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## 21 in the 21st—An Evaluation of the Tobacco Regulation Trend

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## COMMENT

### 21 IN THE 21ST—AN EVALUATION OF THE TOBACCO REGULATION TREND

CASEY KELLUM\*

I.	Introduction.....	1038
II.	Background.....	1039
	A. History of Tobacco Regulation .....	1039
	B. Transitioning to Tobacco 21.....	1042
	1. Preemption—What is it and Why is it Important?.....	1042
	2. Challenges to the Tobacco 21 Ordinance.....	1045
	3. Why Twenty-One?.....	1046
	C. San Antonio, Texas’s Adoption of Tobacco 21.....	1049
III.	Analysis.....	1050
	A. The Retailer Provision.....	1051
	B. The Youth Provision.....	1053
	C. Penalties for Violating the Ordinance .....	1058
	D. Alternative Measures to Reduce Tobacco Use in Youth.....	1060
IV.	Conclusion .....	1061

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## I. INTRODUCTION

The use, effects, and regulation of tobacco have been a prominent topic in the everyday lives of Americans since its introduction. Tobacco regulation, in particular, began in the 17th century.<sup>1</sup> These regulations governed all aspects of tobacco use for both consumers and producers, including advertising and marketing,<sup>2</sup> product ingredients like flavors and additives,<sup>3</sup> areas of permitted use,<sup>4</sup> mandatory warning labels,<sup>5</sup> and the minimum age to purchase tobacco products.<sup>6</sup> Regulations pertaining to the minimum age are commonly referred to as “minimum legal sales age” laws (“MLSA” laws).<sup>7</sup>

Despite the rigorous regulation of tobacco products, tobacco remains the leading cause of preventable deaths in the United States.<sup>8</sup> Federal law currently prohibits the sale of tobacco to any individual under the age of eighteen.<sup>9</sup> However, many critics believe eighteen is an inadequate minimum legal sales age (“MLSA”).<sup>10</sup> Consistent with this understanding,

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1. See Gene Borio, *Tobacco Timeline*, TOBACCO.ORG (2001), [http://archive.tobacco.org/History/Tobacco\\_History.html](http://archive.tobacco.org/History/Tobacco_History.html) [perma.cc/SF5X-3EJ5] (listing a detailed history of tobacco throughout the world); see also Vernellia R. Randall, *History of Tobacco*, B.U. MED. CENTER (Aug. 31, 1999) <http://academic.udayton.edu/health/syllabi/tobacco/history.htm> [https://perma.cc/76YK-YVRD] (describing the early history of tobacco).

2. Advertisement and marketing regulations are frequently met with First Amendment challenges. These types of regulations still must pass constitutional muster. See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 567 (2001) (holding an arbitrary advertising ban on tobacco ads to be unconstitutional).

3. See, e.g., *U.S. Smokeless Tobacco Mfg. v. City of N.Y.*, 703 F. Supp. 2d 329, 346 (S.D.N.Y. 2010) (allowing a New York City ordinance prohibiting the sale of flavored tobacco).

4. The Federal Government has prohibited smoking on all flights but has left regulation of smoking in other enclosed spaces up to the states. See 14 C.F.R. § 252.1 (2016) (banning the use of cigarettes, including e-cigarettes, on air carriers).

5. See, e.g., 15 U.S.C. § 1333 (2012) (regulating labeling and advertisement of cigarettes).

6. See, e.g., 21 U.S.C. § 387f(d)(3)(A)(ii) (2012) (establishing 18 years of age as the minimum age to purchase tobacco products).

7. These regulations are also commonly referred to as “minimum age of legal access” laws (“MLA” laws). See Dorie E. Apollonio & Stanton A. Glantz, *Minimum Ages of Legal Access for Tobacco in the United States From 1863 to 2015*, 106 AM. J. PUB. HEALTH 1200, 1200 (2016) (reviewing the history of MLA in the United States).

8. *CDC National Health Report Highlights*, CDC, <https://www.cdc.gov/healthreport/publications/compendium.pdf> [https://perma.cc/C7WP-7EBG] (overviewing the leading causes of death and contributing factors).

9. 21 C.F.R. § 1140 (prohibiting the sale of tobacco to persons younger than eighteen).

10. See, e.g., Apollonio & Glantz, *supra* note 7, at 1200 (“The increasing evidence on tobacco addiction suggests that restoring MLAs to 21 years would reduce smoking initiation and prevalence, particularly among those younger than 18 years.”).

the Preventing Tobacco Addiction Foundation is leading a national movement encouraging cities, localities, and even states, to raise their MLSA to twenty-one years old.<sup>11</sup> This movement and the ordinances that accompany it are known as “Tobacco 21.”<sup>12</sup>

Each Tobacco 21 ordinance is comprised of common fundamental provisions in addition to provisions unique to each specific location. This Comment will focus on comparing and contrasting the key provisions of five separate Tobacco 21 ordinances in existence at the time of this writing. This Comment will conclude by assisting prospective Tobacco 21 adopters to consider each provision with great detail in order to implement an ordinance that will reach maximum effectiveness.

## II. BACKGROUND

### A. *History of Tobacco Regulation*

Tobacco: a small plant that packs a big punch.<sup>13</sup> The tobacco plant is native to North and South America, and its origins are believed to date back to 6,000 B.C.<sup>14</sup> Historically, tobacco was used for medicinal purposes such as dressing wounds and easing pain.<sup>15</sup> Some even used tobacco for religious purposes and considered it a gift from god with spiritual abilities.<sup>16</sup> After inadvertently discovering the Americas in 1492, Christopher Columbus was first introduced to the tobacco plant and its uses.<sup>17</sup> He would then bring it back to Europe, where its popularity quickly skyrocketed.<sup>18</sup>

Tobacco eventually made its way to every major country in the world. It did not take state leaders long to realize the use of tobacco required regulation. In 1632, Massachusetts Bay was the first colony in North America to create a ban on public smoking.<sup>19</sup> New York and Connecticut

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11. *See generally* TOBACCO TWENTY-ONE, <https://tobacco21.org> [<https://perma.cc/59S9-KQ29>] (overviewing the Tobacco 21 ordinance sweeping the country).

12. *Id.*

13. One ounce of the tobacco plant contains 300,000 seeds. Randall, *supra* note 1.

14. Matthew R. Herington, *Tobacco Regulation in the United States: New Opportunities and Challenges*, 23 HEALTH L. 13 (2010); Randall, *supra* note 1.

15. *See* Randall, *supra* note 1 (explaining the many historical uses of tobacco).

16. *See Traditional Tobacco, KEEP IT SACRED* (2015) <https://keepitsacred.itcmi.org/tobacco-and-tradition/traditional-tobacco-use/> [<https://perma.cc/QJ86-BLUT>] (“In many teachings, the smoke from burned tobacco has a purpose of carrying thoughts and prayers to the spirit world or to the Creator.” (footnote omitted)).

17. Borio, *supra* note 1.

18. Herington, *supra* note 14, at 13; Randall, *supra* note 1.

19. Borio, *supra* note 1; Randall, *supra* note 1.

quickly followed: the former banning smoking completely, while the latter allowing smoking once a day and “not in company with any other.”<sup>20</sup> New Jersey was the first state to create an MLSA in 1883—their MLSA at the time was sixteen years old.<sup>21</sup> Three years later, New York set its own MLSA, also at sixteen years old.<sup>22</sup>

By 1890, twenty-six states and territories created their own MLSA's and outlawed the sale of cigarettes to minors.<sup>23</sup> At the time, a “minor” could be anyone fourteen to twenty-four years old.<sup>24</sup> The number of states that adopted MLSA laws grew to forty-six in 1920.<sup>25</sup> The same year, South Carolina was the first state to ban smoking in restaurants.<sup>26</sup> Ohio and Rhode Island remained the last two states without MLSA laws but eventually passed their MLSA laws in 1939.<sup>27</sup> Even with the increasing regulation of tobacco use, between the 1950s to the 1960s, many states started decreasing their MLSA or even repealing their MLSA law altogether.<sup>28</sup>

The first indication of a link between tobacco use and lung cancer dates back to 1929, however, it was not until 1963 when the American Cancer Society recommended the MLSA be eighteen years old across the

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The law stated:

It is ordered, that noe person shall take any tobacco publicquely, under paine of punishment; also that every one shall pay 1d. for every time hee is convicted for takeing tobacco in any place, and that any Assistant shall have power to receave evidence and give order for the levyeing of it, as also to give order for the levyeing of the officer's charge.

4 RANDALL M. MILLER ET AL., *DAILY LIFE THROUGH AMERICAN HISTORY IN PRIMARY DOCUMENTS* 49 (Randall M. Miller eds., 2012); REV. SAMUEL PETERS, *THE TRUE-BLUE LAWS OF CONNECTICUT AND NEW HAVEN AND THE FALSE BLUE-LAWS* 336 (James Hammond Trumbull ed., 1876) (ebook). The original spelling was preserved to illustrate the historical nature of the law.

20. Apollonio & Glantz, *supra* note 7, at 1200; Borio, *supra* note 1.

21. Apollonio & Glantz, *supra* note 7, at 1201.

22. *Id.*

23. Borio, *supra* note 1.

24. *Id.*

25. Apollonio & Glantz, *supra* note 7, at 1201.

26. *Id.*

27. There were only forty-eight states in the United States at the time. The final two states implemented MLSA laws in 1939 with Ohio's MLSA at eighteen and Rhode Island's MLSA at sixteen. *Id.* at 1201; Borio, *supra* note 1.

28. The “erosion” of tobacco restrictions is believed to be caused by lobbying of the tobacco industry (“Big Tobacco”). Apollonio & Glantz, *supra* note 7, at 1201; Borio, *supra* note 1.

United States.<sup>29</sup>

In 1922, Congress passed the Synar Amendment, which required states to make their MLSA eighteen years old if they wanted to be eligible for substance abuse prevention grants.<sup>30</sup> Three years later, the Food and Drug Administration (FDA) proposed several tobacco-related regulations, one of which made the federal MLSA eighteen years old.<sup>31</sup> However, Big Tobacco pushed back on the FDA requirement, and the United States Supreme Court ultimately held the regulation was impermissible because the FDA did not have the authority to regulate tobacco products.<sup>32</sup> This changed in 2009 when Congress passed the Family Smoking Prevention and Tobacco Control Act (“Tobacco Control Act”), which expressly gave the FDA the authority to regulate tobacco.<sup>33</sup> Big Tobacco attempted to push back yet again, but this time they were unsuccessful.<sup>34</sup>

It is important to note that the authority granted to the FDA through the Tobacco Control Act is limited, and it does not allow the FDA to create a federal tobacco MLSA higher than eighteen years old.<sup>35</sup> However, state and local governments still have the discretion to raise their own MLSA if they desire to do so.

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29. *Id.*; Apollonio & Glantz, *supra* note 7, at 1201.

30. *See* 42 U.S.C. § 300x-26 (1992) (allowing grants “only if the State involved has in effect a law providing that it is unlawful for any manufacturer, retailer, or distributor of tobacco products to sell or distribute any such product to any individual under the age of 18”); *see also Raising the Minimum Legal Sales Age for Tobacco and Related Products*, TOBACCO CONTROL & LEGAL CONSORTIUM (Dec. 2015), <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-guide-minimumlegal-saleage-2015.pdf> [<https://perma.cc/J8FW-6A9V>] (summarizing the benefits and possible legal challenges to increasing the MLSA for tobacco).

31. 21 C.F.R. §§ 801, 803, 804, 897 (proposing the federal MLSA for tobacco at eighteen years old).

32. *See* *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 124 (2000) (affirming the FDA does not have the authority to regulate tobacco products).

33. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009) (codified as amended in scattered sections of 21 U.S.C.); 21 U.S.C. § 387a (2009). *See also* Tobacco Products Rules and Regulations, U.S. FOOD & DRUG ADMIN. (Oct. 25, 2018) <https://www.fda.gov/TobaccoProducts/Labeling/RulesRegulationsGuidance/ucm283974.htm> [<https://perma.cc/SGT7-SMYZ>] (providing an overview of the Tobacco Control Act).

34. *See* *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 531 (6th Cir. 2012) (deciding the Tobacco Control Act passes constitutional muster).

35. *See* 21 U.S.C. § 387f (d)(3)(A)(ii) (2009) (limiting restrictions may not “establish a minimum age of sale of tobacco products to any person older than [eighteen] years of age”).

B. *Transitioning to Tobacco 21*

## 1. Preemption—What is it and Why is it Important?

States have the discretion to raise their MLSA and adopt Tobacco 21 regulations because they are not preempted by the Federal government.<sup>36</sup> The legal doctrine of preemption is derived from the Supremacy Clause of the United States Constitution.<sup>37</sup> It creates a hierarchy of laws amongst the various levels of government (e.g., Federal, state, county, city, and municipal).<sup>38</sup> In general, preemption is a legal doctrine that prohibits a lower level of government from enacting regulations in an area of law that a higher level of government already regulates.<sup>39</sup>

There are two common types of preemption: express preemption and implied preemption.<sup>40</sup> Express preemption occurs when a higher level of government explicitly states a lower level of government may not enact any regulation in conflict with the regulation in question.<sup>41</sup> Implied preemption is just that: a higher level of government prohibits a lower level of government from enacting regulation in an area of law without explicitly saying so.<sup>42</sup> However, there is a third type of preemption that receives less acknowledgment—express non-preemption. This occurs when a higher

36. 21 U.S.C. § 387p (2018) (allowing states and political subdivisions to regulate the sale of tobacco).

37. The Supremacy Clause states:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

38. See *Preemption: The Biggest Challenge to Tobacco Control*, TOBACCO CONTROL & LEGAL CONSORTIUM (Oct. 2014), <http://publichealthlawcenter.org/sites/default/files/resources/tclc-fs-preemption-tobacco-control-challenge-2014.pdf> [https://perma.cc/3RD4-UMXD] (summarizing preemption and its effect on tobacco regulation).

39. *Id.*

40. *Preemption: The Biggest Challenge to Tobacco Control*, *supra* note 38; *State System Preemption Fact Sheet*, CDC (July 2018), <https://data.cdc.gov/download/uu8y-j6ga/application/pdf>.

41. Micah L. Berman, *Raising the Tobacco Sales Age to 21: Surveying the Legal Landscape*, 131 Pub. Health Reports 378, 379 (2016).

42. Implied preemption is further divided into two categories: conflict preemption and field preemption. *Preemption What it is, How it Works, and Why it Matter for Public Health*, NPLAN (2009), [http://changelabsolutions.org/sites/default/files/documents/PreemptionMemo\\_FINAL\\_web\\_090625.pdf](http://changelabsolutions.org/sites/default/files/documents/PreemptionMemo_FINAL_web_090625.pdf) [https://perma.cc/4CG2-4272].

level of government explicitly gives lower levels of government the authority to enact regulation in a certain area of law.<sup>43</sup>

Regarding tobacco regulation, the federal government has expressly preempted states and localities from creating regulations related to “tobacco product standards, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards, or modified risk tobacco product.”<sup>44</sup> The federal government, however, has expressly not preempted states and localities from creating regulations “prohibiting the sale, distribution, possession, exposure to, access to, advertising and promotion of, or use of tobacco products by individuals of any age.”<sup>45</sup> The Tobacco Control Act requires the federal government, states, and local political subdivisions to have a minimum MLSA of eighteen years old. However, this language allows states and localities to raise their tobacco MLSA beyond the federal minimum.

States have the potential to be preempted by the federal government only; lower levels of government, such as cities and counties, have an additional hurdle to overcome. They have the potential to be preempted by the state government in addition to the federal government.<sup>46</sup> As of 2014, nineteen states have expressly preempted their cities and localities from raising their MLSA.<sup>47</sup> In other words, there is “an explicit statement in the state code denying local governments the authority to enact ordinances raising the minimum tobacco sales age higher than the age set by state law.”<sup>48</sup> Twenty-three states have no preemption language in their code, and only eight states have expressly not preempted their localities from raising their MLSA.<sup>49</sup>

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43. Berman, *supra* note 41, at 379.

44. 21 U.S.C. § 387p (2018) (allowing states and political subdivisions to regulate the sale of tobacco); *see also Preemption: The Biggest Challenge to Tobacco Control*, *supra* note 38 (summarizing what is preempted under the Tobacco Control Act).

45. 21 U.S.C. § 387 (2018); *see also Preemption: The Biggest Challenge to Tobacco Control*, *supra* note 38 (contrasting what is preempted and what is not preempted under the Tobacco Control Act).

46. *See* Berman, *supra* note 41, at 379 (“Because local jurisdictions derive their powers from state law, state governments possess the ability to limit the legal authority of local jurisdictions.”).

47. *See id.* (categorizing each of the fifty states based on their codes’ preemption language).

48. *Id.*

49. “‘Expressly not preempted’ refers to an explicit statement in the state code permitting local governments to enact ordinances restricting tobacco sales that are more stringent than state law.” *Id.* at 379.



Texas is one of the eight states that has expressly not preempted their local governments from raising their tobacco MLSA.<sup>50</sup> The Texas Health and Safety Code states:

This subchapter does not preempt a local regulation of the sale, distribution, or use of cigarettes or tobacco products or affect the authority of a political subdivision to adopt or enforce an ordinance or requirement relating to the sale, distribution, or use of cigarettes or tobacco products if the regulation, ordinance, or requirement . . . is compatible with and equal to or more stringent than a requirement prescribed by this subchapter . . .<sup>51</sup>

Furthermore, the Texas Legislature passed S.B. 288, which specifically grants localities the authority to raise their tobacco MLSA to twenty-one.<sup>52</sup> Therefore, localities in Texas and the other non-preempted states can adopt Tobacco 21 and raise their MLSA to twenty-one.

Localities that are within express preemption states are not without hope in adopting Tobacco 21. Due to the ever-changing nature of state legislation, the category of preemption a state falls under is subject to change based on their state legislature.<sup>53</sup> Localities that are interested in increasing their MLSA for tobacco products should check their state's code for the most recent preemption language to avoid impermissible Tobacco 21 ordinances.

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50. See TEX. HEALTH & SAFETY CODE ANN. § 161.089 (West 2017) (authorizing local governments in Texas to enact stricter MLSA laws); *but see* Act of Sept. 1, 2019, 86th Leg. R.S., S.B. 21, § 12 (to be codified as an amendment to TEX. HEALTH & SAFETY CODE ANN. § 161.089).

51. TEX. HEALTH & SAFETY CODE ANN. § 161.089 (West 2017); *see also* Act of Sept. 1, 2019, 86th Leg. R.S., S.B. 21, § 12 (prohibiting local governments from enacting a MLSA more stringent than the state's MLSA). The subchapter mentioned indicates the MLSA for the state of Texas is eighteen years old. TEX. HEALTH & SAFETY CODE ANN. § 161.082 (West 2015).

52. Tex. S.B. 288, 85th Leg., R.S. (2017) (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 161.258).

53. For example, in the 2014 data California was categorized as an "express preemption" state because their Penal Code stated tobacco sales to an individual under eighteen was prohibited and "a city [or] county . . . shall not adopt any ordinance or regulation inconsistent with this statute." CAL. PENAL CODE § 308(f) (2015) (repealed 2016); Berman, *supra* note 41, at 380. With the passage of S.B. 7 in 2016, California became an express non-preemption state. 2016 Cal. Legis. Serv. 2nd Ex. Sess. Ch. 8 (S.B. 7) (West). Their code now provides, "[t]his division sets forth minimum state restrictions with respect to the legal age to purchase or possess tobacco products and does not preempt or otherwise prohibit the adoption of a local standard that imposes a more restrictive legal age to purchase or possess tobacco products." CAL. BUS. & PROF. CODE § 22964 (2016).

## 2. Challenges to the Tobacco 21 Ordinance

To date, three localities have successfully challenged their respective Tobacco 21 ordinances in court.<sup>54</sup> All three challenges are based on a preemption argument.<sup>55</sup>

Genesee County, Michigan, was the first locality in the nation to challenge its Tobacco 21 ordinance.<sup>56</sup> RPF Oil Company, the party opposing the ordinance, argued the ordinance conflicted with state law.<sup>57</sup> The presiding judge ultimately ruled against the ordinance, reasoning it would cause “irreparable harm” to local businesses.<sup>58</sup>

Barrington, Rhode Island, followed in challenging their Tobacco 21 ordinance.<sup>59</sup> The City Council of Barrington agreed to repeal the ordinance after the lawsuit was filed.<sup>60</sup> Despite Tobacco 21’s lack of success at the city level, Rhode Island legislators are working to increase the MLSA to twenty-one on a state level.<sup>61</sup>

54. The three localities include Topeka, Kansas; Genesee County, Michigan; and Barrington, Rhode Island. See *States and Localities That Have Raised the Minimum Legal Sale Age for Tobacco Products to 21*, CAMPAIGN FOR TOBACCO FREE KIDS (Sept. 19, 2018), [https://www.tobaccofreekids.org/assets/content/what\\_we\\_do/state\\_local\\_issues/sales\\_21/states\\_localities\\_MLSA\\_21.pdf](https://www.tobaccofreekids.org/assets/content/what_we_do/state_local_issues/sales_21/states_localities_MLSA_21.pdf) [https://perma.cc/H45W-8HYD] [hereinafter *States and Localities That Have Raised the Minimum Legal Sale Age*] (listing every city, organized by state, that has currently passed a Tobacco 21 ordinance).

55. Luke Ranker, *Attorneys Argue Validity of Topeka Law that Bans Sale of Tobacco to Those Under 21*, TOPEKA CAP. J. (Feb. 1, 2018, 4:31 PM), <https://www.cjonline.com/news/20180201/attorneys-argue-validity-of-topeka-law-that-bans-sale-of-tobacco-to-those-under-21> [https://perma.cc/NX7Y-DEYV]; Oona Goodin-Smith, *18 and Older May Buy Tobacco in Genesee County for Now, Judge Rules*, M LIVE (June 2017), [https://www.mlive.com/news/flint/index.ssf/2017/06/18\\_and\\_older\\_may\\_buy\\_tobacco\\_i.html](https://www.mlive.com/news/flint/index.ssf/2017/06/18_and_older_may_buy_tobacco_i.html) [https://perma.cc/D52A-VCTE]; *Vaping Business Sues Barrington Over New Tobacco Law*, RHODYBEAT (Sept. 25, 2017), <http://www.rhodybeat.com/stories/vaping-business-sues-barrington-over-new-tobacco-law,27389> [https://perma.cc/9UZT-XX8G].

56. Mark Bullion, *Decision Made on Genesee County’s Tobacco Ordinance*, ABC 12 NEWS (May 16, 2017, 3:53 PM), <https://www.abc12.com/content/news/Lawsuit-filed-against-Genesee-County-over-tobacco-ordinance-422330094.html> [https://perma.cc/CDN6-Z3TH].

57. Goodin-Smith, *supra* note 55. Michigan state law currently states “a person who is at least 18 years of age . . . is an adult of legal age for all purposes whatsoever . . .” MICH. COMP. LAWS ANN. § 722.52 (West 1990).

58. Goodin-Smith, *supra* note 55.

59. See RHODYBEAT, *supra* note 55 (“That ordinance runs in contrast to state and federal laws which allow the sale of tobacco products to anyone 18 and older.”).

60. *Id.*

61. See generally H.B. 7647, 2018 Gen. Assemb., Reg. Sess. (R.I. 2018); see also Michelle San Miguel, *Bill Would Increase Age to Buy Tobacco Products in RI to 21*, NBC 10 NEWS (Mar. 15, 2018) <https://turnto10.com/news/local/bill-would-increase-age-to-buy-tobacco-products-in-ri-to-21> [https://perma.cc/489U-485P] (reporting the introduction of a bill “that would raise the minimum age to buy tobacco products, including electronic cigarettes, to [twenty-one]”).

Topeka, Kansas, is the most recent locality to challenge their Tobacco 21 ordinance.<sup>62</sup> The Kansas district court judge agreed that Topeka's Tobacco 21 ordinance violated Kansas' Constitution.<sup>63</sup> The City of Topeka appealed the ruling,<sup>64</sup> and the Kansas Supreme Court reversed, holding the ordinance was a "constitutional exercise of Topeka's home rule power."<sup>65</sup>

### 3. Why Twenty-One?

When determining the appropriate MLSA for tobacco, twenty-one seems to be the ideal age for a variety of reasons.<sup>66</sup> One major reason is that 90% of habitual smokers began smoking before they were twenty-one.<sup>67</sup> With the minimum age at twenty-one, the number of smokers who would pick up the habit would presumably decline. The MLSA of twenty-one also disrupts the "social availability" of tobacco for minors under eighteen.<sup>68</sup> Minors under eighteen rarely purchase cigarettes from retail stores by impersonating an eighteen-year-old. Most middle and high school-aged

62. See Ranker, *supra* note 55 ("Because state law allows tobacco sales to those over 18, the city's ordinance unnecessarily infringes on the economic viability of small businesses, the lawsuit claims.").

63. See DWAGFYS Mfg., Inc. v. City of Topeka, No. 2018CV35, 2018 WL 2268811 at \*29 (Dist. Ct. Kan. 2018), *appeal docketed*, No. 119269 (Kan. Apr. 27, 2018); *Judge Says Topeka Has No Authority to Raise Smoking Age to 21, Prohibits City From Enforcing New Ordinance*, LAWRENCE J. WORLD (Mar. 2018) <http://www2.ljworld.com/news/2018/mar/23/judge-says-topeka-has-no-authority-raise-smoking-a/> [<https://perma.cc/24HD-LV8Y>] (enjoining the enforcement of Topeka's Tobacco 21 ordinance because "the ordinance goes beyond the authority granted to municipalities by the Kans[a]s Constitution").

64. DWAGFYS Mfg., Inc. v. City of Topeka, 443 P.3d 1052, 1055 (Kan. 2019).

65. *Id.* at 1060.

66. Surprising to most, this is not the first time twenty-one has been the MLSA for tobacco products in the United States. In the 1920s, at least twenty states had twenty-one as their tobacco MLSA. See Apollonio & Glantz, *supra* note 7, at 1202. These states gradually decreased their MLSA over the next few decades due to the lobbying of Big Tobacco. See *id.* ("Between 1954 and 1963, 10 states lowered the age of access from 21 to 18 years. . . .").

67. David Burns et al., *Designed for Addiction*, CAMPAIGN FOR TOBACCO FREE KIDS 21 (June 13, 2014), [https://www.tobaccofreekids.org/assets/content/what\\_we\\_do/industry\\_watch/product\\_manipulation/2014\\_06\\_19\\_DesignedforAddiction\\_web.pdf](https://www.tobaccofreekids.org/assets/content/what_we_do/industry_watch/product_manipulation/2014_06_19_DesignedforAddiction_web.pdf) [<https://perma.cc/3AG8-HKZY>]. See also Jonathan P. Winickoff & Lester Hartman, *Healthy Towns, Healthy Kids*, TOBACCO 21, <https://tobacco21.org/wp-content/uploads/2017/03/T21HandBook.pdf> [<https://perma.cc/VU D7-D9PD>] ("Only 10% of smokers start at the age of [twenty-one] or older.").

68. See Berman, *supra* note 41; Jean L. Forster et al., *Social Exchange of Cigarettes by Youth*, 12 TOBACCO CONTROL 148, 149 (2003) ("[S]ocial availability [of tobacco for youth] includes both provision and acquisition, and may be linked to other potent aspects of an adolescent's world, including the role models, normative expectations, social support, and social opportunities and barriers in their environment that have been found to be predictive of adolescent problem behaviours.").

teens get their cigarettes from a peer or another non-commercial source.<sup>69</sup> Therefore, since the vast majority of twenty-one-year-old individuals are out of high school, increasing the MLSA to twenty-one removes the tobacco provider from teenagers' social circles.<sup>70</sup> Even though it is rarer that minors obtain their cigarettes or tobacco from commercial sources, teenagers that are under eighteen will also have greater difficulty presenting themselves as an age-eligible twenty-one-year-old than they would an eighteen-year-old.<sup>71</sup>

The e-cigarette epidemic provides additional support for the rising Tobacco 21 trend.<sup>72</sup> Cigarette smoking for minors has declined in recent years, but the usage of cigarette alternatives, like e-cigarettes usage, may play a role in that decrease. For example, the rise of e-cigarettes might be part of the explanation.<sup>73</sup> The Centers for Disease Control and Prevention reported a steep rise in e-cigarette use from 2013 to 2014.<sup>74</sup> There is evidence that an increase in hookah use is an additional explanation for the decline in cigarette use amongst youth.<sup>75</sup>

The rise in popularity of e-cigarettes and hookah use can largely be pinned on one specific factor—flavoring.<sup>76</sup> Big Tobacco recognizes that individuals under twenty-one are their target market.<sup>77</sup> With this information, Big Tobacco did their homework and figured out how to

69. Other non-commercial sources consist of adults who purchased the cigarettes for them (whether the adult was aware of the youth's age or not) and even taking cigarettes from parents who also smoke. *Id.* at 378; Joseph R. DiFranza & Mardia Coleman, *Sources of Tobacco for Youths in Communities with Strong Enforcement of Youth Access Laws*, 10 *TOBACCO CONTROL* 323, 326 (2001); Forster et al., *supra* note 68, at 148.

70. *Id.* at 153; Berman, *supra* note 41, at 378; Winickoff & Hartman, *supra* note 67.

71. DiFranza & Coleman, *supra* note 69, at 327.

72. See generally William Tilburg et al., *FDA Regulation of Electronic Nicotine Delivery Systems and the "Deeming" Rule: What's Left for States?*, 20 *J. HEALTH CARE L. & POL'Y* 27, 27 (2017) (exploring the modern e-cigarette trend and how it has been regulated).

73. See *id.* at 38 ("There is growing concern that the slowing decline in youth cigarette smoking rates is associated with the increased prevalence of [e-cigarette] use.").

74. E-cigarette use was at 4.5% for high school students and 1.1% for middle school students in 2013. In one year, that number grew to 13.4% and 3.9% respectively. *E-Cigarette Use Triples Among Middle and High School Students in Just One Year*, CDC (Apr. 16, 2016), <https://www.cdc.gov/media/releases/2015/p0416-e-cigarette-use.html> [<https://perma.cc/7YLJ-BZ9G>].

75. See *id.* (reporting hookah use doubled in middle and high school students).

76. See generally FLAVORS HOOK KIDS, <https://www.flavorshookkids.org> [<https://perma.cc/8SFJ-5CG5>] (investigating the use of flavors in addictive nicotine and tobacco products).

77. A researcher for Big Tobacco company R.J. Reynolds stated "[i]f a man has never smoked by age 18, the odds are three-to-one he never will. By age 21, the odds are twenty-to-one." Burns et al., *supra* note 67, at 21.

appeal to this age group.<sup>78</sup> Among many other additives, Big Tobacco realized flavoring tobacco would not only attract the youth to use tobacco products, but it would also “mask the harshness of the smoke and make tobacco more appealing.”<sup>79</sup> In an attempt to combat Big Tobacco’s considerable efforts to target minors, the Tobacco 21 trend began to gain force and momentum.

In a groundbreaking move, Needham, Massachusetts, became the first city in the United States to raise its MLSA in 2005.<sup>80</sup> Needham’s ordinance raised their MLSA for tobacco purchases to twenty-one.<sup>81</sup> Other localities slowly began to follow Needham. Only seven other localities raised their MLSA to twenty-one years old in the eight years following Needham.<sup>82</sup> The Tobacco 21 trend began to pick up some speed after 2013. In 2015, Hawaii became the first state in the United States to make the MLSA twenty-one state-wide.<sup>83</sup> In the same year, at least 125 other localities raised their MLSA to twenty-one.<sup>84</sup> Although unsuccessful, 2015 was also the first time legislation was introduced to raise the MLSA on a federal level.<sup>85</sup> Today, six states and over 360 localities have adopted Tobacco 21 regulations.<sup>86</sup>

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78. *See id.* (“The evidence demonstrates that tobacco manufacturers undertook extensive research that looked at which characteristics appeal to young people.”).

79. *Id.* at 25; FLAVORS HOOK KIDS, *supra* note 76.

80. Berman, *supra* note 41, at 378; Winickoff & Hartman, *supra* note 67.

81. NEEDHAM, MASS., BOARD OF HEALTH REG., art. 1, § 1.6 (2015) (“No person or entity selling tobacco products shall allow anyone under twenty-one (21) years of age to sell cigarettes, other tobacco products.”); Berman, *supra* note 41; Winickoff & Hartman, *supra* note 67.

82. Six of those localities were other cities in Massachusetts. The seventh was Hawaii County, Hawaii. Stephanie R. Morain et al., *Have Tobacco 21 Laws Come of Age?*, 374 NEW ENG. J. MED. 1601, 1601 (2016), <https://www.nejm.org/doi/pdf/10.1056/NEJMp1603294> [<https://perma.cc/6N6U-WFTK>]; Jonathan P. Winickoff et al., *Tobacco 21—An Idea Whose Time Has Come*, 370 NEW ENG. J. MED. 295 (2014), <https://www.nejm.org/doi/pdf/10.1056/NEJMp1314626> [<https://perma.cc/R8TV-T5L4>]; *3 States Pass Tobacco 21 Laws in 3 Weeks*, TRUTH INITIATIVE (Aug. 14, 2017) [hereinafter *3 States Pass Tobacco 21 Laws*] <https://truthinitiative.org/news/3-states-pass-tobacco-21-laws-3-weeks> [<https://perma.cc/J3FP-BWSX>].

83. Brandon Griggs, *Hawaii Set to Become First State to Raise Smoking Age to 21*, CNN (Apr. 28, 2015, 8:22 AM), <https://www.cnn.com/2015/04/27/us/hawaii-smoking-age-21-feat/index.html> [<https://perma.cc/ZMV8-BVMD>] (reporting Hawaii is the first state to prohibit the sale to individuals under 21).

84. *3 States Pass Tobacco 21 Laws*, *supra* note 82.

85. Tobacco to 21 Act, S. 2100, 114th Cong. (2015). S.2100 was introduced again in November 2017 in yet another attempt to increase the federal MLSA to twenty-one years old. The bill was unsuccessful. Tobacco to 21 Act, S. 2100, 115th Cong. (2017).

86. In addition to Hawaii, California, New Jersey, Massachusetts, Oregon, and Maine are among the states that have enacted statewide laws that raised the MLSA for tobacco. The other localities are

It is estimated that 90,743,391 people are “covered by [T]obacco 21 laws.”<sup>87</sup>

C. *San Antonio, Texas’s Adoption of Tobacco 21*

In September 2017, the San Antonio Metropolitan Health District (“Metro Health”) began discussing a proposed ordinance that would increase the minimum age to purchase tobacco from eighteen to twenty-one (“the Ordinance”).<sup>88</sup> At the City Council B Session on December 6, 2017, Dr. Coleen Bridger with Metro Health formally proposed the Ordinance to the San Antonio City Council (“City Council”) to go into effect July 2018.<sup>89</sup> Dr. Bridger stated three main reasons for proposing the Ordinance: first, an increase of the MLSA would delay the age of the first tobacco use, and therefore, reduce the risk of youth becoming habitual smokers; second, it would keep tobacco out of schools, and therefore, remove peer-to-peer tobacco acquisition; and lastly, it would increase the difficulty of younger teens passing themselves off as age-eligible tobacco purchasers, as opposed to the easier task of passing themselves off as eighteen.<sup>90</sup> The proposed ordinance would not only apply to cigarettes. It would also apply to flavored e-cigarettes, chewing tobacco, cigars, and any other tobacco-based products intended for consumption.<sup>91</sup> There are two categories related to the enforcement of the Ordinance: the tobacco retailers and users under the age of twenty-one.<sup>92</sup> For the retailers, violation of the Ordinance will mirror state law and will result in a misdemeanor crime and a fine of up to \$500.<sup>93</sup>

Enforcement against the youths was hotly debated.<sup>94</sup> Dr. Bridger provided three options for enforcement against the youths.<sup>95</sup> The City Council can (1) choose not to enforce the Ordinance against the youths,

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360 cities and counties covering twenty-two states. *States and Localities That Have Raised the Minimum Legal Sale Age*, *supra* note 54.

87. TOBACCO TWENTY-ONE, *supra* note 11.

88. Lyanne A. Guarecuco, *San Antonio May Increase Legal Age to Buy Tobacco to 21*, SAN ANTONIO CURRENT (Sept. 25, 2017, 1:13 PM), <https://www.sacurrent.com/the-daily/archives/2017/09/25/san-antonio-may-increase-legal-age-to-buy-tobacco-to-21> [<https://perma.cc/EHIZ7-RKVV>] (reporting the possibility of San Antonio increasing their MLA to 21).

89. City of San Antonio, City Council B Session Meeting Minutes (Dec. 6, 2017).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *See id.* at 2–5 (summarizing the question and answer session between Councilmembers and Dr. Bridger).

95. *Id.*

(2) require mandatory cessation classes upon violation of the Ordinance, or (3) mirror state law and fine the youth up to \$250.<sup>96</sup>

At the A Session on January 11, 2018, the City Council voted in favor of the Tobacco 21 Ordinance by a 9:2 vote.<sup>97</sup> Mayor Ron Nirenberg, Councilmembers Roberto Treviño, William Shaw, Rebecca Viagran, Rey Saldaña, Shirley Gonzales, Ana Sandoval, Manny Pelaez, and John Courage voted in favor of the Ordinance, while only Councilmembers Greg Brockhouse and Clayton Perry voted in opposition.<sup>98</sup> Regarding the enforcement for youths, the final ordinance does not have any enforcement or penalization of the youths themselves.<sup>99</sup> Another major change from the B Session was the implementation date.<sup>100</sup> The Ordinance has a soft implementation date of October 1, 2018, with a three-month grace period.<sup>101</sup> Retailers found in violation will not be fined until the hard implementation date of January 1, 2019.<sup>102</sup>

### III. ANALYSIS

This Comment will analyze three separate provisions of a typical Tobacco 21 ordinance. The three provisions will include the provision affecting the retailers, the provision affecting the users under twenty-one, and the penalties for violating the ordinance for each. This Comment will compare and contrast San Antonio's ordinance with other Tobacco 21 ordinances that have been enacted. Because of the recency of the Tobacco 21 trend, there is limited data to measure the effectiveness of the ordinances, but distinctions can still be drawn between localities. Lastly, this Comment will evaluate alternative measures taken by states and localities that also promote the reduction of tobacco use in youth.

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96. *Id.*

97. During the A Session, many councilmembers expressed their concern for the impact the ordinance would have, including the impact on the tobacco retailers. Despite their concerns, the majority of the councilmembers voted in favor for the ordinance. City of San Antonio, City Council A Session Meeting Minutes (Jan. 11, 2018).

98. *Id.*

99. *Id.*

100. *Id.* at 6.

101. *Id.* at 5.

102. *Id.*

A. *The Retailer Provision*

Provisions affecting the retailers in Tobacco 21 ordinances are those regulating the sale of tobacco products to consumers under twenty-one years old. These provisions are relatively uniform across the localities and states that have adopted Tobacco 21 ordinances. The retailer provision in San Antonio's Tobacco 21 ordinance reads as follows:

A person commits an offense if the person, with criminal negligence:

- a. Sells, gives, or causes to be sold or given a tobacco product to someone who is younger than twenty-one (21) years of age; or
- b. Sells, gives, or causes to be sold or given a tobacco product to another person who intends to deliver it to someone who is younger than twenty-one (21) years of age.<sup>103</sup>

Needham's ordinance states, "[N]o person shall sell tobacco products or permit tobacco products to be sold to any person under the age of twenty-one (21) . . . ."<sup>104</sup> Hawaii's law is similar, but also specifically mentions the sale of electronic cigarettes.<sup>105</sup>

Tobacco 21 ordinances typically require the retailers to post a notice of the new MLSA.<sup>106</sup> The requirements for the notice vary. San Antonio requires the notice to be "in a location that is conspicuous to all employees and customers and that is close to the place . . . products may be purchased."<sup>107</sup> California's statute requires signage to be posted at "each point of purchase."<sup>108</sup> Some ordinances do not specify what language is

103. SAN ANTONIO, TEX., SAN ANTONIO CITY CODE, ch. 36, § 36-5(c)(1)(a)-(b) (2018).

104. NEEDHAM, MASS., BOARD OF HEALTH, art. 1, § 1.6 (2015).

105. The law states, "it shall be unlawful to sell or furnish a tobacco product in any shape or form or an electronic smoking device to a person under twenty-one years of age." HAW. REV. STAT. ANN. § 712-1258 (West 2018).

106. See *Tobacco 21 Ordinance Checklist*, PUB. L. HEALTH CTR. (Oct. 2017), <http://www.publichealthlawcenter.org/sites/default/files/resources/Tobacco-21-Ordinance-Checklist-2017.pdf> [<https://perma.cc/7CAP-BMLY>] (claiming that signage posted by the retailers will promote compliance with the ordinance). It is also suggested to include information regarding cessation in the signage posted by the retailers. *Raising the Minimum Legal Sales Age for Tobacco and Related Products*, *supra* note 30.

107. SAN ANTONIO, TEX., SAN ANTONIO CITY CODE, ch. 36, § 36-5(d)(1) (2018).

108. CAL. BUS. & PROF. CODE § 22952(b). The statute also requires a toll-free number to be visible on the signage so that individuals can report the illegal sale of tobacco to youth under twenty-one years old. *Id.* California also specifies penalties for failing to post signage. CAL. PENAL CODE § 308 (West 2018); CAL. BUS. & PROF. CODE § 22952(f) (West 2016).



required to be posted,<sup>109</sup> while others are very explicit in the exact phrasing required.<sup>110</sup> It is also not uncommon for the height and width requirements of the mandatory notices to be specified in the ordinance.<sup>111</sup>

The importance of the signage requirement should not be discounted. California attributes the success of its Tobacco 21 ordinance to the “very high awareness” of the new MLSA by both the retailers and the youth.<sup>112</sup>

When promoting Tobacco 21 and raising awareness, it is also important for localities to recognize their specific demographics and their needs. To maximize effectiveness and satisfy their diverse population, California distributed “toolkits” to their retailers, translated in multiple languages.<sup>113</sup> San Antonio, although still in the early stages of implementation, has already made exceptional efforts to reach its diverse population.<sup>114</sup> In the toolkits San Antonio provided to their retailers, they included pre-made signs with an English version and a version translated into Spanish.<sup>115</sup> Since San Antonio is modeling implementation after California and working to maximize awareness, ideally, San Antonio will find comparable success.<sup>116</sup> Although signage and awareness are important, many other factors will

109. California’s signage requirement simply states, “[A] notice stating that selling tobacco products to anyone under 21 years of age is illegal and subject to penalties.” CAL. BUS. & PROF. CODE § 22952(b).

110. For example, Washington D.C.’s ordinance requires:

In any place or business where a person sells any tobacco product, the owner, manager, or person in charge of the place or business shall post a warning sign that includes the following: “No tobacco product will be sold to any person under 21 years of age. Sales clerks will ask for proof of age from any person seeking to purchase any tobacco product who appears to be under 30 years of age.”

D.C. CODE ANN. § 7-1721.02(e)(1) (West 2017). Hawaii, Needham, and San Antonio also have specific language required to be posted. SAN ANTONIO CITY, ch. 36, § 36-5(d)(2); HAW. REV. STAT. ANN. § 712-1258(4) (West 2018); NEEDHAM, MASS., BOARD OF HEALTH, art. 1, § 1.63(a)–(c) (2015).

111. See HAW. REV. STAT. ANN. § 712-1258(4) (West 2018) (requiring the sign to be “in letters at least one-half inch high”).

112. See Xueying Zhang et al., *Evaluation of California’s Tobacco 21 Law*, 27 TOBACCO CONTROL 656, 656 (2018) (evaluating the initial results of California’s T21).

113. Languages included Spanish, Chinese, Korean, Vietnamese, Arabic, and Punjabi. *Id.*

114. See *T21 Community Education Toolkit*, SAN ANTONIO TOBACCO 21 (Sept. 2018), <https://www.sanantonio.gov/Portals/0/Files/health/HealthyLiving/Tobacco21/FinalT21CommunityEducationToolkitUpdated9518.pdf?ver=2018-09-10-113359-897> [https://perma.cc/73SW-AKU8] (listing toolkit materials available in English and Spanish).

115. *Id.* This toolkit also provides pre-made signage in both English and Spanish for retailers to display.

116. *Cf.* Zhang et al., *supra* note 112 (discussing the initial success of California’s T21 ordinance).

contribute to the success, or conversely the downfall, of the Tobacco 21 ordinance.

### B. *The Youth Provision*

Provisions affecting the youth in Tobacco 21 ordinances are those regulating the purchase, use, and possession (PUP) of tobacco products to the users under twenty-one years old. Tobacco 21 ordinances, in general, differ the most when it comes to the provision against the youth. Some localities have chosen not to implement any PUP enforcement against the youth at all.<sup>117</sup> The purpose of enacting Tobacco 21 ordinances is to reduce the prevalence of tobacco use in individuals under the age of twenty-one. Therefore, it is interesting that the majority of the regulations do not actually prohibit tobacco use in this age group, and instead focus solely on retailers.<sup>118</sup> In San Antonio, Needham, and many other localities, it is completely legal for users under twenty-one to purchase, use, and possess tobacco. In other words, if an individual under twenty-one attempts to purchase tobacco, they are not subject to any legal repercussions for doing so. In these localities, only the retailers will face legal consequences for selling to the youth.<sup>119</sup>

One major justification for the lack of enforcement against users is the desire to avoid criminalizing the behavior, especially when some of the youth have become addicted at a young age.<sup>120</sup> Criminalizing tobacco use can result in violations marking the permanent records of the users under

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117. See *Tobacco 21: Legislative Policy Analysis*, ASTHO BRIEF (Oct. 2018), <https://www.astho.org/ASTHOBriefs/Tobacco-21-Legislative-Policy-Analysis/> (emphasizing that most jurisdictions do not “penalize underage tobacco possession.”).

118. Many Tobacco 21 advocates encourage keeping PUP regulation out of the ordinances. It is interesting that PUP enforcement is sought against youth under twenty-one regarding alcohol, even though tobacco is the leading cause of preventable death over alcohol. See *Where We Stand: Raising the Tobacco Age to 21*, TRUTH INITIATIVE (Oct. 23, 2017), <https://truthinitiative.org/news/where-we-stand-raising-tobacco-age-21> [<https://perma.cc/4QQZ-G5V4>] (supporting increasing the minimum legal age to purchase tobacco to 21).

119. NEEDHAM, MASS., BOARD OF HEALTH, art. 1, § 1.6 (2015); SAN ANTONIO, TEX., SAN ANTONIO CITY CODE, ch. 36, § 36-5 (2018). In contrast, Hawaii and Washington D.C. both decided to include PUP regulation in their Tobacco 21 ordinances. HAW. REV. STAT. ANN. § 712-1258(5) (West 2018); D.C. CODE ANN. § 7-1721.03(a)(1) (West 2017).

120. See Becca Knox, *Youth Access Laws That Penalize Kids For Purchase, Use, or Possession are Not Proven to Reduce Tobacco Use*, CAMPAIGN FOR TOBACCO FREE KIDS (Mar. 28, 2016) <http://tobaccopolicycenter.org/wp-content/uploads/2017/11/255.pdf> [<https://perma.cc/NW5M-6UBD>] (“PUP laws also unfairly punish and stigmatize children, many of whom became addicted at a young age as a result of the tobacco industry’s aggressive marketing to kids.”).

twenty-one.<sup>121</sup> San Antonio is among the cities that decided not to include any PUP enforcement against the youth when enacting the Tobacco 21 ordinance.<sup>122</sup> While the motivation is reasonable, PUP regulation and enforcement against the underage users is possible without criminalizing the behavior.<sup>123</sup> This will be discussed further in the penalty section below.

Another reason governments and city councils choose not to seek enforcement against the youth is the prevention of disproportionate enforcement. Some localities fear implementing PUP regulation will result in discriminatory profiling against racial and socioeconomic minorities.<sup>124</sup>

There is, conversely, however, also a concern about disproportionate enforcement even when PUP regulation is *not* sought. The state of Texas currently penalizes minors under eighteen who are in possession of tobacco.<sup>125</sup> In addition to Texas, forty-four other states also penalize minors under eighteen who possess or use tobacco.<sup>126</sup> The concern for fairness in enforcement arises when PUP enforcement is sought against

121. Criminal conduct in youth is broken into two categories: status offenses or criminal law violations. “Status offenders are those who commit acts that are criminal only for children, such as curfew violations, consumption of alcohol, and running away from home.” M Wakefield & G Giovino, *Teen Penalties for Tobacco Possession, Use, and Purchase: Evidence and Issues*, 12 TOBACCO CONTROL (2003). Criminal law violations are acts that would be considered crimes if committed by an adult. PUP law violations are typically considered status offenses however youths that commit either are usually treated the same—as “delinquents.” *Id.*

122. This was against the advisement of lead proponent, Dr. Bridger. Dr. Bridger suggested the councilmembers include some type of enforcement on the youth, however ultimately it was up to the councilmembers to decide. City of San Antonio, City Council A Session Meeting Minutes (Jan. 11, 2018) (granting raising the minimum legal age to purchase tobacco to 21 to be in effect on October 1, 2018 without enforcement against youth).

123. See 11 GUAM CODE ANN. § 6407 (2018) (requiring tobacco PUP violators under twenty-one “attend an education program on tobacco products to include smoking cessation information”). A smoking cessation class was one of the suggested measures of enforcement against the youth in the San Antonio ordinance. However, councilmembers rejected all suggestions and decided not to include PUP enforcement in the ordinance. City of San Antonio, City Council A Session Meeting Minutes (Jan. 11, 2018).

124. Oregon specifically decided against PUP enforcement to prevent “disproportionate[] harm” against racial minorities because they are more likely to use tobacco products at higher rates. *Tobacco 21: Legislative Policy Analysis*, *supra* note 117. San Antonio Councilmember Shirley Gonzales expressed her concern regarding PUP enforcement, fearing it would disproportionately harm the district she represents—a lower socioeconomic district, a class of people who also tend to use tobacco at higher rates. City of San Antonio, City Council B Session Meeting Minutes (Dec. 6, 2017).

125. See TEX. HEALTH & SAFETY CODE ANN. § 161.252 (2015) (criminalizing individuals under eighteen who are in possession of tobacco).

126. The only five states that currently have not implemented PUP regulation for those under eighteen include: Maryland, Massachusetts, Nevada, New Jersey, and New York. See Knox, *supra* note 120.

those under eighteen years of age but not against those between eighteen and twenty-one years of age.<sup>127</sup> Opponents of this argument, however, rely on the “social availability” aspect of tobacco to individuals under eighteen to support their non-PUP enforcement position.<sup>128</sup> Under their logic, the individuals younger than eighteen are usually in high school and, therefore, more likely to supply tobacco to other high school students, while those older than eighteen are more likely to be out of high school and less likely to supply it to other youth.<sup>129</sup> Thus, their perspective is that it is not unfair to penalize the seventeen and younger age group while not penalizing those eighteen and older because of the discrepancy in potential risk.<sup>130</sup>

Needham, Massachusetts, did not include PUP regulation in its pioneering Tobacco 21 ordinance.<sup>131</sup> Nevertheless, results from increasing the MLSA to twenty-one were exceptional.<sup>132</sup> Youth smoking rates decreased from 13% to just 6.7% in the five years after Needham enacted Tobacco 21.<sup>133</sup> Prior to enactment, youth smoking prevalence was at 15% in the localities surrounding Needham.<sup>134</sup> Without the impact of Tobacco 21, youth smoking only dropped to 12.4%.<sup>135</sup>

However, the geographic shape of Needham might be correlative to the success of Tobacco 21. Needham is relatively triangular without being

127. See *Tobacco 21: Tips and Tools*, PUB. L. HEALTH CTR (Oct. 2016), <http://publichealthlawcenter.org/sites/default/files/resources/phlc-Tobacco-21-Tips-Tools-2016.pdf> [<https://perma.cc/4JSF-ALLL>] [hereinafter *Tips and Tools*] (alleging the contrasting enforcement will raise equal protection concerns).

128. See Berman, *supra* note 41 (noting adolescents who purchase tobacco from stores are major providers of tobacco for minors). See also Forster et al., *supra* note 68 (highlighting the fact that youths rely on noncommercial methods to purchase tobacco).

129. Enforcement against those who are exactly eighteen years old may become difficult because it is expected for eighteen-year olds to be in high school. Cf. *Allam v. State*, 830 P.2d 435, 439 (Alaska Ct. App. 1992) (explaining a law penalizing eighteen-year olds and younger was acceptable because “they would share the drug with other younger students or would at least frequently expose those younger students to drug use”).

130. Cf. *Id.* at 439. However, schools should still enforce restrictions prohibiting tobacco on school campuses on all students, including eighteen-year-old students. See *Tips and Tools*, *supra* note 127 (“Research suggests that school policies prohibiting tobacco product use, when consistently enforced, are an essential part of lowering teen tobacco use rates.”).

131. NEEDHAM, MASS., BOARD OF HEALTH, art. 1, § 1.6 (2015).

132. Shari Kessel Schneider et al., *Community Reductions in Youth Smoking After Raising the Minimum Tobacco Sales Age to 21*, 25 TOBACCO CONTROL 355, 356–59 (2015) (discussing the reduction in smoking in Needham).

133. Enacting Tobacco 21 resulted in almost a 50% decline in youth smoking. Winickoff & Hartman, *supra* note 67.

134. *Id.*

135. *Id.*

disrupted by any separate municipalities within the outer borders of the city.<sup>136</sup> The shape of San Antonio, however, is incredibly irregular, almost spider-like, with many separate municipalities not only surrounding but actually penetrating the limits of San Antonio.<sup>137</sup> The San Antonio Tobacco 21 ordinance would not be implemented in these separate municipalities, and this could substantially affect the success of the Ordinance if enforced like in Needham.<sup>138</sup> Without PUP enforcement, it is very unlikely that San Antonio will have the same success as Needham with the implementation of Tobacco 21. Without PUP enforcement within the city, an individual could very easily enter into one of the many municipalities, purchase tobacco, enter back into San Antonio and continue to possess and use tobacco, all of which is completely legal. Because of the unique layout of San Antonio, cigarettes and other tobacco products will continue to be easily accessible to individuals eighteen to twenty-one.<sup>139</sup> With its unique layout combined with the lack of PUP enforcement, San Antonio's Tobacco 21 is less likely to have such exceptional results.

Whether or not a locality decides to enforce PUP restrictions, enforcement on active military members is also something to be considered in a city like San Antonio.<sup>140</sup> Although California has not included any PUP regulation in its ordinance, California decided to exempt active military members eighteen years old and older from the sale of tobacco products.<sup>141</sup> Many critics of the Tobacco 21 trend argue that eighteen is an appropriate MLSA because it is the same age individuals may enlist in the military.<sup>142</sup>

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136. The only exception to this is two small bodies of water located on the outer border. *Needham, Mass.*, GOOGLE MAPS, <https://www.google.com/maps/place/Needham,+MA> [https://perma.cc/WUA4-KM7G].

137. Some of these municipalities include: Leon Valley, Balcones Heights, Castle Hills, Shavano Park, Hollywood Park, and Alamo Heights. *San Antonio, Tex.*, GOOGLE MAPS, <https://www.google.com/maps/place/San+Antonio,+TX> [https://perma.cc/M9W9-C356].

138. Dr. Bridger indicated she was working with these municipalities and encouraging them to implement their T21 ordinance. So far, those efforts have remained unsuccessful. City of San Antonio, City Council A Session Meeting Minutes (Jan. 11, 2018).

139. See *San Antonio, Tex.*, *supra* note 137 (illustrating the spiderweb-like shape of San Antonio).

140. See *Tobacco 21: Legislative Policy Analysis*, *supra* note 117 (noting that military members are a common exemption to Tobacco 21 ordinances).

141. See CAL. PENAL CODE § 308 (a)(1)(A)(ii) (West 2018) (requiring individuals eighteen and older to present an identification card provided by the United States Armed Forces to be able to purchase tobacco products).

142. *Tobacco 21: Legislative Policy Analysis*, *supra* note 117. But see Winickoff & Hartman, *supra* note 67 (“The minimum age of military service does not equal readiness to enlist in a lifetime of smoking.”).

Nevertheless, including military exemptions in a Tobacco 21 ordinance can also lead to enforcement issues.<sup>143</sup>

Even if military exemptions are not included in the Tobacco 21 ordinance in San Antonio, military bases will not be subject to the implementation of a locality's ordinance.<sup>144</sup> Military bases are considered "enclaves" and are subject to federal jurisdiction.<sup>145</sup> In some instances, they are subject to state law, but they are not subject to ordinances passed at the municipality level.<sup>146</sup> This poses a problem for "Military City, USA."<sup>147</sup> It is estimated that almost half of the active-duty population in San Antonio is under twenty-five years old.<sup>148</sup> As a result, those individuals under twenty-one are still able to purchase tobacco products from any of the three military bases in San Antonio.<sup>149</sup>

Excluding PUP enforcement has proven to be successful in Needham.<sup>150</sup> However, Needham does not have the additional obstacles to overcome, such as irregular geography and a high population of active military with

143. See *Tips and Tools*, *supra* note 127 (stating most military identification cards do not display whether or not an individual is active duty or another status).

144. See Joshua Waxman et al., *The Federal Enclave Doctrine: A Potentially Powerful Defense to State Employment Laws*, LITTLER (Mar. 2013), [https://www.littler.com/files/press/pdf/2013\\_03\\_InSight\\_Federal\\_Enclave\\_Doctrine\\_Powerful\\_Defense\\_State\\_Employment\\_Laws.pdf](https://www.littler.com/files/press/pdf/2013_03_InSight_Federal_Enclave_Doctrine_Powerful_Defense_State_Employment_Laws.pdf) [<https://perma.cc/9LWL-ZZ7R>] (explaining federal enclaves).

145. The enclave doctrine is derived from the United States Constitution:

The Congress shall have Power . . . [t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings . . . .

U.S. CONST. art. I, § 8, cl. 17.

146. See Waxman et al., *supra* note 144 (explaining the exceptions to the rule that state law is preempted in federal enclaves).

147. See Mary Jo Pugh et al., *2016 Military City USA Needs Assessment*, MIL. & VETERAN COMMUNITY COLLABORATIVE (2016), <http://mvcc-sa.org/images/upload/2016%20MVCC%20Needs%20Assessment.pdf> [<https://perma.cc/9HNC-WEQU>] (describing the active duty and retired military demographics for San Antonio).

148. A national survey indicated 43.2% of active duty military members are less than twenty-five, which translates to approximately 13,703 active duty individuals under twenty-five living in San Antonio. *Id.* at 10.

149. *Id.* at 9.

150. Schneider et al., *supra* note 132, at 356–58.

multiple military bases.<sup>151</sup> Due to the obstacles San Antonio faces, rejecting a PUP enforcement provision might prove to be detrimental to the success of Tobacco 21.<sup>152</sup> Cities and localities interested in adopting Tobacco 21 need to consider the characteristics unique to their locale and determine if including PUP regulation will be necessary to ensure effectiveness.<sup>153</sup>

### C. Penalties for Violating the Ordinance

The provisions regarding the penalties for potential violations also vary between ordinances. When determining penalties, localities must decide if they want to impose civil or criminal penalties for violations.<sup>154</sup> Some localities have even decided to include both.<sup>155</sup>

California chose to include the option for either civil or criminal penalties for retailers who sell tobacco products to youth under twenty-one years old.<sup>156</sup> The first offense will result in a \$200 fine; the ordinance does not provide for any jail time.<sup>157</sup> Washington D.C. allows for civil or criminal penalties for retailer violators<sup>158</sup> but only accords civil penalties for youth

151. See Pugh et al., *supra* note 147 (estimating San Antonio's population of active duty military members); *San Antonio, Tex.*, GOOGLE MAPS, *supra* note 137 (displaying the various municipalities within San Antonio).

152. Tobacco 21 in San Antonio may prove to be more successful if enacted at the state-wide level as it did in California. Zhang et al., *supra* note 112 (discussing the results of California's T21 ordinance).

153. Tobacco 21 ordinances are not "one size fits all;" they should be created to meet the specific needs of each locality. See *Tobacco 21 Ordinance Checklist*, *supra* note 106 ("Each community starts in a different place and has unique characteristics and values.").

154. A civil penalty is usually a fine received for violating a statute, regulation, or ordinance. They are usually imposed by a government agency. *Civil Penalty Law and Legal Definition*, US LEGAL (2016), <https://definitions.uslegal.com/c/civil-penalty/> [<https://perma.cc/8R9X-C3XJ>]. Whereas, a criminal penalty can also include a fine but may take the form of jail time. Criminal penalties are usually enforced by the state or a district attorney. *What is the Difference Between a Civil Offense and a Crime?*, FREE ADVICE LEGAL (2019), [https://criminal-law.freeadvice.com/criminal-law/criminal-law/civil\\_offense\\_crime.htm](https://criminal-law.freeadvice.com/criminal-law/criminal-law/civil_offense_crime.htm) [<https://perma.cc/N2CP-A4R8>].

155. See, e.g., D.C. CODE ANN. § 7-1721.02 (West 2017) (imposing criminal penalties for violations); *id.* at § 7-1721.07 (West 2010) (allowing civil penalties as an alternative to criminal penalties in the event of a violation).

156. The ordinance states any violator "is subject to either a criminal action for a misdemeanor or a civil action brought by a city attorney, a county counsel, or a district attorney . . ." CAL. PENAL CODE § 308(a)(1)(A)(i) (West 2018). Unique to California, the ordinance also specifies that 25% of the fine collected will go to "whoever is responsible for bringing the successful action." *Id.* at § 308(a)(1)(B) (West 2018).

157. CAL. PENAL CODE § 308(a)(1)(A)(i) (West 2018).

158. The ordinance indicates the first violation by a retailer will result in a misdemeanor and a fine between \$100–\$500, 30 days jail time, or both. D.C. CODE ANN. § 7-1721.02 (West 2017).

violators.<sup>159</sup> Unlike the other ordinances mentioned, Hawaii does not specify whether violations will result in civil or criminal penalties; however, the repercussion is a fine, and jail time is not mentioned.<sup>160</sup> Also, unlike the other ordinances, Hawaii gives the option for community service as a penalty for repeat youth violators.<sup>161</sup>

Similar to Hawaii, Needham's ordinance only provides for civil penalties against retail violators.<sup>162</sup> San Antonio is the only ordinance mentioned that imposes only criminal penalties for retail violators.<sup>163</sup> Interestingly, San Antonio is also the only locality mentioned that does not specify the penalties for repeat offenders.<sup>164</sup>

Multiple factors require consideration when deciding penalties for Tobacco 21 violations. Localities need first to decide if they want to implement civil penalties, criminal penalties, or both. The next factor that must be decided is the fine amount and the jail time if criminal penalties will be imposed. To ensure complete thoroughness, a locality may designate the agency that will receive the funds from violator fines.<sup>165</sup> Lastly, and not to

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However, a civil penalty may be enforced as an "alternative sanction." D.C. CODE ANN. § 7-1721.07 (West 2010).

159. An individual under twenty-one who purchases or possesses tobacco will receive a \$25 civil fine. An individual under twenty-one who attempts to falsely represent their age will receive a \$100 civil fine for the first offense. D.C. CODE ANN. § 7-1721.03 (West 2017).

160. Retail violators will receive a fine of \$500 for the first offense and up to \$2,000 for multiple offenses. HAW. REV. STAT. ANN. § 712-1258(6) (West 2018).

161. Hawaii's ordinance provides a good example of how to include PUP enforcement in a Tobacco 21 ordinance without criminalizing the behavior. First offenses result in a \$10 fine while repeat offenses result in up to a \$50 fine or 48–72 hours of community service. *Id.*

162. A first offense will result in a \$100 fine and a seven-day suspension of the retailer's tobacco license. NEEDHAM, MASS., BOARD OF HEALTH, art. 1, § 1.6 (2015).

163. The ordinance indicates a retailer that sells tobacco to anyone under twenty-one years of age will be subject to a misdemeanor crime and if convicted, will result in a \$500 fine. San Antonio also imposes more strict penalties for anyone who displays or sells tobacco products "on any public right-of-way, city park or any city-owned building or facility. . . ." or anyone who violates the specifications regarding cigarette vending machines. These violations can result in up to a \$2,000 fine. SAN ANTONIO, TEX., SAN ANTONIO CITY CODE, ch. 36, § 36-5 (2018).

164. Imposing harsher penalties for repeat violations provides motivation for complying with the ordinance. As it stands now, San Antonio's ordinance does not lend any deterrence for multiple violations. Furthermore, the councilmembers of San Antonio did not give any explanation for the lack of penalties. *Id.*; City of San Antonio, City Council A Session Meeting Minutes (Jan. 11, 2018); City of San Antonio City Council B Session Meeting Minutes (Dec. 6, 2017).

165. *See* CAL. PENAL CODE § 308(a)(1)(B) (West 2018) (designating the agency that enforces the violation will receive 25% of the fine paid).



be overlooked, a locality should be sure to indicate the penalties for repeat violations.<sup>166</sup>

#### D. *Alternative Measures to Reduce Tobacco Use in Youth*

In addition to enacting a Tobacco 21 ordinance, states and localities can implement other strategies to reduce smoking prevalence. Localities can increase the tax on tobacco and tobacco products.<sup>167</sup> Studies show that increasing the price of cigarettes can successfully reduce smoking in the youth population.<sup>168</sup>

Localities may also increase funding for tobacco prevention education programs.<sup>169</sup> Florida was able to report some of the nation's lowest high school smoking rates ever at just 5.2%, which is attributed to having one of the "longest-running," well-funded smoking prevention programs in the nation.<sup>170</sup> Interestingly, neither Florida nor any of its cities or localities have enacted Tobacco 21 ordinances.<sup>171</sup> North Dakota has also achieved great success in reducing high school smoking by funding and maintaining an effective smoking prevention program.<sup>172</sup>

166. See NEEDHAM, MASS., BOARD OF HEALTH art. 1, § 1.6 (2015) (warning retail violators may have their tobacco license suspended indefinitely for repeat violations).

167. Washington D.C. currently has the highest tax at \$4.50 per pack while Virginia has the lowest at only \$0.30 per pack. Many states, including Texas, have not increased their tobacco tax in over ten years. See *State Cigarette Excise Tax Rates & Rankings*, CAMPAIGN FOR TOBACCO FREE KIDS (Dec. 2018), <https://www.tobaccofreekids.org/assets/factsheets/0097.pdf> [<https://perma.cc/HLF6-3KLA>] (ranking the states based on their tobacco tax from highest to lowest).

168. It is unclear if increased price reduces smoking "initiation," but it does decrease the number of cigarettes consumed in the youth population. See Pearl Bader et al., *Effects of Tobacco Taxation and Pricing on Smoking Behavior in High Risk Populations: A Knowledge Synthesis*, 8 INT'L J. ENVTL RES. & PUB. HEALTH 4118, 4119–23 (2011) (examining the effect of increased tobacco prices on smoking prevalence in at-risk groups).

169. Colorado's rate of high school smoking is below average. This may be attributed to the fact that their funding for tobacco prevention programs is "far above national average." Colorado, TOBACCO TWENTY-ONE, <https://tobacco21.org/state/colorado/> [<https://perma.cc/58SH-WNHS>].

170. *States Can Help Finish the Fight Against Tobacco by Boosting Funding for Tobacco Prevention*, TRUTH INITIATIVE (Dec. 2016), <https://truthinitiative.org/news/states-can-help-finish-fight-against-tobacco-boosting-funding-tobacco-prevention> [<https://perma.cc/UQ6B-2JMK>] [hereinafter *States Can Help Finish the Fight Against Tobacco*].

171. See *States and Localities That Have Raised the Minimum Legal Sale Age*, *supra* note 54 (listing cities that have enacted Tobacco 21, Florida not being one of them).

172. *States Can Help Finish the Fight Against Tobacco by Boosting Funding for Tobacco Prevention*, *supra* note 170. North Dakota also has not adopted Tobacco 21 either. *States and Localities That Have Raised the Minimum Legal Sale Age*, *supra* note 54.

Big Tobacco is openly targeting the youth with focused strategies like flavored tobacco products.<sup>173</sup> The Tobacco Control Act already prohibits flavored cigarettes, but it does not mention other flavored tobacco products that are often used by the youth today.<sup>174</sup> Localities can directly combat Big Tobacco's efforts by restricting the sale of flavored tobacco products.<sup>175</sup> The restriction of flavored tobacco is a trend still working on picking up momentum.<sup>176</sup> However, because this type of restriction directly confronts Big Tobacco's attack on the youth, it is sure to gain traction.

#### IV. CONCLUSION

The regulation of tobacco has been a constant fight against Big Tobacco.<sup>177</sup> We finally began to see progress when smoking rates among high school students appeared to decrease.<sup>178</sup> However, it turned out high schoolers just transitioned to the use of e-cigarettes and other non-cigarette tobacco products.<sup>179</sup> Studies have also shown the "social availability" of tobacco products among peers is contributing to continuing rates of youth tobacco use.<sup>180</sup> The fight against youth tobacco use has not only persisted, it has gotten stronger.<sup>181</sup>

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173. See Burns et al., *supra* note 67 (noting tobacco companies have targeted sales to specific groups, such as youths or women, for decades).

174. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (June 22, 2009) (codified as amended in scattered sections of 21 U.S.C.).

175. See Laura Bach, *States and Localities That Have Restricted the Sale of Flavored Tobacco Products*, CAMPAIGN FOR TOBACCO FREE KIDS (Nov. 2018), <https://www.tobaccofreekids.org/assets/factsheets/0398.pdf> [<https://perma.cc/G2P5-LNVW>] (listing every city that currently prohibits the sale of flavored tobacco products).

176. A little over one-hundred cities encompassed within six states have implemented this restriction, most of which are located in Massachusetts. *Id.*

177. See Apollonio & Glantz, *supra* note 7, at 1200–04 (discussing the evolution and devolution of tobacco laws in the United States in the Nineteenth and Twentieth Centuries). See also Borio, *supra* note 1 (reporting the rise and fall of MLSA laws throughout the 1800 and 1900s).

178. See Tilburg et al., *supra* note 72 (describing the growing popularity of e-cigarettes explains the decline in cigarette smoking in high school students).

179. See *id.* at 38 ("There is growing concern that the slowing decline in youth cigarette smoking rates is associated with the increased prevalence of ENDS use.").

180. Youth under eighteen primarily rely on non-commercial sources for their tobacco products. Raising the MLSA to twenty-one disrupts the social distribution chain. Berman, *supra* note 41, at 378; Forster et al., *supra* note 68, at 148.

181. See *States and Localities That Have Raised the Minimum Legal Sale Age*, *supra* note 54 (listing the six states and 350 localities that have enacted a Tobacco 21 ordinance); see generally TOBACCO TWENTY-ONE, *supra* note 11 (providing an overview of the Tobacco 21 trend).

With the Tobacco 21 trend growing in popularity, it is critical for localities to implement the strongest ordinance that best fits their particular needs.<sup>182</sup> Localities must enact specific provisions directed toward tobacco retailers, prohibiting the sale of tobacco products to youth under twenty-one years of age.<sup>183</sup> A provision requiring explicit language, size, and location of signage has shown to result in optimal awareness, which in turn results in Tobacco 21 success.<sup>184</sup> Localities must remember the specific needs of their demographics and adapt their retailer education toolkits accordingly.<sup>185</sup>

PUP enforcement provisions for the youth continue to be highly contentious.<sup>186</sup> Most Tobacco 21 supporters advocate for no PUP provisions. However, that may not work for all localities. Some localities have very distinct characteristics that may require PUP enforcement for Tobacco 21 to be successful.<sup>187</sup> Penalties for violations, for both the retailers as well as the youth, also need to be considered and tailored to meet the locality's needs.<sup>188</sup> In any instance, the enactment of Tobacco 21 ordinances should not be rushed and instead requires careful consideration in order to be effective.

Although there is limited data on the results of Tobacco 21, if there is any indication a certain provision or regulation will lead to the reduction of youth smoking, it should be employed.<sup>189</sup> In addition to adopting

182. See *Tobacco 21 Ordinance Checklist*, *supra* note 106 (suggesting provisions to be included in a Tobacco 21 ordinance); *Tips and Tools*, *supra* note 127.

183. It is also important to explicitly mention the use of e-cigarettes in the ordinance provision. See, e.g., HAW. REV. STAT. ANN. § 712-1258 (West 2018) (“It shall be unlawful to sell or furnish a tobacco product in any shape or form or an electronic smoking device to a person under twenty-one years of age.”).

184. See Zhang et al., *supra* note 112, at 662 (attributing T21 success to high retailer and youth awareness of the increased MLSA of twenty-one years old).

185. See *id.* at 660–62 (addressing the diverse population of California and providing retailers with T21 toolkits in multiple languages).

186. See Knox, *supra* note 120 (negating the effectiveness of PUP enforcement provisions).

187. Without PUP enforcement, San Antonio's Tobacco 21 ordinance may not show exceptional results due to the unique layout and high population of active duty military under twenty-one. Pugh et al., *supra* note 147; *San Antonio, Tex.*, GOOGLE MAPS, *supra* note 137.

188. Compare HAW. REV. STAT. ANN. § 712-1258 (West 2018) (allowing community service to be a penalty for youth violators), and D.C. CODE ANN. § 7-1721.07 (West 2010) (allowing civil penalties to be used instead of criminal penalties for retail violators), with *San Antonio, Tex.*, San Antonio City Code, ch. 36, § 36-5 (2018) (allowing criminal penalties only for retail violators).

189. See Joseph R. DiFranza, et al., *Enforcement of Underage Sales Laws as a Predictor of Daily Smoking*

Tobacco 21, localities should consider enacting other provisions to reduce tobacco use in the youth further.<sup>190</sup> If localities enact these alternative measures, in addition to Tobacco 21 ordinances, we may begin to win the fight against Big Tobacco. Furthermore, with marijuana legislation becoming an increasing reality for many jurisdictions, Tobacco 21 ordinances may provide guidance on the essential regulation of recreational marijuana as well.

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*Among Adolescents—A National Study*, 9 BMC PUBLIC HEALTH 107, 111 (Apr. 17, 2009) (“But there is no reason why policy makers should choose between these approaches, as all effective measures to reduce smoking among youth should be employed.”).

190. See *States Can Help Finish the Fight Against Tobacco*, *supra* note 170 (stressing the importance of a well-funded and maintained tobacco prevention program); see also Bader et al., *supra* note 168, at 4123 (encouraging the rise of tobacco prices and taxes to reduce smoking rates).