No. 124469

IN THE
SUPREME COURT OF ILLINOIS

IWAN RIES & CO., an Illinois corporation; CIGAR ASSOCIATION OF AMERICA, INC., a New York corporation; ILLINOIS ASSOCIATION OF WHOLESALE DISTRIBUTORS, an Illinois corporation; ILLINOIS RETAIL MERCHANTS ASSOCIATION, an Illinois corporation; INTERNATIONAL PREMIUM CIGAR AND PIPE RETAILERS ASSOCIATION, a New York Corporation; NATIONAL ASSOCIATION OF TOBACCO OUTLETS, INC., a Minnesota corporation; and ARANGOLD CORPORATION, d/b/a ARANGO CIGAR CO., an Illinois corporation,

Plaintiffs-Appellants,

v.

CITY OF CHICAGO and ERIN KEANE, not individually but solely in her capacity as the Comptroller of the Department of Finance within the City of Chicago, Illinois,

Defendants-Appellees.

On Appeal From The Appellate Court of Illinois, First District, No. 1-17-0875,
There Heard On Appeal from the Circuit Court of Cook County, Illinois,
County Department, Law Division, Tax and Miscellaneous Remedies Section,
No. 16 L 50356
The Honorable Ann Collins-Dole, Judge Presiding

BRIEF OF DEFENDANTS-APPELLEES

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POINTS AND AUTHORITIES

NATURE OF THE CASE

On March 16, 2016, the City of Chicago passed the Other Tobacco Products ("OTP") Tax ordinance, which imposes a flat tax on non-cigarette tobacco products sold within the City. Municipal Code of Chicago, Ill. § 3-49-030. Plaintiffs filed a complaint for declaratory judgment and injunctive relief, challenging the OTP tax on the ground that section 8-11-6a(2) of the Illinois Municipal Code, 65 ILCS 5/8-11-6a(2), preempts the City's home rule power to tax non-cigarette tobacco products. C. 14-44.[1] The parties filed cross-motions for partial summary judgment on the issue of preemption. C. 174-76; C. 252. The circuit court granted plaintiffs' summary judgment motion and denied the City's, holding that section 8-11-6(a)(2) preempts the OTP tax. C. 359-67. The City appealed. C. 372-33. The appellate court reversed, holding that the plain language of section 8-11-6a(2) does not preempt the City from taxing non-cigarette tobacco products. A17. Plaintiffs appeal. No questions are raised on the pleadings.

ISSUE PRESENTED

Whether section 8-11-6a(2) of the Illinois Municipal Code preempts the City's home rule authority to tax non-cigarette tobacco products.

[1] We cite the common law record as C. __. We cite plaintiffs' petition for leave to appeal, which they elected to allow to stand as their appellants' brief, as Ries PLA __, and the appendix to their petition as A__.

JURISDICTION

On January 20, 2017, the circuit court entered partial summary judgment for plaintiffs, ruling that state law preempts the OTP tax. C. 359-67. On March 8, 2017, the circuit court made a written finding pursuant to Rule 304(a) that was no just reason to delay enforcement or appeal of that ruling. C. 368-69. On April 5, 2017, the City filed a notice of appeal. C. 372-73. On December 20, 2018, the appellate court issued an opinion reversing the circuit court's judgment. A17. Plaintiffs filed a petition for leave to appeal on January 23, 2019, which this court granted on March 20, 2019. This court has jurisdiction under Ill. Sup. Ct. R. 315.

ORDINANCE AND STATUTE INVOLVED

The Illinois Municipal Code, 65 ILCS 5/8-11-6a:

> Home rule municipalities; preemption of certain taxes. Except as provided in Sections 8-11-1, 8-11-5, 8-11-6, 8-11-6b, 8-11-6c, and 11-74.3-6 on and after September 1, 1990, no home rule municipality has the authority to impose, pursuant to its home rule authority, a retailer's occupation tax, service occupation tax, use tax, sales tax or other tax on the use, sale or purchase of tangible personal property based on the gross receipts from such sales or the selling or purchase price of said tangible personal property. Notwithstanding the foregoing, this Section does not preempt any home rule imposed tax such as the following: 1) a tax on alcoholic beverages, whether based on gross receipts, volume sold or any other measurement; (2) a tax based on the number of units of cigarettes or tobacco products (provided, however, that a home rule municipality that has not imposed a tax based on the number of units of cigarettes or tobacco products before July 1, 1993, shall not impose such a tax after that date); (3) a tax, however measured, based on the use of a hotel or motel room or similar facility; (4) a tax, however

> measured, on the sale or transfer of real property; (5) a tax, however measured, on lease receipts; (6) a tax on food prepared for immediate consumption and on alcoholic beverages sold by a business which provides for on premise consumption of said food or alcoholic beverages; or (7) other taxes not based on the selling or purchase price or gross receipts from the use, sale or purchase of tangible personal property. This Section does not preempt a home rule municipality with a population of more than 2,000,000 from imposing a tax, however measured, on the use, for consideration, of a parking lot, garage, or other parking facility. This Section is not intended to affect any existing tax on food and beverages prepared for immediate consumption on the premises where the sale occurs, or any existing tax on alcoholic beverages, or any existing tax imposed on the charge for renting a hotel or motel room, which was in effect January 15, 1988, or any extension of the effective date of such an existing tax by ordinance of the municipality imposing the tax, which extension is hereby authorized, in any non-home rule municipality in which the imposition of such a tax has been upheld by judicial determination, nor is this Section intended to preempt the authority granted by Public Act 85-1006. This Section is a limitation, pursuant to subsection (g) of Section 6 of Article VII of the Illinois Constitution, on the power of home rule units to tax.

STATEMENT OF FACTS

The City has utilized its home rule power to regulate and tax cigarette purchases in Chicago since 1971. E.g., S. Bloom, Inc. v. Korshak, 52 Ill. 2d 56, 59-62 (1972) (rejecting constitutional challenges to the City's home rule authority to enact 1971 ordinance taxing cigarettes); Journal of the Proceedings of the City Council, December 9, 1992, at 25865-70 (amending ordinance regulating and taxing cigarette sales); Municipal Code of Chicago, Ill. § 3-42-020. In response to a market shift from cigarettes to non-cigarette tobacco products and growing concerns about the public health consequences

of such products, on March 16, 2016, the City Council enacted measures designed to reduce the consumption of non-cigarette tobacco products. C. 27-37. The City Council found that tobacco products, including cigars, "smokeless tobacco," "smoking tobacco," and "pipe tobacco," are "deadly and highly addictive products" that are "harmful to health" and that young adults are particularly vulnerable to "nicotine addiction which can harm brain development." C. 27. The City Council also found, based on numerous studies, that "high tobacco prices reduce tobacco consumption, both among youth users, who are especially price-sensitive, and among adults." Id. Specifically, "high prices reduce the prevalence of tobacco use, the probability of trying tobacco for the first time, the average number of cigarettes consumed per smoker, the initiation of daily smoking, and the initiation of daily heavy smoking." Id. Additionally, the City Council found that "as cigarette prices increased, smokers, particularly youth, have migrated to cheaper tobacco products." Id. For instance, the City Council found that "little cigars" are "virtually identical to cigarettes," but cost "substantially less" because the City has not taxed them like cigarettes. Id.

Accordingly, to reduce consumption of tobacco, especially by youth, the City implemented the following regulatory measures: it raised the legal age for purchasing tobacco within the City from 18 to 21, Municipal Code of Chicago, Ill. § 4-64-345; mandated price floors for the sale of tobacco products within the City, id. § 4-64-810; prohibited the use of coupons or other

discounts "in any transaction related to the sale of a tobacco product to a consumer," id. § 4-64-820; and prohibited the sale of "little cigars" in packages of fewer than 10 per package, id. § 4-64-830. As a part of these comprehensive regulatory measures, the City Council passed the OTP tax. Municipal Code of Chicago, Ill. § 3-49-010, et seq.

The OTP Tax

The OTP tax ordinance imposes a flat tax on non-cigarette tobacco products sold or used in the City. Municipal Code of Chicago, Ill. § 3-49-030. Specifically, the ordinance imposes a $1.80 per ounce tax on smoking and smokeless tobacco, a $0.60 per ounce tax on pipe tobacco, and a $0.20 per cigar tax on "little" and large cigars. Id. The ordinance defines "other tobacco products" to exclude cigarettes, electronic cigarettes and liquid nicotine products. Id. § 3-49-020. It imposes liability for the tax on consumers, id. § 3-49-040, but requires tobacco retailers to collect the tax from purchasers in the City and make payments to the City's Department of Finance, id. § 3-49-050. The ordinance provides that it is unlawful "for a retail tobacco dealer to fail to include the tax . . . in the sale price of the OTP" or to otherwise absorb the tax. Id. § 3-49-020.

The ordinance also imposes registration requirements, requiring tobacco dealers selling other tobacco products to retailers or purchasers in the City to register with the City's Department of Finance. Municipal Code of Chicago, Ill. § 3-49-110. It imposes recordkeeping obligations on all entities

required to collect the tax. Id. § 3-49-070. The ordinance directs that tax proceeds shall be deposited in the City's corporate fund and earmarked for tobacco cessation and other educational programs in public schools and for enhanced police services. Id. § 3-49-140.

The OTP tax was scheduled to go into effect on July 1, 2016, but the City deferred its implementation pending the circuit court's ruling, C. 117-19, and has continued to defer implementation while this litigation is pending.

Plaintiffs' Lawsuit

On May 26, 2016, plaintiffs – several tobacco merchant associations and a tobacco products distributor and retailer – filed a verified complaint for declaratory judgment and injunctive relief. C. 14-44. Plaintiffs asked the circuit court to declare the OTP tax invalid and unconstitutional under article VII, section 6(g) of the 1970 Illinois Constitution and to permanently enjoin its enforcement. C. 20-24. Plaintiffs claimed that the City's home rule power to tax non-cigarette tobacco products is preempted by section 8-11-6a(2) of the Illinois Municipal Code. C. 20-21. Section 8-11-6a of the Municipal Code preempts most sales taxes on tangible personal property, but carves out certain taxes from the scope of preemption, including "a tax based on the number of units of cigarettes or tobacco products." 65 ILCS 5/8-11-6a. In 1993, the statute was amended to provide, in subsection 6a(2), that "a home rule municipality that has not imposed a tax based on the number of units of cigarettes or tobacco products before July 1, 1993, shall not impose

such a tax after that date." Id. 5/8-11-6a(2). Plaintiffs claimed, based on the language the 1993 amendment added, that the City may not impose a new tax on non-cigarette tobacco products because it taxed only cigarettes, but not other tobacco products, before July 1, 1993. C. 20-21.

On June 17, 2016, plaintiffs filed an amended complaint for declaratory and injunctive relief asserting three counts: count I sought a declaratory judgment that the OTP tax was "illegal and unauthorized" because it was preempted by section 8-11-6a(2); count II sought a permanent injunction; and count III challenged the effective date of other regulatory provisions that imposed price floors for non-cigarette tobacco products, prohibited the use of coupons, and imposed minimum package requirements for tobacco products. C. 120-33. The parties filed cross-motions for partial summary judgment on counts I and II of the amended complaint. C. 174-76; C. 252.

Circuit Court Decision

On January 20, 2017, the circuit court issued an opinion and order granting plaintiffs' motion for partial summary judgment and denying the City's cross-motion for summary judgment, ruling that the OTP tax is invalid. C. 359-67; A18-26. The court stated that "[t]axing law[s] are strictly construed . . . against the government and in favor o[f] the taxpayer," and "statutes which grant tax power to a municipal corporation are construed strictly against the municipality." C. 362; A21. The court held that section 8-

11-6a(2) is "unambiguous in its limitation" of home rule taxing power. C. 364; A23. The court found that because that section refers to "'cigarettes or tobacco products,'" it "shows a distinction between the types of products that have already been taxed," and that the phrase "'such a tax' . . . modifies both 'a' cigarette and 'a' tobacco tax, separately." C. 363; A22. The court also found that when the General Assembly amended section 8-11-6a(2) in 1993 to add the provision that "a home rule municipality that has not imposed a tax based on the number of units of cigarettes or tobacco products before July 1, 1993, shall not impose such a tax after that date," it sought "to prohibit new local taxes on cigarettes or tobacco products" in order to protect state tax revenues and limit tobacco employers' tax exposure. C. 364; A23.

Additionally, the circuit court described unsuccessful attempts in the General Assembly in 2011 and 2014 to further amend section 8-11-6a(2). C. 365-66; A24-25. Although the court ascribed "little weight to the legislature's attempts to amend Section 6a(2)," the court deemed it "significant" that, in 2011, the City Council's Finance Committee introduced a draft resolution to urge the General Assembly "to empower home rule units of government to tax any and all tobacco products." C. 366; A25. The draft resolution failed, but the circuit court believed it showed "the City's own understanding" that it did not have authority to tax non-cigarette tobacco products. Id. The circuit court concluded that "the City's home rule authority to tax Other Tobacco Products is preempted." C. 367; A26.

After granting the plaintiffs' motion for partial summary judgment, the circuit court entered a finding pursuant to Rule 304(a) that there was no just reason for delaying either enforcement or appeal of its order, C. 368; A27, and the City appealed, C. 372-33.

Appellate Court Decision

On December 20, 2018, the appellate court unanimously reversed the judgment of the circuit court. A1-17. The court began its analysis "by discussing our constitution and the power it grants to home rule units." A5. The court recognized that the Illinois Constitution was intended to give home rule units, like the City, "'the broadest powers possible,'" including the power to tax, A6 (citing Palm v. 2800 Lake Shore Drive Condominium Association, 2013 IL 110505, ¶ 30), and that when the General Assembly limits that home rule power, the limitation must be express and specific, A7.

The appellate court found no such express preemption in section 8-11-6a(2). It noted that section 8-11-6a of the Illinois Municipal Code was initially enacted in 1988 to preempt home rule units from imposing certain types of taxes, and that the statute set forth seven categories of taxes which were not preempted, including "'a tax based on the number of units of cigarettes or tobacco products.'" A10 (quoting Ill. Rev. Stat. 1989, ch. 24, § 8-11-6a). The court reasoned that, as used in the statute, the phrase "cigarettes or tobacco products" was intended to describe a broad category of goods that home rule units could continue to tax. A11. In other words, "or"

was used in "an inclusive sense": home rule units could "tax either cigarettes, or non-cigarette tobacco products, or both." Id. When section 8-11-6a(2) was amended in 1993 to limit home units' power to tax nicotine-based products, the General Assembly used the same phrase, "a tax based on the number of units of cigarettes or tobacco products," and "mirrored the language that appeared in the original statute." A15. Giving the phrase its original meaning, so as to construe it consistently within the statute, the appellate court concluded that the 1993 amendment prevented only home rule units that had not imposed "a tax based on the number of units of cigarettes or tobacco products or both" from imposing such a tax. A16. The City had imposed a tax in that category – on cigarettes – so its home rule authority was not preempted. A17.

The appellate court also found that the use of the words "a tax" in the language added by the 1993 amendment supported its interpretation. When the indefinite article "a" precedes a noun, it explained, "the noun refers to something general rather than something specific." A16. Thus, "a tax" referred "not to a specific tax, but to a tax generally on cigarettes or tobacco products or both." Id. The appellate court therefore held that, because the City had imposed "a tax" in that general category prior to July 1, 1993, the City was not preempted from taxing non-cigarette tobacco products. A17.

Plaintiffs appeal.

ARGUMENT

The OTP tax is a valid exercise of the City's home rule power. The language of section 8-11-6a(2) is clear. It prohibits home rule units that had not imposed "a tax based on the number of units of cigarettes or tobacco products" prior to July 1, 1993, from taxing products in that category. At the same time, it grandfathers home rule units that had imposed taxes on products in that category, allowing them to continue to tax cigarettes or tobacco products. The City imposed "a tax based on the number of units of cigarettes or tobacco products" before July 1, 1993 – it taxed cigarettes. Therefore, section 8-11-6a(2) does not preempt the City's home rule power to impose the OTP tax.

Plaintiffs' argument for preemption is contrary to the plain language of the statute. The phrase "a tax based on the number of units of cigarettes or tobacco products" was used in section 8-11-6a(2), as originally enacted in 1988, to carve out from preemption a broad category of taxes on similar products containing nicotine. Home rule units could tax cigarettes, tobacco products, or both. When the statute was amended in 1993, the General Assembly repeated the phrase verbatim to limit the imposition of "a tax based on the number of units of cigarettes or tobacco products" by those home rule units that had not previously imposed "such a tax." Because the language added by the 1993 amendment mirrors the language in the original enactment, it calls for the same interpretation. Thus, it too refers to a

category of taxes on similar products. The General Assembly's use of the general, non-restrictive phrase "such a tax" to refer to this category of taxes confirms that preemption of a home rule unit's taxing power depends on whether it imposed a tax in the general category of cigarettes or tobacco products prior to July 1, 1993, not on the specific products within that category that it taxed. In addition, in the amendment, the General Assembly distinguished municipalities that had imposed taxes in that category from those that had not; in other words, it grandfathered municipalities, not particular types of taxes.

The legislative history of the 1993 amendment to section 8-11-6a(2) confirms that the General Assembly's intent was to grandfather those home rule units with existing taxes in the category of "cigarettes or tobacco products," allowing them to impose additional taxes in that category, not, as plaintiffs maintain, to grandfather "only . . . existing municipal cigarette taxes." Ries PLA 17. The floor debate on the amendment reveals legislators' common understanding that home rule units that had taxed cigarettes before July 1, 1993 would not be subject to preemption. No legislator suggested that these units' home rule taxing power would be restricted to the specific taxes they had already imposed. And in any event, home rule authority must be liberally construed, and preemption of home rule power must be explicit. Because section 8-11-6a of the Illinois Municipal Code is a home rule

preemption statute, any ambiguity in the statute as to the scope of preemption should be resolved in favor of preserving home rule power.

When, as here, parties file cross-motions for summary judgment, "they agree that only a question of law is involved." Pielet v. Pielet, 2012 IL 112064, ¶ 28. Review of a ruling on summary judgment is de novo. Id. ¶ 29. Under that standard, the appellate court's judgment upholding the City's OTP tax should be affirmed.

I. THE PLAIN LANGUAGE OF SECTION 8-11-6a(2) DOES NOT PREEMPT THE CITY'S OTP TAX.

The plain language of section 8-11-6a(2) demonstrates that it does not preempt the City's OTP tax. When interpreting a statute, this court "first looks to the statute's language, according that language its plain and commonly understood meaning." People v. Ellis, 199 Ill. 2d 28, 39 (2002) (citing Kraft, Inc. v. Edgar, 138 Ill. 2d 178, 189 (1990)). "If possible, the court must give effect to every word, clause, and sentence; it must not read a statute so as to render any part inoperative, superfluous, or insignificant; and it must not depart from the statute's plain language by reading into it exceptions, limitations, or conditions the legislature did not express." Id. As the appellate court held, A9, A15-16, the statutory language clearly demonstrates that the General Assembly did not preempt the City's authority to tax non-cigarette tobacco products.

A. The Phrase "A Tax Based On The Number Of Units Of Cigarettes Or Tobacco Products" Should Be Interpreted Consistently In Section 8-11-6a(2) To Refer To A Broad Category Of Taxes.

As the appellate court noted, section 8-11-6a was added to the Illinois Municipal Code in 1988. 1988 Ill. Laws 804-05. The phrase "a tax based on the number of units of cigarettes or tobacco products" appears in the version of section 8-11-6a(2) enacted in 1988 and is repeated verbatim in the language added by the 1993 amendment. 1988 Ill. Laws 805; 65 ILCS 5/8-11-6a(2). Under well-established principles of statutory construction, "where the same . . . phrases appear in different parts of the same statute they will be given a generally accepted and consistent meaning, where the legislative intent is not clearly expressed to the contrary." Moran v. Katsinas, 16 Ill. 2d 169, 174 (1959). See also Borg v. Village of Schiller Park Police Pension Board, 111 Ill. App. 3d 653, 657 (1st Dist. 1982) ("[A] word or phrase that is repeated in a statute is presumed to have the same meaning throughout."); 1 Nichols Ill. Civ. Prac. § 6:46 ("Statutory construction requires that amendments be construed together with the original acts . . . ."). Furthermore, "the legislative intent that controls the construction of a public act is the intent of the legislature which passed the subject act, and not the intent of the legislature which amends the act." O'Casek v. Children's Home & Aid Society of Illinois, 229 Ill. 2d 421, 441 (2008). To interpret the phrase "a tax based on the number of units of cigarettes or tobacco products," we

therefore begin by analyzing the meaning of that phrase in the 1988 enactment.

Section 8-11-6a, enacted in 1988, is a home rule preemption statute. Under Article 7, section 6(g) of the Illinois Constitution, the General Assembly may, by a three-fifths vote of both houses, preempt home rule units' taxing power, 1970 Ill. Const., art. VII § 6(g), and section 8-11-6a expresses that it "is a limitation, pursuant to subsection (g) of Section 6 of Article VII of the Illinois Constitution, on the power of home rule units to tax," 1988 Ill. Laws 805. The General Assembly, however, carved out from preemption seven general categories within which home rule units retained the power to tax. Home rule units could, under the 1988 act, continue to impose:

(1) "a tax on alcoholic beverages";

(2) "a tax based on the number of units of cigarettes or tobacco products";

(3) "a tax, however measured, based on the use of a hotel or motel room or similar facility";

(4) "a tax, however measured, on the sale or transfer of real property";

(5) "a tax, however measured, on lease receipts";

(6) "a tax on food prepared for immediate consumption and on alcoholic beverages sold by a business which provides for on premise consumption of said food or alcoholic beverages"; or

(7) "other taxes not based on the selling or purchase price or gross receipts from the use, sale or purchase of tangible personal property."

Id.

As the appellate court recognized, A11, most of these categories of taxes are described using the word "or." These categories include not only "a tax based on the number of units of cigarettes or tobacco products," but also taxes on "a hotel or motel room or similar facility," the "sale or transfer of real property," and "food or alcoholic beverages." 1988 Ill. Laws 805 (emphasis added). In carving out these exceptions from preemption of home rule taxing power, the General Assembly used "or" to group similar types of taxes; it allowed a home rule unit to continue to tax one or multiple items within these tax categories. A11. In grammatical terms, the General Assembly employed "or" as an "inclusive disjunction" (A or B or both), allowing home rule units the choice, when taxing within the category, to tax one thing or another, or both. Even plaintiffs acknowledge this to be true of the original statute. Ries PLA 10 (recognizing that, as enacted in 1988, section 8-11-6a(2) used the phrase "a tax based on the number of units of cigarettes or tobacco products" to identify a broad taxation category and allow municipalities "to impose a tax on either or both" cigarettes or tobacco products).

This use of "or" as encompassing either or both alternatives is common in legal drafting. E.g., Burke v. State ex rel. Department of Land Conservation & Development, 290 P.3d 790, 795-96 (Or. 2012). Although "or" may also be used in the exclusive sense (A or B, but not both), "it is more often the case that the connective 'or' is used in the inclusive sense." Id. at

794 (citing Reed Dickerson, Fundamentals of Legal Drafting 104, 106 (1986)). See also Bryan Garner, Dictionary of Modern Legal Usage 624 (2d ed. 1995) ("The meaning of 'or' is usually inclusive."). Interpreting statutes, courts commonly interpret "or" to permit one or more alternatives rather than to set out mutually exclusive options. For instance, in Thoman v. Village of Northbrook, 148 Ill. App. 3d 356 (1st Dist. 1986), the appellate court construed a statute providing that "[t]he provisions of this Act shall not apply to employees or officials of the State of Illinois or any other public agency engaged in the construction or the maintenance of highways and bridges." Id. at 357. The court ruled that this provision exempted both government agencies and their employees and officials. Id. at 359. Accord Apex Oil Co. v. Henkhaus, 118 Ill. App. 3d 273, 278 (5th Dist. 1983) (statute stating that tax "may be levied . . . by reason of the value of a leasehold estate . . . , or upon such improvements as are constructed" authorized tax "on leasehold and improvements") (emphasis in original); see also United States v. Duran, 754 F. App'x 739, 744-45 (10th Cir. 2018) (criminal statute used "or in its inclusive sense (A or B or both)") (internal quotation marks and modifications omitted); Shaw v. National Union Fire Insurance Co., 605 F.3d 1250, 1254 n.8 (11th Cir. 2010) (explaining that "or" can be used in an inclusive sense); Hansen v. U.S. Bank, National Association, No. 4:15-CV-00085-BLW, 2016 WL 7105865, at *5 (D. Idaho Dec. 5, 2016) (in "the absence of a qualifying 'either,' . . . . 'or' [i]s to be read in the inclusive disjunctive sense," permitting

either alternative or both); Burke, 290 P.3d at 795 ("[T]he legislature certainly knows how to do so when it wishes to signal that listed alternatives are to be mutually exclusive.").

Furthermore, reading "or" to describe mutually exclusive alternatives, rather than a group of possible options, does not make sense in context. Section 8-11-6a uses the phrase "such as" to introduce a list of seven exempt categories of taxes, suggesting at the outset that the General Assembly intended for these categories to be general groups of similar taxes. And under the statute, home rule units do not have to choose between taxing hotel rooms or motel rooms, or between taxing food or alcoholic beverages – they may tax either or both. Likewise, before the 1993 amendment to section 8-11-6a(2), home rule units could tax either cigarettes or tobacco products, or both. The appellate court thus correctly concluded that "the legislature's original inclusive use of the word 'or' in section 8-11-6a created broad categories where home rule units could impose taxes." A11.

Plaintiffs claim that "the conjunction 'or' is not to be construed to be an 'and'" and cite People v. Frieberg, 147 Ill. 2d 326, 349 (1992), for the proposition that "or" should not be construed as "and" unless such legislative intent is clear. Ries PLA 14. But we do not argue simply that "or" means "and." Rather, in section 8-11-6a(2), "or" is used, as in the cases we cite above, to explain that a home rule unit may tax either cigarettes or tobacco products, or both. Frieberg is consistent with our argument. Frieberg

cautions against interpreting "or" to mean "and," explaining that "or" usually indicates "an alternative," 147 Ill. 2d at 349; it does not reject the use of "or" as an inclusive disjunction (A or B, or both). In fact, this court interpreted "or" as an inclusive disjunction in Frieberg itself. The court held that the phrase "for the purpose of manufacture or delivery or with the intent to manufacture or deliver" set out alternative ways an offender could violate a criminal statute by transporting controlled substances. Id. at 344, 352. That is, an offender could violate the statute by transporting a controlled substance for the purpose of delivering it, or with the intent to deliver it, or both. The interpretation of "or" in Frieberg is no different from the appellate court's reading of "or" in section 8-11-6a(2) to create a broad category in which home rule units could tax cigarettes, tobacco products, or both.

Having established the meaning of "a tax based on the number of units of cigarettes or tobacco products" as used in the original version of section 8-11-6a(2), we turn to the use of that same phrase in the clause added in 1993. Act of Oct. 28, 1993, P.A. 88-527; 1993 Ill. Laws 4682-83. In the amendment, the General Assembly repeated the phrase "a tax based on the number of units of cigarettes or tobacco products," as the underlined language shows:

> this Section does not preempt any home rule imposed tax such as the following: . . . (2) a tax based on the number of units of cigarettes or tobacco products (provided, however, that a home rule municipality that has not imposed a tax based on the number of units of cigarettes or tobacco products before July 1, 1993, shall not impose such a tax after that date);

Id. (emphasis added). As we explain, identical language in different parts of the same statute is presumed to have the same meaning. E.g., Moran, 16 Ill. 2d at 174; Borg, 111 Ill. App. 3d at 657. Accordingly, the phrase "a tax based on the number of units of cigarettes or tobacco products" added by the amendment is properly understood to describe a tax on either cigarettes or tobacco products, or both. Thus, the limitation added in 1993 provides that, if a home rule unit did not impose a tax in the category of cigarettes or tobacco products before July 1, 1993, it is preempted from imposing a tax in that category, but those home rule units that had imposed a tax in the category – on cigarettes, tobacco products, or both – may impose any tax in that category.

As we note above, plaintiffs acknowledge that as enacted in 1988, section 8-11-6a(2) used the phrase "a tax based on the number of units of cigarettes or tobacco products" to allow municipalities "to impose a tax on either or both" cigarettes or tobacco products. Ries PLA 10. Yet they resist giving that same meaning to the identical language the 1993 amendment added, arguing that it has a different meaning because the context of the amendment is to "to limit municipal taxation." Id. But plaintiffs do not explain why that would justify a different interpretation of the exact same phrase, and it does not. As plaintiffs themselves recognize, "'if statutory language is clear, then the language must be applied as written.'" Id. at 7 (quoting Quad Cities Open, Inc. v. City of Silvis, 208 Ill. 2d 498, 508 (2004)).

There is no basis to speculate whether the General Assembly meant something different when it used the same words in two places in section 8-11-6a(2). And in any event, it makes sense that the General Assembly would intend the same words in a grandfather provision to have the same meaning as the original provision. The phrase "a tax based on the number of units of cigarettes or tobacco products" should therefore be given the same inclusive meaning it had when originally used in 1988, to define a broad category of taxes.

Plaintiffs also argue that "the General Assembly knew that cigarettes and other tobacco products were separate taxes," because Illinois has taxed cigarettes since the 1940s and did not impose a tax on other tobacco products until 1993. Ries PLA 11. That cigarettes and other tobacco products may be subject to separate taxes is not in dispute. But as we have explained, when identifying taxes that are exempt from preemption in section 8-11-6a(2), the General Assembly grouped these items in the same broad category of taxes and left it to home rule units to decide whether to tax cigarettes, tobacco products, or both. And when the General Assembly amended the statute to limit home rule authority in that category, it repeated the general description of the category used in the original statute, with no indication that it should be interpreted differently. It follows that a home rule municipality that imposed a tax in the category of cigarettes or tobacco products before July 1,

1993 may continue to tax products in that category.[2]

B. The Phrase "Such A Tax" Refers To A General Category Of Taxes.

Our interpretation of the phrase "a tax based on the number of units of cigarettes or tobacco products" to refer to a broad category of taxes is supported by the use of the accompanying phrase, "such a tax," to refer back to that category. "Such a tax" is a general reference. "Such" is defined as "of this or that kind." Black's Law Dictionary 1473 (8th ed. 2004). And "a" – in contrast to "the" – is an indefinite article that does not refer to a specific thing. E.g., Sibenaller v. Milschewski, 379 Ill. App. 3d 717, 722 (2d Dist. 2008) ("The" is a restrictive term," as opposed to "a" or "any."); Illinois Farmers Insurance Co. v. Kure, 364 Ill. App. 3d 395, 401 (3d Dist. 2006) ("The word 'an' is an indefinite article and is applied to more than one individual object."); Stephan v. Pennsylvania General Insurance Co., 621

[2] Plaintiffs' "non-tax" example about dogs and cats, Ries PLA 8, does not advance their argument, for several reasons. For one, plaintiffs insert the word "keep" in their example to limit it to pets previously purchased; no analogous language limits section 8-11-6a(2)'s grandfather provision to taxes previously imposed. Plaintiffs also make the same mistake in interpreting their example that they make in interpreting the statute. They simply assume, in their example, that "a dog or cat" must refer to one or the other, rather than a general category encompassing those types of pets. They do not explain why, in their example, a pet owner could not acquire another dog, or instead a cat, or both, since the person's status as the owner of a pet in the category of "a dog or cat" has been grandfathered. To have the meaning plaintiffs would accord the example, it would have to say, "This section does not prohibit any pets such as the following: a dog or cat (provided, however, that after July 1, 1993, a person may keep only the specific type of pet he or she had purchased before that date)." Or it could simply say, "No new pets."

A.2d 258, 261 (Conn. 1993) ("[T]he word "the" refers to a specific object whereas the indefinite articles "a" and "an" refer to unlimited objects."); Brooks v. Zabka, 450 P.2d 653, 655 (Colo. 1969) ("[T]he definite article 'the' particularizes the subject which it precedes. It is a word of limitation as opposed to the indefinite or generalizing force of 'a' or 'an.'").

"The articles in a statutory text – the definite articles and the indefinite articles – should not be overlooked or discounted. They are meaningful." People v. Hayden, 2018 IL App (4th) 160035, ¶ 122. Here, the General Assembly could have spoken in restrictive terms, and grandfathered only "the" particular taxes on the books as of July 1, 1993. Instead, using the general, indefinite phrase "such a tax," it made clear that a valid tax after that date did not have to be identical to the prior tax but instead could be any tax within the general category of cigarettes or tobacco products.

Plaintiffs insist that the phrase "'such a tax' can only be read to refer to . . . individual taxes," i.e., "a singular tax on tobacco products or a singular tax on cigarettes." Ries PLA 12. Plaintiffs claim to rely on the "last antecedent rule," pursuant to which qualifying words in a statute modify only the immediately preceding words. Id. But the only way the last antecedent rule would support plaintiffs' view that "such a tax" modifies only "tobacco products" would be if the words "a tax" were inserted before "tobacco products." And in fact, plaintiffs do add words to section 8-11-6a(2) to try to make it refer to two distinct taxes rather than a broad tax category:

> provided, however, that a home rule municipality that has not imposed a tax based on the number of units of cigarettes or [a tax based on the number of units of] tobacco products before July 1, 1993, shall not impose such a tax after that date

Ries PLA 11; see also id. at 2 ("a cigarette tax or a tobacco products tax"); id. at 3, 10, 12 ("a tax on cigarettes or a tax on tobacco products"). The General Assembly could have used this language, but it did not. And it is improper for a court to add words to a statute to change its meaning. E.g., Hill Behan Lumber Co. v. Irving Federal Savings & Loan Association, 121 Ill. App. 3d 511, 516 (1st Dist. 1984).[3] Under the plain language of section 8-11-6a(2), the qualifier "such a tax" refers not to "a separate tax on other tobacco products," Ries PLA 12, but to – as the statute provides – "a tax based on the number of units of cigarettes or tobacco products." The City imposed "such a tax" prior to July 1, 1993 because it imposed a tax in the general category of "cigarettes or tobacco products."

C. Section 8-11-6a(2) Grandfathered Certain Home Rule Municipalities, Not Certain Taxes.

In addition, and critically, section 8-11-6a(2) distinguishes between home rule municipalities that imposed taxes before July 1, 1993 and those that did not, not between taxes imposed before and after that date. It states that "a home rule municipality that has not imposed a tax based on the

[3] Plaintiffs accuse the appellate court of "rewriting" the wording of the limitation clause in section 8-11-6a(2), Ries PLA 9, but the court did no such thing. The section of the appellate court's opinion plaintiffs quote simply explains the plain meaning of the clause; it does not rewrite it. A16.

number of units of cigarettes or tobacco products before July 1, 1993, shall not impose such a tax after that date." 65 ILCS 5/8-11-6a(2) (emphasis added). Thus, the statute grandfathers certain municipalities – those that previously imposed taxes based on the number of units of cigarette or tobacco products sold – and not certain taxes.

Plaintiffs claim that the General Assembly grandfathered only "existing municipal cigarette taxes," Ries PLA 17, not municipalities that had taxes on the books. They insist, without citation, that "the intent of [the 1993 Amendment] was to restrict municipal cigarette taxes or tobacco taxes that were not imposed before July 1, 1993," id. at 12, and that "the General Assembly was well aware that . . . all future municipal tobacco products taxes would be prohibited," id. at 17. Plaintiffs' argument is at odds with the plain language of the statute; the subject of the grandfather clause added in 1993 is "a home rule municipality," not taxes. The General Assembly did not distinguish between municipal taxes imposed before and after July 1, 1993; it distinguished those home rule municipalities that imposed a tax on cigarettes or tobacco products from those that had not. Because the City did impose such a tax, the prohibition in section 8-11-6a(2) does not limit the City.

II. THE LEGISLATIVE HISTORY OF SECTION 8-11-6a(2) DEMONSTRATES THAT THE GENERAL ASSEMBLY DID NOT INTEND TO PREEMPT THE CITY FROM TAXING OTP.

Even on the view that section 8-11-6a(2) is ambiguous, the legislative history of the 1993 amendment demonstrates that the General Assembly did

not intend to preclude home rule units that taxed cigarettes prior to July 1, 1993, from taxing other tobacco products in the future.

Again, the General Assembly amended section 8-11-6a(2) in 1993 to add that "a home rule municipality that has not imposed a tax based on the number of units of cigarettes or tobacco products before July 1, 1993, shall not impose such a tax after that date." 1993 Ill. Laws 4682-83. The amendment at issue was introduced in the House.[4] Its sponsor explained:

> House Amendment #2, to Senate Bill 591 would become the Bill and based upon the fact the last time we passed the cigarette tax this would provide that home rule municipalities that have not imposed the tax based upon the number of units of cigarettes or tobacco price [sic] before July 1, 1993 shall not impose that tax thereafter. It applies to only home rule units who have not before implemented such a tax . . . .

State of Illinois, 88th General Assembly, House of Representatives Transcription Debate, 82nd Legislative Day, at 66 (July 13, 1993) (Rep. Larry Hicks).

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[4] When initially introduced as Senate Bill 591, the law proposed to exempt manufacturing businesses from certain state sales taxes. See State of Illinois, 88th General Assembly, Senate Transcript, 34th Legislative Day, at 175-76 (Apr. 15, 1993) (Senator Fitzgerald summarizing the draft bill). The bill engendered disagreement in the Senate between legislators who were concerned with a loss of state tax revenues and those who favored tax-relief measures for businesses. Id. at 176-81. The Senate approved the bill, id. at 181, but the bill was then completely rewritten in the House, see State of Illinois, 88th General Assembly, House of Representatives Transcription Debate, 82nd Legislative Day, at 66 (July 13, 1993). The House introduced and passed House Amendment No. 2, which, instead of providing a state tax exemption to businesses, limited the power of home rule units that had not previously taxed cigarettes and tobacco products by the unit from imposing that type of tax in the future. Id.

Representative Hicks's reference to a singular tax, "the tax based upon the number of units of cigarettes or tobacco" products, indicates that cigarettes and tobacco products were viewed as a single category of taxes. Indeed, throughout the legislative debates, legislators made no mention of separate taxes on cigarettes and on tobacco products and often used "the cigarette tax" as shorthand. For instance, when the House amendment went back to the Senate for a vote, Senator DeAngelis, who sponsored Senate Bill 591 as amended in the House, summarized the amendment as follows: "That amendment prohibits any home rule unit who has not, prior to July 1st, 1993, imposed a cigarette tax, from doing so." State of Illinois, 88th General Assembly, Senate Transcript, 83rd Legislative Day, at 32 (Oct. 28, 1993).

Representative Hicks also explained that the bill distinguished between those home rule units who had imposed a tax in the category and those that had not: "It applies to only home rule units who have not before implemented such a tax." State of Illinois, 88th General Assembly, House of Representatives Transcription Debate, 82nd Legislative Day, at 66 (July 13, 1993). Reflecting that distinction, the House debates on the bill focused on the fairness of exempting some home rule municipalities but not others, without any mention of a limit on the types of tobacco products that the grandfathered home rule units could tax. In particular, legislators debated the fact that the amendment would not apply to Chicago, Cook County, Rosemont, Evanston, and Cicero, the home rule units that imposed cigarette

taxes prior to July 1, 1993. For instance, Representative Dunn noted that "[t]his Amendment exempts the City of Chicago and three other communities which have a [cigarette] tax on the books." State of Illinois, 88th General Assembly, House of Representatives Transcription Debate, 82nd Legislative Day, at 67 (July 13, 1993).[5] Similarly, Representative Murphy stated that the bill "clearly is eliminating an[d] exempting Cook County, Rosemont, Evanston, and the City of Chicago." Id. at 69. See also id. at 68 (Rep. Kubik asking Rep. Hicks whether Cicero, which had passed, but not yet collected, a cigarette tax prior to July 1, 1993, would be subject to preemption or would "fall under the provisions [applying to] the City of Chicago and the County of Cook and the other units"). These comments reflect legislators' understanding that Chicago and other home rule units that imposed a cigarette tax prior to July 1, 1993 would not be preempted by the 1993 amendment from imposing additional taxes in the general category of cigarettes or tobacco products.

Plaintiffs' claim that the General Assembly intended to grandfather

[5] Representative Dunn continued: "[W]e're asked to give up that [home rule] right on behalf of the tobacco industry and yet we're also not going to give it up for the City of Chicago, which is clever enough to have a tax on the books, so that they can raise theirs as high as they want. In Representative Kubik's district, there is the Village of Cicero, which has a tax on its books. They can go ahead and raise it as high as they want. Rosemont can raise their taxes. Evanston can raise their taxes, however, Springfield and Decatur and Champaign-Urbana and all the other Home Rule Communities are stuck with 0 with this vote." State of Illinois, 88th General Assembly, House of Representatives Transcription Debate, 82nd Legislative Day, at 73 (July 13, 1993).

only "existing municipal cigarette taxes," Ries PLA 17, is belied by the legislature's focus on home rule units, not specific taxes, during the debates, and the absence of any indication that legislators thought it mattered that all the pre-1993 municipal taxes they discussed were on cigarettes but not other tobacco products. Thus, the statute's legislative history, along with its text, demonstrates that any municipality that imposed a tax in the category of cigarettes or tobacco products before July 1, 1993, was grandfathered, and could impose additional cigarette or tobacco taxes. The grandfather provision was not limited to certain taxes.

Plaintiffs also argue that the purpose of the 1993 amendment was "three-fold": to (1) limit the loss of revenues to the state caused by new municipal taxes, (2) ensure municipal taxes did not adversely impact employment in the tobacco sector, and (3) "ameliorate the effect" of state tobacco taxes by prohibiting new municipal taxes on tobacco products. Ries PLA 16. But that is an incomplete summary of the General Assembly's goals. The legislative history we cite above shows that, in passing Senate Bill 591, the General Assembly struck a balance between boosting state tax revenue and preserving the power of some home rule units to continue taxing cigarettes and tobacco products.

Moreover, preemption of a home rule unit's power to tax requires approval of three-fifths of the members of each house: "The General Assembly by a law approved by the vote of three-fifths of the members elected

to each house may deny or limit the power to tax and any other power or function of a home rule unit not exercised or performed by the State." Ill. Const., art. VII, § 6(g). The final vote on House Amendment No. 2 was 79 "yes" and 34 "no." See State of Illinois, 88th General Assembly, House of Representatives Transcription Debate, 82nd Legislative Day, at 75 (July 13, 1993). The vote thus satisfied the three-fifths requirement (71 of 118 House members) with eight votes to spare. With such a narrow margin of votes to spare, it was important to secure the support of representatives from the home rule units that already taxed cigarettes. And indeed, the legislative debates show no opposition from the legislators representing the City or other home rule units with cigarette taxes on the books. One would have expected opposition from such home rule units if the proposed bill sought to limit their future sources of revenue.

More important, were the General Assembly concerned only with maximizing state revenue, it could easily have drafted a statute that better accomplished that result. For example, it could have preempted all home rule units alike from taxing either cigarettes or tobacco products. It did not. Or it could have limited the ability of Chicago and other grandfathered home rule units to raise their cigarette taxes – a strategy that would have done far more to protect state revenue than preempting these units' ability to tax other tobacco products, since the vast majority of state tobacco revenues are

from cigarettes.[6] It did not do that either. And if, as plaintiffs speculate, the General Assembly intended to allow only the "existing municipal cigarette taxes" that home rule units had imposed prior to July 1, 1993, Ries PLA 17, it could have said that too, by simply prohibiting new taxes. Furthermore, plaintiffs' interpretation of section 8-11-6a(2) to allow only existing municipal cigarette taxes renders the reference to tobacco products in the statute superfluous. As plaintiffs acknowledge, id., no home rule unit taxed other tobacco products prior to July 1, 1993, so under plaintiffs' interpretation of section 8-11-6a(2), no existing municipal taxes on tobacco products would have been grandfathered. Thus, to eliminate new other tobacco product taxes and allow only existing cigarette taxes, the General Assembly could have deleted the reference to tobacco products in section 8-11-6a(2) altogether. The statute would then have simply stated,

> This Section does not preempt any home rule imposed tax such as the following: . . . . (2) a tax based on the number of units of cigarettes, provided that a home rule municipality imposed a tax on cigarettes prior to July 1, 1993.

That, of course, is not what section 8-11-6a(2) says. It continues to refer to tobacco products as exempt from preemption for some home rule units. This court "must give each word in the statute a reasonable construction, if possible, and no word should be rendered superfluous." In re Marriage of

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[6] Revenues from the State cigarette tax constitute about 95% of all state tobacco tax revenues. C. 260, 276-80 (citing Illinois Department of Revenue's 2000 and 2015 annual reports of collections and distributions).

Goesel, 2017 IL 122046, ¶ 25. The City's reading of section 8-11-6a(2) to grandfather certain home rule units' power to tax in the general category of "cigarettes or tobacco products" gives each word in the statute meaning. Plaintiffs' interpretation does not.

Last, plaintiffs point to several legislative efforts to amend section 8-11-6a(2) to clarify that it does not preempt home rule units with existing cigarette taxes from taxing non-cigarette tobacco products. Ries PLA 18-20. Bills were introduced in the General Assembly in 2011 and 2014 seeking to amend the statute to make these units' power to tax non-cigarette tobacco products more explicit. C. 365-66. There were no legislative debates on either bill in 2011, and they died in committee. C. 319, 322. In 2014, Senator Dan Kotowski introduced a proposal in the 98th General Assembly as SB 3563. C. 325-26. Senate Bill 3563 left the wording of section 8-11-6a(2) intact, but added the following sentence:

> Nothing in this Section shall be construed as prohibiting a home rule municipality that imposed a tax based on the number of units of cigarettes or tobacco products before July 1, 1993 from imposing a tax on either the number of units of cigarettes or tobacco products, or both, on or after July 1, 1993. The language set forth in this amendatory Act of the 98th General Assembly is intended to be a restatement and clarification of existing law.

C. 323-24. During debate, Senator Kotowski explained that, under the existing language of section 8-11-6a(2), the City already "[has] the authority to tax these [tobacco] products. It [the bill] just makes sure that no one can raise the argument that they [home rule units] don't have the authority to do

that. So it provides clarification." C. 330. After this explanation by Senator Kotowski, the bill passed the Senate by a more than three-fifths majority, but it died in the House after the "first reading" and referral to the Rules Committee, with no floor debate. C. 325-26, C. 333.

Plaintiffs' claim that "[t]he General Assembly's multiple refusals to change Section 6a(2) underscores its understanding that Section 6a(2) preempts the City's OTP tax," Ries PLA 19, is baseless. These subsequent, failed attempts at amendment say absolutely nothing about the plain language, legislative history, or legislative intent of the 1993 amendment. It is "a fundamental rule of statutory construction" that "'[s]tatutes are to be construed as they were intended to be construed when they were passed.'" O'Casek, 229 Ill. 2d at 441 (quoting People v. Boreman, 401 Ill. 566, 572 (1948)). As this court has observed, the task of figuring out "what one legislature 'intended' by a particular statute or provision" is "complicated enough," and thus it is inappropriate "to infer what one legislature intended from the subsequent action of a later legislature, composed of different members and perhaps working towards different purposes." Id. at 442. In other words, "the legislative intent that controls the construction of a public act is the intent of the legislature which passed the subject act," and not the actions or intentions of subsequent legislatures. Id. at 441. This is particularly true with respect to the legislature's failure to pass a proposed bill. E.g., South 51 Development Corp. v. Vega, 335 Ill. App. 3d 542, 556 (1st

Dist. 2002) (Legislation "may fail for numerous unexpressed reasons that are unrelated to the merit or content of any one proposed provision.") (quotation omitted).

The cases on which plaintiffs rely to argue that a failure to pass legislation bears on the meaning of a statute, Ries PLA 19, are also distinguishable. In Andruss v. Evanson, 68 Ill. 2d 215 (1977), the amendments the court considered were a part of the legislative history leading up to the passage of the real estate brokers licensing act and were directly relevant to the legislative intent behind the version that passed. Id. at 219. Here, in contrast, the proposed amendments were introduced in subsequent General Assemblies and illuminate nothing about the legislative intent behind the 1993 amendment. In both Bob Jones University v. United States, 461 U.S. 574 (1983), and United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985), the Court considered whether an agency's construction of a statutory term was reasonable. In doing so, the Court analyzed Congressional debates on whether the agency's construction should be changed, and the ultimate lack of congressional action. This case does not concern the General Assembly's failure to act after debating the propriety of a construction of section 8-11-6a(2); there are no such debates. Instead, the only legislative debates discussing the meaning of section 8-11-6a(2) support the City's interpretation of the statute, as we have explained.

Finally, plaintiffs claim that "[f]or 23 years the City understood that

Section 6a(2) prohibited its imposition of the OTP Tax." Ries PLA 18. But the City's forbearance is not surprising, and it has nothing to do with the meaning of section 8-11-6a(2) or whether, as plaintiffs speculate, the City thought the tax was prohibited. It reflects the shift, noted previously, from cigarettes to non-cigarette tobacco products over that period of time and the growing concerns about the public health consequences of such products. Those changes, which ultimately compelled the City Council to enact measures designed to reduce the consumption of non-cigarette tobacco products, C. 27-37, are exemplified by the fact that statewide, revenues from Illinois' OTP tax did not exceed $5.1 million in 1995. Illinois Department of Revenue, Annual Report of Collections and Distributions, Fiscal Year 2000, at 25. Yet, in the decades that followed, consumer demand shifted from cigarettes to other tobacco products to such a degree that by 2013, state OTP tax revenue had jumped more than 700% to $42.9 million. Illinois Department of Revenue, Annual Report of Collections and Distributions, Fiscal Year 2015, at 1; C. 280. As we have explained, the City's OTP tax was passed in response to this market shift towards OTP, as well as growing concerns about the health consequences of OTP. C. 27.

Plaintiffs also point to a proposed 2011 resolution in the City Council that would have urged the General Assembly to amend section 8-11-6a(2) to clarify the power of home rule units to tax any and all tobacco products. Ries PLA 19. See also C. 366. What any individual alderman might have thought

in 2011 is irrelevant to what the plain language of the statute says, or what the General Assembly intended when it amended section 8-11-6a(2) in 1993. Thus, the City Council's draft resolution does not bear on the construction of section 8-11-6a(2). Furthermore, if anything, the City Council's refusal to pass the resolution shows the opposite of what plaintiffs suggest – it shows that the City Council did not believe such a resolution was necessary because the City already had home rule power to tax other tobacco products.

III. ANY AMBIGUITY IN SECTION 6a(2) SHOULD BE RESOLVED IN FAVOR OF PRESERVING HOME RULE TAXING POWER.

Finally, to the extent there is any doubt about the interpretation of section 8-11-6a(2), it should be resolved against preemption and in favor of the City's home rule taxing power. The City derives its home rule power to tax directly from the 1970 Illinois Constitution. Section 6(a) of article VII of the constitution provides:

> Except as limited by this Section, a home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt.

Ill. Const. art. VII, § 6(a). The Illinois Constitution requires that home rule powers "shall be construed liberally." Id. § 6(m). This court has explained that the constitution was intended "to give home rule units the broadest powers possible." Palm, 2013 IL 110505, ¶ 30. This broad grant of power enables home rule units "to address problems with solutions tailored to their local needs." Id. ¶ 29. The framers regarded the power to tax as "essential to

effective home rule and intended that power to be broad." Mulligan v. Dunne, 61 Ill. 2d 544, 548 (1975).

Consistent with this broad grant of power, the constitution also provides that home rule units "may exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the State's exercise to be exclusive." Ill. Const. 1970, art. VII, § 6(i). The purpose of section 6(i)'s specificity requirement is "to eliminate, or at least reduce to a bare minimum, the circumstances under which local home rule powers are preempted by judicial interpretation of unexpressed legislative intention." City of Chicago v. Roman, 184 Ill. 2d 504, 516 (1998) (quotation marks and citation omitted). To that same end, section 7 of the Statute on Statutes, which "has been formally adopted as part of the supreme court's home rule jurisprudence," Midwest Gaming & Entertainment, LLC v. County of Cook, 2015 IL App (1st) 142786, ¶ 59, provides:

> No law enacted after January 12, 1977, denies or limits any power or function of a home rule unit, pursuant to paragraphs (g), (h), (i), (j), or (k) of Section 6 of Article VII of the Illinois Constitution, unless there is specific language limiting or denying the power or function and the language specifically sets forth in what manner and to what extent it is a limitation on or denial of the power or function of a home rule unit.

5 ILCS 70/7. Thus, when a particular subject of regulation is not preempted with explicit language, home rule units remain free to exercise their

authority concurrently with the State, even if there is a comprehensive state statute on the same subject. E.g., Palm, 2013 IL 110505, ¶ 42; Roman, 184 Ill. 2d at 517. And it is not enough for a statute to say that it limits home rule powers; it must set forth with specificity "in what manner and to what extent" it limits these powers. 5 ILCS 70/7; see also Schillerstrom Homes, Inc. v. City of Naperville, 198 Ill. 2d 281, 287 (2001) (citing 5 ILCS 70/7 for the principle that "a state statute cannot preempt home rule power unless it contains 'specific language' which sets forth such a legislative intent"). These fundamental principles demonstrate that any doubts about the scope of home rule power should be resolved in favor of home rule power and against preemption, as there is no preemption when a statute does not explicitly and specifically indicate that home rule power is preempted.

Plaintiffs ignore these principles entirely. They argue that "Section 6a(2) is a tax statute" that, if ambiguous, "should be 'construed most strongly against the government and in favor of the taxpayer.'" Ries PLA 15 (quoting Quad Cities, 208 Ill. 2d at 508). That is plainly incorrect. Section 8-11-6a is not a "tax statute" because it does not grant municipalities the authority to tax. The City's home rule power to tax comes directly from the constitution, and in such circumstances, the power "is not dependent on any grant of power by the General Assembly." Page v. City of Chicago, 299 Ill. App. 3d 450, 459 (1st Dist. 1998). Indeed, this court has recognized that home rule units are empowered to tax cigarettes under article 6(a) of the Illinois

constitution. S. Bloom, 52 Ill. 2d at 59-62. The cases plaintiffs cite in support of a strict construction rule – Quad Cities; Van's Material Co. v. Department of Revenue, 131 Ill. 2d 196 (1989); and Ross v. City of Geneva, 71 Ill. 2d 27 (1978) – are inapposite; they address taxes imposed by non-home rule units or the State. None involves home rule units or the construction of statutes purporting to preempt home rule power.[7]

In sum, plaintiffs' strict construction rule finds no application here. Rather than a tax statute, section 8-11-6a is a home rule preemption statute, and as such, it must be construed in favor of broad home rule power.

As we have explained, the General Assembly did not, in section 8-11-6a(2), preempt the City's home rule power to tax non-cigarette tobacco products. Indeed, the statute affirms the City's home rule taxing power, and its legislative history confirms that the General Assembly did not intend to preempt the City's authority to tax tobacco products. Moreover, even on plaintiffs' view that section 6a(2) is susceptible to an interpretation that could restrict the City's power to tax non-cigarette tobacco products, the statute does not include the clear, express statement of the General Assembly's

[7] Van's Material did not even involve municipal taxation; it concerned state use and retail taxes. 131 Ill. 2d at 198. And while plaintiffs cite Prudential Insurance Co. v. City of Chicago, 66 Ill. 2d 437 (1977), which involved a statute that preempted home rule taxing power, Ries PLA 4, 16, that case does not support their argument either. In Prudential, this court held that the text of the statute at issue made preemption of home rule power "completely clear"; it did not strictly construe the statute against taxation. 66 Ill. 2d at 442.

intent necessary to preempt home rule power. At most, given plaintiffs' reading, the statute would be ambiguous, but when the General Assembly preempts home rule, preemption must be clear and explicit, including "in what manner and to what extent" home rule power is restricted. 5 ILCS 70/7. The constitutional presumption in favor of home rule authority, see Ill. Const., art. VII, § 6(m), thus provides an additional basis for this court to conclude that the General Assembly has not preempted the City's OTP tax.

CONCLUSION

For the foregoing reasons, this court should affirm the appellate court's judgment holding that defendants are entitled to summary judgment on plaintiffs' challenge to the City's OTP tax ordinance.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 40 pages.

/s/Ellen W. McLaughlin
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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing brief was electronically filed with the Clerk of the Court on July 16, 2019, and served on all counsel of record, listed below, via File and Serve Illinois. Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

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