. Main Street,

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INTRODUCTION

Urban-county governments in Kentucky are authorized to enact and enforce local laws preserving and protecting the health, safety, welfare, and convenience of local residents. These broad police powers are limited only to the extent the Commonwealth has clearly preempted local regulation on a particular issue. Such preemption must be expressly imposed by state law or impliedly imposed due to comprehensive state regulation on the same subject.

Lexington-Fayette's Smoking Ban Ordinance is not preempted. The Commonwealth has not passed any laws clearly asserting preemption over the regulation of second-hand smoke in all public places. Nor has the Commonwealth established a comprehensive scheme of statutes regulating second-hand smoke such that implied preemption exists.

There is no doubt that second-hand smoke is a public health hazard. Reports and studies by the United States Surgeon General, the Centers for Disease Control and Prevention, the American Medical Association and countless other medical authorities have all reached the same conclusion: second-hand smoke causes disease and death. Understanding the scientific literature and acting to protect the health, safety, welfare, and convenience of its citizens, the Lexington-Fayette Urban County Government exercised its police powers and adopted a Smoking Ban Ordinance. That ordinance must be upheld.

ARGUMENT

I. A Local Health Ordinance Protecting the Public From Second-hand Smoke is Not Preempted by State Statutes That Do Not Address the Issue of Second-hand Smoke.

The Kentucky Legislature has specifically authorized local governments to enact and enforce police and sanitary ordinances within their territorial limits so long as the ordinances do not conflict with state law. The extent of that authority and the methods of preemption are described in KRS 67A.070 which states:

(1) Urban-county governments may enact and enforce within their territorial limits such tax, licensing, police, sanitary and other ordinances not in conflict with the Constitution and general statutes of this state now or hereafter enacted, as they shall deem requisite for the health, education, safety, welfare and convenience of the inhabitants of the county and for the effective administration of the urban-county government.

(2) Urban-county government ordinances shall be deemed to conflict with general statutes of this state only:

(a) When the ordinance authorizes that which is expressly prohibited by a general statute; or (b) When there is a comprehensive scheme of legislation on the same subject embodied in a general statute.

KRS section 67A.070 (2002). Under KRS section 67A.070 an ordinance is preempted if it directly allows an action that is prohibited by a state statute, or if the legislature has created such a comprehensive set of rules on a particular topic that it can be fairly stated that the adoption of additional local regulation would violate the will of the State Legislature.

As a general matter, preemption is disfavored, and courts should preserve the historic and plenary police powers of local governments unless there is clear evidence of state preemption. *Commonwealth v. Telecom Directories*, Ky., 806 S.W.2d 638, 640 (1991). In

reviewing preemptive statutes the intent of the legislature is the touchstone of determining the extent of preemption. *Cippolone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). Preemptive statutes are to be interpreted narrowly. *Id.* The plain language of the statute within the context of that statute provides the best evidence of the intent of the legislature. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-63 (2002).

A. The Smoking Ban Ordinance is Not Preempted by the State Statute Addressing Youth Access to Tobacco.

The Lexington-Fayette Smoking Ban Ordinance, which regulates second-hand smoke in public places, is not preempted by state statutes addressing the issue of youth access to, and use of, tobacco products. The youth access laws regulate sales of tobacco products to minors including setting a minimum age for purchase of tobacco products, and requirements for customers to show valid identification. The so-called preemption section of the youth access and use statute states:

It is the intent of the Legislature that KRS438.305 to 438.340 shall be enforced in an equitable and uniform manner throughout the Commonwealth. For the purpose of equitable and uniform enforcement, the provisions of KRS 438.305 to 438.340 shall supersede any subsequently enacted local law, ordinance or regulation which relates to the use, display, sale, or distribution of tobacco products. It is the intent of the legislature that KRS 438.305 to 438.340 be enforced so as to ensure the eligibility for and receipt of any federal funds or grants that the Commonwealth of Kentucky now receives or may receive relating to the provisions of KRS 438.305 to 438.340.

KRS 438.300.

The statute clearly preempts certain local powers, but the question remains as to what local powers the legislature intended to restrict. The provisions of the relevant sections referenced in the preemption section address the Commonwealth's interest in preventing

youth from gaining access to and using all varieties of tobacco products. There is no mention of second-hand smoke in KRS 438.305 to 438.340. The legislative intent, as set out in the text of the statute, is to create a system of "uniform and equitable" enforcement of youth access laws throughout the Commonwealth, and to "ensure the eligibility for and receipt of any federal funds or grants" to which Kentucky is entitled. Lexington-Fayette's Smoking Ban Ordinance cannot create a non-uniform or inequitable manner of enforcement of second-hand smoke laws because the State has not addressed the issue. There is no program of federal matching funds for limiting second-hand smoke, so a local clean indoor air law in no way impairs the Commonwealth's eligibility for federal funds. Read in its entirety and in context, KRS 438.300 preempts only local laws regulating youth access to and use of tobacco products. Local laws regulating secondhand smoke are not preempted by KRS 438.300.

Contrary to Petitioner's assertion, the single word "use" in the preemption section does not alter this rational conclusion. First, it is entirely reasonable to interpret the term "use" as applying only to youth use of tobacco, as that is what is specifically addressed in the referenced statutes. See KRS 438.350 (prohibiting youth possession and *use* of tobacco products). With that interpretation, local governments could not regulate youth tobacco use because of the preemption in KRS 438.300. Further, a cardinal rule of statutory construction is to understand the meaning of words within the context of the entire statute. A single word arbitrarily plucked out of the context of youth access to and use of tobacco statutes cannot be plunked down in the middle of a dispute regarding second-hand smoke in public places, altering the reasonable interpretation of the statute in its entirety. This is particularly true

because of the general rule disfavoring preemption. There is simply no support for the conclusion that the Kentucky legislature intended to back-handedly preempt local regulation of second-hand smoke through a series of statutes containing no substantive provisions concerning second-hand smoke.

B. The Lexington-Fayette Smoking Ban Ordinance Regulating Smoking in Public Places is Not Preempted by a Regulation Concerning Food Preparation in Restaurant Kitchens.

State regulations regarding sanitary conditions in food preparation in kitchens do not preempt local governments from regulating second-hand smoke in the public areas of restaurants. As with the youth access and use laws, nothing in the food preparation regulations expressly or impliedly preempts a local clean indoor air ordinance.

Ignoring the lack of mention of second-hand smoke and the general rule against preemption, Petitioner relies on 902 KAR 45:005 for this preemption argument. The regulation states: "The function of this administrative regulation is to establish a uniform code for the regulation of all food service establishments and retail food stores for the purpose of protecting public health." 902 KAR 45:005. The regulations include a long list of safety precautions for food preparation, such as requiring that certain foods be kept at certain temperatures, and that certain cleaning procedures be used routinely for food preparation utensils. Indeed, the regulations address tobacco use in restaurants only by requiring food preparers to take precautions against using tobacco products while preparing food, and requiring they wash their hands after using tobacco products. The goal of these regulations is to protect the customer from unsanitary conditions in the preparation of food.

The regulations address food preparation in a kitchen, not the dangers of breathing second-hand smoke in the public area of a restaurant. There is no evidence that through 902 KAR 45:005, the Commonwealth intends to preempt local second-hand smoke regulations.

II. Lexington-Fayette's Smoking Ban Ordinance Protects the Public From the Serious Health Consequences of Second-hand Smoke and Therefore is the Type of Sanitary Ordinance Authorized by the Legislature in KRS 67A.070.

Local governments are expressly granted the authority to promulgate regulations relative to health and safety under KRS 67A.070. Lexington-Fayette Urban County Government, acting under the authority delegated to it under KRS 67A.070 promulgated an ordinance requiring that restaurants in the town become smoke-free.

That a smoking ban law constitutes a rule relative to health, safety and welfare of the public is a question well-settled by medical authorities, scientists, physicians, and government agencies at all levels. Therefore Lexington-Fayette has the authority to regulate second-hand smoke in public places.

Second-hand smoke is a combination of smoke from the lit end of a cigarette and smoke exhaled by the smoker. There exists a vast body of scientific research on the deadly effects of second-hand smoke. This medical evidence is now so conclusive that, six months ago, when 192 countries concluded negotiation of the world's first public health treaty, the Framework Convention on Tobacco Control, they included a unanimous declaration that "scientific evidence has unequivocally established that exposure to tobacco smoke causes death, disease and disability," and a treaty requirement that national governments "actively promote ... the adoption and implementation of effective legislative, executive, administrative

and/or other measures, providing for protection from exposure to tobacco smoke in indoor workplaces, public transport, indoor public places and, as appropriate, other public places."

Framework Convention on Tobacco Control, Article 8. Official text at http://www.who.int/tobacco/fctc/text/en/fctc_en.pdf

Much of the research underlying this global consensus was summarized in *Health Effects of Exposure to Environmental Tobacco Smoke: The Report of the California Environmental Protection Agency, Smoking and Tobacco Control Monograph No. 10*, Bethesda, MD, USDHHS, National Institutes of Health, National Cancer Institute, NIH Pub. No. 99-4645, 1999, (hereinafter "Cal. EPA"). Second-hand smoke contains many of the same chemical compounds inhaled by smokers and some that may be worse, including 69 known causes of cancer. See National Cancer Institute, *Risks Associated with Smoking Cigarettes with Low Machine-Measured Yields of Tar and Nicotine*. Smoking and Tobacco Control Monograph No. 13. Bethesda MD: U.S. Department of Health and Human Services, National Institutes of Health, NIH Pub. No. 02-5074, October 2001. http://dcccps.nci.nih.gov/tcrb/monographs/13/m13_5.pdf. US Dept. of Health and Human Services, *Reducing the Health Consequences of Smoking: 25 Years of Progress, A Report of the Surgeon General* (1989) ("1989 Surgeon General's Report"). See also *Reducing Tobacco Use: A Report of The Surgeon General*. Atlanta, Georgia: U.S. Dept. of Health and Human Services, Centers for Disease Control and Prevention, Office of Smoking and Health, 2000, at 193 ("2000 Surgeon General's Report");¹ Cal. EPA, *supra*; U.S. Dept. of Health

¹ The Report also cites studies showing that controlling ETS has, as a side benefit, a significant beneficial impact on people trying to quit smoking. *2000 Report* at 193.

and Human Services, *Report of the Surgeon General: The Health Consequences of Involuntary Smoking*, (1986).

Diluting tobacco smoke, whether by separating smokers from nonsmokers, or by increasing ventilation, does not make the smoke safe. As with asbestos, science has been unable to find any level of exposure at which second-hand smoke does not cause cancer. *See, 1989 Surgeon General's Report, supra.* The United States Environmental Protection Agency reported as long ago as 1992 that second-hand smoke is a cause of lung cancer in healthy adult nonsmokers. *Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders*, U.S. Environmental Protection Agency (Washington, D.C. 1992). Second-hand smoke causes cardiovascular disease, childhood asthma, lower respiratory tract infections and other respiratory illnesses. *See, Cal. EPA supra.* The California EPA Report estimates that, in the United States, second-hand smoke kills 1,900 to 2,700 infants each year by inducing Sudden Infant Death Syndrome and another 136 to 212 children each year from respiratory effects such as asthma. Cal. EPA at ES-4. The same report estimates that second-hand smoke kills an astonishing 35,000 to 62,000 American adults each year from heart attacks and other heart disease, and another 3,000 from lung cancer. *Id.* In short, it is a matter of accepted scientific fact that second-hand smoke exposure is not a mere annoyance – it is one of the leading causes of death and disease. Indeed, it kills more Americans than are killed by guns or highway accidents.

The medical community, the US Surgeon General, the Centers for Disease Control and Prevention and public health authorities are in agreement: smoking is a threat not only to the health and safety of smokers but also to the health of bystanders. In

addressing this threat to public health and safety, the Lexington-Fayette Urban County Government acted squarely within its statutory authority.

The Kentucky Legislature has chosen not to regulate in this area, leaving authority in local governments to regulate this health hazard perhaps because local legislators are in the best position to judge the needs of their communities. This is not surprising because studies show that local enforcement of tobacco control laws are the most effective method of regulating tobacco use. Jacobsen, Peter D., and Wasserman, Jeffrey, *Tobacco Control Laws: Implementation and Enforcement* (Rand 1997) at 94. Lexington-Fayette acted under its authority to preserve public safety in accordance with KRS 67A.070, and the state statutes do not preempt the ordinance.

CONCLUSION

For all the reasons stated, Amici Curiae request the Court affirm the lower court's ruling that the Lexington-Fayette Smoking Ban Ordinance is not preempted by any state statutes and preserve the ability of local authorities to regulate smoking to preserve the public safety and health.

Respectfully Submitted,

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