

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK**

AMERICAN APPAREL & FOOTWEAR
ASSOCIATION; HALLOWEEN INDUSTRY
ASSOCIATION; JUVENILE PRODUCTS
MANUFACTURERS ASSOCIATION, INC.;
and TOY INDUSTRY ASSOCIATION, INC.
(individually and d/b/a SAFE TO PLAY
COALITION),

Plaintiffs,

v.

COUNTY OF ALBANY, NEW YORK;
ALBANY COUNTY DEPARTMENT OF
HEALTH; DANIEL P. MCCOY, in his official
capacity as Albany County Executive; and
CHRISTINE COMPTON, in her official
capacity as Acting Commissioner, Albany
County Department of Health,

Defendants.

Civil Action No. 1:15-CV-461 (TJM/ATB)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs American Apparel & Footwear Association, Halloween Industry Association, Juvenile Products Manufacturers Association, Inc., and Toy Industry Association, Inc. (individually and d/b/a the Safe to Play Coalition), allege as follows:

NATURE OF ACTION

1. Plaintiffs bring this action to challenge Local Law No. 1 for 2015 (“Local Law 1”), a law recently enacted by the County of Albany, New York (“the County”),

that bans the sale of children's products containing any amount of seven specified toxic chemicals.

2. Local Law 1 is preempted by the Federal Hazardous Substances Act and the Consumer Product Safety Act, which are federal laws regulating the same children's products covered by Local Law 1. Congress enacted those provisions to ensure that nationwide, uniform standards would govern the safety of children's products, and to avoid the uncertainty and inefficiency of patchwork safety regulation through hundreds of different state and local standards. The law Albany has enacted is precisely the kind of law Congress wanted to preempt.

3. Plaintiffs thus seek a declaration that Local Law 1 violates the Supremacy Clause of the United States Constitution and an injunction preventing enforcement of Local Law 1.

PARTIES

4. Plaintiff Toy Industry Association, Inc. (TIA) is a not-for-profit corporation organized under the laws of New York that represents businesses involved in creating and bringing toys and children's products to children of all ages. TIA's more than 750 global members account for approximately 90% of the annual U.S. domestic toy market and are committed to leadership in toy safety. TIA's mission is to be a leading force in the growth and health of the toy industry, including to advocate for public policies and laws that promote the growth and health of the toy industry.

5. Plaintiff Halloween Industry Association, Inc. (HIA), is a not-for-profit corporation organized under the laws of Delaware, consisting of more than 30 members, which include manufacturers, importers, laboratories and distributors of a broad array of Halloween products, including but not limited to costumes, accessories, home décor, toys and crafts, and including an enormous array of such products for children aged 12 and under. HIA member sales account for almost 50% of all Halloween products sold in the United States, which

exceeded \$2 billion at retail in the year 2014. HIA's mission is to promote and grow the safe celebration of Halloween and year-round costumed events throughout North America.

6. Plaintiff Juvenile Products Manufacturers Association, Inc. (JPMA) is a not-for-profit corporation organized under the laws of New York that represents businesses involved in creating children's products used to care for and protect children from before birth through preschool. JPMA's more than 240 members include manufacturers, importers, laboratories and distributors of juvenile products. JPMA's members account for almost 95% of all sales of such products in the United States, which exceeded \$8 billion at retail in the year 2014. JPMA's mission is to be a leading force in the growth and health of the juvenile products industry, including advocating for public policies and laws that promote the health, care and wellbeing of babies.

7. Plaintiff American Apparel & Footwear Association, Inc. (AAFA) is a not-for-profit corporation organized under the laws of Tennessee. Its more than 340 members design, manufacture, and sell apparel and footwear under more than 1,000 world famous name brands. Its members include manufacturers, importers, laboratories and distributors of a wide variety of apparel and footwear, including a wide assortment of fashion products for children aged 12 and under. AAFA is the trusted public policy and political voice of the apparel and footwear industry, its management and shareholders, and its four million U.S. workers, who contribute collectively \$361 billion in annual U.S. retail sales. AAFA provides a collaborative forum to promote best practices and innovation and its work ensures the continued success and growth of the apparel and footwear industry, its suppliers, and its customers.

8. Plaintiffs are members of the Safe To Play Coalition, which is a coalition of trade associations representing makers of toys, crafts, juvenile products, and Halloween items that are subject to federal regulation.

9. Plaintiffs bring this suit on behalf of their members, which sell toys, apparel, childcare products, and other children's products in Albany County that federal law permits but Local Law 1 will prohibit.

10. Defendant the County of Albany, New York, enacted Local Law 1.

11. Defendant Daniel P. McCoy is the Albany County Executive and is being sued in his official capacity. As the County Executive, defendant McCoy is the chief executive officer of the County with ultimate responsibility for administering its laws and programs.

12. Defendant Albany County Department of Health is the department responsible for enforcing Local Law 1.

13. Defendant Christine Compton is the Acting Commissioner of the Albany County Department of Health and is being sued in her official capacity. As the Acting Commissioner, defendant Compton is responsible for enforcing Local Law 1 and is authorized to promulgate rules and regulations to implement Local Law 1.

JURISDICTION AND VENUE

14. This action seeks declaratory relief under the Federal Declaratory Judgment Act of 1934, 28 U.S.C. §§ 2201-02. Injunctive relief is authorized by Federal Rule of Civil Procedure 65.

15. This Court has subject matter jurisdiction under 28 U.S.C. § 1331 because plaintiffs' claims arise under the Constitution and laws of the United States, and under 28 U.S.C. § 1337 because plaintiffs' claims arise under federal laws regulating commerce or protecting trade and commerce against restraints.

16. Venue is proper in this district under 28 U.S.C. § 1391(b) because defendants reside in this district.

FACTUAL ALLEGATIONS

A. The County of Albany's Local Law No. 1 for 2015

17. On December 8, 2014, the Albany County Legislature passed "The Toxic Free Toys Act." County Executive Daniel P. McCoy approved the law on January 7, 2015, and the County filed the law with the Secretary of State of New York on January 12, 2015. The law is now known as Local Law No. 1 for 2015.

18. Local Law 1 states that its goal is to "protect infants and young children from the[] harmful health effects" of seven specified chemicals that "are known to be toxic and carcinogenic." These chemicals are benzene, lead, mercury, antimony, arsenic, cadmium, and cobalt. Local Law 1 § 1.

19. Local Law 1 states that "[n]o person shall sell or offer for sale" in the County of Albany any "children's products" or "children's apparel" containing benzene, lead, mercury, antimony, arsenic, cadmium, and cobalt, in any amount above zero. *Id.* § 4.

20. Local Law 1 defines a "children's product" as "any product primarily intended for, made for, or marketed for use by children." *Id.* § 3(B). Local Law 1 defines "children's apparel" as "any item of clothing that consists of fabric or related material intended or promoted for use in children's clothing." *Id.* § 3(A). "Children" means a "person or persons aged twelve and under." *Id.* § 3(C).

21. Thus, Local Law 1 bans all children's products (including, among others, children's toys and apparel) containing any amount of any of the seven listed toxic chemicals, regardless of whether it is a trace amount; regardless of whether it is technologically feasible to test such products to ensure they contain none of the listed chemical; regardless of whether there

is a reasonably possibility that a child using the product would actually be exposed to the toxic chemical; and regardless of whether banning products that contain any level of the listed chemicals is actually necessary to ensure child health and safety.

22. Any person who knowingly violates Local Law 1 is subject to an initial civil penalty of \$500 per violation and a penalty of \$1,000 for each subsequent violation. *Id.* § 7.

23. Local Law 1 takes effect one year following its filing with the New York Secretary of State, meaning that it will take effect on January 12, 2016.

B. Federal Law Regulating Hazardous Substances in Children’s Products Expressly Preempts Local Law 1

24. Congress has enacted a comprehensive federal regulatory scheme covering the sale of consumer products containing toxic chemicals, including in particular children’s products, such as toys and apparel, containing toxic chemicals.

25. In 1960, Congress enacted the Federal Hazardous Substances Act (“FHSA”), 15 U.S.C. § 1261 *et seq.*, in response to mounting evidence of the risks, particularly to children, of hazardous household products. The FHSA covers consumer products intended for use or packaged in a form suitable for use in the household or by children.

26. In 1972, Congress enacted the Consumer Product Safety Act (“CPSA”), 15 U.S.C. § 2051 *et seq.*, which established the Consumer Product Safety Commission (“CPSC” or “Commission”). The CPSC is an independent, expert federal regulatory commission charged with protecting the public from unreasonable risks of injury or death associated with the use of consumer products, including children’s products. The CPSC implements the FHSA and the CPSA by issuing rules and guidance regulating hazardous substances in consumer products, including children’s products.

27. Congress created the CPSC to ensure nationwide uniformity in the standards governing the sale of products containing hazardous chemicals. Congress found that “control by State and local governments of unreasonable risks of injury associated with consumer products is inadequate and may be burdensome to manufacturers.” 15 U.S.C. § 2051(a)(4). Congress thus created the CPSC “to develop uniform safety standards for consumer products and to minimize conflicting State and local regulations.” *Id.* § 2051(b)(3).

28. As discussed in greater detail below, both the FHSA and the CPSA contain express preemption provisions preempting state and local standards that diverge in any way from federal standards applicable to the same risk in the same hazardous substance. 15 U.S.C. § 1261 note; 15 U.S.C. § 2075.

29. The CPSC has issued regulations that apply to the same risk in the same substances regulated by Local Law 1, and Local Law 1 is therefore preempted.

30. Further, in 2008, Congress enacted the Consumer Product Safety Improvement Act of 2008 (“CPSIA”), Pub. L. No. 110-314, to protect children from the risk of exposure to toxic chemicals from children’s products and toys. The CPSIA was “comprehensive and carefully balanced legislation,” H. R. Rep. No. 110-501, at 21 (2008), setting maximum levels of specified toxic chemicals in children’s products while leaving other toxic chemicals unregulated. Under the FHSA and the CPSA, the CPSIA’s standards likewise preempt Local Law 1.

1. The Federal Hazardous Substances Act Expressly Preempts Local Law 1

31. The FHSA prohibits a manufacturer from introducing into interstate commerce any “banned hazardous substance.” 15 U.S.C. § 1263(a).

32. Section 2(q) of the FHSA, 15 U.S.C. § 1261(q), defines a “banned hazardous substance” to include “any toy, or other article intended for use by children, which is a hazardous

substance, or which bears or contains a hazardous substance in such manner as to be susceptible of access by a child to whom such toy or other article is entrusted.” 15 U.S.C. § 1261(q)(1)(A).

33. The FHSA defines the term “hazardous substance” to mean, *inter alia*, “[a]ny substance or mixture of substances which (i) is toxic..., if such substance or mixture of substances may cause substantial personal injury or substantial illness during or as a proximate result of any customary or reasonably foreseeable handling or use, including reasonably foreseeable ingestion by children.” 15 U.S.C. § 1261(f)(A).

34. The FHSA defines “toxic” as “any substance (other than a radioactive substance) which has the capacity to produce personal injury or illness to man through ingestion, inhalation, or absorption through any body surface.” 15 U.S.C. § 1261(g).

35. Together, these statutory provisions ban the sale of any children’s product (“any toy, or other article intended for use by children”) containing sufficient levels of a toxic chemical to potentially cause substantial injury or illness through reasonably foreseeable ingestion, inhalation, or absorption. The CPSC has issued regulations to enforce these provisions, including regulations explaining the precise circumstances in which a substance qualifies as “toxic.” 16 C.F.R. § 1500.3(c)(2).

36. CPSC’s regulations sum up the requirements of federal law as follows: “A toy or other article intended for use by children that contains an accessible and harmful amount of a hazardous chemical is banned.” 16 C.F.R. § 1500.231(c)(1).

37. The FHSA contains an express preemption clause stating that, with exceptions not relevant here, “if under regulations of the Commission promulgated under or for the enforcement of section 2(q) [15 U.S.C. § 1261(q)] a requirement is established to protect against a risk of illness or injury associated with a hazardous substance, no State or political subdivision of a

State may establish or continue in effect a requirement applicable to such substance and designed to protect against the same risk of illness or injury unless such requirement is identical to the requirement established under such regulations.” 15 U.S.C. § 1261 note, § (b)(1)(B).

38. In other words, if the CPSC has promulgated a regulation under or for the enforcement of Section 2(q) to protect against a risk associated with a hazardous substance, such as children’s products, the County of Albany may not enact any non-identical regulation to protect against the same risk in the same hazardous substance.

39. The FHSA preempts Local Law 1. The CPSC’s regulations at 16 C.F.R. § 1500.3(c)(2) are regulations under or for the enforcement of Section 2(q) because those regulations define when a chemical qualifies as “toxic,” which in turn determines whether that chemical is a “hazardous substance” 15 U.S.C. § 1261(f)(A), which in turn determines whether a children’s product containing that chemical qualifies as a “banned hazardous substance” under Section 2(q), 15 U.S.C. § 1261(q)(1)(A). Local Law 1 protects against the same risk in the same hazardous substance—exposure to toxic chemicals in children’s products. *See* Local Law 1 § 1 (“This Legislature finds and determines that many common children’s products contain ... toxic chemicals and known carcinogens.); *id.* (“the purpose of this local law is to protect infants and young children from ... the[] harmful health effects” of the seven covered chemicals). And Local Law 1’s requirements are not identical to the federal law requirements. Local Law 1 imposes a blanket ban on children’s products containing any level of the seven specified chemicals. The FHSA and the Commission’s regulations impose no blanket bans on the use of these chemicals, instead banning children’s products only when they contain “an *accessible* and *harmful* amount of a hazardous chemical.” 16 C.F.R. 1500.231(c)(1) (emphases added).

40. The FHSA also preempts Local Law 1 through the CPSIA, the law Congress enacted in 2008 to provide additional protections against the risk of exposure to toxic chemicals in children's products. The CPSIA provides that a "children's product" that contains specified amounts (measured in parts per million) of lead in the product's substrate or surface coating "shall be treated as a banned hazardous substance under the" FHSA. 15 U.S.C. § 1278a. The limits that Congress established are greater than zero, meaning the limits established in Local Law 1 are not identical to the federal limits. Congress expressly recognized that requiring manufacturers to eliminate all lead from their products may not be "technologically feasible." 15 U.S.C. § 1278a(a)(2)(D), (E); *id.* § 1278a(b)(1)(A).

41. Like Local Law 1, the CPSIA defines "children's products" to mean "a consumer product designed or intended primarily for children 12 years of age or younger." 15 U.S.C. §1278a(a)(1); 15 U.S.C. § 2052(a)(2).

42. The CPSIA further provides that its limitation on lead in children's products qualifies as "a regulation of the Commission promulgated under or for the enforcement of section 2(q) of the" FHSA. 15 U.S.C. § 1278a(g).

43. Local Law 1 is therefore preempted by the FHSA's express preemption provision, 15 U.S.C. § 1261 note. The CPSIA's limitations on lead in the substrate or surface coating of children's products are "regulations of the Commission promulgated under or for the enforcement of section 2(q)." *Id.* The CPSIA's limitation protects against the risk of exposure to toxic chemicals "associated with a hazardous substance," namely children's products, and Local Law 1 is a "requirement applicable to such substance and designed to protect against the same risk of illness or injury." *Id.*; *see* Local Law 1 § 1. Finally, Local Law 1's requirement is not "identical" to the federal requirement. 15 U.S.C. § 1261 note.

2. The CPSA Expressly Preempts Local Law 1

44. Like the FHSA, the CPSA authorizes the Commission to issue rules banning the sale of hazardous consumer products that present an “unreasonable risk of injury.” 15 U.S.C. §§ 2057, 2058. Also like the FHSA, the CPSA includes an expression preemption provision, 15 U.S.C. § 2075, to effectuate the statute’s “purpose” to “develop uniform safety standards for consumer products and to minimize conflicting State and local regulations.” 15 U.S.C. § 2051(b)(3).

45. In the 2008 CPSIA, Congress adopted as federal law the previously-voluntary toy safety standards issued by the American Society for Testing and Materials (“ASTM”), known as the ASTM F963. 15 U.S.C. § 2056b(a). Congress provided that those standards “shall be considered to be consumer product safety standards issued by the Commission under” 15 U.S.C. § 2058, *id.*, meaning the ASTM F963 standards are within the scope of CPSA’s preemption provision for “consumer product safety standards.”

46. ASTM F963 contains nearly 70 pages of detailed requirements aimed at addressing various possible risks associated with toys, including the risk of exposure to toxic chemicals, which is the same risk addressed by Local Law 1. ASTM F963’s requirements apply to toys intended for use by children under the age of 14, while Local Law 1 applies to toys intended for use by children aged 12 or under.

47. In particular, ASTM F963 specifies maximum permissible levels of lead, mercury, antimony, cadmium, arsenic, and other chemicals in surface-coating materials in toys. ASTM F963, § 4.3.5.1(2) and Table 1. ASTM F963 also specifies maximum permissible levels of those same chemicals in a toy’s substrate, meaning “all of the accessible materials present in toys, other than paint or similar surface coatings.” ASTM F963, § 3.1.76, § 4.3.5.2. These requirements are “designed to reduce children’s exposure to heavy elements contained in

accessible toy substrate materials.” *Id.* The maximum permissible levels set by ASTM F963 are above zero with respect to all chemicals in surface-coating materials and substrates of toys. *Id.*

Table 1.

48. The CPSA’s preemption provision provides:

Whenever a consumer product safety standard under this chapter is in effect and applies to a risk of injury associated with a consumer product, no State or political subdivision of a State shall have any authority either to establish or to continue in effect any provision of a safety standard or regulation which prescribes any requirements as to the performance, composition, contents, design, finish, construction, packaging, or labeling of such product which are designed to deal with the same risk of injury associated with such consumer product, unless such requirements are identical to the requirements of the Federal standard.

15 U.S.C. § 2075(a).

49. The CPSA expressly preempts Local Law 1’s ban on toxic chemicals in toys. ASTM F963 applies to a “risk of injury associated with a consumer product,” namely the risk of exposure to toxic chemicals associated with children’s toys. 15 U.S.C. § 2075(a). Local Law 1 is a “safety standard or regulation which prescribes...requirements as to the...composition [and] contents...of such product”—toys—that are designed to deal with the same risk of exposure to toxic chemicals. *Id.* And Local Law 1’s blanket ban is not “identical to the requirements of the Federal standard,” because ASTM F963 bans certain chemicals only at specified levels, while Local Law 1 bans the seven covered chemicals at any level. *Id.*

C. Local Law 1 is Preempted Because It Conflicts With Federal Purposes and Objectives

50. The FHSA and the CPSA preempt Local Law 1 for the additional reason that Local Law 1 “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873 (2000) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Congress’s purpose was to “develop uniform

safety standards for consumer products and to minimize conflicting State and local regulations,” 15 U.S.C. § 2051(b)(3), because Congress recognized that “control by State and local governments of unreasonable risks of injury associated with consumer products is inadequate and may be burdensome to manufacturers,” *id.* § 2051(a)(4). In enacting the FHSA and the CPSA and creating the CPSC, Congress recognized that an expert commission should decide whether to ban or restrict consumer products, and then only after careful weighing of the costs and benefits, including whether the “regulation imposes the least burdensome requirement which prevents or adequately reduces the risk of injury for which the regulation is being promulgated.” 15 U.S.C. § 1262(i). Congress instructed the CPSC to ban consumer products only when they presented “unreasonable” safety risks. *Id.* § 2051; *see* § 1261(f). In response, CPSC has adopted a flexible, measured, balanced approach that fully ensures the safety of children’s products.

51. Local Law 1 takes a diametrically opposite approach, imposing an absolute and blanket ban on children’s products that contain non-zero amounts of seven chemicals without regard to whether that ban is necessary or even technologically feasible. Nor does Local Law 1 consider the necessity or feasibility of departing from the limits and analytical approach included in CPSC regulations and guidelines. Local Law 1 also undermines the flexibility that CPSC provides through its guidelines for companies to choose among scientifically sound approaches in evaluating exposure and risk. *See* 16 C.F.R. § 1500.135. The law is preempted because it frustrates the purpose of the FHSA, the CPSA, and the federal regulatory scheme they establish.

D. Local Law 1 Will Irreparably Harm Plaintiffs’ Members

52. Plaintiffs’ members will suffer irreparable harm absent an injunction. Plaintiffs’ members will lose sales, market share, and consumer goodwill because it will be effectively impossible for Plaintiffs’ members to comply with Local Law 1 and continue selling their

products in Albany County. Because distribution centers are not capable of segregating products by County, Plaintiffs' members will lose sales, market share, and consumer goodwill in areas beyond Albany County.

53. Plaintiffs' members thus will suffer economic harm that cannot be adequately calculated and that is likely not recoverable from the County through compensatory damages.

54. Plaintiffs' members will also suffer irreparable harm because they will be forced to undertake significant and costly alterations in their research, development, testing, manufacturing, and distribution processes even to attempt to comply with Local Law 1.

55. Plaintiffs' members will also suffer irreparable injury from the enforcement of a law that is preempted by federal law. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992) (holding that injunctive relief was warranted where local law enforcement officials threatened to apply a state statute in the face of a preemptive federal law).

CLAIMS FOR RELIEF

COUNT I

(Local Law 1 is Preempted by the Federal Hazardous Substances Act)

56. Plaintiffs re-allege and incorporate herein by reference paragraphs 1 through 55.

57. Under 42 U.S.C. § 1983 and *Ex parte Young*, 209 U.S. 123 (1908), Plaintiffs may sue for injunctive and declaratory relief to prevent Defendants from enforcing unconstitutional laws.

58. The Supremacy Clause of the United States Constitution states that the “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land.” U.S. Const. art. VI, cl. 2.

59. Under the Supremacy Clause, any state or local law that conflicts with federal law is preempted and is null and void.

60. The FHSA expressly preempts Local Law 1. 15 U.S.C. § 1261 note.

61. Local Law 1 is preempted by the FHSA for the additional reason that it impermissibly interferes with and frustrates the purposes and objectives of the FHSA.

62. Plaintiffs' members will suffer irreparable harm in the absence of injunctive relief.

63. Plaintiffs have no adequate remedy at law.

64. Accordingly, Plaintiffs seek entry of judgment declaring that the FHSA preempts Local Law 1 and enjoining Defendants from enforcing Local Law 1.

COUNT II

(Local Law 1 is Preempted by the Consumer Product Safety Act)

65. Plaintiffs re-allege and incorporate herein by reference paragraphs 1 through 64.

66. Under 42 U.S.C. § 1983 and *Ex parte Young*, 209 U.S. 123 (1908), Plaintiffs may sue for injunctive and declaratory relief to prevent Defendants from enforcing unconstitutional laws.

67. The Supremacy Clause of the United States Constitution states that the “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof... shall be the supreme Law of the Land.” U.S. Const. art. VI, cl. 2.

68. Under the Supremacy Clause, any state or local law that conflicts with federal law is preempted and is null and void.

69. The CPSA expressly preempts Local Law 1. 15 U.S.C. § 2075.

70. Local Law 1 is preempted by the CPSA for the additional reason that it impermissibly interferes with and frustrates the purposes and objectives of the CPSA.

71. Plaintiffs' members will suffer irreparable harm in the absence of injunctive relief.

72. Plaintiffs have no adequate remedy at law.

73. Accordingly, Plaintiffs seek entry of judgment declaring that the CPSA preempts Local Law 1 and enjoining Defendants from enforcing Local Law 1.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that the Court:

- A. Declare that Local Law 1 violates the Supremacy Clause because it is preempted by the FHSA and the CPSA, and is therefore void;
- B. Enter a preliminary injunction, pending final resolution of this action, enjoining defendants from taking any action to enforce Local Law 1;
- C. Enter a permanent injunction enjoining defendants from taking any action to enforce Local Law 1;
- D. Award such costs and reasonable attorneys' fees to which Plaintiffs might be entitled by law; and
- E. Award such other relief as this Court may deem just and appropriate.

Dated: April 16, 2015

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