

**TESTIMONY IN OPPOSITION TO SENATE BILL 273**

This testimony is submitted in opposition to Senate Bill 273. I am the Deputy Director of the Legal Resource Center for Public Health Policy at the University of Maryland Carey School of Law, and am providing this testimony in my individual capacity. Although this Bill includes some important public health measures with which I generally agree, I submit this testimony to express concern with some of the provisions: (1) This Bill may have the unintended consequence of creating implied preemption for county and municipal governments, preventing local regulation of Electronic Smoking Devices (ESDs); (2) This Bill attempts to require vape shops to check the identification of those who purchase ESD products and to ban those under age 21 from entering vape shops, but uses language that does not accomplish either goal; and (3) The Clean Indoor Air Act as amended does not adequately address all ESD-like products.

***Unintended Implied State Preemption of ESD Regulation***

Without express anti-preemption language, this Bill poses a great risk to local authority in Maryland. Preemption is the constitutional doctrine that federal law is supreme over and in some circumstances will displace, state or local law. Likewise, state law can invalidate a local law in certain instances as well. There are two types of preemption, express and implied. A federal or state statute may explicitly prohibit local regulation; that is express preemption. Preemption may also be implied either by conflict (if the local law interferes with the objectives of a state or federal law) or field preemption (when state or federal government has heavily regulated a particular field, suggesting an intent to occupy the entire subject area). Local control is integral to addressing youth access and retailer restrictions. Local governments typically develop the strongest and most innovative laws tailored to their populations. There are grave concerns in the public health community that by passing this Bill without the anti-preemption amendment, a Court, relying on the precedent set in *Altadis U.S.A. v. Prince George's County*, 431 Md. 307 (2013), may find that the legislature has impliedly preempted any local legislation related to ESDs.

The *Altadis*<sup>1</sup> case concerned 2008 and 2009 Prince George's County ordinances requiring cigars to be sold in packages of at least five. The Court of Appeals ultimately held the state has occupied the field of regulating the packaging and sale of tobacco products due to the extensive laws surrounding state licensing, taxation, sales, use, and packaging restrictions. Although there are some legal concerns surrounding the Court's explanation of preemption, it is clear that the Court either believes that locals cannot regulate tobacco products OR locals may not regulate the

---

<sup>1</sup> *Altadis U.S.A. v. Prince George's County*, 431 Md. 307 (2013).

packaging and sale of tobacco products. Without an express provision in this Bill stating that locals are not preempted from enacting laws regulating the sale, distribution, and packaging of ESDs, it is possible that a Court, relying on the reasoning in *Altadis*, may find that locals are also preempted from passing any ESDs related laws as a result of these new state provisions.

### ***Identification Check and Underage Vape Shop Premises Ban***

Beginning on page 10, line 26, the Bill states that a vape shop vendor must scan the customer's ID "to verify that the consumer may legally receive the electronic smoking device in compliance with §10-107 of the Criminal Law Article." Similar language is used in the next section, which refers to "an individual who may not legally receive an electronic smoking device." It appears that this is an attempt to require vape shop vendors to verify a customer's age, ensuring that they do not sell to a person under 21. It also seems that the Bill tries to prohibit a person under 21 from entering the premises. Unfortunately, the language does not accomplish either purported goal.

The law prohibiting the purchase, use, and possession of tobacco by minors, former Criminal Law §10-108, was repealed as part of the Tobacco 21 legislation that passed in 2019 (HB 1169). Therefore, any person may "legally receive" these products because no law penalizes the purchase, use, or possession. However, Section 10-107 of the Criminal Law Article prohibits a person from ***selling*** tobacco or ESD to a minor, creating a class of people who may not ***legally distribute*** tobacco or ESDs to anyone under 21. ***There is no consumer who may not legally receive an ESD in Maryland even though there are people who may not sell or distribute these products to those under 21.*** Therefore, any language reflecting "legally receive" does not accurately capture those under age 21 and is meaningless.

### ***Clean Indoor Air Act Amendment***

On page 16 beginning on line 2, the Bill adds vapor from electronic smoking devices to the Clean Indoor Air Act, describing it as "the complex mixture formed from the escaping vapor of an electronic smoking device or exhaled as electronic smoking device vapor." This definition fails to encompass heat-not-burn products, which differ from ESDs. Heat-not-burn products are electronic devices that heat processed tobacco instead of combusting it to deliver an aerosol. These use real tobacco, not liquid nicotine. The definition of an ESD, as defined in Business Regulation, §16.7-101 is "a device that can be used to deliver aerosolized or vaporized nicotine to an individual inhaling from the device." Since heat-not-burn products do not deliver aerosolized nicotine, they do not meet this definition and will not be covered by this amendment to the Clean Indoor Air Act.

There is little research on the health effects of exposure to these products. Philip Morris International's (PMI) newest product, the IQOS Tobacco Heating System, is a heat-not-burn product and has gained significant popularity in the U.S. In July 2020, the FDA issued an order

permitting PMI to market these products in the U.S., but did not authorize it to claim that it reduces the health risks associated with smoking. If the Clean Indoor Air Act is amended to include ESDs it should be carefully crafted to include language broad enough to encompass heat-not-burn products.

For these reasons, the Bill poses significant legal issues if enacted into law. As such, we ask that you issue an unfavorable report