



Regulating Sales of Flavored Tobacco Products

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Executive Summary

Cherry Dynamite. Mandarin Mint. Sticky Candy. This is not the children’s menu at your local restaurant. It’s a sampling of tobacco products available at your local store.

Flavors like these drive tobacco use, which remains a leading cause of preventable death, disease, and disability. Flavored products are a primary catalyst reversing the nearly two decades of declines in youth tobacco use, and they are widening use and health disparities among adults. Addressing the problem of flavored tobacco product sales at the local level can significantly advance the state’s objectives of preventing initiation of tobacco use, promoting cessation, and reining in tobacco use disparities.

This report summarizes evidence showing the role of flavored tobacco products in impelling tobacco use, and tobacco companies’ use of flavors to appeal to consumers. The report intends to educate local government decisionmakers in New York State about the problem of flavored tobacco products, outline policy solutions, and help interveners craft and evaluate an impactful, feasible, defensible policy prohibiting the sale of flavored tobacco products.

Findings

Flavors make tobacco products appealing. Tobacco companies have manufactured this appeal through decades of savvy marketing, designed to addict consumers to a deadly product for life. As smoking rates have declined, tobacco companies are becoming more and more dependent on using flavors to hook new users—the vast majority of whom are kids.

It’s no secret that flavored products are especially appealing to youth. In fact, tobacco industry documents reveal that companies view kids as their “replacement customers” of tomorrow. Youth nearly always start with flavored tobacco—and once they start, they’re hooked for life.

That’s because flavored tobacco products are more difficult to quit using—and they drive health disparities. Menthol in particular has a notorious history of being targeted to groups of lower socioeconomic status (low-SES) and racial/ethnic minorities. Today, tobacco companies continue to target certain neighborhoods with flavored tobacco product marketing.

Tobacco marketing works. Fortunately, evidence-based policy interventions can counter the powerful appeal of flavored tobacco. Prohibiting the sale of flavored tobacco products protects kids and especially benefits the disadvantaged groups who today shoulder the heaviest health burden of tobacco use.

Opportunity

In the face of many public health crises competing for local decisionmakers’ attention, it is all too easy to overlook the emergency first identified by the U.S. Surgeon General in 1964: tobacco use. More than 50 years later, the U.S. Surgeon General’s Advisory on E-Cigarette Use Among Youth reminds us that tobacco control remains an urgent policy priority offering dramatic health benefits to the most disadvantaged members of our communities.

Local governments may immediately act to prohibit the sale of flavored tobacco products. Decisionmakers can anticipate tobacco industry opposition—a key strategy to stop or delay effective tobacco controls—and in response, draft comprehensive laws that reflect legal and social considerations. Comprehensive laws are most effective and equitable, because tobacco companies will invariably exploit loopholes to retain their addicted customers.

Flavors Drive Tobacco Use and Addiction



Flavors: The Tobacco Industry’s Remaining “Bright Spot”

Flavored tobacco products are increasingly critical to tobacco companies’ business model. Today menthol cigarettes represent **36 percent of the cigarette market¹ and more than half of the market for non-cigarette tobacco products** is flavored.² As cigarette smoking declines, the importance of flavored tobacco products is growing, across product categories:

- Sales of flavored cigars increased by nearly 50 percent since 2008,³ and sales of moist snuff increased by more than two-thirds between 2005 and 2011, with flavored snuff accounting for the majority of growth.⁴
- The proportion of menthol cigarette sales is steadily increasing, rising from 25 percent in 1994 to 36 percent in 2017.⁵
- Sales of flavored e-cigarettes are rapidly rising⁶—this during a period of unprecedented growth of overall e-cigarettes sales (quadrupling from 2012 to 2017).⁷

New York is not immune from these national sales trends. Between 2011 and 2015 the state experienced significant increases in both the proportion of cigarette sales that were menthol, and the proportion of cigarillo sales that were flavored.⁸ The proportion of

little cigar sales that were flavored decreased during this period,⁹ following implementation of New York City’s ordinance restricting flavored tobacco sales to tobacco bars. Notably, the survey predates the meteoric rise in e-cigarette sales and use.¹⁰

Flavored Products as a Proportion of New York Tobacco Sales, 2011-2015¹¹

Cigarettes	% menthol	33.5
Large Cigars	% flavored	21.6
Cigarillos	% flavored	46.6
Little Cigars	% flavored	25.3
	% menthol	6.2
Chewing Tobacco	% menthol	4.5
Moist Snuff	% flavored	8.7
	% menthol	66.4
Snus	% menthol	85.5

In other words, both nationally and in New York, flavored tobacco sales and use have persisted despite declining smoking rates. This is no coincidence, as tobacco companies have targeted youth, low-SES groups, and other groups with marketing of flavored tobacco products to offset otherwise declining sales volumes. Public health interventions have facilitated a tremendous population-wide decrease in cigarette smoking. In response, tobacco companies increasingly rely on flavored products, including menthol cigarettes, in their quest to hook new users and retain their low-SES customers.

What is Menthol?

Menthol is a minty or wintergreen-flavored additive used in products like mouthwash, candy, and cough medicine. When added to tobacco products, menthol imparts an anesthetizing effect, making smoke or vapor easier or “smoother” to deeply inhale, while masking the harsh taste of tobacco or other additives and chemicals.



Flavors Hook Kids

The flavored tobacco products providing companies a “bright spot” are the same ones preferred by teenagers and young adults. Youth are *far* more likely than adults to use flavored tobacco products.¹²

“It’s a well known fact that teenagers like sweet products. Honey might be considered.”

—Brown & Williamson Tobacco Company, 1972

Tobacco companies’ business model relies on youth interest in flavors, because they need to first attract “experimenters,” and then convert them to “regular users.”¹³ Across all tobacco product categories, the first product youth experiment with is nearly always a flavored product.¹⁴ Moreover, those who first use a flavored product are more likely to be current users.¹⁵

As the infographic on the next pages shows, most youth tobacco users choose flavored products (both nationally and in New York State).¹⁶ Indeed, the U.S. Surgeon General has concluded that characterizing flavors are a key driver of youth tobacco initiation of all types of tobacco products, both historically and currently.¹⁷

Notably, flavors are also driving the current epidemic of youth e-cigarette use: flavored e-cigarettes are increasingly prevalent among youth who use e-cigarettes, including those who exclusively use e-cigarettes.¹⁸ The number of these youth users continues to skyrocket: 37 percent of high school seniors in 2018 reported vaping in the past year.¹⁹ That same year, over one-fifth of high schoolers reported *currently* using an e-cigarette. Combined with the nearly 5 percent of middle schoolers reporting current use, 3.6 million U.S. adolescents were currently using e-cigarettes in 2018.²⁰ U.S. Health and Human Services Secretary Azar signaled in a September press release that preliminary

2019 data suggest this growing epidemic of youth vaping continues unabated.

New York State is experiencing similarly dramatic accelerations, and its Governor reported especially alarming preliminary 2019 state data showing two in five high school students currently use e-cigarettes.²¹ At the same time, 2018 marked the first year in nearly two decades that use of cigarettes did not decline among New York high school students.²² Although not a statistically significant increase, this stagnation could signal a trend that must be closely monitored. **In fact, current rates of overall tobacco use by New York’s high school students are the highest they have been in two decades—since before implementation of youth marketing restrictions in 1998.**²³

FDA, FTC WARN COMPANIES TO STOP MISLEADING KIDS Images From E-Liquid Warning Letters

One Mad Hit Juice Box

- NEwhere Inc. d/b/a Mad Hatter Juice



E-liquid



Food product

Candy King Batch/Candy King Sour Worms

- Drip More, LLC
- On Cloud Vape



E-liquid

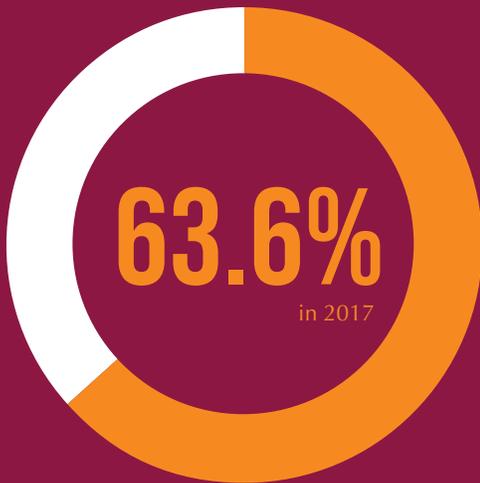


Food product

Although youth e-cigarette use is receiving unprecedented media attention, youth tobacco use remains problematic across product categories, and the current focus on e-cigarettes overlooks important disparities in youth tobacco use. For instance, cigars were the most commonly used tobacco product among non-Hispanic Black high schoolers in 2016, while e-cigarettes were the most commonly used tobacco product among most other groups of students.²⁴

FLAVORS

DRIVE YOUTH TOBACCO USE



The majority of youth who use tobacco products choose **flavored** tobacco products.¹

- *Flavors are preferred in all product categories*



Most youth who have ever used tobacco report that the first product they tried was **flavored**.²



Flavors drive use of two or more tobacco products,³ leading to a higher health burden among these users.

- *Young adults tend to age out of polytobacco use, but remain cigarette users⁴*



Among Youth Users of Flavored Tobacco...

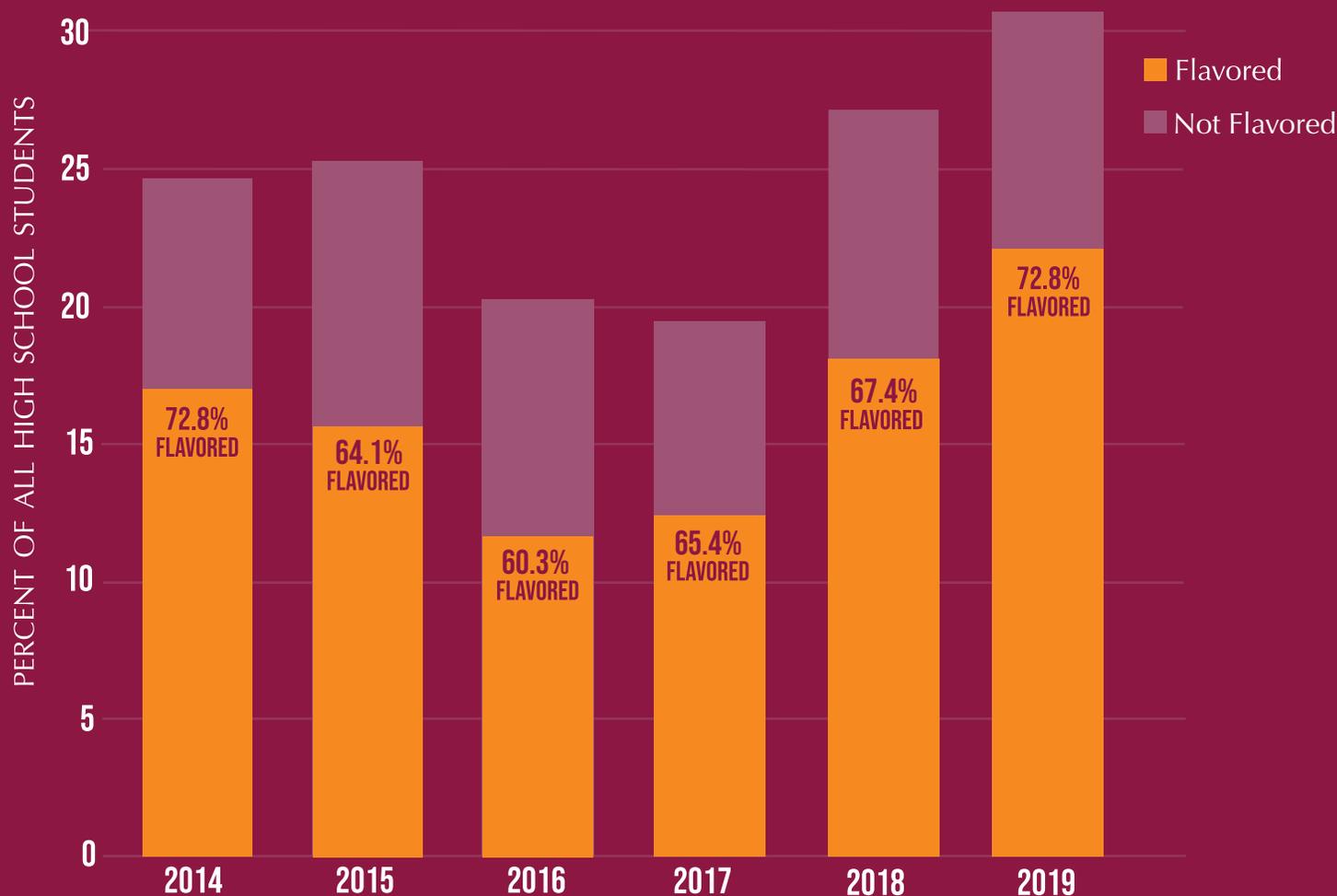


Overall youth tobacco use is rebounding, driven by skyrocketing use of **flavored** e-cigarettes.⁵



- Nearly 11 million U.S. middle and high school students have tried a tobacco product, and more than 6 million report current use⁶
- Among youth tobacco users, use of flavored products is on the rise

Current Use of Any Tobacco Product Among U.S. High School Students⁷



INFOGRAPHIC REFERENCES

- Hongying Dai, *Changes in Flavored Tobacco Product Use Among Current Youth Tobacco Users in the United States, 2014-2017*, JAMA PEDIATR. (2019).
- Bridget K. Ambrose et al., *Flavored Tobacco Product Use Among US Youth Aged 12-17 Years, 2013-2014*, 314 JAMA 1871-1873 (2015).
- Hongying Dai, *Single, Dual, and Poly Use of Flavored Tobacco Products Among Youths*, 15 PREV. CHRONIC. DIS. (2018); Dai *supra* note 1.
- Alexandra Loukas, C. Nathan Marti & Cheryl L. Perry, *Trajectories of Tobacco and Nicotine Use Across Young Adulthood, Texas, 2014-2017*, 109 AM J PUBLIC HEALTH 465-471 (2019).
- Karen A. Cullen, *Notes from the Field: Use of Electronic Cigarettes and Any Tobacco Product Among Middle and High School Students—United States, 2011-2018*, 67 MORB MORTAL WKLY REP (2018).
- Teresa W. Wang et al., *Tobacco Product Use and Associated Factors Among Middle and High School Students - United States, 2019*, 68 MORB MORTAL WKLY REP (2019).
- Wang, et al., *supra* note 6; Dai, *supra* note 1; Cullen et al., *Notes from the Field, supra* note 5; Cullen et al., *Flavored Tobacco Product Use, supra* note 5; Teresa W. Wang, *Tobacco Product Use Among Middle and High School Students—United States, 2011-2017*, 67 MORB MORTAL WKLY REP (2018); Ahmed Jamal et al., *Tobacco Use Among Middle and High School Students—United States, 2011-2016*, 66 MORB MORTAL WKLY REP (2017); Tushar Singh et al., *Tobacco Use among Middle and High School Students—United States, 2011-2015*, 65 MORB MORTAL WKLY REP (2016); Rene Arrazola et al., *Tobacco Use among Middle and High School Students—United States, 2011-2014*, 64 MORB MORTAL WKLY REP (2015).

Flavors Exacerbate Tobacco Use Disparities

Tobacco companies' predatory marketing heavily contributed to the landscape of today's tobacco-related health disparities. Companies targeted sociodemographic groups who today use tobacco at higher rates and are significantly more likely to suffer from tobacco-attributable diseases.²⁵ In New York State, these groups include adults with low income, low educational attainment, and/or serious mental illness.²⁶

As tobacco use has shifted over time to become concentrated among these groups, tobacco companies continue to feed the misperception that tobacco use is a lifestyle choice, rather than a foreseeable result of their strategic marketing.²⁷

Disparities in flavored tobacco use mirror overall tobacco use disparities.

For instance, higher prevalence of flavored product use is observed among young adults (ages 18–24) and people of less income or education.²⁸ Thus, flavored tobacco is an issue of social injustice.

Disparities in flavored tobacco use are especially notable for menthol cigarettes (discussed in *Menthol Case Study* below), but **persist across product categories**. For example, among adult cigar users, those with lower income and less formal education have the highest prevalence of flavored cigar use.²⁹ Prevalence of flavored cigar use among these users decreases with increasing educational attainment.³⁰ Adult little cigar users consider little cigars, especially flavored versions, less addictive than cigarettes and generally “healthier,”³¹ misperceptions that factor into product use. Yet, those who have used flavored little cigars are more than twice as likely to remain current little cigar users, compared to those who have only tried unflavored versions.³²

Racial/ethnic disparities in flavored tobacco use are also evident. These appear to begin at an early age, and become persistent: A 2014 study of New York City teens found 43 percent of Hispanic youth and 30 percent of Black youth had tried a flavored tobacco product, compared to 18 percent of White youth and 9 percent of Asian youth.³³ Young Black adults in the U.S are 2.73 times more likely than their White peers to use flavored tobacco products.³⁴ Flavored tobacco products like menthol cigarettes are disproportionately used by racial and ethnic minority older adults, as well.³⁵

These tobacco use disparities, as well as youth experimentation and use, are the direct consequence of tobacco companies' targeted marketing—marketing which increasingly exploits flavor preferences to build brand identity among focus groups of consumers. As we'll explore in the next section, companies strategically use flavors to build brand identity to appeal to youth, young adults, and the disadvantaged groups that continue to use tobacco at much higher rates.

Flavors: Yet Another Tobacco Industry Marketing Ploy

Tobacco companies are notorious for their skill in attracting consumers to inherently unappealing products.³⁶ Flavors are simply a tool for achieving this goal. This section illustrates how flavors aid tobacco companies' execution of the “4 Ps” of marketing fundamentals: **product, promotion, placement, and price**.

In short, flavorants are easily manipulated to impact tobacco product characteristics, and flavor descriptions are easily tailored for resonance and visibility within “focus” communities. Indeed, internal tobacco company documents from 1992 identify

flavors as potentially the “most innovative change in cigarette marketing.”³⁷ Through endless reinvention, flavors enable highly targeted marketing to susceptible audiences (namely, youth and low-SES groups).³⁸

PRODUCT: Flavorants Make Tobacco Products Palatable

For decades, tobacco companies have conducted extensive market research to understand how flavors drive demand for their products. Companies alter product characteristics, including flavorants, to attract new users and optimize users’ experiences with using tobacco products.³⁹ Companies research flavor profiles attractive to specific populations and then apply brand “personalities” and other marketing and branding strategies tailored to their target consumers.⁴⁰

Tobacco companies use flavorants to formulate tobacco products that are appealing and useable, especially for new users (namely, youth).⁴¹ Across product categories, for instance, flavorants mask the harshness of tobacco and other constituents, making products easier to consume.⁴² Flavorants also create pleasant aromas and aftertaste, smoking enjoyment, novelty appeal, and “high curiosity to try factor.”⁴³ Further, recent research suggests that flavorants independently improve users’ moods, thus adding to the appeal of flavored tobacco products.⁴⁴ These pleasant user experiences enhance the social acceptability of flavored products, which in turn contributes to youth experimentation and continued use of tobacco products.

Finally, use of flavored products continues past experimentation. There is unequivocal evidence that menthol in cigarettes contributes to long-term use (see *Menthol Case Study* below). Beyond menthol and beyond cigarettes, flavorants seem to likewise increase dependence on other tobacco products (“OTP”).⁴⁵ By enhancing

user enjoyment and masking the harsh taste of tobacco, flavorants enable deeper inhalation, longer duration of use, and more frequent use, thereby increasing nicotine dependence across product categories.⁴⁶

“Flavor and nicotine are both necessary to sell a cigarette.”

-- Philip Morris Tobacco Company, 1966

In sum, **flavorants make tobacco products easier to use (especially for new users), and consumers tend to use flavored products with greater frequency, inhale more deeply, perceive flavored products to be safer than unflavored products, and are less likely to successfully quit using them.**

PROMOTION: Flavors Tie Consumers to Brands

Exacerbating the innate harms of flavorants, tobacco product marketing featuring flavor characteristics is pervasive, calculating, and alluring. Tobacco companies feature flavors in their marketing campaigns to build brand identity among youth. These campaigns also help maintain brand identity among addicted consumers. Further, the brand-personalities built around distinctive flavor profiles serve to launch promotion and advertising to targeted groups—thereby driving tobacco use disparities.

In other words, “flavors” are about much more than just the product ingredients—they are used to market tobacco products to consumers and mold their expectations of using specific products. In fact, tobacco company internal documents acknowledge that users’ reported taste perceptions may be attributed less to the actual product characteristics and more to “a playback of some advertising messages.”⁴⁷

For instance, to attract young people,⁴⁸ tobacco companies create sweet-tasting products that come in brightly colored

packaging.⁴⁹ Kid-friendly flavors like cherry, cotton candy, and honey were historically intended to invoke concepts of fun and frivolity, with companies intending to execute a “graduation strategy” toward eventual addiction to unflavored products.⁵⁰ Indeed, tobacco companies have a well-documented and notorious history of attracting youth via flavored tobacco products: Company documents tout flavored products as a way to attract new smokers (overwhelmingly youth), and confirm that their flavored product marketing targets youth.⁵¹ Additionally, by claiming young adults as a target market, tobacco companies capture teens, who seek to emulate their older peers.⁵²

“Make a cigarette which is obviously youth oriented. This could involve cigarette name, blend, flavor and marketing technique...for example, a flavor which would be candy-like but give the satisfaction of a cigarette.”

-R.J. Reynolds Tobacco Company, 1974

The recent proliferation of flavored e-cigarette and marketing illuminates companies’ unscrupulous youth targeting. Among the 15,000+ flavors of e-liquids currently available, blatantly kid-friendly flavors like Unicorn Vomit and Cereal Treats Loopz embody products that are both palatable and fun.⁵³ In general, Industry research has identified mildness, smoothness, sweetness, and less harshness as key preferences of younger smokers.⁵⁴

Other brand-personalities were conjured to appeal to other subgroups. For example, Black males living in urban areas have been targeted by tobacco

marketing featuring descriptors such as “smooth,” “cool,” or “fresh,” with advertising displaying imagery and themes of hip hop or rap music, urban nightlife, or fame/cultural edginess.⁵⁵ This targeting persists today, with companies like Swisher Sweets and Black & Mild marketing flavored cigars to Black teens via social media platforms like Instagram.⁵⁶ To attract young, White males living in rural areas, companies have marketed flavored smokeless tobacco products as “refreshing” through advertising depicting outdoor lifestyles, “active” men, independence, ruggedness, and hard work.⁵⁷

Flavors provide an opportunity for tobacco companies to continually introduce new and reinvented products to maintain an exciting product line.⁵⁸ New flavors convey new personalities, and are key to distinguishing among brands and sustaining customer interest, especially among youth.⁵⁹ Thus, flavors help companies avoid losing customers to competing brands, quitting, and stalled progression from initiation to regular use.⁶⁰ Indeed, flavors “may entice . . . smokers to continue smoking, derail quitting attempts, and lure those who have quit smoking to take it up again.”⁶¹



3,700 likes

swishersweets Who’s ready for the next Limited Edition? Any guesses as to what it will be?

When promotional materials for tobacco products highlight the presence of flavors, tobacco companies knowingly *signal* the products’ palatability and create an expectation of a pleasant user experience. By doing so, companies imply that flavored products are less harmful. Industry research has found that consumers were likely to perceive flavored products marketed as tasty and smooth as less risky—leading to increased

willingness to try new products and to continue using them over time.⁶² These misperceptions persist: Though younger consumers now understand that menthol cigarettes are at least as risky as other cigarettes,⁶³ they continue to believe (incorrectly) that flavors make other tobacco products safer to use.⁶⁴ For instance, youth e-cigarette users perceive lower harm from flavored e-cigarettes, despite research documenting harmful constituents present in e-cigarette flavorants.⁶⁵ Misperceptions of harm are a direct outcome of tobacco marketing touting flavors, and are a factor in youth experimentation and continuing use among addicted users.

PLACEMENT: Tobacco Companies Push Flavored Products in Stores

Visible products and advertisements drive tobacco product sales.⁶⁶ Flavors once again serve as a tool for implementing this marketing strategy, with tobacco companies prominently featuring flavors in massive product displays and colorful, splashy advertisements in retail outlets. Although most tobacco products may be sold and promoted online, the overwhelming strategy for placing tobacco products in front of consumers continues to be the retail store.⁶⁷

To ensure that audiences see their products and promotions, tobacco companies pay top dollar to control their product and advertising placement.⁶⁸ Contracts between manufacturers and tobacco retailers may dictate the size of tobacco displays, countertop positioning, proximity to candy or other kid-friendly products, placement of retail marketing materials such as interior and exterior advertisements, or reducing store “clutter” interfering with effective promotion of tobacco products.

Flavors are conspicuously featured in this retail marketing. A national survey of

tobacco outlets revealed nearly half of inspected stores displayed exterior advertisements for menthol cigarettes—more than for any other product type.⁶⁹ Nearly 70 percent of stores advertised menthol cigarette price promotions (e.g. buy a pack, get one free).⁷⁰ In New York City, over half of cigarette and smokeless tobacco advertisements promoted menthol or another flavor, and more than one-fifth of all advertisements surveyed were for Newport menthol cigarettes.⁷¹ Notably, storefront ads for flavored OTP persist in the City despite New York City prohibiting their sale in 2013.⁷²

Some placement strategies continue to especially appeal to youth, despite prohibitions on youth targeting. For instance, stores often display flavored tobacco products at the front register, near candy, or at kids’ eye level.⁷³ A minority of stores continue to place tobacco products within a foot of kids’ toys or gum, or feature tobacco ads within three feet of the floor.⁷⁴



Retail marketing for flavored tobacco products not only appeals to youth who see it, but also triggers impulse purchases by addicted users seeking to quit.⁷⁵ Given that flavored products have been shown to be especially difficult to quit using, this marketing is especially disruptive to consumers who are attempting to quit.

Beyond the Retail Store: Reaching Youth via Digital & Social Media

Tobacco companies reach youth through digital media.⁷⁶ Despite restrictions on youth targeting, companies are flouting the rules and heavily marketing to youth on social media, via hashtag marketing, paid celebrity and non-celebrity “influencers,” user-generated content, and, often, misleading claims.⁷⁷ Flavors are prominently featured in their social and digital advertising. An investigation by the Campaign for Tobacco-Free Kids found that insidious, pervasive marketing for cigarettes on social media can be traced to tobacco companies, and includes promotion of “#NewFlavors” alongside youth-appealing themes of fashion and independence.⁷⁸ Most recently, CNN found that Juul’s social media strategy has included paying young, stylish influencers to post ads that “emphasized fruity flavors and sometimes oozed with sex appeal.”⁷⁹ In general, e-cigarettes are sold and promoted online far more frequently than other tobacco products, because there are fewer restrictions and more numerous manufacturers and online retailers. E-cigarette manufacturers’ predatory online marketing tactics (including promotion of flavors) and failure to comply with age restrictions for online sales have led to multiple legal complaints and lawsuits.⁸⁰

PRICE: Tobacco Companies Heavily Discount Flavored Products

Tobacco companies heavily discount flavored tobacco products knowing that their targets prefer flavors and are especially price sensitive. Low prices on flavored products are broadly promoted, especially in targeted areas.⁸¹ For instance, stores in neighborhoods with more African-Americans are more likely to display price promotions and sell flavored cigars.⁸²

Marketing for flavored tobacco products that features low prices increases perceived affordability and provides environmental cues to use tobacco. Building on the efficacy of the other 3 P’s, low prices round out the Industry’s winning marketing formula to attract their price-sensitive target populations: youth and low-SES groups:

- Prices for flavored tobacco products are often lower in neighborhoods with higher proportions of **youth and young adults**.⁸³ Further, young people are more likely to take advantage of promotional offers and discounts, and to participate in tobacco company reward programs that provide incentives for purchasing tobacco products.⁸⁴
- Cheap, flavored products also appeal to **low-SES users**. For instance, consumers who report using cigars because they are cheaper than cigarettes have greater odds of using flavored cigars compared to their peers.⁸⁵ Prices for menthol cigarettes are lower in neighborhoods with more low-income residents, and price promotions for these products are more common in those areas.⁸⁶ Targeted advertising that includes coupons or other incentives also interferes with the cessation efforts of low-SES users.

Removing flavored products from retail stores reduces consumers’ exposure to marketing for these products—marketing that features low prices especially seductive to young and low-SES consumers. Accordingly, **reducing exposure to flavored tobacco product marketing is a particularly salient way to disrupt the Industry’s predatory tactics.**

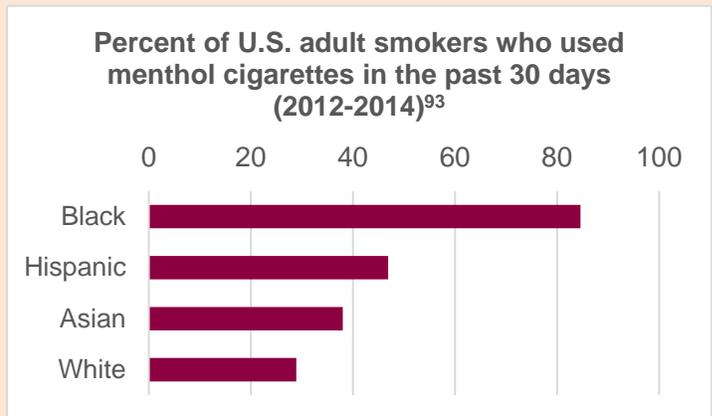


Menthol: A Case Study of the 4 Ps of Marketing

Menthol cigarettes offer a particularly nefarious example of tobacco companies' strategic use of the 4 Ps. The 4Ps playbook elevated menthol cigarettes to the cigarette of choice among African Americans,⁸⁷ who now shoulder the bulk of the health burden caused by menthol products.⁸⁸ African-Americans have the highest incidence of lung cancer and mortality, and the shortest survival rate of any racial or ethnic group for most tobacco-related cancers.⁸⁹

Industry documents from the 1960s and 1970s confirm that tobacco companies aggressively targeted youth, women, and especially African-Americans with menthol cigarette marketing campaigns⁹⁰ that exploited flavor preferences and promoted brand identity as a social identity. Fueled by Industry marketing, the market share of this single flavor of cigarette rose from 25 percent in 1994 to 36 percent in 2017.⁹¹ Menthol cigarette use is now highly concentrated among certain groups and heavily contributes to "troubling disparities in health related to race and socioeconomic status"⁹²:

- Both nationally and in New York, the majority of middle and high school students who smoke usually smoke menthols.⁹⁴
- Groups with severe psychological distress, and groups with fewer years of education and lower income use menthol products at far higher rates.⁹⁵



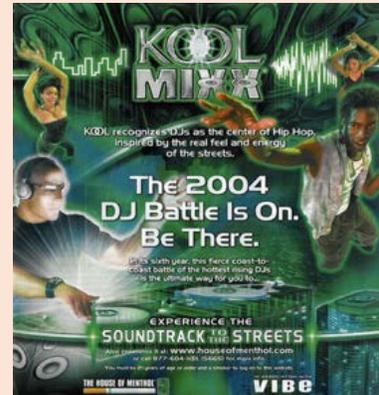
PRODUCT: Menthol's cooling properties play an important role in the initiation of tobacco use across product categories, by masking the harsh taste of tobacco.⁹⁶ Nearly half of youth who have ever used a cigarette first used menthol. Youth perceive menthol cigarettes to be less harmful and less harsh to smoke relative to non-menthol cigarettes,⁹⁷ and youth who first try a menthol cigarette are less likely to feel nauseated than those who start with a non-menthol cigarette.⁹⁸ Industry documents reveal that tobacco companies manipulated levels of menthol in cigarettes in ways that attract youth, and targeted menthol cigarette marketing toward youth.⁹⁹

Further, menthol's numbing properties create an inherently riskier cigarette, both by increasing a user's exposure to carcinogens and by making mentholated products more addictive and difficult to quit.¹⁰⁰ Menthol increases a user's exposure to the slew of carcinogens in a cigarette by allowing deeper inhalation and more frequent use.¹⁰¹ It may also exacerbate risks of this exposure by promoting the absorption and diffusion of tobacco smoke constituents in the lungs.¹⁰² As a result, menthol cigarette consumers are more likely to say they want to quit,¹⁰³ and to make quit attempts, but are less likely than consumers of non-menthol cigarettes to successfully quit.¹⁰⁴ Disparities in cessation success (between menthol and non-menthol smokers) are especially apparent among African-American users.¹⁰⁵ **In sum, menthol in cigarettes has been shown to increase youth smoking initiation and progression to regular cigarette smoking, aids nicotine dependence, and decreases successful quitting.**



PROMOTION: Tobacco companies use focused marketing and promotions to retain target adult consumer subgroups. Black communities have been especially targeted, through marketing incorporating stereotypical themes of urban nightlife, fame, and music.¹⁰⁶ Menthol marketing further incorporates themes that are problematically associated with “Blackness” in America, such as sex, intrigue, and exoticism.¹⁰⁷ Notorious menthol cigarette campaigns include:

- “Brand X” menthol cigarettes featured packaging in colors that symbolize Black and African pride, and were promoted using Spike Lee’s movie, *Malcolm X*.¹⁰⁸
- R.J. Reynolds’ 2004 “Kool Mixx” promotion (for Kool brand menthol cigarettes) capitalized on hip-hop’s popularity in Black communities through sponsorship of nationwide contests of music mixing, scratching, and DJing.¹⁰⁹
- R.J. Reynolds’ pervasive advertising for Newport menthol cigarettes in African-American magazines and other media used themes of sociability and sexuality.¹¹⁰



Tobacco companies have also targeted organizations that serve the homeless and groups with mental health disorders, by distributing tobacco product promotions and free samples, including menthol cigarettes.¹¹¹ Historically, companies claimed menthol cigarettes have “therapeutic effects,” leading consumers to associate them with medicines.¹¹² Treatment providers serving individuals with mental health and addiction disorders have only relatively recently addressed tobacco use a concurrent concern; previously, providers considered tobacco use a secondary concern, or even a treatment aid, despite patients being far more likely to die from tobacco’s harms than from complications of their mental illness or other substance abuse.¹¹³

PLACEMENT: In general, communities of color tend to have more tobacco retailers, and therefore higher exposure to tobacco marketing.¹¹⁴ Evidence suggests there is more menthol advertising at stores in Black and in poor neighborhoods,¹¹⁵ including more price promotions for menthol cigarettes.¹¹⁶ Additionally, menthol products are given more shelf space in retail outlets within communities of color.¹¹⁷ In New York State (outside of New York City), menthol cigarettes are promoted at more than two-thirds of stores that sell tobacco—through price discounts, and interior and exterior advertisements.¹¹⁸ In New York City, where space is more limited, nearly half of tobacco outlets still feature interior advertising for menthol cigarettes, and more than half feature exterior advertising for menthol cigarettes.¹¹⁹ In short, menthol is prominently featured by retail marketing, especially in communities of color and other targeted areas.

PRICE: Recent data show neighborhoods with a higher proportion of Black residents offer more price promotions and lower prices for menthol cigarettes.¹²⁰ Most advertisements for menthol cigarettes (87 percent) feature coupons or other incentives that appeal to price-sensitive



customers, such as youth.¹²¹ Further, tobacco companies more heavily promote lower-priced brand names in areas where higher concentrations of African-Americans reside.¹²² This is especially true for Newport, the leading brand of cigarettes among young African-American smokers.¹²³ In New York State (outside of New York City, where there is a high minimum price for all cigarettes), more than half of retailers offer price promotions for menthol cigarettes.¹²⁴ More of these retailers offer price promotions for menthol cigarettes than for any other observed product.¹²⁵

Regulating Sales of Flavored Tobacco

State and Local Policies

In the absence of impactful federal regulation, state and local governments are exercising their inherent police power authority to address the public health problem posed by flavored tobacco products. While numerous states, including New York, are entertaining regulating access to flavored tobacco products, local governments in particular are regulating where and how flavored tobacco products are sold.

In Massachusetts, for example, more than 130 localities have restricted the sale of most flavored tobacco products to age 21+ retailers, while cities and counties in California, Illinois, Minnesota, Rhode Island, and New York restrict sales of some or all flavored products to specified retailer types or locations.¹²⁶ A growing number of these jurisdictions are enacting a flavored tobacco sales *prohibition*, applying their ordinance to all retailers, all flavors, and all types of tobacco products.

Industry opposition to these local initiatives has been fierce at times. The tobacco industry and its allies were a strong presence opposing Minneapolis and St. Paul (ultimately successful) comprehensive restrictions on the sale of flavored tobacco products.¹²⁷ In San Francisco, tobacco giant R.J. Reynolds led a successful campaign to petition City Council to overturn the city's newly passed prohibition on sales of flavored tobacco products. The initiative went to a voter referendum, by which citizens delivered a resounding rejection to Big Tobacco in upholding the law 68-32, despite R.J. Reynolds spending nearly \$12 million in an attempt to mislead voters.

Despite this opposition, many communities have successfully enacted and defended regulations on the sale of flavored tobacco products. Post-implementation studies demonstrate achievement of the stated public health objectives and validate the efficacy of these policy interventions.

Flavored Tobacco Sales Regulations Are Effective

Research unequivocally establishes that policies restricting the sale of flavored tobacco products reduces the market for these products as well as overall tobacco use. Yet studies also tell a cautionary tale, illustrating how incomplete policies leave regulatory gaps that tobacco companies exploit with increased marketing of substitute flavored products. In other words, studies confirm that **comprehensive sales regulations are necessary and most effective in reducing tobacco use.**

After the FDA banned characterizing flavors (other than menthol) in cigarettes, an adolescent's probability of becoming a cigarette smoker declined by 17 percent.¹²⁸ Cigarette users also smoked 59 percent fewer cigarettes per month because of the ban.¹²⁹ However, the continued availability of menthol cigarettes and flavored tobacco products other than cigarettes undermined the success of the policy: Smokers migrated to these available flavored products¹³⁰ and menthol smokers did not have to adjust.



2004 advertisement for flavored cigarettes

The consequence of exempting menthol was particularly devastating: Researchers estimate that more than 600,000 deaths could have been averted by 2050 had a federal menthol ban gone into effect in 2011.¹³¹ Implementing a menthol cigarette ban in 2011 would have especially benefitted African-American communities, with the policy reducing African-American smoking prevalence by 24.8 percent by 2050, compared to 9.7 percent overall.¹³² Further, recent choice experiment surveys support the effectiveness of prohibiting menthol products in promoting smoking cessation.¹³³ The evidence supporting a menthol prohibition is compelling, and there is no valid public health reason to less stringently regulate sales of products with this flavor.

Canada prohibited sales of flavored cigarillos in July of 2010.¹³⁴ This policy achieved its aim of reducing youth consumption of cigarillos, and extended to a net reduction in youth use of all cigars (the category that includes both unregulated large cigars and regulated cigarillos).¹³⁵ However, researchers observed a small, gradual increase in youth use of regular cigars, which were not included in the flavor restriction.¹³⁶ Policymakers can discourage product substitution by extending the law to cover all flavored cigars (regardless of size) and imposing policies that increase the price of cigars.¹³⁷

Ontario, Canada's 2017 ban on menthol in cigarettes and most other tobacco products demonstrates the policy's positive impact on public health.¹³⁸ Before the ban went into effect, tobacco companies went to great lengths to prepare their menthol customers with the goal of retaining them as smokers.¹³⁹ Some companies directly promoted switching to non-menthol cigarettes.¹⁴⁰ Others indirectly encouraged switching over quitting. For instance, they

introduced cigarettes with menthol-flavored capsules inserted in filters to help transition users to non-menthol cigarettes, and promoted these with new colors as well as references to personal choice that encourage the choice of switching products.¹⁴¹

Leading up to the ban, researchers asked a small group of menthol smokers whether they intended to completely quit tobacco, or switch to other products. Follow-up one month after the ban revealed twice as many smokers in fact attempted to quit, indicating the ban's substantial impact on this key public health outcome (despite Industry's efforts to undermine quitting).¹⁴² Other research confirmed the policy was successful in enabling quitting, especially among menthol smokers, and did not lead to an increase in overall smoking.¹⁴³ A menthol ban could be even more impactful in the United States, where more cigarette users choose menthol as their primary brand and experience less success in quitting.¹⁴⁴

In July 2009, the state of Maine restricted the sale of flavored cigarettes and non-premium cigars.¹⁴⁵ Six years later, Maine saw significantly fewer flavored cigar sales than any other state.¹⁴⁶ Yet the exception for some types of cigars dampened the policy's impact, as the proportion of premium cigar sales that were flavored significantly increased.¹⁴⁷ Maine legislators have recently considered a bill that would apply to all flavored products (no exemptions).¹⁴⁸

Providence, Rhode Island, and numerous Massachusetts municipalities restrict sales of flavored tobacco products. Notably, Rhode Island and Massachusetts alone have seen a reduction in sales of flavored cigarillos; in all other states, proportion of cigarillos sales that are flavored continues to rise.¹⁴⁹ The impact of the policy was also

demonstrated at the local level: Massachusetts and Rhode Island communities with a local restriction saw significant declines in the availability of flavored tobacco products compared to communities without a policy.¹⁵⁰ Similarly, recent local policies in Minnesota restricting the sale of flavored tobacco products to adult-only stores successfully reduced availability of these products in convenience stores and grocery stores.¹⁵¹ By contrast, Chicago saw lower rates of compliance with its partial restriction on menthol cigarette sales (which prohibited sales by stores within 500 feet of a school), meaning menthol cigarettes remained available in nearly half of stores near schools.¹⁵² Chicago's experience highlights yet again the complications posed by policy gaps, this time caused by incomplete coverage of retailers subject to the restriction.

New York City's flavored tobacco sales restriction (limiting sales to adult-only retail tobacco stores) has also proven effective. Prior to the City's flavor restriction, 20 percent of teens reported having ever tried a flavored tobacco product, and teens who were current smokers were much more likely to have ever tried flavored tobacco.¹⁵³ After the restriction, teens were less likely to ever try flavored tobacco, and were less likely to ever try *any* type of tobacco.¹⁵⁴

Further, sales of flavored tobacco products declined 87 percent in New York City because of the law.¹⁵⁵ Importantly, in 2015, researchers tested a sample of tobacco products whose packaging did not indicate the presence of a flavor, and found 14 of the 16 samples had higher levels of flavor chemicals than products with explicit flavor names studied prior to the restriction. This illustrates how tobacco companies may exploit loopholes in local sales restrictions by rebranding flavored products.¹⁵⁶ Still, New York City has achieved high compliance with its policy, by integrating

enforcement of its flavor restriction into local tobacco retail license requirements.¹⁵⁷

Concept Flavors

Over the past decade, all levels of government have entertained responses to the growing outrage over the role of flavors in tobacco use. Tobacco companies have reacted to adopted and anticipated restrictions on flavored products with a scheme to keep their valued flavored products available for sale: Companies have increasingly turned to marketing flavored products without explicit references to flavor.¹⁵⁸ Packaging and other marketing instead allude to a product's flavor spirit, or "concept."¹⁵⁹ For instance, tobacco companies have dropped the descriptors "strawberry" and "blueberry," allowing the pink and blue packaging to speak for itself,¹⁶⁰ just as they have come to rely on color-coded packaging to indicate "regular," "light," "mild" and "ultra light" cigarettes.¹⁶¹ From there, manufacturers have developed tobacco products with names such as Jazz, Casino, First Flight, and Unicorn Milk that do not describe a flavor yet imply a conceptual flavor profile.

While these concept-flavored products fit the definition of "flavored" under many local laws, enforcement officers dependent on explicit flavor indicia on packaging and other marketing may not properly identify concept-flavored products.¹⁶²



Concept-flavored cigar and e-liquid products

In addition to evaluations of existing policies, there are other kinds of studies that provide further evidence in support of restricting sales of flavored tobacco. For instance, surveys indicate that at least three-quarters of youth users of flavored OTP would no longer use OTP if flavors were no longer available.¹⁶³ Applying these findings to New York State, researchers estimated that overall prevalence of OTP use could dramatically decline if sales of flavored OTP were prohibited in the state, and that overall prevalence of cigarette smoking in the state could decline by 10-30 percent if sales of menthol cigarettes were prohibited.¹⁶⁴ Finally, other research estimates that a policy prohibiting all flavors (other than tobacco flavor) in cigarettes and e-cigarettes would lower interest in *both* products.¹⁶⁵ In contrast, a policy that applies to only one product or the other would lower interest in only that product.¹⁶⁶

Taken together, these studies demonstrate that **restricting the sale of flavored tobacco products effectively reduces use of those products, including youth experimentation.** These examples also caution that **tobacco companies will strategically circumvent incomplete policies at the expense of public health.**

The Public Supports Regulating Flavored Tobacco Products

In a national survey of U.S. adults, the majority of respondents believed that FDA should ban candy and fruit-flavored little cigars/cigarillos (56.4 percent) and e-cigarettes (54.4 percent).¹⁶⁷ Low-SES, non-White, and female respondents were more likely to support these potential regulations.¹⁶⁸ California voters polled in 2018 overwhelmingly affirmed that a “good reason to prohibit the sale of flavored tobacco products is that it can reduce youth smoking.”¹⁶⁹

FDA Action on Flavors Is Stalled

This section provides an overview of the minimal federal action to address flavored tobacco products’ disparate impact on tobacco use by youth and other disadvantaged groups. This includes discussion of FDA’s mandate to evaluate the role that menthol cigarettes play in use and health disparities, and the agency’s timeline for beginning enforcement of existing regulations that affect flavored tobacco products.

In 2009, Congress passed the Family Smoking Prevention and Tobacco Control Act (“Tobacco Control Act”) granting primary federal regulatory authority of tobacco products to the FDA, while reiterating states’ traditional authority to regulate the sale of tobacco products in furtherance of the Act’s public health aims.¹⁷⁰ The law’s findings recognized tobacco industry actions, including the way it manufactures and markets its products, created a public health crisis.¹⁷¹ Congress also concluded oversight of the tobacco industry is necessary and will benefit public health.¹⁷² Among the law’s stated purposes are preventing tobacco use by young people, preventing dependence on tobacco, and promoting cessation “to reduce disease risk.”¹⁷³

In recognition of these findings and the law’s purpose, Congress immediately prohibited cigarettes with characterizing flavors other than menthol or tobacco flavor.¹⁷⁴ However, by exempting menthol-flavored cigarettes, Congress excluded consumers of these products from the steep incentive to quit smoking. As a result, menthol smokers were left further behind the cessation curve, exacerbating use disparities between menthol and non-menthol users. Further regrettable, instead of quitting, many flavored cigarette users instead switched to flavored tobacco products remaining on the market.¹⁷⁵ Users

shifted to flavored little cigars and flavored cigarillos in particular,¹⁷⁶ and, most dramatically, to menthol cigarettes.¹⁷⁷ Evidence of product switching to compensate for a product ban underscores the significance of flavors in tobacco products, and the problem with laws tackling only a part of a problem.

Despite the menthol exemption, Congress also flagged this flavor as a public health concern. The Tobacco Control Act mandated the FDA to commission a study and recommendation of “the impact of the use of menthol in cigarettes on the public health.”¹⁷⁸ FDA received this advisory report in 2011, which drew the firm conclusion and overall recommendation: “Removal of menthol cigarettes from the marketplace would benefit public health in the United States.”¹⁷⁹ Tobacco companies reacted in typical fashion by suing FDA, this time challenging the integrity of the report. FDA rewarded companies with agency delay, halting pursuit of menthol cigarette regulations, despite sufficient evidence satisfying the federal law’s public health standard for agency action.¹⁸⁰ In fact, FDA did not publicly return to announcing its intention to restrict menthol cigarettes until 2018. This, despite persistent calls for a menthol ban by public health professionals, including a 2013 Citizens Petition, and a January 2016 appellate court decision upholding FDA’s right to rely up on its advisory report. The bottom line: despite Congress’ explicit prioritization of menthol, a sufficient evidentiary basis, and ample time, FDA has not proposed regulating menthol as of September 2019.

Meanwhile, FDA issued an Advance Notice of Proposed Rulemaking in 2018, seeking public comment on “how to possibly regulate kid-appealing flavors in products

like [e-cigarettes]; and whether we should ban menthol in cigarettes and flavors in cigarillos—factors that we know are a leading driver of youth smoking.”¹⁸¹ Amid these precursory regulatory steps, youth use of e-cigarettes (largely flavored) rapidly accelerated. In response, the Surgeon General issued a rare *Advisory on E-cigarette Use Among Youth* in December 2018, identifying youth vaping as an epidemic and kid-friendly flavors as a significant driver.¹⁸² The Nation’s Doctor placed an urgent call to action for state and local governments to address this epidemic through “implement[ing] strategies to reduce access to flavored tobacco products by young people.”¹⁸³ This call to action emphasized federal regulatory hurdles, including a protracted procedural timeline, and stressed the importance of more nimble state and local action. Local

regulation of the sale of flavored tobacco products answers the Surgeon’s General call to action in a manner consistent with the objectives of the Tobacco Control Act.

In March 2019, amidst calls to action to combat the unprecedented rise in youth using e-cigarettes, the FDA issued draft guidance aimed at restricting youth access to flavored of e-cigarettes, as well as flavored cigars.¹⁸⁴ The March draft notably exempts menthol-flavored e-cigarettes, and is viewed as “too little too late” by many public health advocates. The agency announced expedited review and potential expansion of the guidance in September 2019, prompted by President Trump’s concern over flavored e-cigarettes.¹⁸⁵ Meanwhile, other strategists oppose virtually any impactful regulation of e-cigarettes, in the hopes that adults will use e-cigarettes to quit smoking and that flavors will aid this transition—hopes that have not borne out.¹⁸⁶



Legal Considerations for Regulating Flavored Tobacco Product Sales

The use of flavors in tobacco products raises compelling public health concerns. In recent years, various regulatory approaches to reduce access to flavored tobacco products have been pioneered locally in New York State, as well as in other jurisdictions.¹⁸⁷ No matter how compelling the public health proposal may be, it must be able to survive a legal challenge in order to achieve meaningful health outcomes. In the case of regulating commercial tobacco products, the probability of a legal challenge is particularly high. Thus, great care must be taken when crafting a flavored tobacco sales restriction.

Lawsuits typical of tobacco industry and its allies date back more than three decades in New York State—to when affected parties successfully challenged the New York Public Health Council’s modest restrictions on smoking in schools, hospitals, banks, and taxis, among other places.¹⁸⁸ When New York City restricted the sale of flavored tobacco products in 2012, tobacco companies immediately filed a lawsuit (the City prevailed and the policy remains in effect).¹⁸⁹ Likewise, a tobacco industry-launched trade association led the (unsuccessful) legal challenge to the City’s 2013 restriction on retailer redemption of tobacco product coupons and discounts.¹⁹⁰ The tobacco industry’s litigiousness is not limited to New York. Fortunately, there is now guidance from the courts to help craft legally defensible tobacco control policies.

The recent epidemic in youth e-cigarette use has brought renewed focus and urgency to the wider problem of flavored tobacco products and the importance of local solutions. Indeed, communities

nationwide are heeding the call to action: Nimble local governments can swiftly enact ordinances restricting the sale of flavored tobacco products that are necessary to help stem this epidemic. The discussion below presents foreseeable legal challenges and strategies to minimize legal vulnerability.

Federal v. State, Local Approaches to Tobacco Control

Congress has bestowed federal, state, and local governments with distinct yet sometimes overlapping authority to regulate tobacco product sales and use in order to benefit public health. Through its passage of the 2009 Tobacco Control Act, Congress provided FDA authority to regulate the manufacturing, marketing, and sale of all tobacco products.¹⁹¹ Prior to passage of this law, tobacco products were largely shielded from regulation.

The Tobacco Control Act tasked FDA with establishing tobacco product standards to control the design and safety of tobacco products.¹⁹² The FDA can demand changes to tobacco products in order to meet safety standards,¹⁹³ but cannot use the agency’s product standards authority to ban entire categories of tobacco products,¹⁹⁴ or drive nicotine yields of a tobacco product down to zero.¹⁹⁵ Additionally, the FDA is required to review and approve all new tobacco products before they can be introduced to the market. Further, FDA is granted exclusive authority to establish labeling requirements, and may restrict tobacco product advertising (subject to review under the First Amendment).

At every turn, the tobacco industry has used litigation to block FDA’s attempts to exercise agency authority granted in the Tobacco Control Act to regulate tobacco products. The tobacco industry’s unremitting legal challenges have worked to delay implementation of federal tobacco control

policies. State and local policies are therefore all the more imperative.

While the Tobacco Control Act carved out specific areas of regulatory authority for the FDA, it also reserved for state and local governments the authority to enact or enforce any law or measure related to tobacco products that is more stringent than federal law, as long as it is not in an area reserved for federal action.¹⁹⁶ The Tobacco Control Act also allows state governments to regulate the sale and distribution of tobacco products;¹⁹⁷ regulate the time, place, manner of advertising and promotion;¹⁹⁸ and tax tobacco products.¹⁹⁹ Additionally, the federal law reiterates that state and local governments have authority to regulate the sale of tobacco products even if the regulation touches on a product standard or other measure in the exclusive domain of the FDA.²⁰⁰

At the local level, the Home Rule Article (IX) of the New York State Constitution generally grants local government authority to pass laws relating to their “property, affairs or government,” so long as the laws are not inconsistent with the State Constitution or state law.²⁰¹ The New York Constitution also empowers local governments to legislate designated subject matters, including the broadly stated “health and well-being of persons or property therein.”²⁰² Finally, local boards of health, which are overseen by the New York State Department of Health, have the authority to issue regulations “necessary and proper for the preservation of life and health.”²⁰³ However, courts have constrained the scope of regulatory action these boards may take.



Erie County Executive Mark Poloncarz signs the Public Health Protection Act of 2018.

Potential Bases for Challenging Local Regulation of the Sale of Flavored Tobacco Products

Federal Preemption

States’ obligation and authority to take measures to protect public health is foundational, and explicitly recognized by the Supreme Court in 1824.²⁰⁴ Yet tobacco companies or retailers sometimes argue that a state or local government is preempted by federal law from restricting sales of flavored tobacco products.

Preemption occurs when a higher level of government restricts, or altogether deprives a lower level of government the ability to regulate with respect to a particular issue. Preemption may be express or implied. Preemption is express when language in a federal statute explicitly bars state or local regulation of an issue.²⁰⁵ In contrast, implied preemption occurs when: (1) there is a direct conflict between the federal law and the state or local law (“conflict preemption” wherein federal law reigns); or (2) Congress has so comprehensively legislated or “occupied the field” of a particular subject that the federal statute intended to leave no room for state or local governments to also legislate in that field (“field preemption” or “subject matter preemption”).²⁰⁶ Courts are often tasked with interpreting whether a statute implies preemption.

The Tobacco Control Act includes three important clauses that outline the scope of federal, state, and local authority to regulate flavored tobacco products. First, the **Preservation Clause** acknowledges and preserves regulatory areas that state and local governments have historically enjoyed, such as sales, distribution, and promotion of tobacco products. This includes the sale and distribution of “finished” tobacco products: the products’ components and parts sealed in final packaging and intended

for consumer use.²⁰⁷ Second, the **Preemption Clause** expressly identifies areas such as tobacco product manufacturing processes that fall within the exclusive domain of the federal government. The result of this clause is that state and local governments shall not regulate tobacco product ingredients and other manufacturing processes.²⁰⁸ Finally, the **Saving Clause** identifies a subset of fields that state and local governments may regulate, even when those areas “relate to” activities identified as off-limits by the Preemption Clause. These “saved” areas permit state and local regulation of tobacco product sales, advertising, and promotions, even if touching on tobacco product standards.²⁰⁹

Read together, these three clauses establish *exclusive federal authority over the manufacturing of tobacco products, but*

provide an equally clear delegation of authority to state and local governments to regulate almost all aspects of tobacco marketing and sales, including the retail environment. Of course, any regulation may only be made within Constitutional limits.

Preemption has formed the basis for Tobacco Industry challenges to several local ordinances restricting the sale of flavored tobacco products. The resulting case law reaffirmed the broad authority of state and local governments to protect the health and safety of citizens by restricting sales of flavored tobacco products.²¹⁰ The paragraphs below review the preemption issues raised in these cases.

Manufacturing Standards

Tobacco industry interests challenged local flavored tobacco ordinances in Providence (2013), New York City (2010), and Chicago

Tobacco Control Act	Provisions Regarding State Authority
Preservation Clause 21 U.S.C. § 387p(a)(1)(2018)	Act does not limit the authority of a State or local government from adopting any law with respect to tobacco products that is in addition to, or more stringent than, requirements established under this chapter. . . “relating to or prohibiting the sale, distribution, possession, exposure to, access to, advertising and promotion of, or use of tobacco products by individuals of any age, information reporting to the State, or measures relating to fire safety standards for tobacco products”
Preemption Clause 21 U.S. Code § 387p(a)(2)(A)	“No State or political division of a State may establish or continue in effect with respect to a tobacco product any requirement which is different from, or in addition to, any requirement under the provisions of this subchapter relating to tobacco product standards, premarket review, adulteration, misbranding, registration, good manufacturing standards, or modified risk tobacco products”
Saving Clause 21 U.S. Code § 387p(a)(2)(B)	Preemption clause “does not apply to requirements relating to the sale, distribution, possession, information reporting to the State, exposure to, access to, the advertising and promotion of, or use of, tobacco products by individuals of any age, or relating to fire safety standards for tobacco products”

(2015) alleging that each city's sales restriction was actually a manufacturing standard in disguise, because the restriction would cause manufacturers to reduce production of flavored tobacco products.²¹¹ In each case, the courts found that while sales regulations may affect the decisions of manufacturers, the ordinances were not manufacturing standards.²¹² A flavored tobacco product relies on a certain combination of ingredients and techniques to achieve its flavor profile, but a sales-focused regulation does not concern itself with the flavor-creation process. Instead, it focuses on whether the finished product can be perceived and categorized as "flavored."²¹³ If a flavor can be perceived from the finished product, the product can be subject to a state or local sales regulation.

In the New York City case, the court stated that a manufacturing standard subject to preemption "must be something more than an incentive or motivator...it must require manufacturers to alter the construction, components, ingredients, additives, constituents, and properties of their products."²¹⁴ A state or local sales regulation that does not interfere with the federal government's authority to determine the ingredients or processes used to make tobacco products is not preempted.²¹⁵

Ban on Category of Product

Smokeless tobacco companies challenged New York City's 2009 ordinance restricting the sale of certain flavored tobacco products to adult-only "tobacco bars."²¹⁶ Because none of the city's tobacco bars chose to sell the restricted flavored tobacco products, the tobacco companies argued the city's restriction constituted a *de facto* ban.²¹⁷ As such, they argued that the ordinance was in conflict with the Tobacco Control Act's express prohibition on FDA banning entire tobacco product categories, such as all cigarettes or cigars.²¹⁸ The tobacco

companies also argued that flavored tobacco products are a distinct tobacco product category and the provision prohibiting FDA from banning entire product categories extends to state and local governments.²¹⁹ The Second Circuit disagreed with the challengers' arguments, reasoning, (1) flavored tobacco is a "niche product, not a broad category of products such as cigarettes or smokeless tobacco...,"²²⁰ and, (2) "while [the Tobacco Control Act] prohibits the FDA from banning entire categories of tobacco products...the Act nowhere extends that prohibition to state and local governments."²²¹ Further, the Second Circuit concluded that New York City's flavored tobacco ordinance was not an impermissible prohibition on the sale of tobacco products, but an allowable sales restriction because it "permits the limited sale of flavored tobacco products within New York City."²²²

Although no court has since been presented with the question of whether a state or local government is preempted from banning the sale of all flavored tobacco products or all tobacco products, the Second Circuit confirms state and local governments' broad authority over tobacco product sales through its analysis of the Tobacco Control Act's triumvirate preservation-preemption-saving provision. The court explains, "the preservation clause expressly preserves localities' traditional power to adopt any 'measure relating to or prohibiting the sale' of tobacco products" and they are only limited by the specific prohibitions in the preemption clause.²²³ "Even then," the court states, "pursuant to the saving clause, local laws that would otherwise fall within the preemption clause are exempted if they constitute 'requirements relating to the sale . . . of . . . tobacco products.'"²²⁴ The court further relayed, "given Congress' explicit decision to preserve for the states a robust role in regulating, and even banning, sales

of tobacco products, we adopt a broad reading of the saving clause and a limited view of the kinds of restrictions that would constitute a ban...²²⁵ The Second Circuit's broad interpretations of the preservation and saving clauses signal that state and local governments have wide latitude to regulate the sale of flavored tobacco products, including prohibiting their sale.

Menthol Products & Cigarettes

By extension of the Second Circuit's analysis, state and local governments may reasonably argue their authority to restrict sales of flavored tobacco products extends to all flavors of tobacco products, including menthol-flavor, and to all types of tobacco products, including cigarettes. For a variety of reasons, New York City and Providence both exempted menthol-flavored tobacco products from their sales ordinances. The courts did not make reference to the menthol exemptions in their analyses, but, absent an explicit exemption, mentholated products fall within the definition of a "flavored" tobacco product. Therefore, a local law restricting or prohibiting the sale of menthol, among other flavors of tobacco products, should prevail.

Despite the Second Circuit's findings that the Tobacco Control Act prohibits only the FDA from banning entire categories of tobacco products, companies may nonetheless challenge a comprehensive state or local flavored tobacco sales regulation on preemption grounds. For instance, a legal challenge to a menthol sales restriction or prohibition may assert that menthol tobacco products account for nearly one-third of the cigarette market,²²⁶ and are, therefore, not a "niche" product. Beyond asserting authority to regulate tobacco product sales, a state or local government may respond to this argument by asserting that the court did not use the word "niche" to refer to the size of the market, but to refer to the fact that flavored

products are a subset of a broader product category. For example, mentholated cigarettes are a subset of the broader product category of cigarettes.

A related argument in opposition to a comprehensive policy that restricts or prohibits the sale of *all* flavored tobacco products, would declare that a sales ban would be antithetical to the Tobacco Control Act's intention of allowing adult access to tobacco products. In particular, a large number of addicted adults might be faced with the discomfort of nicotine withdrawal if the sale of tobacco products was suddenly prohibited.²²⁷ In response, a state or local government may fairly identify the numerous tobacco products that a flavored sales regulation would not prevent adults from accessing, including tobacco products without a characterizing flavor and FDA-authorized nicotine replacement therapies.

In the New York City flavored tobacco case, the court found that the City's ordinance "advance[d] the Tobacco Control Act's objective of reducing the use and harmfulness of tobacco products, especially among young people . . . without trenching on Congress's competing goal of keeping tobacco products generally available to addicted adults."²²⁸ A menthol sales prohibition similarly advances this objective, especially when considering that young people are more likely to use mentholated cigarettes, while adults with tobacco dependency would retain access to regular cigarettes or other nicotine products.²²⁹ The



2017 rally introducing the City of San Francisco's bill prohibiting sales of all flavored tobacco products.

court's finding suggests that potential challenges to a flavored tobacco product sales restriction based on Congress' intent to preempt state and local action are not likely to succeed.

As of September 2019, numerous local governments in California, Colorado, Massachusetts, and New York have enacted comprehensive prohibitions on the sale of flavored tobacco products, including menthol flavor.²³⁰

Packaging and Labeling

Another potential preemption issue that has not been litigated in the context of restrictions on the sale of flavored tobacco products concerns the exclusive federal authority over cigarette packaging and labeling. Enacted in 1966, the Federal Cigarette Labeling and Advertising Act ("FCLAA") gave the federal government exclusive regulatory authority over the advertising and promotion of cigarettes, including cigarette packaging.²³¹

In the event that a flavored tobacco sales restriction relies on product packaging to identify products as flavored, tobacco industry interests may argue that mere reference to packaging renders the restriction preempted by FCLAA. However, so long as the language of the regulation is limited to regulating the sale of flavored tobacco products, and not the packaging of tobacco products, it would likely survive a preemption challenge based on FCLAA.

In sum, a carefully crafted regulation that restricts or even bans the sale of flavored tobacco products, including those with menthol and mint flavor, can likely survive a legal challenge based on federal preemption.

State Preemption

Development of public health policy in New York is primarily handled at the local level. Local governments that seek to promote

public health by restricting the sale of flavored tobacco products may do so through a legislative process or a regulatory process. In New York, local boards of health²³² have authority to undertake rulemaking "necessary and proper for the preservation of life and health."²³³ New York courts, however, have narrowly interpreted the regulatory authority of boards of health, and have rejected agency regulations that are not carefully constructed to remain within the bounds of a legislative directive.

New York courts employ a four-factor analysis to determine whether a regulation passed by a local board of health exceeded the authority delegated to it by the State Legislature.²³⁴ New York's highest court explained the four factors in striking down the 1987 health regulations promulgated by the Public Health Council restricting smoking in public spaces. Smoke-free air regulations were politically fraught at the time, and the court found that the Council had exceeded its state-granted authority in implementing them.²³⁵

First, courts examine whether the local board of health improperly considered economic or social impacts when crafting the regulation—this is traditionally a legislative function, and boards of health are constrained to health considerations.²³⁶ The Council's 1987 regulation of public smoking included exceptions, and it appeared to the Court that the Council impermissibly considered economic and social factors in developing the policy and its exceptions. More recently, the New York Court of Appeals rejected a 2013 New York City health regulation that sought to cap the portion size of some sugary drinks.²³⁷ As in the smoke-free air decisions, the court found that in analyzing a local regulation, "focus must be on whether the challenged regulation attempts to resolve difficult social problems in this manner. That task, policymaking, is reserved to the legislative

branch.”²³⁸ These court decisions suggest that a board of health drafting a restriction on the sale of flavored tobacco products will need to ensure that the regulatory language and findings are free of any social or economic considerations, and only address the public health rationale for the proposal.

Second, New York courts weigh whether the legislature has previously considered the subject of the board of health regulation, particularly where previous legislation was contentious and failed to become law.²³⁹ This was the case in the 1987 regulations restricting smoking in public spaces. There, the court voiding the regulations noted that the New York State Legislature recently had struggled with and declined to pass a smoke-free law.²⁴⁰ This reasoning suggests that a local board of health considering a flavored tobacco regulation might be vulnerable to a similar challenge if the State Legislature recently debated a proposal of the same nature.

Third, courts weigh whether the local board of health is addressing existing regulatory gaps, or creating “its own comprehensive set of rules without benefit of legislative guidance.”²⁴¹ The court’s analysis of the 1987 smoke-free case suggests that a tobacco regulation must be tailored to fill gaps in existing legislative policymaking.²⁴² Otherwise, a local health authority may be vulnerable to a legal challenge by setting out a comprehensive regulatory scheme absent legislative guidance.

Finally, the courts evaluate whether special technical expertise in the field of health was involved in developing the regulation.²⁴³ The legal decisions indicate that a regulation will be on stronger ground when demonstrating that expertise was utilized in the development of the policy. Relevant expertise may be fairly demonstrated in the context of a flavor product sales ordinance where a local board of health is tasked with

enforcement of sales restrictions on flavored tobacco products.

In order to minimize the likelihood of a successful legal challenge, a local board of health seeking to regulate the sale of flavored tobacco products can carefully craft its regulation in light of these four factors. Accordingly, these New York court rulings may make the legislative process a more feasible process to enact new, comprehensive tobacco controls.

Commerce Clause

The Commerce Clause of Article I of the U.S.

Constitution grants Congress the exclusive power to, “regulate commerce with foreign nations, and among the several states . .

.”²⁴⁴ Implied in this

provision is what is known as the “dormant Commerce Clause.” It prohibits a state from passing a law that discriminates against people or products outside of that state by favoring people or products located within the state. Historically, however, the dormant Commerce Clause has been used to challenge state and local health laws.²⁴⁵

In 2009, smokeless tobacco companies argued that New York City’s ordinance restricting the sale of flavored tobacco products to specialty tobacco retailers violated the Commerce Clause.²⁴⁶ The plaintiff tobacco companies pointed to congressional findings in the Tobacco Control Act showing that the sale and distribution of tobacco products substantially affected interstate commerce, and contended that the City’s sales restriction excessively burdened out-of-state tobacco manufacturers and distributors intending to sell their flavored tobacco products in the



city.²⁴⁷ The City’s ordinance was upheld without addressing the companies’ dormant Commerce Clause claim.²⁴⁸ Accordingly, the legal question remains unresolved.

A court might find a dormant Commerce Clause issue if a flavored tobacco restriction were to unfairly burden out-of-state tobacco industry interests and create a business advantage for in-state businesses. A restriction on the sale of flavored tobacco products that does not discriminate between in-state and out-of-state entities—but simply limits the sale of certain products—would be unlikely to result in a violation of the dormant Commerce Clause.

Equal Protection

The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution requires states to similarly treat persons that are similarly situated.²⁴⁹ This is intended to prevent government discrimination based upon distinctions irrelevant to a legitimate government purpose. The U.S. Supreme Court has consistently extended this protection to corporations.²⁵⁰

Tobacco retailers have relied on equal protection claims as a basis for challenging local laws that restrict tobacco product sales, including sales of flavored products, by a subset of retailers. In 2010, the Walgreens pharmacy chain raised an Equal Protection claim to challenge a San Francisco ordinance prohibiting tobacco sales by most (but not all) pharmacy retailers.²⁵¹ The ordinance exempted (and thus allowed tobacco sales by) supermarkets and “big box” stores that also featured a licensed pharmacy within the larger store.²⁵² As part of the preamble to the ordinance, San Francisco legislators expressed the legitimate government interests of reducing the adverse health consequences of tobacco use and dependence and eliminating the

contradictory messaging posed by a health-based entity selling and marketing a deadly, addictive product.²⁵³

Walgreens argued the ordinance violated the corporation’s right to Equal Protection under the law by differently treating similar businesses.²⁵⁴ The California Court of Appeals preliminarily agreed with Walgreens, finding that San Francisco failed to meet its legal burden of showing a “rational basis” for the differential treatment of pharmacy retailers in connection to the government’s goal of reducing tobacco use.²⁵⁵ To remedy this, San Francisco amended its ordinance and extended the tobacco sales prohibition to *all* stores with a pharmacy, including the “big box” stores. The amended ordinance was not challenged in court and remains in place.

Equal Protection claims must be also considered in the context of a restriction on the sale of flavored tobacco products. Where the proposed restriction applies to some retailers but not others with similar characteristics, the ordinance may violate Equal Protection if it does not clearly express how that distinction is related to the government’s interest. For example, a sales regulation that does not apply to adult-only retailers is likely defensible when the government has identified an interest in reducing youth access to and use of tobacco products. Conversely, defending an Equal Protection challenge for a restriction applied to convenience stores selling tobacco products, but not to gas stations selling tobacco products might be more difficult, and require more explication on how the distinction is rationally related to a legitimate government interest.

These arguments are playing out in Massachusetts state court at the time of this writing. In June 2019, convenience store chain Cumberland Farms challenged regulations of several Massachusetts

municipalities that restrict the sale of flavored tobacco products to smoking bars and/or adult-only “retail tobacco stores.” These venues are defined as primarily selling tobacco products and paraphernalia, and prohibiting entry to persons under the age of 21. Cumberland Farms argues that the regulations’ different treatment of convenience stores and tobacco specialty stores harms Cumberland Farms (which is not permitted to sell flavored tobacco products while other retailers may) and does not further the objectives of the local regulations.

The express purpose of the regulations is to curb underage use of vapor products and flavored tobacco products, yet Cumberland Farms conflates this with an objective of preventing youth access to these products. Cumberland Farms asserts that convenience stores, in general, have a higher compliance rate with youth access laws than specialty tobacco stores—and therefore allowing only these specialty stores to sell the prohibited products does not further the municipalities’ objective, and hence violates Equal Protection guarantees.

These arguments should not prevail, as they do not reflect an understanding of the regulations’ purpose nor how the sales restriction furthers that purpose. Namely, Massachusetts municipalities aim to reduce youth tobacco use, an objective achieved in part through reducing the availability of these products, along with youth exposure to the marketing for them.

Free Speech

The First Amendment to the U.S. Constitution restricts government from enacting laws “abridging freedom of speech.”²⁵⁶ Speech applies to many forms of expression, and can include “commercial speech” such as advertising commercial products (with some restrictions).²⁵⁷ Thus,

corporations also enjoy some First Amendment protection.

Tobacco companies or retailers may argue that a restriction on the sale of flavored tobacco products implicates speech when the regulation relies on tobacco company statements about the product’s flavor as evidence that the product satisfies the definition of “flavored.” For example, a product marketed as “grape flavored” is deemed to be in fact flavored, and therefore its sale is restricted. The challenge rests on the premise that the regulation hampers manufacturer/retailer communications with prospective customers, thereby limiting their speech in violation of the First Amendment.

“[Companies] are free to describe their products as having or producing a characterizing flavor; they are, however, precluded from selling flavored tobacco products in Providence.”

Judge Lisi, District Court of RI, 2013

Tobacco companies and retailers made this very argument in their 2012 challenge to a Providence, RI ordinance restricting the sale of flavored tobacco products to adult-only specialty tobacco businesses. The federal trial court in Rhode Island rejected this argument, concluding the ordinance merely restricts economic activity—the sale of flavored tobacco products—rather than commercial speech.²⁵⁸ In upholding Providence’s flavor ordinance, the court further noted that “[p]laintiffs are free to describe their products as having or producing a characterizing flavor; they are, however, precluded from selling flavored tobacco products in Providence (with the exception of tobacco bars).”²⁵⁹ The First Circuit Court of Appeals concurred and upheld Providence’s restriction on the sale of flavored tobacco products.²⁶⁰

Notably, New York City had earlier enacted an ordinance similarly restricting the sale of

flavored tobacco products, yet the suing tobacco companies did not challenge the City's ordinance on the same grounds. Companies did, however, allege a First Amendment and free speech violation of the New York State Constitution in their 2013 challenge to the City's ordinance restricting stores from redeeming tobacco manufacturer price discounts and price promotions.²⁶¹ In that case, companies argued the ordinance impeded their ability to communicate price information to their customers.²⁶² The court disagreed, relying on the First Circuit's analysis in the Providence case, and ruled that the ordinance merely regulated an economic transaction, not expression.²⁶³ At the time of writing, only the First Circuit has explicitly ruled on First Amendment challenge to a flavor restriction, and has rejected the challenge.

While these decisions represent a commonsense approach to the question of whether free expression is limited by a sales restriction, they highlight the importance of carefully crafting a flavored tobacco ordinance to restrict only product sales, and not the advertising, promotion, or marketing of flavored tobacco products.²⁶⁴ For instance, it may be problematic under the First Amendment for local governments to directly regulate words, images, and other indicia of product flavoring. These additional provisions could trigger a legal challenge based on the First Amendment.

Due Process

The right to fair treatment under the law, with opportunity to be meaningfully heard before losing property, and being free from arbitrary government action, are embedded in our Constitution. The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution guarantees procedural safeguards before the government may deprive a person (including a business) of

liberty or property interests.²⁶⁵ This is known as procedural due process. Specifically, procedural due process requires that affected persons or businesses are provided sufficient information about a law and that they have an opportunity to protect their liberty or property interest before a court.²⁶⁶ In two legal cases involving flavored tobacco products, tobacco industry interests raised procedural due process claims to challenge local laws restricting the sale of flavored tobacco products. One case challenged the language of the law on its face, and the other case challenged how the law was being enforced.

First, in the Providence case, tobacco retailers challenged language in Providence's flavored tobacco sales ordinance as "unconstitutionally vague." Plaintiffs claimed that the terms "tastes," "aromas," and "concepts" within the ordinance's definition of "characterizing flavor" were not specific enough, thereby encompassing an unclear, "non-exhaustive list" of flavored tobacco products subject to the restriction.²⁶⁷ The court rejected this argument, noting that the language was closely modeled after a provision of the Tobacco Control Act, which included some specific examples of flavors.²⁶⁸ The court concluded that the language was not unconstitutionally vague simply because the definition included a "non-exhaustive list" of examples.²⁶⁹

Second, in *Cumberland Farms, Inc. vs. Town of Yarmouth Board of Health*, Cumberland Farms (a tobacco retailer) challenged how the Town of Yarmouth, Massachusetts enforced its flavored tobacco sales regulation. The challenge arose after a Yarmouth Health Department inspector found the retailer selling flavored tobacco products in violation of Yarmouth's regulation.²⁷⁰ The retailer argued that the Town failed to independently and sufficiently inspect and determine the product was

flavored, and therefore not permitted for sale.²⁷¹ Instead, the Town relied on a list developed by a third party (Massachusetts Association of Health Boards (“MAHB”)) to make its determination.²⁷² In a 2018 decision, the court rejected this argument, noting that the MAHB list was only one piece of evidence used by Yarmouth in making its flavored product determination.²⁷³ The record showed “substantial evidence” that Yarmouth also relied on the perceptions and testimony of its inspectors and members at the Department of Health, testimony of other expert witnesses, and examination of third party advertisements from online tobacco retailers.²⁷⁴

Although the procedural due process challenges were rejected in each of these instances, they signal the need for caution as state and local governments craft and enforce their ordinances. Identifying clear evidentiary processes for flavored product determinations and legislative findings of the benefits of utilizing such processes (e.g., cost, consistency) in the ordinance can help protect the implementing government from a procedural due process challenge. Articulating a clear appeals process that provides opportunity to contest a finding that a tobacco product falls under the restriction can further strengthen the legal standing of the policy.

“Taking” Property

Most people know a little bit about the Fifth Amendment to the U.S. Constitution. In a legal proceeding, a person has the right to “take the Fifth” Amendment and decline to give self-incriminating testimony. There is another provision of the Fifth Amendment known as the “Takings Clause,” which protects a person’s private property from being taken by the government for public use without “just compensation” (generally assessed as fair market value).²⁷⁵ Some

state constitutions, including New York State’s,²⁷⁶ have their own takings clauses.

Typically, these protections come into play in the context of eminent domain, where government seizes land for public purposes such as creating a dam or building a railroad.²⁷⁷ While land is usually the type of property protected by the Takings Clause, intellectual property such as copyrights and trade secrets may be included as property that cannot be taken by government without fair compensation.²⁷⁸

Another type of “taking” argument, and one more likely raised in the context of a flavored tobacco product restriction, is a “regulatory taking.” This can occur where a government regulation denies the owner of “all economically viable use” of property.²⁷⁹ While tobacco companies or retailers may have difficulty showing that a flavored tobacco sales restriction has deprived them of “all economically viable use” of their business, they may argue that the restriction amounts to a *partial* regulatory taking.



The rule around a partial regulatory taking argument is that the government must fairly compensate the property owner if the regulation “goes too far.”²⁸⁰ The question in these cases is: how far is “too far”? In a (literally!) landmark 1978 case, New York City designated Grand Central Station as a landmark, resulting in a restriction of the owners’ air rights over the station. The U.S. Supreme Court rejected the argument that the designation was a partial regulatory taking.²⁸¹ The Court held that, despite the restriction, the law allowed the owners reasonable use of the property by considering three factors: (1) the economic impact of the regulation; (2) the impact of

the regulation on the owners' investment-backed expectations; and (3) the character of the action, e.g., whether it is a physical invasion of property or "public program . . . to promote the common good."²⁸²

To date, tobacco control challenges in this vein have arisen in the context of clean indoor air laws that restricted smoking inside businesses such as restaurants and bars. None of the "takings" claims was successful. In all these cases, courts ruled that loss in profits alone is not a taking.²⁸³

This rationale may be applied to a retailer that can no longer sell flavored tobacco products due to a government restriction on selling those products. Under such a policy, the business owner may continue to offer for sale unrestricted products, and thus, is conceivably able to maintain economically viable uses of the business. In addition, business owners could not reasonably claim their investment-backed expectations would be drastically affected by a sales restriction, given that the tobacco products and tobacco outlets are subject to regulatory oversight. Finally, if the flavored regulation were crafted to benefit public health, it would promote the common good. Thus, a challenge to a flavored tobacco sales policy based on a full or partial regulatory takings argument is unlikely to prevail.

Conclusion

Flavors are an increasingly important driver of tobacco use. Thus, policies prohibiting the sale of flavored tobacco products are increasingly critical. Prohibiting the sale of flavored tobacco products will advance the State's objectives of preventing initiation of tobacco use, reducing overall tobacco use and promoting cessation, and narrowing the widening disparities in tobacco use. While tobacco companies and their allies rely on litigation as a strategy for deterring legally sound policy interventions, local

governments have a rich record of success in defending their thoughtful policies.

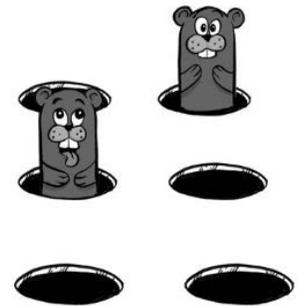
Drafting Considerations and a Model Ordinance

Preventing Whac-A-Mole: Comprehensive Retail Policies

Tobacco companies are adept at skirting laws and regulations implemented at all levels of government. Accordingly, a comprehensive policy best maximizes the public health benefits of a flavored tobacco products sales regulation. In other words, an effective local ordinance will address all categories of tobacco products, as well as paraphernalia and component parts

intended to add flavor to tobacco products.

Additionally, an effective policy will not exempt any category of retailer (e.g., no grand-parenting).



Tobacco companies invariably exploit loopholes in order to undermine incomplete policies and maintain addicted users. History provides numerous examples of this, including recent local policies restricting the sale of flavored tobacco products. This report presents this recent Tobacco Industry cunning in the above section, "Restricting Sales of Flavored Tobacco Is Effective." Additional tobacco control policies offer further lessons regarding this risk:

- In response to the 1970 federal broadcast ban on cigarette advertising, tobacco companies added weight to their products and marketed them as filtered cigars. Companies were able to advertise these reinvented products on TV and avoid cigarette excise tax.²⁸⁴

- In response to the Tobacco Control Act prohibition on flavored cigarettes, tobacco companies manipulated their cigarettes to qualify as little cigars.²⁸⁵
- In response to the 2009 federal tax increase on roll-your-own (loose cigarette) tobacco, companies reclassified their “RYO” tobacco as pipe tobacco to exploit the lower tax rate.²⁸⁶
- Tobacco companies increased production and marketing of concept-flavored OTP following local restrictions on flavored OTP and federal restriction on flavored cigarettes.²⁸⁷
- To circumvent Duluth, MN’s restriction of flavored tobacco sales to designated smoke-shops, some convenience stores are creating autonomous smoke shops within their stores.²⁸⁸

The Model Ordinance: Restricts Sale of All Flavored Products

The Public Health and Tobacco Policy Center has created a [model policy](#) that prohibits the sale of flavored tobacco products. The model ordinance covers all categories of tobacco and nicotine products, including combustible products like cigarettes and cigars of all classes, hookah, and loose tobacco; wet and dry smokeless tobacco products like snuff, chew, and snus; and all vapor products.

Notably, the model also covers flavored iterations of tobacco-free and nicotine-free products that are typically regulated alongside tobacco products, and therefore extends to herbal cigarettes, herbal shisha,



and non-nicotine e-liquids. These products are difficult to distinguish from their tobacco-containing counterparts, and challenge enforcement of a flavored tobacco sales restriction. Further, sales, marketing, and use of lookalike non-tobacco products pose independent health concerns and re-normalize tobacco use.

Importantly, the model policy also regulates tobacco product paraphernalia (aligning the model with New York State’s primary tobacco control, ATUPA).²⁸⁹ The model policy requires a license to sell smoking paraphernalia and prohibits the sale of paraphernalia that is itself flavored, or is likely used to add flavor to a tobacco product. The model policy defines these as a “component and part” of a tobacco products. These include products such as flavor capsules, flavor cards, and flavored rolling papers developed by tobacco companies to circumvent local regulations.

The model ordinance regulates the sale of tobacco products with a discernable flavor other than tobacco flavor. The sales regulation therefore extends to menthol-flavored tobacco products, which is the most commonly marketed flavor for tobacco products. A flavor does not have to be identifiable for the product to fit the definition of “flavored product.” Rather a product or its emission with a smell or taste different from the smell or taste of tobacco satisfies the definition and thereby falls under the policy.

Accordingly, the model policy broadly defines “Flavored Product” to cover sales of “concept-flavored” products. As discussed in the report, products with concept flavors include products marketed without explicit flavor names or images, yet impart a flavor different from tobacco. Enforcing a sales restriction against concept-flavored products may require additional considerations and regulatory procedures. The Public Health and Tobacco Policy Center can assist

jurisdictions with identifying and resolving enforcement considerations.

The Model Ordinance: Restricts All Retailers

The model ordinance is drafted to prohibit all retail sales of flavored tobacco products in the implementing community. While pioneering jurisdictions exempted adult-only retailers or specialty shops, evidence and policy momentum continue to favor a comprehensive approach.²⁹⁰

The Model Ordinance: Implemented through Retail Licensing

The model ordinance regulates the sale of flavored tobacco products within the framework of a local license requirement. Requiring a local license to sell tobacco products transfers agency from tobacco

companies back to the community. Requiring stores to obtain a local license to sell tobacco products—whether flavored or unflavored—allows a community to identify and survey these stores, and to efficiently enforce all retail tobacco controls, including the flavored tobacco sales regulation.

The potential to lose a local license creates a strong incentive for retailers comply with tobacco controls. For example, New York City suspended or revoked 36 tobacco retail licenses between 2010–2015 for violation of its flavor sales ordinance.²⁹¹ Tobacco retail license fees cover the costs of administering the local license and enforcing the flavored tobacco product sales regulation that is a condition of the local license. To learn more about tobacco retail licensing, visit our technical report, "[Tobacco Retail Licensing: Promoting Health Through Local Sales Regulations](#)."

¹ FEDERAL TRADE COMM'N, Cigarette Report for 2017 (2019).

² Cristine D. Delnevo, Daniel P. Giovenco & Erin J. Miller Lo, *Changes in the Mass-merchandise Cigar Market since the Tobacco Control Act*, 3 TOB. REGUL. SCI. S8–S16 (2017) [hereinafter, "Delnevo, Changes in Cigar Market"] (finding more than half of cigars sold in 2015 were flavored); Cristine D. Delnevo et al., *Examining market trends in the United States smokeless tobacco use: 2005–2011*, 23 TOB. CONTROL 107–112 (2014) (finding flavored products comprised at least 54% of moist snuff market from 2005–2011) [hereinafter, "Delnevo, Examining market trends"]; Kristy L. Marynak et al., *Sales of Nicotine-Containing Electronic Cigarette Products: United States, 2015*, 107 AM. J. PUBLIC HEALTH 702–705 (2017) (finding flavored e-cigarettes comprise half of sales within major U.S. retail stores in 2015).

³ Delnevo, *Changes in Cigar Market*, *supra* note 2; see also Doris G. Gammon et al., *National and state patterns of concept-flavoured cigar sales, USA, 2012–2016*, 28 TOB. CONTROL 394–400 (2019) ("Cigar sales increased by 29% during 2012–2016, driven by a 78% increase in cigarillo sales.").

⁴ Delnevo, *Examining market trends*, *supra* note 2.

⁵ FEDERAL TRADE COMM'N, Cigarette Report for 2017 (2019).

⁶ Nicole M. Kuiper et al., *Trends in Sales of Flavored and Menthol Tobacco Products in the United States During 2011–2015*, 20 NICOTINE TOB. RES. 698–706, Table 3 (2018).

⁷ Jidong Huang et al., *Vaping versus JUULing: how the extraordinary growth and marketing of JUUL transformed the US retail e-cigarette market*, 28 TOB. CONTROL 146–151 (2019).

⁸ Kuiper et al., *supra* note 6.

⁹ *Ibid.*

¹⁰ M.B. Harrell et al., *Flavored e-cigarette use: Characterizing youth, young adult, and adult users*, 5 PREV. MED. REP. 33–40 (2016).

¹¹ Kuiper et al., *supra* note 6.

- ¹² Andrea C. Villanti et al., *Flavored Tobacco Product Use Among U.S. Young Adults*, 44 AM. J. PREV. MED. 388–391 (2013); Victoria L. Owens, Trung Ha & Julia N. Soulakova, *Widespread use of flavored e-cigarettes and hookah tobacco in the United States*, 14 PREV. MED. REP. (2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6441788/> (last visited May 3, 2019); Sarah M. Klein et al., *Use of Flavored Cigarettes Among Older Adolescent and Adult Smokers: United States, 2004–2005*, 10 NICOTINE TOB. RES. 1209–1214 (2008); Stephen Soldz & Elizabeth Dorsey, *Youth attitudes and beliefs toward alternative tobacco products: cigars, bidis, and kreteks*, 32 HEALTH EDUC. BEHAV. OFF. PUBL. SOC. PUBLIC HEALTH EDUC. 549–566 (2005).
- ¹³ Claude E. Teague, *Research Planning Memorandum On Some Thoughts About New Brands Of Cigarettes For The Youth Market*, TRUTH INDUSTRY DOCUMENTS Bates No. 502987357-502987368 (Feb.2 1973), <https://www.industrydocuments.ucsf.edu/docs/ylnx0096> at 502987358 (explaining that smoking’s psychological benefits influence the pre-smoker to try smoking and provide motivation during the “learning” period to keep the “learner” going).
- ¹⁴ Andrea C. Villanti et al., *Flavored Tobacco Product Use in Youth and Adults: Findings From the First Wave of the PATH Study (2013–2014)*, 53 AM. J. PREV. MED. 139–151, 139 (2017) (observing 81% of youth and 86% of young adults who had ever used tobacco reported that their first product was flavored); Bridget K. Ambrose et al., *Flavored Tobacco Product Use Among US Youth Aged 12-17 Years, 2013-2014*, 314 JAMA 1871–1873 (2015).
- ¹⁵ Villanti et al., *supra* note 14; Danielle M. Smith et al., *Association between use of flavoured tobacco products and quit behaviours: findings from a cross-sectional survey of US adult tobacco users*, 25 TOB. CONTROL ii73–ii80 (2016).
- ¹⁶ Hongying Dai, *Changes in Flavored Tobacco Product Use Among Current Youth Tobacco Users in the United States, 2014-2017*, JAMA PEDIATR. (2019), (reporting 63.6% of youth current tobacco users reported use of a flavored tobacco product in 2017); RTI, Jessica Pepper, James Nonnemaker, and Kimberly Watson, *Flavored and Menthol Tobacco Use Among New York Youth (March 2018)* (on file with author) (finding 60.8% of NY middle school smokers and 51.4% of NY high school smokers usually smoke menthols).
- ¹⁷ U.S. DEP’T HEALTH & HUMAN SERVS., *E-CIGARETTE USE AMONG YOUTH AND YOUNG ADULTS: A REPORT OF THE SURGEON GENERAL 11* (2016), https://e-cigarettes.surgeongeneral.gov/documents/2016_SGR_Full_Report_508.pdf [hereinafter 2016 SURGEON GENERAL REPORT]; U.S. DEP’T OF HEALTH AND HUMAN SERVICES, *THE HEALTH CONSEQUENCES OF SMOKING--50 YEARS OF PROGRESS: A REPORT OF THE SURGEON GENERAL 782* (2014) [hereinafter 2014 SURGEON GENERAL REPORT] (finding “smokeless tobacco products were designed with...flavor characteristics targeted...for initiation by youth” and that menthol in cigarettes contributes to smoking initiation); U.S. DEP’T OF HEALTH AND HUMAN SERVICES, *PREVENTING TOBACCO USE AMONG YOUTH AND YOUNG ADULTS: A REPORT OF THE SURGEON GENERAL 541* (2012) [hereinafter 2012 SURGEON GENERAL REPORT] (finding tobacco companies historically manipulated product design, including by adding flavors, to attract new customers and promote a graduation strategy to unflavored cigarettes, “a practice which the industry has continued”).
- ¹⁸ Karen A. Cullen, *Notes from the Field: Use of Electronic Cigarettes and Any Tobacco Product Among Middle and High School Students — United States, 2011–2018*, 67 MMWR MORB. MORTAL. WKLY. REP. (2018), <https://www.cdc.gov/mmwr/volumes/67/wr/mm6745a5.htm> (last visited Aug 6, 2019).
- ¹⁹ NAT’L INST. ON DRUG ABUSE, “Teens using vaping devices in record numbers,” December 17, 2018, *available at* <https://www.drugabuse.gov/news-events/news-releases/2018/12/teens-using-vaping-devices-in-record-numbers> (last visited Aug 6, 2019).
- ²⁰ *Ibid.*
- ²¹ N.Y. DEP’T OF HEALTH, BUREAU OF TOBACCO CONTROL, *Electronic Cigarette Use by Youth Increased 160% Between 2014 and 2018*, Stashot Vol. 12, No. 1 (January 2019) *available at* https://www.health.ny.gov/prevention/tobacco_control/reports/statshots/volume12/n1_electronic_sig_use_increase.pdf (last visited Aug 6, 2019); see N.Y. OFFICE OF THE GOVERNOR, *Governor Cuomo Takes Aggressive Action to Protect New Yorkers from Harmful and Addictive Vaping Products Following Rise in Vaping-Associated Illnesses Nationwide*, 1 (September 9, 2019), <https://www.governor.ny.gov/news/governor-cuomo-takes-aggressive-action-protect-new-yorkers-harmful-and-addictive-vaping> (last visited Sept 17, 2019) (reporting 40% of high school seniors are current e-cigarette users in 2019).
- ²² *Ibid.*
- ²³ *Ibid.*
- ²⁴ Tushar Singh et al., *Tobacco Use among Middle and High School Students — United States, 2011–2015*, 65 MORB. MORTAL. WKLY. REP. 361–367 (2016).
- ²⁵ Limin X. Clegg et al., *Impact of socioeconomic status on cancer incidence and stage at diagnosis: selected findings from the surveillance, epidemiology, and end results: National Longitudinal Mortality Study*, 20 CANCER CAUSES CONTROL 417–435 (2009); Elizabeth Ward et al., *Cancer disparities by race/ethnicity and socioeconomic status*, 54 CA. CANCER J. CLIN. 78–93 (2004); Gopal K. Singh et al., *Socioeconomic, Rural-Urban, and Racial Inequalities in US Cancer Mortality: Part I-All Cancers and Lung Cancer and Part II-Colorectal, Prostate, Breast, and Cervical Cancers*, 2011 J. CANCER EPIDEMIOL. 107497 (2011).
- ²⁶ N.Y. DEP’T OF HEALTH, BRFSS Brief Number 1704, “Cigarette Smoking: New York State Adults, 2015,” *available at* https://www.health.ny.gov/statistics/brfss/reports/docs/brfssbrief_smoking_1704.pdf (last visited Aug 8, 2019).
- ²⁷ Stephan Risi and Robert N. Proctor, “Focus on the Facts to Hide the Truth? Using Algorithms to Explore Big Tobacco’s Courtroom Tropes and Taboos,” (2019), on file with author.
- ²⁸ Michèle G. Bonhomme et al., *Flavoured non-cigarette tobacco product use among US adults: 2013–2014*, 25 TOB. CONTROL ii4–ii13, ii8 (2016).

- ²⁹ Brian A. King, Shanta R. Dube & Michael A. Tynan, *Flavored Cigar Smoking Among U.S. Adults: Findings From the 2009–2010 National Adult Tobacco Survey*, 15 NICOTINE TOB. RES. 608–614 (2013).
- ³⁰ *Ibid.*
- ³¹ Amy L. Nyman et al., *Little Cigars and Cigarillos: Users, Perceptions, and Reasons for Use*, 2 TOB. REGUL. SCI. 239–251, 6 (2016).
- ³² *Id.* at 6.
- ³³ S. M. Farley et al., *Teen Use of Flavored Tobacco Products in New York City*, 16 NICOTINE TOB. RES. 1518–1521, 1518, 1519 (2014).
- ³⁴ Villanti et al., *supra* note 12 at 390.
- ³⁵ Andrea C. Villanti et al., *Changes in the prevalence and correlates of menthol cigarette use in the USA, 2004–2014*, 25 TOB. CONTROL ii14–ii20, ii15 (2016).
- ³⁶ See *U.S. v. Philip Morris, USA, Inc., et al.*, 449 F. Supp. 1 (D.D.C. 2006) (finding the major tobacco manufacturers liable for a civil racketeering enterprise that conspired to defraud its customers to consume dangerous, addictive products while hiding these facts from them).
- ³⁷ Carrie M. Carpenter et al., *New Cigarette Brands With Flavors That Appeal To Youth: Tobacco Marketing Strategies*, 24 HEALTH AFF. (MILLWOOD) 1601–1610 (2005).
- ³⁸ M. Jane Lewis & Olivia Wackowski, *Dealing With an Innovative Industry: A Look at Flavored Cigarettes Promoted by Mainstream Brands*, 96 AM. J. PUBLIC HEALTH 244–251 (2006).
- ³⁹ E.g. Jennifer M. Kreslake et al., *Tobacco industry control of menthol in cigarettes and targeting of adolescents and young adults*, 98 AM. J. PUBLIC HEALTH 1685–1692 (2008) (“the tobacco industry attracted new smokers by promoting cigarettes with lower menthol content, which were popular with adolescents and young adults, and provided cigarettes with higher menthol content to long-term smokers”).
- ⁴⁰ E.g. Pamela G. Hollie, *Segmented Cigarette Market*, The New York Times, March 23, 1985, <https://www.nytimes.com/1985/03/23/business/segmented-cigarette-market.html> (last visited Dec 20, 2018) (“Rio [a menthol flavored cigarette], which has a tropical image, is expected to appeal primarily to blacks, who are the principal smokers of menthol cigarettes.”).
- ⁴¹ Ganna Kostygina, Stanton A. Glantz & Pamela M. Ling, *Tobacco industry use of flavours to recruit new users of little cigars and cigarillos*, 25 TOB. CONTROL 66–74 (2016); Carpenter et al., *supra* note 37; Janine Paynter & Richard Edwards, *The impact of tobacco promotion at the point of sale: A systematic review*, 11 NICOTINE TOB. RES. 25–35 (2009).
- ⁴² TOBACCO PRODUCTS SCIENTIFIC ADVISORY COMMITTEE, *Menthol Cigarettes and Public Health: Review of the Scientific Evidence and Recommendations* 23 (2011), <https://wayback.archive-it.org/7993/20170405201731/https://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/TobaccoProductsScientificAdvisoryCommittee/UCM269697.pdf> (finding menthol in cigarettes masks the harshness of tobacco smoke); Joel Nitzkin, Farsalinos Konstantinos & Siegel Michael, *More on Hidden Formaldehyde in E-Cigarette Aerosols*, 372 N. ENGL. J. MED. 1575–1577 (2015) (finding flavors in e-cigarette liquids mask the bad taste of formaldehyde); Ganna Kostygina & Pamela M. Ling, *Tobacco industry use of flavourings to promote smokeless tobacco products*, 25 TOB. CONTROL ii40–ii49 (2016) (concluding flavors in smokeless tobacco products mute the harsh taste of tobacco and alter the product pH); Andrew J. Oliver et al., *Flavored and nonflavored smokeless tobacco products: rate, pattern of use, and effects*, 15 NICOTINE TOB. RES. 88–92 (2013) (finding flavors make smokeless tobacco more palatable).
- ⁴³ Carpenter et al., *supra* note 37 (citing Philip Morris, *New Flavors Qualitative Research Insights*, Truth Industry Documents Bates No. 2023163698-2023163710 [Oct. 1992], <https://www.industrydocuments.ucsf.edu/docs/pnhy0117> at 2023163703).
- ⁴⁴ Nyman et al., *supra* note 31.
- ⁴⁵ Shari P. Feirman et al., *Flavored Tobacco Products in the United States: A Systematic Review Assessing Use and Attitudes*, 18 NICOTINE TOB. RES. 739–749 (2016); see Oliver et al., *supra* note 42 at 90–91 (finding flavor, especially mint, in smokeless tobacco may contribute to continued use, but that flavored smokeless tobacco products do not lead to greater dependence or toxicant exposure); see also Satomi Odani, Brian Armour & Israel T. Agaku, *Flavored tobacco product use and its association with indicators of tobacco dependence among U.S. adults, 2014-2015*, NICOTINE TOB. RES. OFF. J. SOC. RES. NICOTINE TOB. (2019) (finding an association between flavored product use and increased tobacco dependence).
- ⁴⁶ Kostygina and Ling, *supra* note 42; CAMPAIGN FOR TOBACCO-FREE KIDS, *DESIGNED FOR ADDICTION: HOW THE TOBACCO INDUSTRY HAS MADE CIGARETTES MORE ADDICTIVE, MORE ATTRACTIVE TO KIDS, AND EVEN MORE DEADLY*, 7 (2014), https://www.tobaccofreekids.org/global-resource/created_for_addiction1 (last visited Feb 6, 2019) (reporting added flavors mask the harshness of smoke; added sugars make tobacco smoke easier to inhale, and form acetaldehyde, enhancing nicotine’s addictive effects); see also Regulation of Flavors in Tobacco Products, 81 Federal Register 12296 (2018) <https://www.federalregister.gov/d/2018-05655/p-26> (reporting flavors can trigger reward pathways in the brain and additionally enhance the rewards of nicotine, facilitating dependence).

- ⁴⁷ A 1975 internal industry document states: “[I]t is almost impossible to know if the taste smokers talk about is something which they, themselves attribute to a cigarette or just a ‘play-back’ of some advertising messages.” Marketing and Research Counselors, Inc., *What Have We Learned From People? A Conceptual Summarization Of 18 Focus Group Interviews On The Subject of Smoking*, TRUTH INDUSTRY DOCUMENTS Bates No. 3990549102-3990549138 (May 26, 1975), <https://www.industrydocuments.ucsf.edu/docs/ysml0190>, at 3990549106. See also NAT. CANCER INST., Monograph 13: Risks Associated with Smoking Cigarettes with Low Tar Machine-Measured Yields of Tar and Nicotine 209 (2001).
- ⁴⁸ 2012 SURGEON GENERAL REPORT, *supra* note 16 at 535–539 (concluding flavored tobacco products appeal to youth); Li-Ling Huang et al., *Impact of non-menthol flavours in tobacco products on perceptions and use among youth, young adults and adults: a systematic review*, 26 TOB. CONTROL 709–719 (2017) (concluding flavors in tobacco products strongly appeal to youth and young adults); Soneji, Knutzen, and Villanti, *supra* note 42.
- ⁴⁹ Joseph G. L. Lee et al., *Is the cigarette pack just a wrapper or a characteristic of the product itself? A qualitative study of adult smokers to inform U.S. regulations*, 15 J. CANCER POLICY 45–49 (2018) (finding pack design and changes to pack design are particularly relevant to new and young smokers); Joseph G. L. Lee et al., *Promotions on Newport and Marlboro Cigarette Packages: A National Study*, 19 NICOTINE TOB. RES. 1243–1247 (2017).
- ⁵⁰ See Carrie M. Carpenter et al., *New Cigarette Brands With Flavors That Appeal To Youth: Tobacco Marketing Strategies*, 24(6) HEALTH AFF. 1601 (2005); see also CAMPAIGN FOR TOBACCO-FREE KIDS, ET AL., THE FLAVOR TRAP: HOW TOBACCO COMPANIES ARE LURING KIDS WITH CANDY-FLAVORED E-CIGARETTES AND CIGARS 20, 21 (Mar. 15, 2017) (citing Marketing Innovations Incorporated, *Brown & Williamson Tobacco Corporation: Project Report – Youth Cigarette - New Concepts*, TRUTH INDUSTRY DOCUMENTS Bates No. 170042014 (Sept. 1972), <https://www.industrydocuments.ucsf.edu/docs/pgwc0205>; R.M. Manko Associates, *Summary Report: New Flavors Focus Group Sessions*, TRUTH INDUSTRY DOCUMENTS Bates No. 85093450-85093480 (Aug. 1978), <https://www.industrydocuments.ucsf.edu/docs/ysl0113>).
- ⁵¹ 2012 SURGEON GENERAL REPORT, *supra* note 18 at 537–539.
- ⁵² Jaimee Coombs et al., *“Below the Line”: The tobacco industry and youth smoking*, 4 AUSTRALAS. MED. J. 655–673 (2011).
- ⁵³ Robert K. Jackler & Divya Ramamurthi, *Unicorns cartoons: marketing sweet and creamy e-juice to youth*, 26 TOB. CONTROL 471–475 (2017); U.S. FOOD AND DRUG ADMINISTRATION, *FDA warns company for selling e-liquids that resemble kid-friendly foods as part of the agency’s ongoing Youth Tobacco Prevention Plan*, FDA (2018), <http://www.fda.gov/news-events/press-announcements/fda-warns-company-selling-e-liquids-resemble-kid-friendly-foods-part-agencys-ongoing-youth-tobacco> (last visited May 29, 2019).
- ⁵⁴ G. Ferris Wayne & G. N. Connolly, *How cigarette design can affect youth initiation into smoking: Camel cigarettes 1983-93*, 11 TOB. CONTROL i32–i39 (2002).
- ⁵⁵ Tess Boley Cruz, La Tanisha Wright & George Crawford, *The Menthol Marketing Mix: Targeted Promotions For Focus Communities in the United States*, 12 NICOTINE TOB. RES. S147–S153 (2010).
- ⁵⁶ Anna Edney & Jeff Green, *Tobacco Companies Target Black Teens With Candy-Flavored Cigars*, BLOOMBERG, February 21, 2019, <https://www.bloomberg.com/news/articles/2019-02-21/tobacco-companies-target-black-teens-with-candy-flavored-cigars> (last visited Mar 8, 2019).
- ⁵⁷ Adrienne B. Mejia & Pamela M. Ling, *Tobacco Industry Consumer Research on Smokeless Tobacco Users and Product Development*, 100 AM. J. PUBLIC HEALTH 78–87 (2010).
- ⁵⁸ Although FDA regulations prohibit companies’ at-will introduction of new tobacco products into the market, FDA does not fully enforce these safeguards, and consequently, new flavored products flood the market. *E.g.* Delnevo, *Changes in Cigar Market*, *supra* note 2.; see PUBLIC HEALTH LAW CENTER, “Extensions & an Epidemic: The FDA’s Gatekeeping Authority for E-cigarettes,” February 2019, <https://publichealthlawcenter.org/sites/default/files/resources/FDA-Gatekeeping-Authority-ECigarettes-2019.pdf> (last visited Aug 1, 2019); see also Micah Berman, *The Faltering Promise of FDA Tobacco Regulation*, 12 SAINT LOUIS UNIV. JOURNAL OF HEALTH LAW & POLICY, 155-164 (2019).
- ⁵⁹ *E.g.* Howard Riell, *Cigars Light Up Category*, CStore Decisions, 1 (November 6, 2018), <https://cstoredecisions.com/2018/11/06/cigars-light-up-category/> (last visited Aug 23, 2019) (“multitude of flavors by the tobacco companies is what is driving the category” and “millennials seem to be big on flavors”); Sarah D. Kowitz et al., *Perceptions and Experiences with Flavored Non-Menthol Tobacco Products: A Systematic Review of Qualitative Studies*, 14 INT. J. ENVIRON. RES. PUBLIC. HEALTH, 14 (2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5409539/> (last visited Aug 1, 2019) (“Regardless of product type, common reasons for the appeal of flavored tobacco products included the availability and novelty of flavors”); see Deesha Patel et al., *Reasons for current E-cigarette use among U.S. adults*, 93 PREV. MED. 14–20 (2016) (finding “trying something new” was a factor for adult e-cigarette use, and that young adults were more likely to cite flavor as a reason for use compared to older adults).
- ⁶⁰ James Nonnemaker et al., *Initiation with menthol cigarettes and youth smoking uptake*, 108 ADDICT. ABINGDON ENGL. 171–178 (2013); Villanti et al., *supra* note 14; Krysten W. Bold et al., *Reasons for Trying E-cigarettes and Risk of Continued Use*, 138 PEDIATRICS (2016) (finding that flavors as reason for use predicted continued use over time).
- ⁶¹ Lewis and Wackowski, *supra* note 38.
- ⁶² Youn Ok Lee & Stanton A Glantz, *Menthol: putting the pieces together*, 20 TOB. CONTROL ii1–ii7 (2011) (“Tobacco company research in the 1960s and 1970s consistently found that smokers perceive menthol cigarettes as healthier, safer, milder and less harmful. This effect seems to have faded with time.”).

- ⁶³ Amy M. Cohn et al., *Menthol Smoking Patterns and Smoking Perceptions Among Youth: Findings From the Population Assessment of Tobacco and Health Study*, 56 AM. J. PREV. MED. e107–e116 (2019).
- ⁶⁴ Allison Ford et al., *Adolescents' responses to the promotion and flavouring of e-cigarettes*, 61 INT. J. PUBLIC HEALTH 215–224 (2016); J. K. Pepper, K. M. Ribisl & N. T. Brewer, *Adolescents' interest in trying flavoured e-cigarettes*, 25 TOB. CONTROL ii62–ii66 (2016); Sarah E Adkison et al., *Impact of smokeless tobacco packaging on perceptions and beliefs among youth, young adults, and adults in the U.S: findings from an internet-based cross-sectional survey*, 11 HARM. REDUCT. J. 2 (2014).
- ⁶⁵ Maria Cooper et al., *Flavorings and Perceived Harm and Addictiveness of E-cigarettes among Youth*, 2 TOB. REGUL. SCI. 278–289 (2016).
- ⁶⁶ See *Philip Morris, USA*, 449 F. Supp. at 660.
- ⁶⁷ Lewis and Wackowski, *supra* note 38.; PUBLIC HEALTH AND TOBACCO POLICY CTR, U.S. TOBACCO COMPANIES SPEND BILLIONS MARKETING THEIR PRODUCTS (2019), available at <http://www.tobaccopolicycenter.org/documents/IndustryMarketingExpenditures.pdf> (last visited Aug 6, 2019).
- ⁶⁸ Scott P. Novak et al., *Retail tobacco outlet density and youth cigarette smoking: a propensity-modeling approach*, 96 AM. J. PUBLIC HEALTH 670–676, 673–674 (2006); Lisa Henriksen et al., *Is adolescent smoking related to the density and proximity of tobacco outlets and retail cigarette advertising near schools?*, 47 PREV. MED. 210–214, 213 (2008); Sharon Lipperman-Kreda, Joel W. Grube & Karen B. Friend, *Local tobacco policy and tobacco outlet density: associations with youth smoking*, 50 J. ADOLESC. HEALTH OFF. PUBL. SOC. ADOLESC. MED. 547–552, 551 (2012); Jennifer Cantrell et al., *The impact of the tobacco retail outlet environment on adult cessation and differences by neighborhood poverty*, 110 ADDICTION 152–161, 159 (2019).
- ⁶⁹ CTR FOR PUBLIC HEALTH SYSTEMS SCIENCE, STANFORD PREVENTION RESEARCH CTR & UNIVERSITY OF NORTH CAROLINA GILLINGS SCHOOL OF GLOBAL PUBLIC HEALTH, POINT-OF-SALE REPORT TO THE NATION: REALIZING THE POWER OF STATES AND COMMUNITIES TO CHANGE THE TOBACCO RETAIL AND POLICY LANDSCAPE 6 (2016), https://cpb-us-w2.wpmucdn.com/sites.wustl.edu/dist/e/1037/files/2017/10/Reporttothenation_2016-2mfepqr.pdf (last visited May 29, 2019).
- ⁷⁰ Sarah D. Mills et al., *Disparities in retail marketing for menthol cigarettes in the United States, 2015*, 53 HEALTH PLACE 62–70 (2018).
- ⁷¹ Daniel P. Giovenco et al., *Characteristics of storefront tobacco advertisements and differences by product type: A content analysis of retailers in New York City, USA*, 123 PREV. MED. 204–207 (2019).
- ⁷² *Ibid.*
- ⁷³ CTR FOR PUBLIC HEALTH SYSTEMS SCIENCE, STANFORD PREVENTION RESEARCH CTR, AND UNIVERSITY OF NORTH CAROLINA GILLINGS SCHOOL OF GLOBAL PUBLIC HEALTH, *supra* note 69 at 9.
- ⁷⁴ *Id.* at 9.
- ⁷⁵ Lindsay Robertson et al., *A Systematic Review on the Impact of Point-of-Sale Tobacco Promotion on Smoking*, 17 NICOTINE TOB. RES. 2–17 (2015).
- ⁷⁶ Kelvin Choi et al., *Exposure to Multimedia Tobacco Marketing and Product Use Among Youth: A Longitudinal Analysis*, NICOTINE TOB. RES., <https://academic.oup.com/ntr/advance-article/doi/10.1093/ntr/ntz096/5518940> (last visited Aug 22, 2019); Sally Dunlop, Becky Freeman & Sandra C. Jones, *Marketing to Youth in the Digital Age: The Promotion of Unhealthy Products and Health Promoting Behaviours on Social Media*, 4 MEDIA COMMUN. 35–49 (2016) (reporting that around 50% of US middle and high school students had received tobacco ads or promotions via Facebook or MySpace in the past 30 days in 2011); Annice E. Kim et al., *Estimated Ages of JUUL Twitter Followers*, 173 JAMA PEDIATR. 690–692 (2019); H. Kasi Vishwanathan & L. James, *Gender and Tobacco Marketing in Social Media: How Celebrity Smoking Culture is Conveyed and Perceived by Young Women*, 34 CAN. J. CARDIOL. e1 (2018).
- ⁷⁷ Jidong Huang et al., *Vaping versus JUULing: how the extraordinary growth and marketing of JUUL transformed the US retail e-cigarette market*, 28 TOB. CONTROL 146–151 (2019); CAMPAIGN FOR TOBACCO-FREE KIDS, et al., “Request for Investigative and Enforcement Action to stop Deceptive Advertising Online,” 18 (August 4, 2018), available at https://www.tobaccofreekids.org/assets/content/press_office/2018/2018_08_ftc_petition.pdf (last visited May 30, 2019); *Massachusetts v. Eonsmoke, LLC*, No. 2:19-cv-08405 (Mass. Sup. Ct. filed May 29, 2019), <https://www.mass.gov/files/documents/2019/05/29/CW%20v.%20Eonsmoke%20Filed%20Stamped%20Copy.pdf>.
- ⁷⁸ CAMPAIGN FOR TOBACCO-FREE KIDS, et al., *supra* note 77 at 18.
- ⁷⁹ Michael Nedelman, Roni Selig & Arman Azad, #JUUL: How social media hyped nicotine for a new generation, CNN (2018), <https://www.cnn.com/2018/12/17/health/juul-social-media-influencers/index.html> (last visited Mar 8, 2019).
- ⁸⁰ See, e.g., *Murphy et al. v. Juul Labs, Inc.*, No. 1:19-cv-11755 (D. Mass. filed Aug. 15, 2019); *Massachusetts v. Eonsmoke, LLC*, No. 2:19-cv-08405 (Mass. Sup. Ct. filed May 29, 2019), <https://www.mass.gov/files/documents/2019/05/29/CW%20v.%20Eonsmoke%20Filed%20Stamped%20Copy.pdf>; *Colgate et al. v. Juul Labs, Inc.*, No. 3:18-cv-02499 (D. Cal. filed Apr. 26, 2018); *North Carolina v. Juul Labs, Inc.*, 19-cvs-2885 (D. N.C. filed May 15, 2019). For a general discussion of Juul’s history of marketing and selling to youth, see *Juul’s Role In The Youth Nicotine Epidemic: Hearing Before the House Committee On Oversight and Reform, Economic and Consumer Policy Subcommittee*, 116th Cong. (2019), <https://oversight.house.gov/legislation/hearings/examining-juul-s-role-in-the-youth-nicotine-epidemic-part-i>; <https://oversight.house.gov/legislation/hearings/examining-juul-s-role-in-the-youth-nicotine-epidemic-part-ii>.
- ⁸¹ Mills et al., *supra* note 70; Kurt M. Ribisl et al., *Disparities in tobacco marketing and product availability at the point of sale: Results of a national study*, 105 PREV. MED. 381–388 (2017).

- ⁸² Ribisl et al., *supra* note 81.
- ⁸³ Jennifer Cantrell et al., *Marketing little cigars and cigarillos: advertising, price, and associations with neighborhood demographics*, 103 AM. J. PUBLIC HEALTH 1902–1909 (2013); Mills et al., *supra* note 70; Jennifer Cantrell et al., *Cigarette price variation around high schools: evidence from Washington DC*, 31 HEALTH PLACE 193–198 (2015).
- ⁸⁴ Victoria M. White et al., *Cigarette promotional offers: who takes advantage?*, 30 AM. J. PREV. MED. 225–231 (2006).
- ⁸⁵ Josephine T. Hinds et al., *Flavored Cigars Appeal to Younger, Female, and Racial/Ethnic Minority College Students*, 20 NICOTINE TOB. RES. 347–354 (2018).
- ⁸⁶ Mills et al., *supra* note 70.
- ⁸⁷ FOOD AND DRUG ADMINISTRATION, *Preliminary scientific evaluation of the possible public health effects of menthol versus non-menthol cigarettes*, 5 (2013), <https://www.fda.gov/media/86497/download> (last visited May 29, 2019).
- ⁸⁸ US DEPARTMENT OF HEALTH AND HUMAN SERVICES (HHS), “Tobacco Use Among US Racial/Ethnic Minority Groups—African Americans, American Indians and Alaskan Natives, Asian Americans and Pacific Islanders, and Hispanics: A Report of the Surgeon General,” 1998, http://www.cdc.gov/tobacco/data_statistics/sgr/1998/complete_report/pdfs/complete_report.pdf.
- ⁸⁹ AMERICAN LUNG ASSOCIATION, “Too Many Cases; Too Many Deaths: Lung Cancer in African Americans,” 1 (2010), available at <https://www.lung.org/assets/documents/research/ala-lung-cancer-in-african.pdf> (last visited May 29, 2019).
- ⁹⁰ Lee and Glantz, *supra* note 62 at ii3.
- ⁹¹ FEDERAL TRADE COMMISSION, Cigarette Report for 2017 (2019).
- ⁹² Press Announcement, Statement from FDA Commissioner Scott Gottlieb, M.D., November 15, 2018 (proposing new steps to protect youth by preventing access to flavored tobacco products and banning menthol in cigarettes), <https://www.fda.gov/news-events/press-announcements/statement-fda-commissioner-scott-gottlieb-md-proposed-new-steps-protect-youth-preventing-access>; see 2014 SURGEON GENERAL REPORT, *supra* note 16 at 782.
- ⁹³ Villanti et al., *supra* note 35 at ii15.
- ⁹⁴ Gary A Giovino et al., *Differential trends in cigarette smoking in the USA: is menthol slowing progress?*, 24 TOB. CONTROL 28–37, 28 (2015); Villanti et al., *supra* note 12 at ii19–20; Catherine G. Corey et al., *Flavored Tobacco Product Use Among Middle and High School Students—United States, 2014*, 64 MORB. MORTAL. WKLY. REP. 1066–1070, 1066 (2015).; RTI, Jessica Pepper, James Nonnemaker, and Kimberly Watson, *Flavored and Menthol Tobacco Use Among New York Youth (March 2018)* (on file with author) (finding 60.8% of NY middle school smokers and 51.4% of NY high school smokers usually smoke menthols).
- ⁹⁵ Norval J Hickman, Kevin L Delucchi & Judith J Prochaska, *Menthol use among smokers with psychological distress: findings from the 2008 and 2009 National Survey on Drug Use and Health*, 23 TOB. CONTROL 7–13 (2014); Villanti et al., *supra* note 35.
- ⁹⁶ TOBACCO PRODUCTS SCIENTIFIC ADVISORY COMMITTEE, *supra* note 42 at 23 (finding menthol in cigarettes masks the harshness of tobacco smoke); Suchitra Krishnan-Sarin et al., *Studying the interactive effects of menthol and nicotine among youth: An examination using e-cigarettes*, 180 DRUG ALCOHOL DEPEND. 193–199 (2017) (finding “menthol, even at very low doses, alters the appeal of e-cigarettes among youth [and] menthol enhances positive rewarding effects of high nicotine-containing e-cigarettes among youth”); Oliver et al., *supra* note 42 at 88 (finding mint flavors may play a role in the initiation of smokeless tobacco use); Kostygina and Ling, *supra* note 42 (finding in smokeless tobacco, menthol evokes a perception of mildness, and alters the product to create more readily absorbable nicotine).
- ⁹⁷ See Cohn et al., *supra* note 63 (finding 43% of ever cigarette smoking youth first used a menthol cigarette; youth who smoke menthol cigarettes perceive them as easier to smoke; age of initiation and black race are correlates of menthol cigarette initiation, brand preference, and cigarette harm perceptions).
- ⁹⁸ Joanne D’Silva et al., *Differences in Subjective Experiences to First Use of Menthol and Nonmenthol Cigarettes in a National Sample of Young Adult Cigarette Smokers*, 20 NICOTINE TOB. RES. 1062–1068 (2018).
- ⁹⁹ Lee and Glantz, *supra* note 62.
- ¹⁰⁰ Pebbles Fagan et al., *Comparisons of three nicotine dependence scales in a multiethnic sample of young adult menthol and non-menthol smokers*, 149 DRUG ALCOHOL DEPEND. 203–211 (2015); FOOD AND DRUG ADMINISTRATION, *supra* note 87 at 6.
- ¹⁰¹ FOOD AND DRUG ADMINISTRATION, *supra* note 87 at 6; Jonathan Foulds et al., *Do smokers of menthol cigarettes find it harder to quit smoking?*, 12 Suppl 2 NICOTINE TOB. RES. S102–109, 107 (2010).
- ¹⁰² U.S. DEP’T HEALTH & HUMAN SERVS., *Tobacco use among U.S. racial/ethnic minority groups--African Americans, American Indians and Alaska Natives, Asian Americans and Pacific Islanders, Hispanics: A Report of the Surgeon General.*, 143 (1998).
- ¹⁰³ Jessica M. Rath et al., *Patterns of Longitudinal Transitions in Menthol Use Among US Young Adult Smokers*, 17 NICOTINE TOB. RES. OFF. J. SOC. RES. NICOTINE TOB. 839–846 (2015).
- ¹⁰⁴ David T. Levy et al., *Quit attempts and quit rates among menthol and nonmenthol smokers in the United States*, 101 AM. J. PUBLIC HEALTH 1241–1247 (2011).
- ¹⁰⁵ Philip H. Smith et al., *Use of Mentholated Cigarettes and Likelihood of Smoking Cessation in the United States: A Meta-Analysis*, NICOTINE TOB. RES., 1 (2019) (“This difference is likely the result of the tobacco industry’s ongoing marketing influence on the black/African American Community, suggesting that a menthol ban may have a unique public health benefit for black/African American smokers by encouraging quitting behavior.”).

¹⁰⁶ Cruz, Wright, and Crawford, *supra* note 55.

¹⁰⁷ Lewis and Wackowski, *supra* note 38.

¹⁰⁸ Phillip S. Gardiner, FROM CANADA TO CALIFORNIA: BUILDING MOMENTUM ON MENTHOL RESTRICTIONS (2017), <http://www.publichealthlawcenter.org/webinar/canada-california-building-momentum-menthol-restrictions> (last visited Mar 15, 2019).

¹⁰⁹ *Ibid.*

¹¹⁰ Amanda Richardson et al., *How the industry is marketing menthol cigarettes: the audience, the message and the medium*, TOB. CONTROL tobaccocontrol-2014-051657 (2014).

¹¹¹ See D. E. Apollonio & R. E. Malone, *Marketing to the marginalised: tobacco industry targeting of the homeless and mentally ill*, 14 TOB. CONTROL 409–415 (2005) (citing 1995 Philip Morris marketing study and concluding “volunteers in homeless shelters were the kind of urban consumer it was trying to reach with a new menthol cigarette.”).

¹¹² Stacey J. Anderson, *Marketing of menthol cigarettes and consumer perceptions: a review of tobacco industry documents*, 20 TOB. CONTROL ii20–ii28 (2011).

¹¹³ See Apollonio and Malone, *supra* note 111 at 412 (reporting provider beliefs of menthol/nicotine’s calming effects on patients, etc.).

¹¹⁴ Ribisl et al., *supra* note 81.

¹¹⁵ Mills et al., *supra* note 70; Nina C. Schleicher et al., *Tobacco Marketing in California’s Retail Environment (2008-2011)*.

¹¹⁶ Lisa Henriksen et al., *Targeted Advertising, Promotion, and Price For Menthol Cigarettes in California High School Neighborhoods*, 14 NICOTINE TOB. RES. 116–121 (2012).

¹¹⁷ CTRS FOR DISEASE CONTROL & PREVENTION, *African Americans and Tobacco Use*, SMOKING AND TOBACCO USE (2018), <https://www.cdc.gov/tobacco/disparities/african-americans/index.htm> (last visited May 29, 2019).

¹¹⁸ Brett Loomis, Doris Gammon & Gray Spinks, *Selected Results from the 2017 New York Retail Advertising of Tobacco Survey* (2017).

¹¹⁹ *Ibid.*

¹²⁰ Lindsay Kephart et al., *The association between neighborhood racial composition and menthol cigarette pricing in Boston, MA*, 58 HEALTH PLACE 102144 (2019); Henriksen et al., *supra* note 116; Cantrell et al., *supra* note 83.

¹²¹ Richardson et al., *supra* note 110.

¹²² Mills et al., *supra* note 70.

¹²³ CAMPAIGN FOR TOBACCO-FREE KIDS, “Tobacco Company Marketing to African-Americans,” 1 (2018), available at <https://www.tobaccofreekids.org/assets/factsheets/0208.pdf> (last visited Mar 14, 2019) (reporting 69.1% of African-American youth and 76.1% of African-American young adults prefer Newport).

¹²⁴ N.Y. DEP’T. OF HEALTH, *Key Tobacco Control Outcome Indicators* (May 2018), at 8-13, available at https://www.health.ny.gov/prevention/tobacco_control/docs/2018-05_key_tobacco_outcome_indicators.pdf (last visited May 29, 2019).

¹²⁵ *Ibid.*

¹²⁶ CAMPAIGN FOR TOBACCO-FREE KIDS, *States & Localities That Have Restricted the Sale of Flavored Tobacco Products*, <https://www.tobaccofreekids.org/assets/factsheets/0398.pdf> (last visited May 29, 2019).

¹²⁷ CLEARWAY MINNESOTA AND THE CENTER FOR PREVENTION AT BLUE CROSS AND BLUE SHIELD OF MINNESOTA, *How Minneapolis, St. Paul and Duluth Passed Nation-Leading Menthol Tobacco Sales Restrictions: Case Studies from Minnesota* (Feb. 2019), 11-12, 16-18, <https://www.centerforpreventionmn.com/wp-content/uploads/2019/02/Menthol-Case-Studies-Minneapolis-St.-Paul-Duluth-FINAL.pdf> (last visited May 29, 2019).

¹²⁸ Charles J. Courtemanche, Makayla K. Palmer & Michael F. Pesko, *Influence of the Flavored Cigarette Ban on Adolescent Tobacco Use*, 52 AM. J. PREV. MED. e139–e146 (2017).

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

¹³¹ David T. Levy et al., *Modeling the Future Effects of a Menthol Ban on Smoking Prevalence and Smoking-Attributable Deaths in the United States*, 101 AM. J. PUBLIC HEALTH 1236–1240 (2011).

¹³² Levy et al., *supra* note 104 at 1238.

¹³³ John Buckell, Joachim Marti & Jody L. Sindelar, *Should flavours be banned in cigarettes and e-cigarettes? Evidence on adult smokers and recent quitters from a discrete choice experiment*, 28 TOB. CONTROL 168–175 (2019); see also Shyanika W. Rose et al., *Longitudinal Response to Restrictions on Menthol Cigarettes Among Young Adult US Menthol Smokers, 2011–2016*, 109 AM. J. PUBLIC HEALTH 1400–1403 (2019) (“Menthol cigarette restrictions benefit vulnerable groups and those interested in quitting, but the availability of menthol in noncigarette products could limit benefits”).

¹³⁴ Canada, Bill C-32, Chapter 27 (2010).

¹³⁵ Hai V. Nguyen & Paul Grootendorst, *Intended and unintended effects of restrictions on the sale of cigarillos to youth: evidence from Canada*, 24 TOB. CONTROL 382–388 (2015).

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

- ¹³⁸ Bill 45, Making Healthier Choices Act, 2015, Schedules 2, 3 (First reading Nov. 24, 2014, Third reading May 26, 2015, Royal Assent May 28, 2015), http://www.ontla.on.ca/bills/bills-files/41_Parliament/Session1/b045ra.pdf.
- ¹³⁹ Robert Schwartz et al., *Tobacco industry tactics in preparing for menthol ban*, TOB. CONTROL tobaccocontrol-2017-053910 (2017).
- ¹⁴⁰ *Ibid.*
- ¹⁴¹ *Ibid.*
- ¹⁴² Michael Chaiton et al., *Association of Ontario's Ban on Menthol Cigarettes With Smoking Behavior 1 Month After Implementation*, 178 JAMA INTERN. MED. 710–711 (2018).
- ¹⁴³ Michael Chaiton et al., *Evaluating a real world ban on menthol cigarettes: an interrupted time series analysis of sales*, NICOTINE TOB. RES., <https://academic.oup.com/ntr/advance-article/doi/10.1093/ntr/ntz041/5385586> [hereinafter, "Chaiton, Evaluating a real world ban on menthol"] (last visited Mar 28, 2019) (reporting that Ontario's menthol ban was associated with an immediate, significant reduction in sales of both menthol cigarettes and total cigarettes); Michael O. Chaiton et al., *Ban on menthol-flavoured tobacco products predicts cigarette cessation at 1 year: a population cohort study*, TOB. CONTROL tobaccocontrol-2018-054841 (2019) (finding that following Ontario's menthol ban, quit attempts, including successful quit attempts, were higher among menthol smokers as compared to non-menthol smokers).
- ¹⁴⁴ Chaiton, *Evaluating a real world ban on menthol*, *supra* note 143 at 2, 6.
- ¹⁴⁵ ME. REV. STAT.tit. 22, § 1560-D (2018).
- ¹⁴⁶ Kuiper et al., *supra* note 6 at 5.
- ¹⁴⁷ *Ibid.*
- ¹⁴⁸ Me. L.D. 1190, 129th Legis., 1st Reg. Sess. (Mar. 12, 2019).
- ¹⁴⁹ Kuiper et al., *supra* note 6 at 7.
- ¹⁵⁰ Melody Kingsley et al., *Impact of flavoured tobacco restriction policies on flavoured product availability in Massachusetts*, TOB. CONTROL tobaccocontrol-2018-054703 (2019); Todd Rogers et al., *Changes in cigar sales following implementation of a local policy restricting sales of flavoured non-cigarette tobacco products*, TOB. CONTROL tobaccocontrol-2019-055004 (2019).
- ¹⁵¹ Betsy Brock et al., *A tale of two cities: exploring the retail impact of flavoured tobacco restrictions in the twin cities of Minneapolis and Saint Paul, Minnesota*, 28 TOB. CONTROL 176–180 (2019).
- ¹⁵² Lauren Czaplicki et al., *Compliance with the City of Chicago's partial ban on menthol cigarette sales*, 28 TOB. CONTROL 161–167 (2019) (reporting 57% compliance and highlighting the need for comprehensive policy efforts).
- ¹⁵³ Farley et al., *supra* note 33 at 1518.
- ¹⁵⁴ Shannon M. Farley & Michael Johns, *New York City flavoured tobacco product sales ban evaluation*, 26 TOB. CONTROL 78–84 (2017).
- ¹⁵⁵ *Ibid* (finding 37% lower odds for trying flavored products and 28% lower odds for trying any product after the ban).
- ¹⁵⁶ Shannon M. Farley et al., *Flavour chemicals in a sample of non-cigarette tobacco products without explicit flavour names sold in New York City in 2015*, 27 TOB. CONTROL 170–176 (2018).
- ¹⁵⁷ Elizabeth M. Brown et al., *Implementation of the New York City Policy Restricting Sales of Flavored Non-Cigarette Tobacco Products*, HEALTH EDUC. BEHAV. 1090198119853608, Table 2 (2019) (reporting a 4.1% violation rate).
- ¹⁵⁸ Adrienne S. Viola et al., *A cigar by any other name would taste as sweet*, 25 TOB. CONTROL 605–606 (2016) ("Nielsen convenience store market scanner data show an increasing number of 'other' options have emerged in the past few years, using names that do not explicitly identify a flavor.").
- ¹⁵⁹ Gammon et al., *supra* note 3; Viola et al., *supra* note 158; see, e.g., Lisa Henriksen et al., *Marijuana as a 'concept' flavour for cigar products: availability and price near California schools*, 27 TOB. CONTROL 585–588 (2018).
- ¹⁶⁰ Farley and Johns, *supra* note 154.
- ¹⁶¹ Maansi Bansal-Travers et al., *What Do Cigarette Pack Colors Communicate to Smokers in the U.S.?*, 40 AM. J. PREV. MED. 683–689 (2011).
- ¹⁶² Viola et al., *supra* note 158; Brown et al., *supra* note 157.
- ¹⁶³ Melissa B. Harrell et al., *Flavored Tobacco Product Use among Youth and Young Adults: What if Flavors Didn't Exist?*, 3 TOB. REGUL. SCI. 168–173 (2017).
- ¹⁶⁴ RTI, Jessica Pepper, James Nonnemaker, and Kimberly Watson, *Flavored and Menthol Tobacco Use Among New York Youth* (March 2018) (on file with author) (applying Harrell, *supra* note 163 to NYS).
- ¹⁶⁵ Buckell, Marti, and Sindelar, *supra* note 133.
- ¹⁶⁶ *Ibid.*
- ¹⁶⁷ Allison M. Schmidt et al., *Attitudes towards Potential New Tobacco Control Regulations among U.S. Adults*, 15 INT. J. ENVIRON. RES. PUBLIC. HEALTH (2018).
- ¹⁶⁸ *Ibid*; see also Jennifer L. Pearson et al., *A Ban on Menthol Cigarettes: Impact on Public Opinion and Smokers' Intention to Quit*, 102 AM. J. PUBLIC HEALTH e107–e114 (2012) (finding support for a menthol ban is strongest among populations with the highest prevalence of menthol cigarette use).
- ¹⁶⁹ AMERICAN LUNG ASSOCIATION, The Center for Tobacco Policy and Organizing, "Tobacco Retail General Poll 2018 Survey Data," 4 (2018), available at <https://center4tobaccopolicy.org/wp-content/uploads/2019/02/Tobacco-Retail-General-Poll-2018-Survey-Data.pdf> (last visited May 30, 2019).

¹⁷⁰ Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776, 1776 (2009) (amending 21 U.S.C. §§ 387f(d)(1), p(a)(1) (2018)).

¹⁷¹ Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 2(29), 123 Stat. 1776, 1776 (2009) (codified in 21 U.S.C. § 387) (2018)).

¹⁷² Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 2(6-8), (12), (25-29), (31), (33), (36-37), (40-43), 123 Stat. 1776, 1776 (2009) (codified throughout 21 U.S.C. (2018)).

¹⁷³ Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 3(2), 9, 123 Stat. 1776, 1776 (2009) (codified in 21 U.S.C. § 387 (2018)).

¹⁷⁴ Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776, 1776 (2009) (amending 21 U.S.C. § 387g(a)(1)(A)) (2018).

¹⁷⁵ Courtemanche, Palmer, and Pesko, *supra* note 128 at e139.

¹⁷⁶ Delnevo, Changes in Cigar Market, *supra* note 2.

¹⁷⁷ Villanti et al., *supra* note 35; Courtemanche, Palmer, and Pesko, *supra* note 128.

¹⁷⁸ Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 387g(e) (2018).

¹⁷⁹ TOBACCO PRODUCTS SCIENTIFIC ADVISORY COMMITTEE, *supra* note 42.

¹⁸⁰ WORLD HEALTH ORGANIZATION, *WHO Framework Convention on Tobacco Control* (updated 2005), https://www.who.int/tobacco/framework/WHO_FCTC_english.pdf (last visited May 29, 2019); Amicus Curiae Br. of Pub. Health Groups in Support of Def.-Appellants, *Lorillard, Inc. v. FDA*, 1-5, 9-10 (Mar. 26, 2015), <https://publichealthlawcenter.org/sites/default/files/Amicus-USFDA-Lorillard-TPSAC-2015.pdf> (last visited May 29, 2019).

¹⁸¹ 83 Fed. Reg. 12294 (Mar. 21, 2018); FDA Commissioner Scott Gottlieb [speech] “Protecting American Families: Comprehensive Approach to Nicotine and Tobacco,” June 28, 2017, *available at* <https://www.fda.gov/news-events/speeches-fda-officials/protecting-american-families-comprehensive-approach-nicotine-and-tobacco-06282017>.

¹⁸² U.S. SURGEON GENERAL, *Surgeon General’s Advisory on E-cigarette Use Among Youth 1* (2018), <https://e-cigarettes.surgeongeneral.gov/documents/surgeon-generals-advisory-on-e-cigarette-use-among-youth-2018.pdf> (last visited May 29, 2019).

¹⁸³ *Id.* at 3.

¹⁸⁴ Modifications to Compliance Policy for Certain Deemed Tobacco Products; Draft Guidance for Industry; Availability, 84 Fed. Reg. 9345 (Mar. 14, 2019) (Notice of Availability), <https://www.fda.gov/regulatory-information/search-fda-guidance-documents/modifications-compliance-policy-certain-deemed-tobacco-products> (prioritizing enforcement of tobacco products lacking submission for FDA marketing order; or sold in a manner posing greater risk for youth access and interest, specifying flavored cigars and e-cigarettes in flavors other than menthol or tobacco); *but see* U.S. FOOD AND DRUG ADMINISTRATION, Trump Administration Combating Epidemic of Youth E-Cigarette Use with Plan to Clear Market of Unauthorized, Non-Tobacco-Flavored E-Cigarette Products (September 11, 2019), *available at* <https://www.fda.gov/news-events/press-announcements/trump-administration-combating-epidemic-youth-e-cigarette-use-plan-clear-market-unauthorized-non> (last visited Sept 19, 2019) [hereinafter, “FDA, Trump Administration Combating Epidemic”] (forthcoming guidance may instead remove all flavored e-cigarettes other than tobacco flavor from the market).

¹⁸⁵ FDA, Trump Administration Combating Epidemic, *supra* note 184.

¹⁸⁶ S. Sean Hu, *State-Specific Patterns of Cigarette Smoking, Smokeless Tobacco Use, and E-Cigarette Use Among Adults — United States, 2016*, 16 PREV. CHRONIC. DIS., 14 (2019), https://www.cdc.gov/pcd/issues/2019/18_0362.htm (last visited Apr 17, 2019) (finding nearly half of NYS adult e-cigarette users were also current cigarette users in 2016, and the remaining half of e-cigarette users were split about equally between never and former smokers.)

¹⁸⁷ See, e.g., PUBLIC HEALTH LAW CENTER, *U.S. Sales Restrictions on Flavored Tobacco Products*, (June 2019), *available at* <https://www.publichealthlawcenter.org/sites/default/files/resources/US-Sales-Restrictions-Flavored-Tobacco-Products-2019.pdf> (last visited Aug 6, 2019).

¹⁸⁸ *Boreali v. Axelrod*, 71 N.Y.2d 1 (N.Y. 1987).

¹⁸⁹ *U.S. Smokeless Tobacco Mfg. Co. v. City of New York*, 708 F.3d 428 (2d Cir. 2013).

¹⁹⁰ *National Association of Tobacco Outlets, Inc. v. City of New York*, 27 F.Supp.3d 415 (S.D.N.Y. Jun. 18, 2014).

¹⁹¹ 21 U.S.C. 387p(a)(2)(A).

¹⁹² 21 U.S.C. 387g(a)(2).

¹⁹³ 21 U.S.C. 387g(a)(3)(A).

¹⁹⁴ 21 U.S.C. 387g(d)(3)(A).

¹⁹⁵ 21 U.S.C. 387g(d)(3)(B).

¹⁹⁶ 21 U.S.C. 387p(a)(1).

¹⁹⁷ 21 U.S.C. 387p(a)(1).

¹⁹⁸ 15 U.S.C. § 1334(c) (2012).

¹⁹⁹ 21 U.S.C. 387p(a)(1).

²⁰⁰ 21 U.S. C. 387p(a)(2)(B).

²⁰¹ N.Y. Const. art IX, § 2(c)(i).

²⁰² N.Y. Const. art IX, § 2(c)(10).

²⁰³ N.Y. PUB. HEALTH LAW § 308(d).

²⁰⁴ *Gibbons v. Ogden*, 22 U.S. 1 (1824); Wendy Parmet, Health Care and the Constitution: Public Health and the Role of the State in the Framing Era, 20 HASTINGS CONST. L.Q. 267, 319-320 (1993);

²⁰⁵ *Gibbons v. Ogden*, 22 U.S. 1 (1824).

²⁰⁶ *Gade v. Natl. Solid Wastes Mgmt. Assn.*, 505 U.S. 88, 98 (1992) (alteration in original) (citation omitted); *Pacific Gas & Elec. Co. v. State Energy Resources Commn.*, 461 U.S. 190, 203-04 (1983).

²⁰⁷ 21 U.S.C. § 387p(a)(1)(2018).

²⁰⁸ 21 U.S.C. § 387p(a)(2)(A)(2018).

²⁰⁹ *Independents Gas & Serv. Stations Ass'ns, Inc. v. Chicago*, 112 F. Supp. 3d 749, 753 (N.D. Ill. 2015) (concluding the saving clause “exempts certain categories of regulation from the preemption clause, even if related to tobacco product standards”); *U.S. Smokeless Tobacco Mfg. Co. LLC v. N.Y.C.*, 708 F.3d 428, 433 (2d Cir. 2013) (finding “local laws that would otherwise fall within the preemption clause are exempted if they constitute ‘requirements relating to the sale. . . of. . . tobacco products.’”); *Natl. Assoc. of Tobacco Outlets, Inc. v. Providence*, 731 F.3d 71, 82 (1st Cir. 2013) (“[T]he savings clause, overrides the [tobacco product] standards preemption but allows only regulations ‘relating to’ the sale of tobacco products.”).

²¹⁰ See *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (affirming “state regulation of matters of health and safety” are among “historic police powers of the States,” and “field[s] which the States have traditionally occupied,” that may not be preempted by federal law without a clear purpose by Congress).

²¹¹ *Natl. Assoc. of Tobacco Outlets, Inc. v. Providence*, 731 F.3d 71 (1st Cir. 2013); *Indep. Gas & Serv. Stations Ass'ns, Inc. v. Chicago*, 112 F. Supp. 3d 749 (N.D. Ill. 2015); *U.S. Smokeless Tobacco Mfg. Co. v. N.Y.C.*, 703 F.Supp.2d 329 (S.D.N.Y. 2010).

²¹² *U.S. Smokeless Tobacco Mfg. Co. LLC v. N.Y.C.*, 708 F.3d 428 (2d Cir. 2013); *Natl. Assoc. of Tobacco Outlets, Inc. v. Providence*, 731 F.3d 71 (1st Cir. 2013); *Indep. Gas & Serv. Stations Assns., Inc. v. Chicago*, 112 F. Supp. 3d 749 (N.D. Ill. 2015).

²¹³ *U.S. Smokeless Tobacco Mfg. Co. LLC v. N.Y.C.*, 708 F.3d at 435.

²¹⁴ *Id.* at 434.

²¹⁵ *Ibid.*

²¹⁶ NEW YORK CITY, N.Y., Admin. Code § 17-715 (2018).

²¹⁷ *U. S. Smokeless Tobacco Mfg. Co., LLC v. N.Y.C.*, 703 F. Supp. 2d 329, 342 (S.D.N.Y. 2010).

²¹⁸ 21 U.S.C.S. § 387g(d)(3) (2018) (prohibiting FDA from “banning all cigarettes, all smokeless tobacco products, all little cigars, all cigars other than little cigars, all pipe tobacco or all roll-your-own tobacco”).

²¹⁹ *U.S. Smokeless Tobacco Mfg. Co. LLC*, 708 F.3d at 433.

²²⁰ *Id.* at 436.

²²¹ *Id.* at 433.

²²² *Id.* at 435-436.

²²³ *U.S. Smokeless Tobacco Mfg. Co. LLC*, 708 F.3d at 433 (citing 21 U.S.C. § 387p(a)(1)(2018)) [highlighting that state and local governments are only limited by the specific prohibitions of the preemption clause].

²²⁴ *Ibid.*

²²⁵ *Id.* at 436.

²²⁶ CTRS FOR DISEASE CONTROL AND PREVENTION, Tobacco Brand Preferences, available at https://www.cdc.gov/tobacco/data_statistics/fact_sheets/tobacco_industry/brand_preference/index.htm (last visited May 30, 2019).

²²⁷ *U.S. Smokeless Tobacco Mfg. Co. LLC*, 708 F.3d at 433.

²²⁸ *Id.* at 436.

²²⁹ Gary A Giovino et al., *Differential trends in cigarette smoking in the USA: is menthol slowing progress?*, 24 TOB. CONTROL 28-37, 29 (2015) (finding 56.7% of 12-17 year old smokers used menthol cigarettes from 2004-2010).

²³⁰ See, e.g., S.F., CAL., HEALTH CODE §19Q.3 (2019); BEVERLY HILLS, CAL., CITY CODE § 4-2-2109(H) (2019);

BROOKLINE, MASS., MUN. CODE § 8.23 (Tobacco Control Bylaws) (2019); TOWN OF MANHEIM, N.Y., LOCAL LAW 3 (2019); BOULDER, COLO., ORDINANCE 8340 (2019).

²³¹ 15 U.S.C. § 1334(b) (2018).

²³² See N.Y. PUB. HEALTH LAW §§ 301, 302, 340, 341, 356, 360, 380, 390, 391 (describing variants of local boards of health based on structure of local government and how it is organized).

²³³ N.Y. PUB. HEALTH LAW § 308(d).

²³⁴ *Boreali v. Axelrod*, 517 N.E.2d 1350, 1355-1356 (1987).

²³⁵ *Id.* at 1351.

²³⁶ *Id.* at 1355.

²³⁷ *N.Y. Statewide Coalition v. N.Y.C. DOHMH*, 23 NY 3d 681, 690 (2014).

²³⁸ *Id.* at 697.

²³⁹ *Boreali*, 517 N.E.2d at 1356.

²⁴⁰ *Ibid.*

²⁴¹ *Ibid.*

²⁴² *Id.* at 1353-1354.

²⁴³ *Id.* at 1356.

²⁴⁴ U.S. Constitution, Art. 1, § 8, cl. 3.

- ²⁴⁵ *Hughes v. Alexandria Scrap. Corp.*, 426 U.S. 794, 810 (1976). [*West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994)] *Assn. for Accessible Medicines v. Frosh*, 887 F.3d 664 (4th Cir. 2018).
- ²⁴⁶ *U.S. Smokeless Tobacco Mfg. Co., LLC v. City of N.Y.*, 703 F. Supp. 2d 329 (S.D.N.Y. 2010).
- ²⁴⁷ Pl. Compl. 51 (Dec. 28, 2009).
- ²⁴⁸ *U.S. Smokeless Tobacco Mfg. Co., LLC v. N.Y.C.*, 708 F.3d 428 (2d Cir. 2013); *U.S. Smokeless Tobacco Mfg. Co., LLC v. City of N.Y.*, 703 F. Supp. 2d 329 (S.D.N.Y. 2010).
- ²⁴⁹ George Blum et al., 16B Am. Jur. 2d *Constitutional Law* § 823 (2019).
- ²⁵⁰ *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, n. 9 (1985) (“[I]t is well established that a corporation is a ‘person’ within the meaning of the Fourteenth Amendment.”); see also *Southern Ry. v. Greene*, 216 U.S. 400, 412-413 (1910) (explaining “there is no doubt that a private corporation is included” in protections afforded by the Equal Protection Clause).
- ²⁵¹ *Walgreen Co. v. City & Co. of S.F.*, 110 Cal. Rptr. 3d 498, 501 (Cal. Ct. App. 2010).
- ²⁵² *Id.* at 502.
- ²⁵³ *Ibid.*
- ²⁵⁴ *Id.* at 501.
- ²⁵⁵ *Ibid.*
- ²⁵⁶ U.S. Const. amend. I.
- ²⁵⁷ *Virginia Board of Pharmacy v. Virginia Consumer Council*, 425 U.S. 748 (1976); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).
- ²⁵⁸ *Natl. Assn. of Tobacco Outlets, Inc. v. Providence*, No. 12-96-ML, 2012 U.S. Dist. LEXIS 176256, at 23 (D.R.I. Dec. 10, 2012), *aff’d*, 731 F.3d 71 (1st Cir. 2013).
- ²⁵⁹ *Ibid.*
- ²⁶⁰ *Natl. Assn. of Tobacco Outlets, Inc. v. Providence*, 731 F.3d 71 (1st Cir. 2013).
- ²⁶¹ *Natl. Assn. of Tobacco Outlets, Inc. v. N.Y.C.*, 27 F.Supp.3d 415, 421 (S.D.N.Y. Jun. 18, 2014).
- ²⁶² *Ibid.*
- ²⁶³ *Id.* at 422-423.
- ²⁶⁴ Office of the Attorney General of California, *Focus on Flavors: The authority of state or local government to restrict or prohibit the sale or distribution of flavored tobacco products* (2016), available at <https://www.cdph.ca.gov/Programs/CCDPHP/DCDIC/CTCB/CDPH%20Document%20Library/Policy/FlavoredTobaccoAndMenthol/FinalWellingtonFocusOnFlavors.pdf> (last visited Aug 6, 2019).
- ²⁶⁵ U.S. Const. amend. XIV.
- ²⁶⁶ George Blum et al., 16B Am. Jur. 2d *Constitutional Law* § 955 (2018).
- ²⁶⁷ *Natl. Assn. of Tobacco Outlets, Inc. v. Providence*, No. 12-96-ML, 2012 U.S. Dist. Lexis 176256, at 38-41 (D.R.I. Dec. 10, 2012), *aff’d*, 731 F.3d 71 (1st Cir. 2013).
- ²⁶⁸ *Id.* at 40-41.
- ²⁶⁹ *Ibid.*
- ²⁷⁰ *Memo. of Dec. & Or. on Pl.’s Mot. for Judm. on the Pldg. After Remand*, 1-2 (Sept. 26, 2018), <https://mahb.org/wp-content/uploads/2018/10/Motion-for-Judgment-on-the-pleadings-denied-10.1.18.pdf> (last visited Aug 6, 2019).
- ²⁷¹ *Id.* at 8-10.
- ²⁷² *Memo. of L. in Support of Pl. Cumberland Farms, Inc.’s Ex Parte Mot. for T.R.O. & Mot. for Prelim. Inj.* (July 28, 2017), on file with author.
- ²⁷³ *Memo. of Dec. & Or. on Pl.’s Mot. for Judm. on the Pldg. After Remand*, at 10-13.
- ²⁷⁴ *Ibid.*
- ²⁷⁵ U.S. Const. amend. V; U.S. Const. amend. XIV (applying the Bill of Rights to states).
- ²⁷⁶ N.Y. Const. art. I, § 7 (amended 2014).
- ²⁷⁷ See, e.g., *United States v. Twin City Power Co.*, 350 U.S. 222 (1956); *Chicago, Milwaukee & St. Paul Railway Co. v. Minneapolis*, 232 U.S. 430 (1914).
- ²⁷⁸ E.g., *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1003 (1984).
- ²⁷⁹ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).
- ²⁸⁰ *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).
- ²⁸¹ *Penn. Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).
- ²⁸² *Id.* at 123-28.
- ²⁸³ E.g., *Knight v. Tupelo*, 2006 U.S. Dist. Lexis 90947, at 6 (N.D. Miss. Dec. 15, 2006).
- ²⁸⁴ M. Justin Byron, Andrew A. Strasser & Cristine D. Delnevo, *Little and filtered cigars meet the legal definition of cigarettes and should be included in nicotine reduction regulation*, TOB. CONTROL tobaccocontrol-2018-054410 (2018).
- ²⁸⁵ CAMPAIGN FOR TOBACCO-FREE KIDS, et al., *supra* note 50 at 11; Courtemanche, Palmer, and Pesko, *supra* note 128; Viola et al., *supra* note 158; Delnevo, *Changes in Cigar Market*, *supra* note 2.
- ²⁸⁶ See Daniel S. Morris & Michael A. Tynan, *Fiscal and policy implications of selling pipe tobacco for roll-your-own cigarettes in the United States*, 7 PLOS ONE e36487 (2012).
- ²⁸⁷ Courtemanche, Palmer, and Pesko, *supra* note 128; Rogers et al., *supra* note 150; Gammon et al., *supra* note 3.

²⁸⁸ Brady Slater, *Duluth Businesses Circumvent Flavored Tobacco Ban*, Duluth News Tribune (Mar. 19, 2019), <https://www.duluthnewstribune.com/news/government-and-politics/4587043-duluth-businesses-circumvent-flavored-tobacco-ban> (last visited Sept. 18, 2019).

²⁸⁹ N.Y. PUB. HEALTH LAW § 1399-cc.

²⁹⁰ See *supra* note 230; see also MASS. ASSN. OF HEALTH BOARDS, *Tobacco Maps of Massachusetts* (Mar. 28, 2019), <https://www.mahb.org/tobaccomaps/> (last visited Sept. 18, 2019); see also PUBLIC HEALTH LAW CENTER, *supra* note 187.

²⁹¹ Brown et al., *supra* note 157 at 5.



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The Public Health and Tobacco Policy Center provides legal background and policy guidance for research, development, and implementation of tobacco control strategies and policies. We do not represent clients or provide legal advice. The Policy Center is a resource for the New York tobacco control community. Individuals from state-funded coalitions and local governments may contact us with tobacco-related legal or policy issues at tobacco@tobaccopolicycenter.org.



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