

To: Senate Finance Committee

From: Brooke Torton, attorney with the University of Maryland Carey School of Law, 500 W. Baltimore Street, Baltimore, Maryland 21201

Date: February 3, 2022

Re: Testimony in Support of SB249

Background Information Relevant to Senate Bill 249

My name is Brooke Torton and I am the Managing Director of the Legal Resource Center for Public Health Policy at the University of Maryland Carey School of Law. This testimony is submitted to provide background information relevant to Senate Bill 249.

SB249 would restore authority to the Baltimore City Council and Mayor, respectively, to enact and enforce laws regulating the sale of tobacco products. This authority was stripped from Baltimore City and other local jurisdictions as a result of a faulty 2013 court decision, *Altadis U.S.A. v. Prince George's County*, 431 Md. 307 (2013). In that case, the court held that merely by passing a law requiring cigar sellers to be licensed, the General Assembly impliedly preempted local jurisdictions from enacting laws relating to the sale and distribution of tobacco products.

Preemption is the constitutional doctrine that federal law is supreme over any conflicting state or local law. Likewise, in cases of conflict between state and local law, state law is controlling. 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.

The *Altadis*¹ case concerned a 2008 Prince George's County ordinance requiring cigars to be sold in packages of at least five. The Maryland Court of Appeals ultimately held the state has occupied the field of regulating the packaging and sale of tobacco products. In reaching its decision, the Court focused extensively on the other tobacco product (OTP) licensing provisions which passed in 2011, *subsequent* to the oral argument which took place in this case. The Court stated that the licensing provisions define the term "package" as not more than 10 cigars, which is at odds with the Prince George's County ordinance which defined a "package" as minimum of 5 cigars. However, this analysis is flawed because a minimum of 5 cigars is certainly consistent, not at odds with, not more than 10.

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

Additionally, my office provided extensive technical assistance on these licensing provisions and worked closely with the Comptroller's Office (which drafted and had the legislation introduced), advocates, opponents, and legislators. Never was there discussion about this licensing scheme, designed to mirror licensing for cigarette sellers, preempting local law. The public health community certainly would have opposed the bill if there was any belief that the result would be preemption of local tobacco regulation. In fact, the *Altadis* case was pending decision during the 2011 session and the public health community, including local health officers, weighed in in favor of Prince George's County and local control in that case. It is nonsensical that a bill the public health community supported would end up curtailing local powers.

Regardless of whether the Court of Appeals properly found implied preemption, Baltimore City and county governments across the State are hamstrung by the *Altadis* decision and only the General Assembly can remedy that. As a result of *Altadis*, since 2013 Baltimore City has been unable to enforce tobacco regulation that preexisted the decision and has been unable to pass additional regulations to address new and persistent issues related to tobacco use. This bill seeks to rightfully return this authority to Baltimore City. I urge you to issue a favorable report for SB249.